



December 20, 2019

**VIA FOREST SERVICE COMMENT PORTAL**

Delilah Brigham, Project Leader  
Thorne Bay Ranger District  
Tongass National Forest  
1312 Federal Way  
P.O. Box 19001  
Thorne Bay, AK 99919-001

Re: Prince of Wales Landscape Level Analysis Project, updated Out-year Plan Comments

Dear Ms. Brigham:

The Forest Service is soliciting comments on the proposed updated Out-year Plan issued for the implementation phase of the Prince of Wales Landscape Level Analysis Project (the Project). Earthjustice submits these comments on behalf of its clients Southeast Alaska Conservation Council, Alaska Rainforest Defenders, Center for Biological Diversity, Sierra Club, Sierra Club Alaska Chapter, Defenders of Wildlife, Alaska Wilderness League, National Audubon Society, Audubon Alaska, and Natural Resources Defense Council.

As we have explained throughout the planning and implementation of this Project, the final environmental impact statement (FEIS) for the Project violates the National Environmental Policy Act (NEPA), Alaska National Interest Lands Conservation Act (ANILCA), and National Forest Management Act (NFMA) because it does not provide site-specific information for a decision to log up to 656 million board feet (mmbf) of timber and build about 164 miles of roads over 15 years.<sup>1</sup> The Out-year Plan process cannot cure these violations. Instead, the Forest Service must withdraw those portions of the Record of Decision authorizing Vegetation Management Activities and road construction, immediately stop implementing them, and prepare a site-specific environmental impact statement (EIS) with a new record of decision before proceeding with any Vegetation Management Activities or new roads, including those described in the proposed Out-year Plan.<sup>2</sup>

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<sup>1</sup> See, e.g., Earthjustice, Comments on Prince of Wales Landscape Level Analysis Project Draft Environmental Impact Statement at 9-27 (June 18, 2018); Earthjustice, Objection to the Prince of Wales Landscape Level Analysis Project at 4-37 (Dec. 21, 2018); Earthjustice, Prince of Wales Landscape Level Analysis Project Out-year Plan Comments (May 13, 2019); Plaintiffs' Opening Brief under Local Rule 16.3(c), *Southeast Alaska Conservation Council v. U.S. Forest Serv.*, No 1:19-cv-00006-SLG (D. Alaska July 12, 2019), Doc. 10 at 14-34.

<sup>2</sup> We do not object to the Watershed Improvement and Restoration or Sustainable Recreation Management components of the Out-year Plan.

We raised these NEPA, ANILCA, and NFMA claims in a suit filed against the Forest Service on May 7, 2019.<sup>3</sup> On September 23, 2019, the Alaska District Court granted our motion for preliminary injunction against “any cutting of trees, road construction, or other ground-disturbing activities implementing the Twin Mountain Timber Sale authorized in the Prince of Wales Landscape Level Analysis Project Record of Decision until further order of th[e] Court.”<sup>4</sup> The court anticipates that it will issue a final decision on the merits by March 31, 2020.<sup>5</sup> In the order granting the injunction, the court concludes plaintiffs raise “serious questions” about whether the FEIS violates NEPA because “the Project EIS does not identify individual harvest units; by only identifying broad areas within which harvest may occur, it does not fully explain to the public how or where actual timber activities will affect localized habitats.”<sup>6</sup>

Despite this order, the proposed Out-year Plan continues the Project’s implementation phase. Under the Out-year Plan’s Vegetation Management Activities heading for Fiscal Year 2020, the “Staney Cone Helicopter Timber Sale” is listed.<sup>7</sup> The maps issued with the Out-year Plan also show plans for road construction.<sup>8</sup> This Out-year Plan process is the same process the agency used last spring and attempted to rely on for the Twin Mountain Timber Sale last fall, before being enjoined from doing so.

The timber sale and roads in the proposed Out-year Plan and associated maps would cause significant harm to the people, wildlife, and old-growth ecosystems of Prince of Wales Island and surrounding areas. The people of Prince of Wales Island use the land for many purposes and are connected to it in a variety of ways. There are commercial and recreational hunters and fishers who use the area. There are many who maintain deep cultural connections to the land through subsistence practices and artistic traditions, such as carving and weaving. And, there are many who use the area for wildlife viewing, photography, and education. For all of these people, Prince of Wales Island and the surrounding areas contain vital ecosystems.

There has already been a massive amount of old-growth logging on Prince of Wales Island, significantly jeopardizing these uses. Namely, it has caused significant restrictions to subsistence hunting of deer, a vitally important resource use for the rural communities of the project area. The logging has significantly damaged the habitat of wolves, goshawks, and endemic species such as Prince of Wales flying squirrel and Prince of Wales spruce grouse. To cut more old-growth timber and build more roads will only worsen these harms. While the site-specific harms will vary—a critical factor that was never analyzed in the FEIS—the additional

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<sup>3</sup> Complaint for Declaratory and Injunctive Relief, *Southeast Alaska Conservation Council v. U.S. Forest Serv.*, No 1:19-cv-00006-SLG (D. Alaska May 7, 2019), Doc. 1.

<sup>4</sup> See Order Granting Motion for Preliminary Injunction, *Southeast Alaska Conservation Council v. U.S. Forest Serv.*, No. 1:19-cv-00006-SLG (D. Alaska Sep. 23, 2019), Doc. 27 at 25 (citations omitted).

<sup>5</sup> *Id.* at 8.

<sup>6</sup> *Id.* at 18, 20.

<sup>7</sup> U.S. Forest Serv., Out-year Plan at 3 (Nov. 2019).

<sup>8</sup> U.S. Forest Serv., POWLLA First and Second Helicopter Offerings North Units (Nov. 2019) (map); U.S. Forest Serv., POWLLA First and Second Helicopter Offerings South Units (Nov. 2019) (map).

habitat loss and road construction is unacceptable in all of the areas proposed in the Out-year Plan.

During the NEPA process, the Forest Service failed to provide unit and road cards as required by the 2016 Amended Land and Resource Management Plan for the Tongass, with which NFMA requires compliance.<sup>9</sup> These cards would normally provide the type of site-specific information that is missing here. The Forest Service did not disclose where in the 1.8 million acres of national forest land in the project area any of the logging or roadbuilding would occur. In the absence of basic locational information, it was not possible to analyze the site-specific impacts of the proposed action or any of its alternatives on the human environment, as required by NEPA, or on subsistence uses, as required by section 810 of ANILCA. Given this lack of information, the public was left unable to provide meaningful input or understand what activities the agency was planning to authorize.

Even now, the Forest Service continues to lack information necessary to implement the Project in an informed way. The proposed Out-year Plan itself merely lists proposed activities, without clear information on where or how they will be implemented or what the impacts of logging or road construction will be. It indicates the commercial timber harvest surveys for the Stanley Cone Helicopter Timber Sale will not be complete until August 2020, well after the public comment period for the plan ends.<sup>10</sup> And, the Draft Unit Cards confirm that the agency will not have complete site-specific resource information until after all opportunities for public engagement are over: “The final prescriptions, including detailed sale layout and marking instructions for any harvest units, will be completed after field reviews are completed by specialists, public workshop, and Out-year Plan comment period.”<sup>11</sup> Moreover, there is no aggregate information about the size of the Stanley Cone Helicopter Timber Sale or associated road construction in the Out-year Plan or the Draft Unit Cards.

Without this information, the public, including the undersigned organizations, is unable to provide comments on activity design components, locations, methods, mitigation measures, and integration opportunities as the Forest Service requests. NEPA, ANILCA, and NFMA work to ensure the agency plans site-specific projects in a way that meets those statutes’ mandates for informed decisionmaking and public participation, but the process the Forest Service has undertaken for the Project ignores all of this. The agency continues to implement the largest timber sale on the Tongass in 30 years without providing site-specific information or understanding of impacts. Though providing the information at this stage would not cure the violations of those statutes, the persisting lack of information continues to hamper the public’s ability to understand the Project or to provide meaningful input.

The Forest Service’s continual hampering of the public’s ability to participate in this process stands in stark contrast to the agency’s treatment of the timber industry. As we understand, the Alaska Forest Association is being paid by the Forest Service, through the Alaska Division of Forestry, to work with the Forest Service in “locating, designing, understanding and

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<sup>9</sup> U.S. Forest Serv., Tongass National Forest Amended Forest Plan at 4-68 (TIM3.I.C).

<sup>10</sup> Out-year Plan at 3.

<sup>11</sup> U.S. Forest Serv., Stanley Cone Helicopter Timber Sale Draft Unit Cards at 3 (Nov. 2019).

incorporating economic considerations into timber sale project design and implementation.”<sup>12</sup> This work is being done pursuant to a \$1.5 million challenge cost-sharing agreement between the Forest Service and the Division of Forestry.<sup>13</sup> The Division of Forestry has contracted to pay the Alaska Forest Association up to \$260,000 per year to carry out the work described in that cost-sharing agreement.<sup>14</sup> This means the Forest Service is paying the industry to tell the agency exactly what trees it wants to log. After the industry gets its pick, the public is left to receive incomplete information about logging projects with minimal opportunity to provide input. Allowing the timber industry to directly influence project design and implementation creates a major conflict of interest for the agency, provides an unfair inside path of influence for the industry, and further shows how the planning and implementation of this Project continue to fail the public.

For the reasons stated above, the proposed Out-year Plan does not and cannot cure the violations of NEPA, ANILCA, and NFMA inherent in the FEIS and the Record of Decision. Proceeding with the implementation of Vegetation Management Activities when a federal court has held there are “serious questions” as to the legality of the Project and issued an injunction accordingly is a waste of agency time and resources. The Forest Service must withdraw those portions of the Record of Decision authorizing Vegetation Management and road construction, immediately stop implementing them, and prepare a site-specific EIS with a new record of decision before proceeding with any Vegetation Management Activities or new roads.

Sincerely,



Olivia Glasscock  
Thomas S. Waldo  
EARTHJUSTICE

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

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<sup>12</sup> U.S. Forest Serv., Challenge Cost Share Agreement between the Alaska Division of Forestry and the USDA, Forest Service, Alaska Region, 19-CS-11100100-077 at 2 (July 12, 2019).

<sup>13</sup> *Id.* at 2-3.

<sup>14</sup> State of Alaska Division of Forestry, Cooperative Agreement between Division of Forestry, DNR, State of Alaska Department of Natural Resources and Alaska Forest Association, CT 200000198 (Aug. 2019).

DOCUMENTS IN SUPPORT OF EARTHJUSTICE *ET AL.*'S  
PRINCE OF WALES LANDSCAPE LEVEL PROJECT UPDATED OUT-YEAR PLAN  
COMMENTS

Earthjustice, Comments on Prince of Wales Landscape Level Analysis Project Draft Environmental Impact Statement (June 18, 2018)

Earthjustice, Objection to Prince of Wales Landscape Level Analysis Project (Dec. 21, 2018)

Earthjustice, Prince of Wales Landscape Level Analysis Project Out-year Plan Comments (May 13, 2019)

Complaint for Declaratory and Injunctive Relief, *Southeast Alaska Conservation Council v. U.S. Forest Serv.*, No 1:19-cv-00006-SLG (D. Alaska May 5, 2019), Doc. 1

Plaintiffs' Opening Brief under Local Rule 16.3(C), *Southeast Alaska Conservation Council v. U.S. Forest Serv.*, No 1:19-cv-00006-SLG (D. Alaska July 12, 2019), Doc. 10

Order Granting Motion for Preliminary Injunction, *Southeast Alaska Conservation Council v. U.S. Forest Serv.*, No. 1:19-cv-00006-SLG (D. Alaska Sep. 23, 2019), Doc. 27

State of Alaska Division of Forestry, Cooperative Agreement between Division of Forestry, DNR, State of Alaska Department of Natural Resources and Alaska Forestry Association, CT 200000198 (Aug. 2019)

U.S. Forest Serv., Challenge Cost Share Agreement between the Alaska Division of Forestry and the USDA, Forest Service, Alaska Region, 19-CS-11100100-077 (July 12, 2019)

U.S. Forest Serv., Tongass National Forest Amended Forest Plan (2016) (excerpts)

**ALASKA RAINFOREST DEFENDERS – ALASKA WILDERNESS LEAGUE  
CENTER FOR BIOLOGICAL DIVERSITY – DEFENDERS OF WILDLIFE  
EARTHJUSTICE – GEOS INSTITUTE  
NATURAL RESOURCES DEFENSE COUNCIL – SIERRA CLUB  
SOUTHEAST ALASKA CONSERVATION COUNCIL – THE BOAT COMPANY  
WOMEN’S EARTH AND CLIMATE ACTION NETWORK**

June 18, 2018

**VIA FOREST SERVICE COMMENT PORTAL AND EXPRESS MAIL**

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Re: Prince of Wales Landscape Level Analysis Project Draft Environmental Impact Statement

Dear Ms. Brigham:

The U.S. Forest Service is in the process of analyzing the Prince of Wales Landscape Level Analysis Project (the Prince of Wales Project or the Project) and has prepared a Draft Environmental Impact Statement (the DEIS). These comments are submitted on behalf of the undersigned organizations. These groups have a long-standing interest in the social and ecological values of the Tongass National Forest and any developments that may affect those values. For the reasons described below, the Forest Service should not pursue the logging aspects of the Prince of Wales Project. We urge the Forest Service to reconsider its overall approach to this gargantuan logging project, as it will mire the region in unprecedented controversy and permanently compromise the quality of life on Prince Wales Island.

The Prince of Wales “landscape analysis” is, in fact, the single most destructive old-growth timber sale project that the Forest Service has proposed anywhere in the country in decades. The agency proposes to log 235 million board-feet (MMBF) of old-growth forest under the guise of “improv[ing] forest ecosystem health on the Craig and Thorne Bay Ranger Districts.”

It is nonsensical that in a time of all-time weak and ever declining demand for timber, the Prince of Wales Project dwarfs any project on the Tongass since the Ketchikan pulp mill was still in operation under a 50-year timber contract. Worse, it is located in an area of the Tongass that has experienced so much habitat loss from past logging that bird and wildlife populations, most especially vulnerable endemics, and sustainable deer hunting opportunities are already jeopardized. It is especially vexing that the agency was less than forthcoming with the public as this project has developed. Rather than destroy a large amount of the old-growth habitat that remains in the logging base on Prince of Wales Island in 10 short years, the Forest Service

should focus its efforts on sustainable logging decisions consistent with a transition away from old-growth logging.

The undersigned continue to encourage the Forest Service to pursue the important issues contemplated by the original purpose of this project aimed at supporting the thriving sustainable industries on the Tongass as well as watershed and habitat improvement, including fishing and recreational improvements, and projects to improve habitat conditions in young-growth stands.

The Forest Service's unfortunate and unnecessary decision to include the record-breaking logging proposal only mires these necessary improvements in the quagmire of the destructive and unsustainable practices of the Tongass old-growth program. The agency should have analyzed the logging components in separate, stand-alone processes based on a separate environmental impact statements (EIS) for the timber sale projects. Given the long-term weak demand for Tongass timber, the enormous waste of taxpayer money spent subsidizing the Tongass timber program year after year, and the extreme threat posed to wildlife populations and dwindling hunting opportunities on Prince of Wales Island—the better course would be to drop the plans for old-growth logging altogether.

Based on the paltry analysis provided in the DEIS, the Prince of Wales Project would be unlawful because the Forest Service fails to comply with the National Forest Management Act (NFMA), the Tongass Timber Reform Act (TTRA), the Multiple-Use Sustained-Yield Act, and the National Environmental Policy Act (NEPA). Without detailed analysis and despite overwhelming expert opinion to the contrary, the Forest Service intends to continue the controversy of industrial-scale, old-growth logging at significant risk to Prince of Wales's wildlife populations and ecosystems and the communities and people who depend upon those forest resources.

The decision is all the more remarkable given U.S. taxpayers spend tens of millions of dollars every year to subsidize the Tongass timber industry, which contributes a miniscule amount to the regional economy and allows virtually all of the logs to be exported out of Alaska. “The Forest Service reported an average of \$12.5 million annually in timber-related expenditures for the Tongass from fiscal years 2005 to 2014. During that period, it reported receiving an average of \$1.1 million in revenues associated with timber harvested from the Tongass.”<sup>1</sup> These losses

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<sup>1</sup> U.S. Government Accountability Office, Tongass National Forest, Forest Service's Actions Related to Its Planned Timber Program Transition at 7 (2016); *see also* Taxpayers for Common Sense, Money Losing Timber Sales: Tongass National Forest at 1 (Mar. 2015) (“From 2008 through 2013, the Forest Service spent \$139.1 million on timber sales (including road construction) in the Tongass and received \$8.6 million in proceeds from these sales, a net loss of \$130.5 million.”); U.S. Forest Service, State of the Tongass National Forest (FY 2009 – 2013); Headwaters Economics, The Tongass National Forest and the Transition Framework: A New Path Forward? at 2-5 (Nov. 2014).

continue a decades-long drain on the public's financial resources; from 1982-2012 the Forest Service spent \$1,193,521,560 more to log the Tongass than it received in timber revenues.<sup>2</sup> Despite these massive public subsidies, the timber industry consistently contributes less than one percent in total employment earnings for Southeast Alaska.<sup>3</sup>

In short, the logging aspects of the Prince of Wales Project epitomize a losing endeavor. As a policy matter, the proposed logging is neither environmentally nor economically sustainable. It perpetuates controversy regarding old-growth logging and depends on massive public subsidies to support an industrial-scale, export-dependent industry that contributes virtually nothing to the region's economy. As a legal matter, the agency's "condition-based" analysis of timber sales that could take place anywhere and at any time across the 1.8 million acres of National Forest System lands in the project area fails to provide essential information about logging that would be authorized by this decision and, as a result, fails to meet basic legal obligations to assess impacts and balance competing interests.

For all of these reasons, the Forest Service should not proceed with the logging aspects of the Prince of Wales Project, but if it does then the agency must prepare a new draft environment impact statement that complies with the agency's legal obligations. Today's economic drivers depend upon the forest's old-growth stands to support Southeast Alaska's fish, wildlife, and outdoor recreation industries. Clear-cutting these ancient trees also compromises the United States' climate preparedness, and reduces the country's ability to address the effects of climate change worldwide. The logging aspects of the Prince of Wales Project represent a wasteful and unsustainable logging program that threatens values important to residents of Prince of Wales Island, Southeast Alaska, and the nation. We strongly urge the Forest Service to take a different approach with regard to the logging contemplated in the Prince of Wales Project.

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Any documents cited in this comment letter (with the exception of statutes, regulations, the 2016 Amended Forest Plan and related documents, documents in the Prince of Wales Project planning record, and documents cited in the agency's planning documents) are being mailed to the Thorne Bay Ranger District on June 18, 2018 with these comments. These documents are now part of the planning record for the Project.

<sup>2</sup> J. Mehrkens, Scoping Comments for Proposed TLMP Amendment at 2 (June 19, 2014).

<sup>3</sup> See Southeast Conference, Southeast Alaska by the Numbers 2017 at 4 (Sept. 2017); Southeast Conference, Southeast Alaska by the Numbers 2016 at 3 (Sept. 2016); Southeast Conference, Southeast Alaska by the Numbers 2015 at 4 (Sept. 2015); Southeast Conference, Southeast Alaska by the Numbers 2014 at 4 (Sept. 2014); Southeast Conference, Southeast Alaska by the Numbers 2013 at 4 (Sept. 2013); *see also* Southeast Conference, The Arts Economy of Southeast Alaska at 1 (Sept. 2014) ("[i]n terms of workforce earnings, the arts sector is nearly twice the size of the regional timber industry").<sup>3</sup>



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## DESCRIPTION OF THE COMMENTING PARTIES

For purposes of 36 C.F.R. § 218.8(d)(1), the undersigned are providing “[s]pecific written comments,” and they are being submitted “during a designated opportunity for public participation (§ 218.5(a)) provided for a proposed project.”<sup>4</sup> These comments are “within the scope of the proposed action, have a direct relationship to the proposed action, and . . . include supporting reasons for the responsible official to consider.”<sup>5</sup>

For purposes of 36 C.F.R. § 218.25(a)(3), this comment letter identifies the organizations signing this letter. The commenting parties can be reached via the Earthjustice contact information indicated in the signature block.

Many of the undersigned groups commented on, and objected to the 2016 Amendment to the Tongass Land and Resource Management Plan Final Environmental Impact Statement (Forest Plan FEIS) and the 2016 Amendment to the Tongass Land and Resource Management Plan (2016 Amended Forest Plan), which now governs the Prince of Wales Project. Groups also participated in the administrative processes for the 1997 Tongass Land Management Plan (1997 Forest Plan) and the 2008 Amended Tongass Land Management Plan (2008 Amended Forest Plan). The undersigned organizations incorporate the arguments and issues raised in these forest planning efforts in their entirety.<sup>6</sup> They also incorporate the Forest Service’s EISs, records of decisions (RODs), and the planning/administrative records for the 1997 Forest Plan, 2008 Amended Forest Plan, and the 2016 Amended Forest Plan.<sup>7</sup>

Additionally, many of the undersigned groups commented on, appealed, and litigated other recent timber sale projects on Prince of Wales Island, Big Thorne and Logjam. The Prince of

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<sup>4</sup> 36 C.F.R. § 218.2.

<sup>5</sup> *Id.*

<sup>6</sup> See, e.g., Southeast Alaska Conservation Council *et al.*, Letter to B. Pendleton, Regional Forester, Re: Objection 2016 Amended Tongass Land Management Plan (Aug. 30, 2016) (SEACC Forest Plan Objection); Alaska Wilderness League *et al.*, Letter to E. Stewart, Tongass Forest Supervisor (Feb. 22, 2016) (SEACC Forest Plan Comment Letter); Alaska Rainforest Defenders (formerly known as Greater Southeast Alaska Conservation Community) *et al.*, Letter to B. Pendleton, Regional Forester (Aug. 30, 2016) (ARD Forest Plan Objection); Alaska Rainforest Defenders (formerly known as Greater Southeast Alaska Conservation Community) *et al.*, Letter to E. Stewart, Tongass Forest Supervisor (Feb. 22, 2016) (ARD Forest Plan Comment Letter).

<sup>7</sup> As explained below, these documents and the associated planning records (including all comments and administrative appeals) serve as the scientific and management predicate for the 2016 Amended Forest, but the Forest Service notified Earthjustice the agency failed to include them in the Prince of Wales Project DEIS project record. See D. Brigham, Forest Service, Email to H. Harris, Earthjustice, Re. POW LLA Project DEIS Planning Record (Jun. 13, 2018). Thus the undersigned are mailing all of these materials to the Thorne Bay Ranger District on June 18, 2018, as part of their comments on the DEIS to ensure they are included in the Prince of Wales Project record.

Wales Project encompasses all of Prince of Wales Island and the surrounding islands, comprising approximately 1.8 million acres of National Forest System land and 480,000 acres of non-National Forest System acres.<sup>8</sup> Thus the project area includes all of the areas affected by Big Thorne and Logjam. To avoid duplicating arguments presented to, and analysis already completed by, the Forest Service, the undersigned organizations incorporate the EISs, RODs, planning records and/or administrative records, and the arguments and issues raised in those earlier comments and appeals regarding the Big Thorne and Logjam sale projects in their entirety.<sup>9</sup>

## PROPOSED ACTION

According to the DEIS, the Prince of Wales Project “is a large scale, condition-based analysis to comply with [NEPA] that will produce one decision to authorize integrated resource management actions on Prince of Wales Island over the next 15 years.”<sup>10</sup> “The proposed activities fall within four broad categories: Vegetation Management, Watershed Improvement and Restoration, Sustainable Recreation Management, and Associated Actions.”<sup>11</sup>

Vegetative management activities include: logging (both old-growth and young-growth), pre-commercial thinning, and wildlife habitat improvement treatments. Watershed improvement and restoration activities include: fish habitat restoration, improvements, habitat connectivity, and invasive plant management. Sustainable recreation management activities include: maintenance of all existing recreation facilities, improving some existing facilities, and constructing new facilities (*e.g.* cabins, shelters, trails, campsites, water sport access and enhancement). Associated actions are divided into infrastructure actions (*e.g.*, road construction and maintenance, and development of rock pits) and non-infrastructure actions (*e.g.* site preparation, hazard tree removal, and brushing).<sup>12</sup>

The Council for Environmental Quality’s (CEQ) NEPA regulations require agencies to analyze proposals or parts of proposals that are related to each other closely enough to be a single course of action. To do so, an agency must “make sure the proposal which is the subject of an environmental impact statement is properly defined.”<sup>13</sup> “Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.”<sup>14</sup> To make this determination, agencies are directed to

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<sup>8</sup> See Forest Service, Prince of Wales Landscape Level Analysis Project, Draft Environmental Impact Statement at 1 (Apr. 2018) (DEIS); *id.* at 4, Fig. 1.

<sup>9</sup> Again the undersigned are mailing all of these materials to the Thorne Bay Ranger District on June 18, 2018, as part of their comments on the DEIS to ensure they are included in the Prince of Wales Project record.

<sup>10</sup> DEIS, Abstract at PDF 5.

<sup>11</sup> *Id.* at i.

<sup>12</sup> See generally *id.*

<sup>13</sup> 40 C.F.R. § 1502.4(a).

<sup>14</sup> *Id.*

“use the criteria for scope (§ 1508.25) to determine which proposal(s) shall be the subject of a particular statement.”<sup>15</sup>

In this case, the Forest Service improperly defined the scope of the Prince of Wales Project, and the DEIS, given the logging aspects of the proposed action are not only unrelated to the other aspects of the proposal, but also because the impacts of that logging and the continued loss of habitat on Prince of Wales Island is directly detrimental to those other activities (*i.e.*, watershed improvement and restoration activities, and sustainable recreation management activities).

The CEQ criteria for deciding the scope of the project demonstrate why logging should have been considered and analyzed as a separate proposal. The restorative and recreational management activities are not connected actions to logging (and certainly not old-growth logging), meaning they are not “closely related and therefore should [not] be discussed in the same impact statement.”<sup>16</sup> Actions are connected only if they “automatically trigger other actions,” “cannot or will not proceed unless other actions are taken previously or simultaneously,” or “are interdependent parts of a larger action.”<sup>17</sup> Similarly, they also are not cumulative actions to logging.<sup>18</sup>

The alternatives criteria also speak against including logging.<sup>19</sup> CEQ outlines other “reasonable courses of action” and “mitigation measures” as factors to consider in deciding what constitutes a single proposal, but both advise against including logging.<sup>20</sup> The decision to build a cabin, for example, is separate and distinct from the decision to clear-cut a large amount of the old-growth habitat remaining in the timber base on Prince of Wales Island.

Similarly, the Forest Service has not suggested nor could it that the impacts of recreational management or watershed improvement have direct, indirect, and cumulative impacts similar to industrial-scale old-growth logging. The impacts are distinct; the proposed logging adversely affects, and directly compromises, both the recreational and watershed improvement opportunities on the island.

The only basis for including logging in a proposal is that it is a “similar action” based on geography.<sup>21</sup> All of these activities, logging, habitat improvement, recreational management, etc., would take place on Prince of Wales Island. Given the project area approaches 2.3 million acres and the temporal scope of the proposed action is 15 years,<sup>22</sup> geographic consideration alone

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<sup>15</sup> *Id.*

<sup>16</sup> *See id.* § 1508.25(a)(1).

<sup>17</sup> *See id.* § 1508.25(a)(1)(i)-(iii).

<sup>18</sup> *See id.* § 1508.25(a)(2).

<sup>19</sup> *See id.* § 1508.25(b).

<sup>20</sup> *See id.* § 1508.25(b)(2)-(3).

<sup>21</sup> *See id.* § 1508.25(a)(3).

<sup>22</sup> DEIS at 1.

is insufficient to overcome the rest of the CEQ criteria. At a minimum, the Forest Service fails to explain its rationale that all of these activities are related to each other closely enough to be, in effect, a single course of action to be “evaluat[ed] . . . in a single impact statement.”<sup>23</sup> Thus, the agency would act in an arbitrary manner and contrary to CEQ’s governing regulations if it proceeds in this regard.

## PURPOSE AND NEED

The DEIS violates NEPA by failing to demonstrate an underlying need that justifies the Forest Service’s proposal to take such drastic action<sup>24</sup> and, therefore, the agency cannot authorize the ultimate agency action. The Forest Service will also act in an arbitrary manner under the Administrative Procedure Act (APA) and the statutes governing timber sales if it fails to explain how the proposal meets the need for action.

According to the DEIS, “[t]he purpose of the [Prince of Wales] Project is to respond to the Forest Plan’s multiple-use goals and objectives, while moving the project area toward the desired conditions in that Plan (USDA Forest Service 2016a, p. 2-1).”<sup>25</sup> The Forest Service contends the Project “will improve forest ecosystem health on Craig and Thorne Bay Ranger Districts, help support community resiliency, and provide economic development, consistent with the multiple-use goals and objectives of the Forest Plan.”<sup>26</sup>

With regard to timber specifically, the DEIS states that the action is needed to “contribute to the economic viability of Prince of Wales communities by providing a sustainable level of forest products to help maintain the expertise and infrastructure of the timber industry.”<sup>27</sup> The Forest Service, however, makes no effort to support the assertion that the levels of logging contemplated by the Project are, in fact, economically or ecologically sustainable.

The DEIS asserts that “[m]ost all the operators on the island currently sell old-growth and may not be interested in young-growth since it does not fit their operations.”<sup>28</sup> By promising this record-breaking amount of old-growth, the agency actually discourages those operators from ever transitioning to young-growth. The Forest Service’s proposal simply destroys old-growth for a short term gain, while imposing long-term losses for subsistence users, hunters, and fish, birds, and wildlife. In the end, the logging contemplated in the Prince of Wales Project is little more than a poorly veiled guise to allow one timber operator to log old-growth in the island’s timber base to the detriment of many other resources, running contrary to the Project’s stated purpose and need with regard to timber.

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<sup>23</sup> 40 C.F.R. § 1508.25

<sup>24</sup> *Id.* § 1502.13

<sup>25</sup> DEIS at 5.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at ii.

<sup>28</sup> *Id.* at 108.

The purpose and need statement does not reflect the reality of Southeast Alaska's economy or the goal of transitioning away from the controversy and conflict of old-growth logging. As explained above, the region has moved beyond massive old-growth logging as the primary economic driver. By including logging in the purpose and need statement for this project, the agency actually works against the economic interests of Southeast Alaskans. The economic drivers of the Southeast economy depend upon intact, old-growth forests: fishing, tourism, and recreation. The agency should be developing projects that support those industries and, in so doing, facilitate the transition away from environmentally and economically unsustainable industrial-scale old-growth logging.

## ALTERNATIVES

Under NEPA, the Forest Service must develop alternatives that “inform decision makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.”<sup>29</sup> The DEIS does not comply with NEPA's directive to “[r]igorously explore and objectively evaluate all reasonable alternatives.”<sup>30</sup> As the courts have made clear: “The agency must look at every reasonable alternative within the range dictated by the nature and scope of the proposal. The existence of reasonable but unexamined alternatives renders an EIS inadequate.”<sup>31</sup> For the reasons explained below, the DEIS violates NEPA because it fails to consider an adequate range of alternatives with regard to logging volumes.

As an initial matter, groups raised several concerns regarding the Forest Plan FEIS and its consideration of alternatives at the forest plan stage.<sup>32</sup> Those concerns are not repeated herein, rather they are incorporated in their entirety.

### I. THE FOREST SERVICE ACTS IMPROPERLY IN FAILING TO ANALYZE DIFFERENT OLD-GROWTH LOGGING ALTERNATIVES.

At the project level, the Forest Service arbitrarily rejected calls to evaluate alternatives that would offer no old-growth sales,<sup>33</sup> as well as an alternative that would “limit old-growth to 5 MMBF . . . annually for small purchasers and cottage industry only.”<sup>34</sup> The agency explains a no old-growth alternative “was eliminated because timber volumes under this alternative would not sustain a local timber industry to meet the purpose and need of this project . . . [and] [i]t does not meet the need for a sustainable level of forest products to contribute to the economic viability

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<sup>29</sup> 40 C.F.R. § 1502.1; *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 965 (9th Cir. 2005) (failing to provide “‘full and fair’ discussion of the potential effects of the project” violated NEPA).

<sup>30</sup> 40 C.F.R. § 1502.14(a).

<sup>31</sup> *Ilio 'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1095 (9th Cir. 2006).

<sup>32</sup> See SEACC Forest Plan Objection at 12-19; ARD Forest Plan Objection at 29-40.

<sup>33</sup> DEIS at 32.

<sup>34</sup> *Id.* at 33.

of Prince of Wales area communities.”<sup>35</sup> The agency explains that it rejected the five MMBF annual alternative because “Alternatives 3 and 5 have a reduced amount of old-growth harvest that would support local small mills or ‘cottage industry’ while providing a limited time for larger mills to increase their utilization of young-growth or locate another source of old-growth to supplement their timber supply.”<sup>36</sup> In both cases, however, the DEIS provides no support for the conclusions.

As explained below in the market demand section, the Forest Service’s pre-determined decision to lock in massive volumes of old-growth timber sales over the next 15 years is arbitrary, unsupported, and violates the statutes that require the agency to balance timber objectives with other forest values. The agency’s failure to analyze market demand also led the agency to summarily reject viable old-growth alternatives, including alternatives that would provide for only small volumes of old-growth to small operators (<5 MMBF annually) or no more old-growth logging on Prince of Wales Island. As a result, the Project defeats the agency’s stated intent to transition the Tongass away from old-growth logging. The decision locks in a guaranteed old-growth supply, thus creating no incentive for the timber industry to transition to young-growth. The most likely outcome is that Viking Lumber logs the old-growth authorized in the Project and then shuts down altogether.

## II. THE ALTERNATIVES IN THE DEIS ARE TOO SIMILAR.

The action alternatives the Forest Service does analyze in the DEIS are too similar to one another in fundamental ways with regard to logging and road construction activities. The agency must examine alternatives with more varied characteristics to provide a meaningful analysis.

As an initial matter, it is impossible to know whether there are any meaningful differences in the location and amount of the timber sales that would be authorized under the alternatives because those decisions will not be made until some undisclosed point in the future. “The specific location and amount of harvest in each [wildlife analysis area] would be determined during implementation and vary by alternative.”<sup>37</sup> Thus the logging alternatives might be identical.

Similarly, the agency’s analysis of alternatives with regard to roads is almost uniform. Alternatives 3 and 5 contemplate 48 and 49 miles of new Forest Service roads, respectively.<sup>38</sup> They contemplate 175 miles and 180 miles of temporary roads, respectively.<sup>39</sup> Alternative 2 varies from these only slightly with 35 miles of new roads and 129 miles of temporary roads.<sup>40</sup> The young-growth volume alternatives are essentially the same, if not identical in most cases. For example, Alternatives 3 and 5 provide for the same volume of young-growth logging, 529

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<sup>35</sup> DEIS at 32.

<sup>36</sup> *Id.* at 33.

<sup>37</sup> *Id.* at 162.

<sup>38</sup> *Id.* at 44.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*



MMBF.<sup>41</sup> In terms of total acreage of young-growth logging, they differ by only one acre, 36,670 and 36,669 respectively.<sup>42</sup> They also provide identical acres of even-aged and uneven-aged management, 15,630 and 21,040 acres, respectively.<sup>43</sup>

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Under NEPA, the agency is required to develop alternatives that “inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.”<sup>44</sup> The DEIS does not comply with NEPA’s directive to “[r]igorously explore and objectively evaluate all reasonable alternatives.”<sup>45</sup> The courts have made it clear: “The agency must look at every reasonable alternative within the range dictated by the nature and scope of the proposal. The existence of reasonable but unexamined alternatives renders an EIS inadequate.”<sup>46</sup> The Forest Service must address these infirmities and should prepare a new DEIS that addresses the logging and road building aspects of the Project.

### MARKET DEMAND

As explained in the objections to the 2016 Amended Forest Plan, the agency’s flawed market demand analysis led the agency to adopt an improperly rigid timber objective of 46 MMBF per year regardless of actual demand.<sup>47</sup> These errors unlawfully restrict the range of alternatives considered in the Forest Plan FEIS, misrepresent the ostensible jobs and economic benefits from logging under the plan, and will lead to wasteful expenditure of resources on timber sales. The undersigned incorporate the arguments made regarding the 2016 Amended Forest Plan’s market demand analysis in their entirety.

At the project level, the DEIS not only fails to correct these errors, it fails to justify the Prince of Wales Project altogether. In the past, the Forest Service has attempted to at least explain in other timber sale EISs why a particular project was selected and how the agency decided how much volume should be offered.<sup>48</sup> In doing so, the agency provided the public and the decision-maker essential information, including how a particular project fits into the broader Tongass Timber Program and the agency’s analysis of future timber market demand.<sup>49</sup> Though these analyses

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<sup>41</sup> *Id.* at 20.

<sup>42</sup> *Id.* at 21.

<sup>43</sup> *Id.*

<sup>44</sup> 40 C.F.R. § 1502.1; *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 965 (9th Cir. 2005).

<sup>45</sup> 40 C.F.R. § 1502.14(a).

<sup>46</sup> *’Ilio’ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1095 (9th Cir. 2006).

<sup>47</sup> See SEACC Forest Plan Objection at 22-24; ARD Forest Plan Objection to at 80-85.

<sup>48</sup> See, e.g., Big Thorne FEIS, Appendix A at A-1.

<sup>49</sup> See *id.*

failed to justify the timber sale, at least the Forest Service provided relevant information. The DEIS fails to provide any of this information.

The Forest Service seeks to justify the Prince of Wales Project in large part based on the stated need to provide a sustainable level of timber. “The underlying need for the . . . Project comes in part from the Forest Service’s obligation, subject to applicable law, to seek to provide a supply of timber from the Tongass National Forest that meets market demand annually and for the planning cycle.”<sup>50</sup> The DEIS also explains the Project responds to the goals and objectives of the 2016 Amended Forest Plan,<sup>51</sup> which include “provid[ing] about three years supply of volume under contract to local mills and then establish[ing] NEPA-cleared volume to maintain flexibility and stability in the sale program.”<sup>52</sup>

The DEIS, however, fails to explain the agency’s conclusions regarding how much total old-growth should be authorized in this decision and how and when individual timber sales will contribute to meeting market demand. As the DEIS explains, “[i]t is difficult to estimate market demand for timber from the Tongass National Forest, even a year or two in advance.”<sup>53</sup> Yet the Forest Service is making a decision about how much logging it will authorize over the next 15 years without any explanation.

The Ninth Circuit has specifically addressed the Forest Service’s obligation to provide complete and accurate market demand information to conduct a proper analysis of proposed timber sales in the Tongass:

Had the decision makers and public known of the accurate demand forecast for Tongass timber, and the concomitant lower employment and earnings potential, the Forest Service may have selected an alternative with less adverse environmental impact, in less environmentally sensitive areas. Presenting accurate market demand information [is] necessary to ensure a well-informed and reasoned decision, both of which are procedural requirements under NEPA.<sup>54</sup>

Indeed, “inaccurate economic information may defeat the purpose of an EIS by impairing the agency’s consideration of the adverse environmental effects and by skewing the public’s evaluation of the proposed agency action.”<sup>55</sup>

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<sup>50</sup> DEIS at 6.

<sup>51</sup> *Id.* at ii.

<sup>52</sup> *Id.* at 6.

<sup>53</sup> *Id.* at 96.

<sup>54</sup> *Natural Res. Def. Council v. United States Forest Serv.*, 421 F.3d 797, 812 (9th Cir. 2005).

<sup>55</sup> *Id.* at 811.

The Forest Service cannot sign a ROD for the Prince of Wales Project without a more realistic and justified approach to timber market demand. If the agency approves the Prince of Wales Project without that analysis, it will act unlawfully under NEPA, misapply the market demand provision of the TTRA, and skew the multiple-use balancing choices under NFMA and the Multiple-Use Sustained-Yield Act.<sup>56</sup>

#### FLAWED CONDITION-BASED NEPA REVIEW

The Forest Service's use of "condition-based NEPA" reflected in the DEIS runs contrary to NEPA, as well as decades of case law interpreting its requirements. As explained below, the agency must confront its fundamental failure to examine the impacts of this enormous timber sale project and should prepare a new DEIS that addresses the logging and road building in the manner that NEPA (and NFMA) requires.<sup>57</sup> Basing an FEIS (and a ROD) on the Forest Service's "condition-based" approach will violate the law.

In enacting NEPA, Congress recognized the "profound impact" of human activities, including "resource exploitation," on the environment and declared a national policy "to create and maintain conditions under which man and nature can exist in productive harmony."<sup>58</sup> To advance this policy objective, NEPA "establishes 'action-forcing' procedures that require agencies to take a 'hard look' at environmental consequences."<sup>59</sup> A hard look does not allow the agency to take "a soft touch or brush-off of negative effects."<sup>60</sup>

In *Natural Resources Defense Council v. U.S. Forest Service*, for example, the Court faulted the Forest Service for providing empty disclosures that lacked any analysis, explaining the agency "d[id] not disclose the effect" of continued logging on the Tongass and "d[id] not give detail on whether or how to lessen the cumulative impact" of the logging.<sup>61</sup> Elsewhere, the Court

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<sup>56</sup> See 16 U.S.C. § 1604(e) (NFMA); *id.* § 529 (Multiple-Use Sustained-Yield Act); *id.* § 539d(a) (TTRA); *id.* § 3120(a)(3)(A) (Alaska National Interest Lands Conservation Act); *see also* *Natural Res. Def. Council v. U.S. Forest Service*, 421 F.3d 797, 808-09 (9th Cir. 2005) (explaining balancing of timber and other goals in the Tongass).

<sup>57</sup> In an effort to better understand the Forest Service's novel approach to this timber sale project, Earthjustice contacted the Tongass Forest Supervisor, Earl Stewart. See H. Harris, Earthjustice Email to E. Stewart, Forest Service (Jun. 6, 2018). The email asked the Forest Service to identify any other timber sale projects that employed this condition-based analysis or, alternatively, to confirm that the Prince of Wales Project is the first time the agency has relied on this approach for a commercial logging project. The Forest Service failed to respond to that inquiry.

<sup>58</sup> 42 U.S.C. § 4331(a).

<sup>59</sup> *Metcalf v. Daley*, 214 F.3d 1135, 1141 (9th Cir. 2000) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989)).

<sup>60</sup> *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1241 (9th Cir. 2005).

<sup>61</sup> 421 F.3d at 815.

explained that “general statements about possible effects and some risk do not constitute a hard look, absent a justification regarding why more definitive information could not be provided.”<sup>62</sup> The Forest Service also must provide the public “‘the underlying environmental data’ from which the Forest Service develop[ed] its opinions and arrive[d] at its decisions.”<sup>63</sup> In the end, “vague and conclusory statements, without any supporting data, do not constitute a ‘hard look’ at the environmental consequences of the action as required by NEPA.”<sup>64</sup> “The agency must explain the conclusions it has drawn from its chosen methodology, and the reasons it considered the underlying evidence to be reliable.”<sup>65</sup>

At the project-level, as compared to a programmatic decision, the required level of analysis is far more stringent.<sup>66</sup> At the “implementation stage,” the NEPA review is more tailored and detailed because the Forest Service is confronting “individual site specific projects.”<sup>67</sup> Indeed, the Ninth Circuit has faulted the Forest Service for failing to provide site-specific information in a landscape level analysis:

This paltry information does not allow the public to determine where the range for moose is located, whether the areas open to snowmobile use will affect that range, or whether the Forest Service considered alternatives that would avoid adverse impacts on moose and other big game wildlife. In other words, the EIS does not provide the information necessary to determine how specific land should be allocated to protect particular habitat important to the moose and other big game wildlife. Because the Forest Service did not make the relevant information available . . . the public was limited to two-dimensional advocacy—interested persons could argue only for the allocation of more or less land for snowmobile use, but not for the protection of particular areas. As a result, the Forest Service effectively stymied the public’s ability to challenge agency action.<sup>68</sup>

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<sup>62</sup> *Or. Natural Res. Council Fund v. Brong*, 492 F.3d 1120, 1134 (9th Cir. 2007) (citation omitted); *see also Or. Natural Res. Council Fund v. Goodman*, 505 F.3d 884, 892 (9th Cir. 2007) (holding the Forest Service’s failure to discuss the importance of maintaining a biological corridor violated NEPA, explaining that “[m]erely disclosing the existence of a biological corridor is inadequate” and that the agency must “meaningfully substantiate [its] finding”).

<sup>63</sup> *WildEarth Guardians v. Mont. Snowmobile Ass’n*, 790 F.3d 920, 925 (9th Cir. 2015).

<sup>64</sup> *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 973 (9th Cir. 2006).

<sup>65</sup> *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1075 (9th Cir. 2011) (citation and internal quotation marks omitted).

<sup>66</sup> *See, e.g., Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 800-01 (9th Cir. 2003).

<sup>67</sup> *Forest Ecology Ctr., Inc. v. U.S. Forest Serv.*, 192 F.3d 922, 924 (9th Cir. 1999).

<sup>68</sup> *WildEarth Guardians v. Montana Snowmobile Ass’n*, 790 F.3d 920, 927 (9th Cir. 2015).

When the Forest Service fails to conduct that site-specific analysis, the agency “does not allow the public to ‘play a role in both the decisionmaking process and the implementation of that decision.’”<sup>69</sup> Notably, the magnitude of the project area does not excuse an agency’s failure to conduct a site-specific analysis. In *State of Cal. v. Block*, for example, the decision concerned 62 million acres of National Forest Service Land and the Ninth Circuit still required an analysis of “[t]he site-specific impact of this decisive allocative decision.”<sup>70</sup> In short, NEPA’s procedural safeguards are designed to guarantee that the public receives accurate *site-specific* information regarding the impacts of an agency’s project-level decision *before* the agency approves the decision.

Here the Forest Service characterizes the Prince of Wales Project as a “condition-based NEPA”<sup>71</sup> analysis that “will produce one decision to authorize integrated management action on Prince of Wales Island over the next 15 years.”<sup>72</sup> As such, the agency describes it as “a project-level analysis.”<sup>73</sup> According to the DEIS, this “means that while the range of treatments or activities authorized will be described and analyzed in [the DEIS], the specific locations and methods will be determined during implementation based on defined conditions in the alternative selected in the Decision and activity cards (Appendix A).”<sup>74</sup> The DEIS also states explicitly that the Implementation Plan in Appendix B “describes the linkage from the EIS to the project-specific work *without the need for additional NEPA analysis*.”<sup>75</sup>

In reality, the Forest Service fails to explain even the basic characteristics of this 604-656 MMBF old-growth and young-growth logging project that encompasses almost 2.3 million acres. This renders the DEIS devoid of any site-specific explanation or evaluation of the impacts, alternatives, and the necessary mitigation.

At its most basic, the DEIS fails to disclose the location of any of timber sales that this decision will authorize despite Forest Service guidance and long-standing agency practice to the contrary. According to the Forest Service Handbook for the Tongass: “Unit and road cards will be provided electronically when Draft or Final NEPA documents and decisions are published.”<sup>76</sup> It continues: “*For Draft Environmental Impact Statements (DEIS’s) . . . completed unit and road shall be published on the project webpage . . . in bookmarked PDF format for review by other*

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<sup>69</sup> *Id.* at 928 (quoting *Methow Valley Citizens Council*, 490 U.S. at 349).

<sup>70</sup> *California v. Block*, 690 F.2d 753, 763 (9th Cir. 1982).

<sup>71</sup> DEIS at i.

<sup>72</sup> *Id.* at Abstract at \*1.

<sup>73</sup> *Id.* at 9.

<sup>74</sup> *Id.* at i.

<sup>75</sup> *Id.*, Appendix B at B-1 (emphasis added).

<sup>76</sup> FSH 1909.15-2015-1, Environmental Policy and Procedures Handbook, Chapter 10 (April 27, 2015), 13.1.

agencies or interested parties *when the NEPA document is published.*”<sup>77</sup> In the Big Thorne FEIS, the Forest Service explained, for example, that the “[s]ite-specific descriptions and resource considerations for each potential harvest unit are included as unit cards.”<sup>78</sup> Additionally, “[t]he cards describe site-specific concerns, and how these concerns would be mitigated or avoided in the design of each unit and road segment.”<sup>79</sup>

Here the DEIS explains that the unit cards for timber sales (and the road cards described below) will not even be developed until “site-specific conditions are determined” after the ROD is signed.<sup>80</sup> Elsewhere the DEIS makes clear there will not be any additional NEPA review: “The process described in [Appendix B] describes the linkage from the EIS to the project-specific work without the need for additional NEPA analysis.”<sup>81</sup> Without that site-specific information, the Forest Service’s impacts analysis is meaningless, rendering any future decision arbitrary.

The DEIS also fails to explain the size and timing of the timber sales that will be authorized by this decision. The Forest Service plans to authorize the timber sales first and then “[t]he size of both old-growth and young-growth timber offerings will be determined during implementation.”<sup>82</sup>

The DEIS fails to explain where, when, and in what sequence and spatial relationship any of the roads will be constructed (or reconstructed) as well as the nature of those roads (*i.e.*, temporary versus permanent), making it impossible to explain the site-specific impacts of any given road or combination of roads. For example, in describing the direct and indirect effects of roads on wolves, the DEIS states: “It is unknown where on the landscape the road building would occur.”<sup>83</sup> The agency also fails to explain the costs of the individual roads or disclose whether the public will be forced to pay for those roads through pre-logging. Again, because the decisions regarding when and where to build the roads will not even be determined until after the Forest Service authorizes the Project,<sup>84</sup> the agency fails to analyze the site-specific effects of those roads (or explain the trade-offs regarding costs and funding for those roads).

As for the unit cards described above, the Forest Service Handbook explains that the road cards must be developed in association with the DEIS to explain the nature of the proposed road and

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<sup>77</sup> FSH 1909.15-2015-1, Environmental Policy and Procedures Handbook, Chapter 10 (April 27, 2015), 13.1 (emphasis added); *see also id.* at 13.2c (directing the Forest Service to “display unit-specific information necessary for project implementation on one unit card map representing the selected alternative or alternatives in a DEIS”).

<sup>78</sup> Big Thorne FEIS at S-2.

<sup>79</sup> *Id.* at S-9.

<sup>80</sup> DEIS, Appendix A at A-1.

<sup>81</sup> *Id.*, Appendix B at B-1.

<sup>82</sup> *Id.* at 107.

<sup>83</sup> *Id.* at 202.

<sup>84</sup> *Id.*, Appendix A at A-1 (explaining the road cards “will be developed as site specific locations are determined”).

the resulting impacts and necessary mitigation. They “[d]escribe or display site specific application of required resource protection measures . . . [d]emonstrate field knowledge pertaining to site specific Forest Plan standards and guidelines, [p]rovide a tracking tool for project implementation and monitoring, and [p]rovide road level information for the public and other agencies.”<sup>85</sup> In this case, the Forest Service provides none of this information, making it impossible to assess the project-level impacts, necessary mitigation, and alternatives prior to authorizing the Project.

The DEIS also fails to explain how the agency plans to offer old-growth sales as compared to young-growth sales. Given the DEIS’s acknowledgement that the timber industry on Prince of Wales is not engaged in young-growth, the Forest Service’s approach to the Project all but ensures the industry will not transition away from old-growth. In light of this reality, the agency might well decide to offer the entire amount of old-growth in one sale in one year, for example, but the DEIS fails to provide any meaningful information to the public or the decision-maker.

These failures result in a DEIS that inventories numbers and percentages (*e.g.*, less than 20% of habitat remaining), rather than providing meaningful analysis. Although it is impossible to inventory all of the ways in which the agency’s flawed approach compromises the resulting discussion and analysis, a few examples prove this point. The lack of project specific detail means, in many cases, that the agency is left to make baseless assumptions about what might happen. The DEIS explains, for example, that the Forest Service made assumptions about the logging impacts on high volume productive old-growth, but admits “if a higher percentage of the harvest is [high volume productive old-growth] below 800 feet on south-facing slopes, effects would increase.”<sup>86</sup> In describing the impacts across species, the Forest Service is unable to explain the impacts of logging, because the agency has not explained where and when the logging and road building will take place.<sup>87</sup> Below we address for a variety of species how the lack of site-specific analysis makes the wildlife impact analysis in the DEIS fundamentally inadequate.<sup>88</sup>

Finally, the Forest Service’s approach fails to account for missing information regarding the impacts of the Prince of Wales Project. When an agency confronts incomplete or unavailable information as part of the environmental review process, NEPA regulations dictate how the

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<sup>85</sup> FSH 1909.15-2015-1, Environmental Policy and Procedures Handbook, Chapter 10 (Apr. 27, 2015), 13.3; *see also id.* at 13.3a, c-e.

<sup>86</sup> DEIS at 179.

<sup>87</sup> *See, e.g., id.* at 173-76 (lumping project impacts to goshawks, marbled murrelets, Prince of Wales flying squirrels, and sage grouse into a single discussion); *id.* at 172 (“If timber harvest reduces the proportion of the landbase consisting of POG and mature second-growth forest to below 50 percent this could result in portions of the landscape becoming marginal or unsuitable for goshawks.”), *id.* at 197 (wolf conclusions), *id.* at 202 (direct and indirect effects on wolves), *id.* at 203-05 (pack depletion and mortality).

<sup>88</sup> *See infra* pp. 27-49.

agency must address that information.<sup>89</sup> “[T]he agency shall include the information in the environmental impact statement” if the missing information is: (1) “relevant to reasonably foreseeable significant adverse impacts;” (2) “essential to a reasoned choice among alternatives;” and (3) “the overall costs of obtaining it are not exorbitant.”<sup>90</sup> CEQ has explained that “[t]he evaluation of impacts under § 1502.22 is an integral part of an EIS and should be treated in the same manner as those impacts normally analyzed in an EIS.”<sup>91</sup> As outlined below, the DEIS fails to account for missing information regarding a variety of species (*e.g.*, ermine, wolves, Prince of Wales flying squirrel) and, more importantly, fails to explain why the agency is not gathering that missing information before it approves this record-breaking timber sale project. Thus, the Forest Service’s “condition-based” analysis also fails to comply with the requirements of 40 C.F.R. § 1502.22.

In sum, NEPA’s fundamental purpose is to guarantee that the agency’s “hard look” evaluation of site-specific consideration of impacts and necessary mitigation be completed and disclosed to the public and the decision-maker *before* the agency “produce[s] one decision to authorize integrated management action on Prince of Wales Island over the next 15 years.”<sup>92</sup> “NEPA promotes its sweeping commitment to ‘prevent or eliminate damage to the environment and biosphere’ by focusing Government and public attention on the environmental effects of *proposed* agency action.”<sup>93</sup> “By so focusing agency attention, NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.”<sup>94</sup> “Similarly, the broad dissemination of information mandated by NEPA permits the public and other government agencies to react to the effects of a proposed action at a meaningful time.”<sup>95</sup> The Forest Service’s entire approach to the Prince of Wales Project is inconsistent with the fundamental principles of NEPA and contrary to almost 50 years of case law.

## FLAWED NFMA APPROACH

### I. NFMA IMPOSES SUBSTANTIVE OBLIGATIONS ON THE FOREST SERVICE TO PROTECT WILDLIFE POPULATIONS.

NFMA requires that the Forest Service “provide for the diversity of plants and animals, based on the suitability and capability” of each national forest, as part of meeting overall multiple-use objectives.<sup>96</sup> The Forest Service has also adopted regulations that provide: “[f]ish and wildlife

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<sup>89</sup> See *Mont. Wilderness Ass’n v. McAllister*, 666 F.3d 549, 559-561 (9th Cir. 2011).

<sup>90</sup> 40 C.F.R. § 1502.22(a).

<sup>91</sup> 51 Fed. Reg. 15,618, 15,621 (Apr. 25, 1986).

<sup>92</sup> DEIS at Abstract.

<sup>93</sup> *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989) (quoting 42 U.S.C. § 4321) (emphasis added).

<sup>94</sup> *Id.* (citation omitted).

<sup>95</sup> *Id.*

<sup>96</sup> 16 U.S.C. § 1604(g)(3)(B).



habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area.”<sup>97</sup> The agency characterizes a viable population, for planning purposes, “as one which has the estimated numbers and distribution of reproductive individuals to insure its continued existence is well distributed in the planning area.”<sup>98</sup> This means, with regard to a forest plan, to “insure that viable populations will be maintained, habitat must be provided to support, at least, a minimum number of reproductive individuals and that habitat must be well distributed so that those individuals can interact with others in the planning area.”<sup>99</sup>

The 2016 Amended Forest Plan incorporates these viability obligations: “Provide the abundance and distribution of habitat necessary to maintain viable populations of existing native and desirable non-native species well-distributed in the planning area (*i.e.*, the Tongass National Forest).”<sup>100</sup> It incorporates the Forest Service planning regulations and extends the “viable populations” mandate to “implementation . . . of forest plans,” such as through timber sales.<sup>101</sup> All “[r]esource plans, permits, contracts and other instruments for the use and occupancy of National Forest System lands” must be consistent with the applicable Forest Plan.<sup>102</sup> Accordingly, the agency adopts the obligation to “[m]aintain the necessary abundance and distribution of habitats . . . to sustain viable populations” as one of the planning goals for the Project, “especially in old-growth forests.”<sup>103</sup>

The substantive duty to “ensure” that forest plans and timber sales authorized pursuant to those plans maintain viable wildlife populations imposes a stringent obligation on the Forest Service.<sup>104</sup> The agency should “use[] all the scientific data currently available.”<sup>105</sup> And NFMA “requires planning for the entire biological community,”<sup>106</sup> rather than only select species. It establishes the “Forest Service’s duty to protect wildlife” and imposes a “substantive limitation

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<sup>97</sup> 36 C.F.R. § 219.19 (2000).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> See 2016 Amended Forest Plan at 4-85.

<sup>101</sup> 36 C.F.R. § 219.27(a)(6) (1982); see 2016 Amended Forest Plan at 2-6.

<sup>102</sup> 16 U.S.C. § 1604(i).

<sup>103</sup> DEIS at 6.

<sup>104</sup> See *Idaho Sporting Congress v. Rittenhouse*, 305 F.3d 957, 961 (9th Cir. 2002) (“In providing for multiple uses, the forest plan must comply with the substantive requirements of [NFMA] designed to ensure ... the continued viability of wildlife in the forest....” (*citing* 16 U.S.C. § 1604(g)(3)(B); 36 C.F.R. § 219.19 (1999))).

<sup>105</sup> *Inland Empire Pub. Lands Council v. U.S. Forest Serv.*, 88 F.3d 754, 762 (9th Cir. 1996).

<sup>106</sup> *Seattle Audubon Soc’y v. Moseley*, 798 F. Supp. 1473, 1483 (W.D. Wash. 1992), *aff’d sub nom.*, *Seattle Audubon Soc’y v. Espy*, 998 F.2d 699 (9th Cir. 1993).

on timber production.”<sup>107</sup> The Forest Service must demonstrate it has considered the evidence and explained in a non-arbitrary manner how it expects to meet NFMA’s obligations before it can approve the Prince of Wales Project.

## II. THE FOREST SERVICE HAS RELIED ON SITE-SPECIFIC MATRIX MANAGEMENT IN THE TONGASS FOR DECADES.

In 1997, the Forest Service adopted the 1997 Forest Plan in a record of decision and prepared the 1997 FEIS.<sup>108</sup> In 2008, the Forest Service published the 2008 FEIS and announced in a record of decision that it had adopted the 2008 Amended Forest Plan as an amendment to the 1997 Forest Plan (the 2008 ROD).<sup>109</sup> As explained below, the Forest Service’s 1997 planning effort served as the scientific foundation for the 2008 Amended Forest Plan, and eventually the 2016 Amended Forest Plan.

The Forest Service based the 1997 Forest Plan and the subsequent amended plans on a wildlife conservation strategy that has two basic components: (1) a forest-wide old-growth reserve system and (2) management of those lands where logging might occur (the matrix or matrix lands).<sup>110</sup> The reserve system protects “old-growth forest by retaining blocks of intact, largely undisturbed habitat.”<sup>111</sup> In the matrix, old-growth forest is “maintained by standards and guidelines to protect important areas and provide old-growth forest habitat connectivity.”<sup>112</sup> Thus, the “standards and guidelines regulate how development will occur” in the matrix lands and “incorporate a species-by-species approach that addresses issues that are more localized or not accounted for in the broader, ecosystem context approach that was incorporated into the old-growth reserve system.”<sup>113</sup>

In 1993, Congress directed the Forest Service to “arrange for peer review” of the proposed conservation strategy and, based on that review, to integrate a final viability strategy into the 1997 Forest Plan.<sup>114</sup> The Forest Service asked its Pacific Northwest Research Station to review

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<sup>107</sup> *Seattle Audubon Soc. v. Moseley*, 798 F. Supp. 1484, 1489 (W.D. Wash. 1992), *aff’d sub nom.*, *Seattle Audubon Soc. v. Espy*, 998 F.2d 699 (9th Cir. 1993) (quoting Charles F. Wilkinson & H. Michael Anderson, *Land and Resource Planning in the National Forests*, 64 Or. L. Rev. 1, 296 (1985)).

<sup>108</sup> 1997 ROD at 1.

<sup>109</sup> 2008 ROD at 1.

<sup>110</sup> *See* 2008 ROD at 15-16; 2008 FEIS at 3-174-75; 2016 ROD at 21-22; 2016 FEIS at 3-200-01.

<sup>111</sup> 2008 FEIS at 3-174.

<sup>112</sup> *Id.* at 3-175.

<sup>113</sup> 2008 ROD at 16.

<sup>114</sup> H.R. Rep. No. 103-158, 1993 WL 226250 (1993).

the strategy.<sup>115</sup> This review, based on individual opinions from 18 wildlife experts,<sup>116</sup> ultimately concluded that the committee’s preliminary strategy was inadequate: “None of the planning alternatives described or suggested is adequate . . . to ensure viability of all species.”<sup>117</sup> The peer review explained, among other significant flaws, that the Forest Service needed to pay greater attention to matrix management.<sup>118</sup> These concerns culminated in the Forest Service’s decision to adopt the 1997 Forest Plan, including standards and guidelines to govern matrix management relating to specific species, as well as spatial considerations for the matrix:

The old-growth habitat conservation strategy in the Forest Plan was carefully crafted in response to these fundamental conservation planning documents. Based upon an [*sic*] consideration of the best available information related to conservation planning, the Forest Plan provides a sufficient amount and distribution of habitat to maintain viable populations of old-growth associated species after 100 years of Plan implementation.<sup>119</sup>

Thus the conservation strategy, now reflected in the 2016 Amended Forest Plan, has served as the foundation of the Forest Service’s management of the Tongass since the adoption of the 1997 Forest Plan. Matrix management, including site and species specific considerations, has been essential to meeting NFMA’s obligations since that time.

### III. THE FOREST SERVICE INEXPLICABLY ABANDONS MATRIX MANAGEMENT IN FAVOR OF ARBITRARY HABITAT THRESHOLDS.

The Forest Service’s approach to the Prince of Wales Project departs from this decades-long foundation. Instead, the Forest Service is attempting to assess project level impacts and justify its decision to proceed with the Prince of Wales Project using a conditioned-based analysis and arbitrary habitat thresholds that purportedly relate to species “persistence”. In the more than 20 years since the 1997 Forest Plan was adopted, the Forest Service has never handled a wildlife impact analysis in the perfunctory manner it attempts in the DEIS. The agency never explains what it means to persist and provides no scientific support to establish habitat thresholds either at the individual species level or for the Tongass generally. Additionally, mere persistence is not the threshold established in NFMA or the 2016 Amended Forest Plan.<sup>120</sup> For the reasons explained below, the agency must conduct the requisite project-specific impacts analysis, and

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<sup>115</sup> A. R. Kiester and C. Eckhardt, Review of Wildlife Management and Conservation Biology on the Tongass National Forest: A Synthesis with Recommendations at Preface, v (Mar. 1994).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 1.

<sup>118</sup> 1997 FEIS, Appendix N at N-22.

<sup>119</sup> *See id.* at N-30.

<sup>120</sup> *See, e.g.*, 2016 Amended Forest Plan at 4-92 (“maintaining long-term sustainable marten populations”); *id.* at 4-91 (“maintaining long-term sustainable wolf populations”).

explain its rationale and conclusions regarding the Prince of Wales Project or it will act contrary to NFMA and the other statutes governing timber sale projects.

The DEIS bases the agency's entire impacts on analysis on the conclusion that a bird or wildlife population will "persist" after the Prince of Wales Project based on whether 20-50 percent of any given type of habitat will remain.<sup>121</sup> The DEIS explains that:

The likelihood of a population persisting over time has been suggested to be related to some threshold level of habitat loss on the landscape (Fahrig 1997, 1999, 2003; Flather *et al.* 2002; Andren 1994). After reaching this threshold, the rate of population decline, and thus the likelihood of extinction, may increase (Haufler 2007). Reported threshold levels (percentage of habitat maintained or remaining on the landscape) range from 20 percent (Fahrig 1997) to 50 percent (Soule and Sanjayan 1998), depending in part on the dispersal capability of the species under consideration.<sup>122</sup>

"The change to habitat assumes that prior to 1954, when large scale logging began on the Tongass, is the original habitat."<sup>123</sup> The agency conducted the "analysis of the percent of landscape that may be necessary for a population to persist over time . . . at the [wildlife analysis area] scale" and it ran the numbers for a few different habitat types: productive old-growth, high-value productive old-growth, SD67, and specific locations (average and deep snow habitat).<sup>124</sup>

As an initial matter, the Forest Service has never relied on generic habitat thresholds to justify its viability conclusions or assess project-level impacts. The agency has only recognized the role that these thresholds play with regard to concepts of biodiversity, habitat connectivity, and fragmentation.<sup>125</sup> Notably, the DEIS fails to explain why the agency is departing so dramatically from its historical approach.

More importantly, however, the Forest Service has no scientific evidence to support the agency's use of these habitat thresholds for any individual species under consideration. Even considering forest-wide biodiversity, the agency admitted in the Forest Plan FEIS: "No specific threshold has been determined for the Tongass."<sup>126</sup>

With regard to productive old-growth impacts, for example, the DEIS inexplicably lumps black bear and the insular dusky shrew together and concludes:

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<sup>121</sup> See, e.g., DEIS at 165 (describing impacts on deer and marten persistence given remaining thresholds of average snow habitat), 197 (describing "minor" to "moderate" effects on wolves).

<sup>122</sup> DEIS at 157-58.

<sup>123</sup> *Id.* at 158.

<sup>124</sup> *Id.*

<sup>125</sup> See 2008 FEIS at 3-289.

<sup>126</sup> Forest Plan FEIS at 3-289

The percentages of remaining POG habitat remains above both the 20 and 50 percent thresholds at the project area and at the individual WAA scales on both NFS lands and lands in all ownerships. While no specific habitat thresholds have been identified for either the black bear or the insular dusky shrew based on the amounts of 20 percent habitat remaining (Fahrig 1997), and 50 percent habitat remaining (Soule and Sanjayan 1998) the determination for POG habitat is minor. The “minor” effect could be changed to moderate in some WAAs depending on the amount of proposed harvest under the POW LLA Project, which would be calculated prior to implementation when specific information is available.

The areas of potential concern, especially for species with more limited dispersal capabilities such as the shrew, would be in areas where POG harvest has been concentrated or on islands. These areas would be WAA 1003, Heceta Island and to a lesser extent WAA 1525, Kosciusko Island. Other areas of potential concern may be WAAs 1315 and 1420; both have these WAAs have experienced a reduction in POG approaching the 50 percent threshold identified by some research and the effect may be compounded because these WAAs are adjacent to each other.<sup>127</sup>

Elsewhere the Forest Service lumps together goshawk, marbled murrelets, Prince of Wales flying squirrel, and Prince of Wales spruce grouse together to explain the affected environment, direct and indirect effects and cumulative effects. Again, virtually the entire discussion, covering little more than six pages, discloses the effects of this Project solely in terms of the 20-50 percent habitat thresholds.<sup>128</sup>

Outside experts are quick to criticize the Forest Service’s arbitrary use of habitat thresholds, failure to conduct project specific impacts analysis, and explain its conclusions in that manner consistent with the 2016 Amended Forest Plan. The undersigned incorporate the comments of Drs. David Person, Winston Smith, Joseph Cook, Natalie Dawson, John Schoen, Jocelyn Colella, Ph.D. Candidate and Matt Kirchhoff in their entirety. Even a retired Forest Service planner for the Tongass is at a loss to understand the Forest Service’s thinking: “[t]he DEIS may have fallen off the cliff of interdisciplinary science that is mandated by NEPA.”<sup>129</sup>

Dr. Winston Smith, for example, faults the Forest Service for its “arbitrary determination that 20% or 50% remaining habitat is sufficient to support wildlife across the Tongass National

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<sup>127</sup> DEIS at 163.

<sup>128</sup> *Id.* at 171-76.

<sup>129</sup> James Kelly Comments to the Prince of Wales Landscape Level Analysis Project Draft EIS (Jun. 12, 2018).

Forest and that meeting this threshold results in a conclusion of ‘minor’ effect.”<sup>130</sup> As he explains:

There are multiple problems with the use of these thresholds for evaluating impacts to wildlife habitat or connectivity, not the least of which is the spatially inexplicit nature of using a percentage or total acres of remaining habitat without landscape context (Holloway et al. 2012) to evaluate the impacts on all wildlife species across the Tongass, regardless of their habitat affinities or ecological communities (which vary across islands; Smith 2012b).<sup>131</sup>

Dr. Smith notes that “[w]ithout further evidence or justification, the DEIS uses these thresholds to make determinations of impacts to habitat throughout the wildlife habitat and connectivity section.”<sup>132</sup> He explains that the 20 percent threshold (Fahrig 1997) and 50 percent habitat remaining (Soulé and Sanjayan 1998) “are not based on wildlife research studies of any species or group of species, nor does the objective of these studies have any relevance to habitat suitability to support breeding populations of wildlife, much less viable and widely distributed populations.”<sup>133</sup> He cautions: “Neither of these studies cited as the basis for determining impacts to wildlife habitat has anything to do with habitat suitability. Indeed, they are not studies of wildlife populations, and in fact, do not even represent ecological research.”

Based on the analysis provided in the DEIS, the Forest Service would not meet NFMA’s obligations if it approves the Project. The Forest Service’s analytical approach to the Project runs contrary to more than two decades of Tongass management. It is also inconsistent with the science (both historical and contemporary) with regard to individual species. The agency must provide a clear, defensible assessment of the impacts on the ability of Prince of Wales Island to support sustainable wildlife populations and hunting opportunities after this massive timber sale project. Suggesting that bird and wildlife species might simply “persist” based on arbitrary habitat thresholds is insufficient. The agency must conduct the required analysis before it can conclude the Project meets substantive requirements of NFMA. To do otherwise, the Forest Service will fail to provide a rational connection between the facts and the decision to approve the Project, rendering the decision arbitrary under the APA and NFMA.<sup>134</sup>

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<sup>130</sup> W. Smith, Prince of Wales Landscape Level Analysis Project - Comments (Jun. 11, 2018) (Smith Prince of Wales Comments) at 1-2. The undersigned incorporate the Smith Prince of Wales Comments in their entirety.

<sup>131</sup> *Id.* at 2.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> 5 U.S.C. §§ 500-59 (2012); *Washington v. Daley*, 173 F.3d 1158, 1169 (9th Cir. 1999).

#### IV. THE DEIS FAILS TO EXPLAIN WHY THE AGENCY BELIEVES THE PRINCE OF WALES PROJECT COMPLIES WITH THE 2016 AMENDED FOREST PLAN.

In addition to failing to demonstrate compliance with NFMA generally, the Forest Service fails to explain its conclusion that the Project complies with the 2016 Amended Forest Plan. As explained above, the 2016 Amended Forest Plan contains specific provisions governing matrix management in the Tongass. The DEIS, however, fails to explain whether and why the agency could approve the Project and still comply with those provisions. The Forest Service in most cases fails to even acknowledge the governing provisions in the 2016 Amended Forest Plan and in others offers nothing more than conclusory assertions that it meets the provisions.

By way of illustration, the Forest Service is violating specific provisions in the 2016 Amended Forest Plan that govern logging. The DEIS fails to analyze “site-specific project conditions” to determine operability.<sup>135</sup> The DEIS fails to provide “timber resource information,” including “inventories, analysis of data, and input for environmental analysis.”<sup>136</sup> Most notably, the Forest Service fails to provide unit cards describing the proposed logging in violation of TIM3.I.C., which provides:

Consider the management prescription of the LUDs within the project area in project design and environmental analysis for timber activities. Timber harvest unit cards will document resource concerns and protection measures. The unit cards, including a map with relevant resource features, will be provided electronically when Draft or Final NEPA documents and decisions are published. (Consult Tongass National Forest Supplement 1909.15-2015-1.)<sup>137</sup>

The 2016 Amended Forest Plan specifically requires the agency to assess “site-specific project conditions” and provide “[t]imber harvest unit cards [that] document resource concerns and protection measures . . . *when Draft or Final NEPA documents and decisions are published.*”<sup>138</sup> Here the Forest Service is failing to comply with any of these requirements in violation of NFMA.

The Forest Service is also violating the 2016 Amended Forest Plan’s extensive site-specific requirements governing road construction activities. For example, “[d]uring project planning, [the Forest Service must] identify resource concerns and site-specific mitigation measures.”<sup>139</sup> The agency is directed to “[c]learly document these mitigation measures” prior to approval “to

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<sup>135</sup> 2016 Amended Forest Plan at 4-68 (TIM3.I.B).

<sup>136</sup> *Id.* at 4-68 (TIM3.I.A.).

<sup>137</sup> *Id.* at TIM3.I.C.; *see also supra* pp. 11-13 (discussing the Forest Service’s failure to comply with Tongass National Forest Supplement 1909.15-2015-1).

<sup>138</sup> *Id.* at TIM3.I.B-C (emphasis added).

<sup>139</sup> *Id.* at 4-75 (TRAN3.I.D).

facilitate project implementation and monitoring.”<sup>140</sup> The agency must “[p]erform route or site selection, location, geotechnical investigations, survey, and design to a technical level sufficient to meet the intended use and commensurate with both ecological objectives and the investment to be incurred.”<sup>141</sup> In locating and designing roads, the Forest Service must “[s]eek to minimize effects wildlife and fish habitat, riparian habitat, and wetlands.”<sup>142</sup> Elsewhere, the 2016 Amended Forest Plan requires the Forest Service to “[l]ocate and design National Forest System Roads to minimize impacts to soils, water, and associated resources” and “to the extent feasible, in areas of important wetland identified during project interdisciplinary team analysis.”<sup>143</sup> All of these considerations, and these are just a few examples, require the Forest Service to conduct a site-specific analysis of impacts and mitigation measures relating to road construction activities and the Forest Service is violating those provisions.

The 2016 Amended Forest Plan also requires the Forest Service to assess site-specific considerations and impacts before it authorizing clearcutting,<sup>144</sup> including limitations on the size of clearcuts, openings, and leave strips.<sup>145</sup> For example “[w]here it is determined by an environmental analysis that exceptions to the size limit are warranted, the actual size of openings maybe up to 200 acres.”<sup>146</sup> Similarly, the “[l]eave strips between openings must be of sufficient size and composition to be managed as a separate stand.”<sup>147</sup> These considerations depend upon a site-specific analysis that the Forest Service fails to do in this case, in violation of the 2016 Amended Forest Plan and NFMA.

The 2016 Amended Plan also contains site-specific requirements to ensure logging is consistent with NFMA obligations to protect wildlife populations. For example, the 2016 Amended Forest Plan includes various prescriptions for wolves,<sup>148</sup> but the Forest Service fails to reach any conclusions regarding these considerations. The DEIS, most notably, fails to explain how many wolf packs are in the project area and whether those individual packs will be sustainable after implementation of the Project. It acknowledges that increased road density negatively affects wolves, but does not project the effects of any future changes in road density due to the proposed timber sales and does not include any mapping of potential future roads.<sup>149</sup> Elsewhere Alternative 5 is the only alternative that incorporates all of the habitat and access considerations

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 4-77 (TRAN4.I.A.).

<sup>142</sup> *Id.* at 4-78 (TRAN4.II.A.).

<sup>143</sup> *Id.* at 4-79 (TRAN4.III.A.).

<sup>144</sup> *Id.* at 4-68 (TIM4.II).

<sup>145</sup> *Id.* at TIM4.III.

<sup>146</sup> *Id.* at TIM4.III.C.

<sup>147</sup> *Id.* at TIM4.III.F.

<sup>148</sup> *Id.* at 4-91 (WILD1.XIX.).

<sup>149</sup> DEIS at 199, 196.



outlined in the Wolf Habitat Management Plan,<sup>150</sup> but even with regard to that alternative the DEIS fails to analyze site-specific application.<sup>151</sup> More importantly, the agency fails to explain the impacts if the Forest Service refuses to implement the Wolf Habitat Management Plan at either the island level (*i.e.*, whether the wolf populations on Prince of Wales will be sustainable) or the Tongass as a whole (*i.e.*, whether wolves will be well-distributed and viable). The Forest Service fails to obtain local knowledge of habitat conditions and spatial habitat location,<sup>152</sup> instead of relying solely on model outputs.<sup>153</sup> It does not state whether 600-foot road buffers will be maintained, let alone how far the project area and its individual wildlife analysis areas will fall below the deer habitat capability of 18 deer per square mile guideline.

Instead of following the 2016 Amended Forest Plan, the DEIS relies on the unsubstantiated assertion that so long as 20 to 50 percent of habitat remains, then sufficient deer habitat will remain for deer and wolves.<sup>154</sup> For example, it states that all wildlife analysis areas currently have more than 50 percent of the productive old-growth and non-winter habitats remaining and none are projected to drop.<sup>155</sup> The Forest Service's decision to base its conclusions on habitat thresholds instead of the 2016 Amended Forest Plan is especially troubling given the agency's conclusions the proposed sale may significantly restrict subsistence use of deer.<sup>156</sup>

In another example, DEIS fails to explain the agency's conclusions regarding bears. The 2016 Amended Forest Plan requires that the Forest Service cooperate with various agencies to prevent bear habituation to human food and garbage, evaluate the need for *additional* protection of important foraging sites, manage human-bear interactions to limit mortality, and manage road use where bears are concentrated.<sup>157</sup> Once again, the DEIS fails to meet these requirements. It discusses how bears have relatively greater dispersal ability than other species, but does not indicate whether additional protection may be needed for particular forage sites if timber sales are made.<sup>158</sup> With no specific spatial or temporal analysis, it assumes that "species with greater dispersal ability . . . would have the capability to move from areas of greater impact to those of lesser impact."<sup>159</sup> Furthermore, it relies on the 20 to 50 percent of remaining habitat threshold theory, admits there has been no finding for bears in relation to that theory, and still concludes

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<sup>150</sup> *Id.* at 97.

<sup>151</sup> *See id.* at 28, 30, 40, 156 (addressing the Wolf Habitat Management Plan, but failing to provide analysis specific to proposed projects).

<sup>152</sup> *See* 2016 Amended Forest Plan at 4-91

<sup>153</sup> 2016 Amended Forest Plan at 4-91.

<sup>154</sup> DEIS at 78.

<sup>155</sup> *Id.* at vii.

<sup>156</sup> *Id.* at 203, v.

<sup>157</sup> 2016 Amended Forest Plan at 4-88.

<sup>158</sup> DEIS at 158, 190.

<sup>159</sup> *Id.* at 161.

that impacts to bears would be minor.<sup>160</sup> It does not address what measures would be taken to manage human-bear interactions or how road siting in areas of bear concentration would be managed.

In a few last examples, the 2016 Amended Forest Plan requires project-level effects analysis for endemic terrestrial species, including analysis of impacts relative to distinctiveness of taxa, population status, degree of isolation, island size, and habitat associations.<sup>161</sup> Again, the DEIS fails to comply. It fails to mention certain endemic species (such as vole and ermine) and it fails to provide a project-level analysis for all endemics. It indicates there is some threshold level of habitat required, but admits that level depends on each species' individual dispersal capability and does not analyze those capabilities or the resulting impacts of the Project on those habitat needs for each species.<sup>162</sup> Elsewhere, the DEIS states the spruce grouse has a dispersal distance of one mile and that the species strongly avoids young clear cut areas, but does not indicate how this would be managed.<sup>163</sup> Similarly, it indicates that the dispersal ability of Keen's myotis would interact with the spatial position of different wildlife analysis areas, but then fails to analyze the resulting impacts.<sup>164</sup>

Notably, the planning record for the Prince of Wales Project also does not reflect any consideration of these factors. The Wildlife Resource Report, for example, fails to analyze and explain any of the impacts of this record-breaking timber sale project on the wildlife on Prince of Wales Island. It merely states that "wildlife species are exposed to disturbance from . . . timber harvest activities" and that such activity is expected to occur within the next 15 years.<sup>165</sup> The biological evaluation cited in the DEIS purports to provide some additional analysis of logging impacts on wildlife, but it could not be located in the planning record.<sup>166</sup>

The Forest Service's analysis must analyze and explain why the Project complies with NFMA and the 2016 Amended Forest Plan. The agency must make the findings required the 2016 Amended Forest Plan based on a project-level, site-specific, and species-specific analysis. To do otherwise, the agency will act in an arbitrary and unlawful manner.

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<sup>160</sup> *Id.* at 190.

<sup>161</sup> 2016 Amended Forest Plan at 4-93.

<sup>162</sup> DEIS at 163

<sup>163</sup> *Id.* at 172.

<sup>164</sup> *Id.* at 175.

<sup>165</sup> PR 833\_1074 (M. Dillman, Prince of Wales Landscape Level Analysis Project Wildlife Resource Report, U.S. Forest Serv., 22-22 (2018)).

<sup>166</sup> *See* DEIS at 367 (citing Dillman, M. 2018a. Wildlife Biological Evaluation – POW LLA Tongass National Forest. Internal document. 84 pp.).

## V. THE DEIS'S ANALYTICAL APPROACH DEPARTS FROM THE FOREST SERVICE HISTORICAL ANALYSIS OF TIMBER SALES.

As explained above, the DEIS fails to explain *why* the Forest Service believes the Prince of Wales Project is consistent with NFMA and the 2016 Amended Forest Plan. Instead, the agency assesses impacts based on arbitrary habitat thresholds and speaks in terms of populations continuing to “persist” after the Prince of Wales Project. The agency’s decision to offer such a paltry characterization is a marked and disappointing departure from the agency’s previous conclusions and explanations in recent timber sale EISs.<sup>167</sup> It is impossible to explain all the ways the Forest Service’s analysis of the Prince of Wales Project departs from the agency’s past practices, but a few examples from the Big Thorne FEIS demonstrate the consequences of the agency’s failure to provide a project-level analysis in this instance.

With regard to deer and wolves, the Big Thorne FEIS delineated precise historic trends and expected changes in various types of deer habitat and deer habitat capability across various spatial scales (wildlife assessment areas, biogeographic provinces, larger portion of Prince of Wales Island) to evaluate the impacts of the logging and road-building across the landscape.<sup>168</sup> The Big Thorne FEIS explained how these changes would affect wolf populations, as well as how historic and projected wolf harvest would affect those populations. It analyzed the wildlife corridors and explained with project-level detail how logging and road building would adversely affect those corridors and habitat connectivity.<sup>169</sup> It also identified site-specific mitigation to address those concerns. The Forest Service explained how road density affects wolf populations and what the maximum increase in road density would be after the timber sale project was completed.<sup>170</sup> It presented deer habitat capability in terms of percent of original habitat remaining and deer per square mile for each wildlife assessment area, in addition to analyzing how the proximity of each wildlife assessment area would affect the ability of wolves to disperse between them.<sup>171</sup> Based on this analysis, the Forest Service explained its conclusion that the “the project area [wildlife analysis areas] may not be capable of sustaining wolves without immigration from neighboring areas” after the Big Thorne timber sale project.<sup>172</sup> Though the Forest Service’s conclusions with regard to impacts on wolves were controversial and challenged, at least the agency provided the analysis in the Big Thorne FEIS.

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<sup>167</sup> Even a simple comparison of the length of the EISs demonstrates the agency’s perfunctory analysis of the Prince of Wales Project. The Big Thorne FEIS addressed a logging project of approximately 149 MMBF and the document spans almost 1,000 pages. Logjam was about of half that size (73 MMBF), but the Logjam FEIS was more than 500 pages. Here, the DEIS contemplates a project more than five times the size of the Big Thorne timber sale—around 621 million board feet over a 15-year time period—and yet the document is less than 500 pages.

<sup>168</sup> Big Thorne FEIS at 3-96.

<sup>169</sup> *Id.* at 3-107-09.

<sup>170</sup> *Id.* at 3-113-17, -178.

<sup>171</sup> *Id.* at 3-114-15.

<sup>172</sup> *Id.* at 3-114.

In contrast, the Prince of Wales DEIS fails to provide any project-level analysis with regard to wolves and deer because the agency is not disclosing any details of the anticipated timber sales and road construction activities (*e.g.*, temporal, spatial, volumes, sequence, etc.). It does not explain, for example, how deer habitat would be affected by any particular sale activity or the collective effects of those activities—instead, it offers the meaningless conclusion that in terms of the percent of deer habitat capability retained with full implementation of the 2016 Amended Forest Plan there would be relatively minor changes in remaining habitat.<sup>173</sup> This, of course, fails to account for the decades of logging that have taken place on Prince of Wales and the effects of stem exclusion on the habitat and wildlife of Prince of Wales. The DEIS also fails to explain what the increased road densities would be after implementation and the resulting effects of those increases either individually or collectively. Instead, the DEIS blithely concludes that road-building would occur to the detriment of wolves.<sup>174</sup> It fails to analyze the density of deer each of the wildlife assessment areas, biogeographic provinces, and Prince of Wales Island as whole are capable of sustaining per square mile and what densities the agency expects those areas will be able to support after the Project is implemented. Ultimately, the DEIS never explains the agency’s conclusions regarding the impacts on carrying capacity for deer, deer hunting, and whether the wolf populations on Prince of Wales will be sustainable over the long-term after this record-breaking timber sale project.

With regard to bears, the Big Thorne FEIS explained how the Forest Service chose a 300-foot den buffer for black bears and subsequently modified one proposed logging unit to account for that habitat protection.<sup>175</sup> Here, the DEIS merely explains that bears have greater dispersal capabilities than other species, so the impacts will be “minor”.<sup>176</sup>

In the context of endemic species, the Big Thorne FEIS addressed site-specific connectivity issues and provided suggested spacing for old-growth reserves between particular wildlife assessment area.<sup>177</sup> The DEIS lacks any site-specific analysis, offering only generalized assertions regarding connectivity across habitat types.<sup>178</sup>

For each species it analyzed, the Big Thorne FEIS provided site-specific analysis of how the project would affect the species. It identified and analyzed what measures needed to be taken to mitigate those impacts based on the particular area in question.

In this case, the DEIS fails to provide this level of analysis, largely because it fails to explain the nature of the logging and road constructions activities making it impossible to explain site-specific impacts on particular part of Prince of Wales or to identify the necessary mitigation measures based on the site-specific conditions. The Forest Service’s lack of analytical rigor

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<sup>173</sup> DEIS at 193.

<sup>174</sup> *Id.* at 182, 203.

<sup>175</sup> Big Thorne FEIS at 3-121.

<sup>176</sup> DEIS at 161.

<sup>177</sup> Big Thorne FEIS at 3-124-25.

<sup>178</sup> DEIS at 171.

conflicts with an explicit goal of the 2016 Amended Forest Plan in managing approaches for wildlife: “The intent is that determinations of prescriptions and opening sizes consider spatial and temporal conditions of adjacent landscapes.”<sup>179</sup>

In sum, the Forest Service’s failure to examine the impacts of the Prince of Wales Project based on the spatial and temporal context of the proposed scope of activities renders the agency’s conclusions regarding impacts and the balancing of interests arbitrary and unlawful under NFMA (as well as the other statutes governing timber sales). Before it can approve the Project, the Forest Service must prepare a new DEIS that presents the agency’s conclusions regarding NFMA based on a site-specific evaluation and provide a non-arbitrary explanation of the agency’s rationale and the evidence that supports the ultimate conclusions.

## WILDLIFE

In commenting on, and objecting to, the 2016 Amended Forest Plan, the undersigned groups highlighted concerns regarding several key Tongass species. They explained that because the Forest Service disregarded the existing pressures on those species and inadequately assessed the possible effects of the 2016 Amended Forest Plan, the Forest Service violated NFMA and the other statutes governing timber sales. They incorporate those arguments in their entirety, as well as the arguments relating to the 1997 Forest Plan and the 2008 Forest Plan.

They also argued that the Forest Plan FEIS’s review of the 2016 Amended Forest Plan’s effects on species also violated NEPA. Again, rather than repeat those concerns regarding the Forest Plan FEIS, the parties incorporate the arguments in their entirety, as well as the arguments regarding the 1997 FEIS and the 2008 FEIS given they serve as the predicate for the 2016 Amended Forest Plan.

With regard to Forest Service’s project level analysis of the Prince of Wales Project, the undersigned begin by highlighting the overarching concerns voiced by Dr. John Schoen in his comments regarding the DEIS:

I have had the opportunity to participate in the scientific, management, and policy arenas on the Tongass National Forest as both a state agency and conservation [non-governmental organization] scientist for nearly four decades. In that time, I have seen increased conservation measures applied to the Tongass. However, as a result of the continued clearcutting of old-growth forests and the disproportionate harvest—highgrading—of the rare and most valuable old-growth stands, I believe that the [Project] will result in unsustainable forest management on northern [Prince of Wales] and the Tongass. Thus, management of our nation’s largest national forest—which represents the nation’s greatest repository of

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<sup>179</sup> 2016 Amended Forest Plan at 5-8.

rare old growth—will likely be out of compliance with federal laws and regulations.<sup>180</sup>

For the reasons explained below, the Forest Service should not move ahead with the logging aspects of the Prince of Wales Project.

## I. ENDEMIC SPECIES

### A. The Agency's Overall Approach to Impacts on Endemic Species, Including Viability, is Arbitrary and Unlawful.

Like its predecessors, the 2016 Amended Forest Plan establishes as one of its objectives “to maintain habitat to support viable populations and improve knowledge of habitat relationships of rare or endemic terrestrial mammals that may represent unique populations with restricted ranges.”<sup>181</sup> With respect to the project-level decisions, the 2016 Amended Forest Plan directs the agency to:

Use existing information on the distribution of endemic mammals to assess project-level effects. If existing information is lacking, surveys for endemic mammals may be necessary prior to any project that proposes to substantially alter vegetative cover (*e.g.*, road construction, timber harvest, etc.). Surveys are necessary only where information is lacking to assess project-level effects.<sup>182</sup>

Notably, the 2016 Forest Plan specifically cautions the Forest Service that those “[s]urveys should emphasize small (voles, mice, and shrews) and medium sized (ermine and squirrels) endemic mammals with limited dispersal capabilities that may exist within the project area.”<sup>183</sup>

The Forest Service acknowledges that it has “increasing” viability concerns for endemic populations:

There are roughly 24 mammal species or subspecies considered endemic to Southeast Alaska (Smith et al. 2005). Mammal surveys on the Tongass have resulted in the documentation of new distributions, new species. However, there continue to be gaps in knowledge about the natural history and ecology of wildlife subspecies indigenous to Southeast Alaska (Hanley et al. 2005). Within Southeast Alaska, roughly 20 percent of known mammal species and subspecies have been described as endemic to the

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<sup>180</sup> J. Schoen, Comments on Prince of Wales Landscape Level Analysis (Jun. 14, 2018) (Schoen Comments) at 6. The undersigned incorporate the Schoen Comments in their entirety.

<sup>181</sup> 2016 Amended Forest Plan at 4-93 (WILD1.XIX.A).

<sup>182</sup> *Id.* (WILD1.XIX.A.1).

<sup>183</sup> *Id.* (WILD1.XIX.A.1.c).

region. *The long-term viability of these endemic populations is unknown, but of increasing concern* since island endemics are extremely susceptible to extinction because of restricted ranges, specific habitat requirements, and sensitivity to human activities such as species introductions (<http://msb.unm.edu/isles/>).<sup>184</sup>

Thus the Forest Service acknowledges that it does not know whether endemic populations will remain viable on the Tongass and is growing increasingly concerned that they will not. Yet, the agency fails to address that concern both at the level of the 2016 Amended Forest Plan and the Prince of Wales Project. Given the breadth and depth of those concerns, and the Project's location, it is all the more important that the Forest Service use contemporary information regarding those endemic populations to understand the potential effects of the 2016 Amended Forest Plan and the Prince of Wales Project. The agency must explain, for example, whether and why it concluded it did not need additional information regarding these populations and whether these populations would remain viable and well distributed as NFMA requires. The lack of analysis makes it impossible for the agency to accurately assess and explain the resulting impacts on endemic populations in the Tongass.

Here, the Forest Service's use of condition-based analysis renders the explanation of impacts on endemics meaningless. In response, Dr. Winston P. Smith raises significant concerns regarding the agency's use of condition-based NEPA to examine impacts on endemics. Dr. Smith explains:

Indeed, the functional connectivity of endemic small mammals cannot be determined without spatially explicit information on landscape composition, landscape configuration, and movement capability of the intervening matrix (Smith et al. 2011). A "condition-based" NEPA project is spatially neutral; that is, the specific locations and types and amounts of timber harvest will be determined during implementation (DEIS Summary, page I, lines 1-4). Therefore, it is not possible to determine the direct, indirect, or cumulative impacts to wildlife habitat or connectivity that could result from this project before implementation.<sup>185</sup>

Dr. Smith also faults the agency's misuse of habitat thresholds to explain impacts to species, including endemics. Dr. Smith explains "[t]here are multiple problems with the use of these thresholds for evaluating impacts to wildlife habitat or connectivity, not the least of which is the spatially *implicit* nature of using a percentage or total acres of remaining habitat without landscape context (Holloway et al. 2012) to evaluate the impacts on all wildlife species across the Tongass, regardless of their habitat affinities or ecological communities (which vary across islands; Smith 2012b)."<sup>186</sup> He pays particular attention to the agency's arbitrary conclusions:

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<sup>184</sup> Wrangell Island Project DEIS at 83 (emphasis added).

<sup>185</sup> Smith Prince of Wales Comments at 1.

<sup>186</sup> *Id.* at 2.

Most importantly: “Habitat is organism-specific; it relates the presence of a species, population, or individual (animal or plant) to an area’s physical and biological characteristics” (Hall et al. 1997:175). . . . Without further evidence or justification, the DEIS uses these thresholds to make determinations of impacts to habitat throughout the wildlife habitat and connectivity section. Not only does this approach disregard the organism-specific nature of habitat, but the references cited as a basis for the use of these thresholds are not based on wildlife research studies of any species or group of species, nor does the objective of these studies have any relevance to habitat suitability to support breeding populations of wildlife, much less viable and widely distributed populations.<sup>187</sup>

Drs. Joseph Cook and Natalie Dawson and Jocelyn Colella, Ph.D. Candidate, offer a similar critique regarding the Forest Service’s flawed approach to assessing the Project’s impacts on endemics.<sup>188</sup> They begin by noting that “[t]he Alexander Archipelago (most of the Tongass National Forest) contains a significant portion of endemic mammals for the entire continent and based on our information to date, Prince of Wales Island is a hotspot for endemics.”<sup>189</sup> They explain:

The Forest Service’s reliance on habitat thresholds for endemic mammals has no basis in the contemporary science of conservation biology of island endemics. The DEIS’s suggestion that so long as 20-50% of the old-growth habitat remains, then the impacts on any given species are minor is unsubstantiated based on the available science. Critically, the distribution of these forests and their connectivity can have dramatic effects on the survivorship of a species. Particularly for mammals, some of which (*e.g.*, wolf) have large home range territories, the geography of the proposed logging on [Prince of Wales] is essential to evaluating the impact of the plan on native faunas.<sup>190</sup>

They detail the Forest Service’s historical failures to address and evaluate endemics on the Tongass. They explain “the Forest Service lacks sufficient information to assess project level effects of the proposed Prince of Wales Project.”<sup>191</sup> They conclude: “In sum, the Prince of Wales project, if approved, represents an unacceptable risk to the long-term persistence of

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<sup>187</sup> *Id.*

<sup>188</sup> The undersigned incorporate the J. Cook *et al.* Statement on DEIS Prince of Wales Landscape Level Analysis (Jun. 11, 2018) (Cook Comments) in their entirety.

<sup>189</sup> Cook Comments at PDF 5.

<sup>190</sup> *Id.* at PDF 7.

<sup>191</sup> *Id.* at PDF 3 (Project Level Survey section).



endemic mammals on Prince of Wales Island.”<sup>192</sup> They call on the Forest Service to conduct the analysis contemplated in the 2016 Amended Forest Plan,<sup>193</sup> including population surveys of endemic species on Prince of Wales Island that are “commensurate with the degree of existing and proposed forest fragmentation” on the island.<sup>194</sup>

Under NFMA, the Forest Service has a mandatory and substantive obligation to ensure the viability of these populations. As Dr. Cook and his colleagues explain:

To date, the only viability analysis the Forest Service ever conducted (as part of the 1997 [Forest Plan] effort) lumped all endemics species (rodents, carnivores, bats, etc.) into category, rendering the analysis all but useless in understanding the habitat quality and quantity that must be retained to ensure the viability of endemic species. Each endemic species has its own suite of environmental and ecological conditions under which it thrives. Therefore, the link between each of these independent entities and their associated habitat (which can differ dramatically across islands) should be assessed on a case-by-case basis. [Additionally] [the 1997] analysis, of course, also fails to account for all of the new scientific discoveries that have developed since 1997.<sup>195</sup>

The Forest Service must demonstrate its decision with regard to the competing interests between logging what little old-growth forest remains on Prince of Wales and maintaining sufficient habitat for wildlife. Here, the agency must do the analysis required to show how 15 years of timber sales on Prince of Wales may affect endemic species, including the ability to ensure enough habitat remains to retain viable and well-distributed populations. Without the necessary analysis and findings, the agency will violate NFMA.

Additionally, because this incomplete and misleading information and the agency’s resulting conclusions regarding endemic species are presented in EISs (both for the 2016 Amended Forest Plan and the Prince of Wales Project), the agency’s failure to take a hard look at these concerns will violate NEPA.

B. The Forest Service’s Treatment of the Prince of Wales Flying Squirrel is Arbitrary and Unlawful.

The Forest Service’s analysis and conclusions regarding the Prince of Wales flying squirrel are unlawful under NEPA. Any ROD based on this analysis would be arbitrary and contrary to the 2016 Amended Forest Plan, NFMA, and the other statutes governing timber sales.

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<sup>192</sup> *Id.* at PDF 7.

<sup>193</sup> *Id.* at PDF 6.

<sup>194</sup> 2016 Amended Forest Plan at 4-93 (WILD.1.XIX.A.1.b).

<sup>195</sup> Cook Comments at PDF 3-4.

The DEIS fails to disclose and analyze the potential adverse consequences of the Prince of Wales Project on the Prince of Wales Flying Squirrel. In light of this analysis, Dr. Smith raises serious concerns regarding the Forest Service's analysis of the impacts of logging and road building on this endemic species. By way of background, he notes:

The Forest Service has never determined what constitutes a viable population of the Prince of Wales Flying Squirrel (or any endemic small mammal) on the Tongass. The agency also has no credible population estimates for either the species as a whole or any of the subspecies on the Tongass.

The Forest Service has never determined the quantity or quality of habitat that must remain to ensure the Prince of Wales Flying Squirrel (or any endemic small mammal) remains viable on the Tongass.

The Forest Service has never determined a meaningful measure of habitat that must remain on the Tongass or Prince of Wales Island to ensure the viability of the Prince of Wales Flying Squirrel.<sup>196</sup>

More specifically, Dr. Smith faults the Forest Service for failing to determine what contributions the Prince of Wales Flying Squirrel “make[s] toward ensuring viable and well-distributed populations of northern flying squirrels across the Tongass.”<sup>197</sup> He points out that “essential questions . . . remain unanswered,” leading him to conclude:

I conclude that the proposed Prince of Wales Landscape Level Project will further reduce, fragment, and isolate populations, all of which will contribute to an increasing downward trajectory of population decline, raising significant viability concerns regarding the future of this island endemic on the Tongass and the sustainability of the squirrel on Prince of Wales Island.<sup>198</sup>

Given the lack of species understanding and project-specific analysis, these concerns lead Dr. Smith to advise the Forest Service to conduct the surveys contemplated by the 2016 Amended Forest Plan before it approves the Project.<sup>199</sup>

The Forest Service has relied on Dr. Smith's expertise regarding endemics since the 1997 Forest Plan's inception. The agency must respond to his concerns. The Prince of Wales Project raises significant concerns regarding the Forest Service's ability to ensure the viability of flying squirrels, and the Prince of Wales subspecies, on the Tongass. The agency must conduct a

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<sup>196</sup> Smith Prince of Wales Comments at 5.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 7.

<sup>199</sup> *See id.*; 2016 Amended Forest Plan at 4-93 (WILD1.XIX (Endemic Terrestrial Mammals)).

population survey or, at minimum, justify its decision to proceed with the Prince of Wales Project despite lacking essential information regarding these squirrels. As it stands, the agency's assessment of project-level effects raises both NEPA and NFMA infirmities.

C. The Forest Service's Treatment of the Prince of Wales Ermine is Arbitrary and Unlawful.

The DEIS fails to even mention the Prince of Wales ermine and never discloses and analyzes the potential adverse consequences of the Prince of Wales Project on this endemic old-growth dependent species. The Forest Service's failure to analyze and explain the impacts of the Project on the Prince of Wales ermine is unlawful under NEPA. Given the lack of analysis, the agency cannot approve the Project without acting arbitrarily and contrary to the 2016 Amended Forest Plan, NFMA, and the other statutes governing timber sales.

Like the Prince of Wales flying squirrel, the Forest Service has never determined what constitutes a viable population of the Prince of Wales ermine on the Tongass. The Forest Service lacks any understanding of this endemic mammal whatsoever (*e.g.*, population estimates, distribution across the Tongass, quantity or quality of habitat that must remain to ensure viability).

Given these failures, Dr. Cook and his colleagues raise serious concerns regarding the impacts of logging and road-building on this endemic species. Dr. Cook *et al.* explains: "Ongoing work on the Prince of Wales ermine (Dawson et al. 2014; Colella et al. 2018, Colella unpublished data) highlights the distinct evolutionary origin and unique genetic properties of this mammal that, to the best of our knowledge, is only found on Prince of Wales Island, and potentially a very few nearby islands (not yet fully assessed)." <sup>200</sup> This "genetic data suggest the Prince of Wales ermine, currently recognized as subspecies *Mustela erminea celenda*, is distinctive, but closely related to the subspecies *Mustela erminea haidarum*, a subspecies which occurs on a few islands of the Haida Gwaii Archipelago (Queen Charlotte Islands)." <sup>201</sup> That subspecies is "listed under the Canadian Federal Species at Risk Act (SARA) and COSEWIC (Committee on the Status of Endangered Wildlife in Canada; S2--Imperiled or Rare) and is subject to protections and prohibitions under the British Columbia Wildlife Act." <sup>202</sup>

They explain that "[t]he Forest Service lacks understanding of the distribution, habitat needs, or viability requirements of the Prince of Wales ermine and this knowledge gap has not been fully acknowledged in the . . . DEIS." <sup>203</sup> They explain that because the agency lacks any information of the spatial and temporal scale of the logging and road construction, the analysis in the DEIS is

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<sup>200</sup> Cook Comments at 6 (Prince of Wales Ermine, *Mustel ermine celenda*).

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

“severely lacking,” explaining “[i]t is not possible to determine the direct, indirect, or cumulative impacts to wildlife habitat or connectivity that could result from the logging.”<sup>204</sup>

Based on the agency’s total lack of understanding of the Prince of Wales ermine, Dr. Cook and his colleagues conclude:

Given the Forest Service’s lack of knowledge regarding this species and its habitat requirements on Prince of Wales Island and the fact that the Prince of Wales Project encompasses 1.8 million acres of National Forest System land, the agency must conduct a population survey, as prescribed by the 2016 Amended TLMP, to assess the impacts of the logging on the Prince of Wales ermine.<sup>205</sup>

They also caution that the Forest Service must adhere to the 2016 Amended Forest Plan’s direction to assess those impacts ““relative to distinctiveness of the taxa, population status, degree of isolation, island size, and habitat associations relative to the proposed management activity.””<sup>206</sup> They also note that because the Prince of Wales ermine is only known to inhabit Prince of Wales Island, the Forest Service must demonstrate how it is designing the timber sales and road building activities ““to provide for their long-term persistence on the island.””<sup>207</sup>

The DEIS’s impacts analysis for the Prince of Wales ermine is non-existent, rendering it unlawful under NEPA. And given the lack of analysis, the agency cannot approve the Project without acting arbitrarily and contrary to the 2016 Amended Forest Plan, NFMA, and the other statutes governing timber sales.

## II. QUEEN CHARLOTTE GOSHAWKS

The DEIS wholly fails to disclose or examine the serious risks to goshawks on the Tongass and Prince of Wales Island, either the pre-existing risks or the ways in which the various alternatives would aggravate them, in any fashion that would alert the public or decision-makers to them. In fact, the DEIS offers only one paragraph to describe the goshawks’ biological and ecological needs.<sup>208</sup> The Forest Service must correct these deficiencies or run afoul of NEPA and NFMA.

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<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 7 (quoting the 2016 Amended Forest Plan at WILD1.XIX.A.2).

<sup>207</sup> *Id.*

<sup>208</sup> *See* DEIS at 171.

A. The Forest Service's Analysis of Queen Charlotte Goshawks is Arbitrary and Unlawful.

The Forest Service fails to evaluate the consequences of the Prince of Wales Project on the population of goshawks on Prince of Wales Island in any credible way. The agency ignores harmful information, including changes caused by the 2016 Amended Forest Plan and instead only discloses information that is supportive of its logging decision. As explained below, the Forest Service must prepare a new DEIS that corrects these failings or the agency's decision-making will be arbitrary and capricious under NFMA and the other statutes governing timber sales.

As Dr. Smith explain in his comments, "maintaining sufficient habitat to support a [Queen Charlotte goshawk] breeding population on [Prince of Wales] is fundamental to maintaining the viability of the [Queen Charlotte goshawk]." <sup>209</sup> The DEIS, however, fails to address the fact that a spatially explicit analysis of the 2016 Forest Plan's conservation strategy concluded that the Forest Service is failing to retain sufficient habitat to account for "three critical spatial components of the nesting home range:" nest area, post-fledging family area, and foraging area. <sup>210</sup> As Dr. Smith explains, the Forest Service's "expectation that, in intensively managed landscapes, preferred habitat contributed by other elements of the TLMP conservation strategy (e.g., old-growth reserves, riparian or shoreline buffers) will mitigate this deficiency was *not supported* by a spatially explicit analysis of 136 virtual PFAs created from actual nest sites." <sup>211</sup> In fact:

[S]patially explicit analyses of contributions to northern goshawk breeding season habitat revealed that TLMP conservation measures contribute about half the secure habitat recommended for PFAs of breeding pairs in the southern portion of this species range (Reynolds et al. 1992) and was less than half the relative amount of preferred habitat documented in nest areas in Southeast Alaska. <sup>212</sup>

The DEIS must grapple with the fact that Forest Service is failing to maintain sufficient habitat (instead of presenting it in terms of arbitrary thresholds or total amount) in the three critical spatial components of the nesting home range. As Dr. Smith explains in his comments, this leads to a variety of fundamental questions the agency must answer regarding the role Prince of Wales Island and the Queen Charlotte Goshawk play to overall goshawk distribution and viability on the Tongass. <sup>213</sup>

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<sup>209</sup> Smith Prince of Wales Comment at 9-10.

<sup>210</sup> W. P. Smith, Proposed Forest Plan Amendment Further Compromises Established Conservation Measures to Sustain Viable Northern Goshawk Populations at 3 (2016).

<sup>211</sup> Smith Prince of Wales Comments at 10.

<sup>212</sup> *Id.* at 11.

<sup>213</sup> *Id.* at 12-13.

The DEIS also offers a flawed justification to conclude goshawks will not be as adversely affected by logging impacts as other species because goshawks can disperse.<sup>214</sup> As Dr. Smith explains: “This conclusion demonstrates a lack of understanding in two fundamental areas: 1) the biology and breeding habitat requirements of Queen Charlotte Goshawks; and 2) the fundamentals of wildlife habitat assessments.”<sup>215</sup> As an initial matter, “[b]reeding pairs of goshawks are territorial, landscape scale species that occupy breeding home ranges (median = 21 km<sup>2</sup> for breeding females in Southeast Alaska; Iverson et al. 1996) representing a sequential hierarchy of three life-history specific areas (Anderson et al. 2005), all of which need to be considered simultaneously (Reynolds et al. 2006).”<sup>216</sup> This fact leads Dr. Smith to fault the agency’s dispersal assumption because it “places the emphasis on the well-being of a breeding pair rather than the suitability of remaining breeding habitat, which is what ultimately determines breeding success and viability of Queen Charlotte Goshawks (Reynolds et al. 1994).”<sup>217</sup>

Additionally, the Forest Service’s failure to conduct any site-specific analysis further erodes this assumption. The agency’s dispersal theory “requires that there is a suitable nest site within their existing breeding home range that has not been rendered unsuitable by current or cumulative vegetation management actions (Anderson et al. 2005); and 2) requires there is a vacant, suitable breeding home ranges that goshawks can find and occupy to breed successfully (Reynolds et al. 1994).”<sup>218</sup> Here, the Forest Service fails to examine any of these considerations because it has not decided where, when, or how it will be implementing timber sales. Absent that site-specific analysis, it is impossible to base the impacts analysis on the assumption that goshawks will simply fly away from logging disturbance—there is no evidence to suggest that habitat is available and not already inhabited.

All of these challenges are exacerbated by the Forest Service’s choices for young-growth management that are reflected in the 2016 Forest Plan. Rather than manage young-growth in a way that returns it to old-growth characteristics, the Forest Service is targeting young-growth for commercial purposes in critical old-growth reserves, Beach-Estuary Fringe, and Riparian Management Areas. As explained below, these areas were originally set aside as reserves, in part, because they represented important habitat and they were considered critical to the long-term viability of goshawks.

In the end, the Forest Service must address conflicting expert opinion, empirical data and analyses to counter the conclusion that the agency is failing to maintain sufficient breeding habitat for goshawk pairs in managed landscapes of the Tongass and must accurately assess the impacts of the Prince of Wales Project. The DEIS fails to explain to the public or decision-maker what impacts the Project will have on the goshawk population. Absent a non-arbitrary

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<sup>214</sup> See, e.g., DEIS at 170.

<sup>215</sup> Smith Prince of Wales Comments at 2.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 2-3.

<sup>218</sup> *Id.* at 3.

explanation, the Forest Service will violate NEPA and result in an arbitrary decision under NFMA and the other statutes governing timber sales.

B. The Forest Service Fails to Evaluate the Cumulative Impacts on Goshawks, Including Those Relating to the Changes Adopted in the 2016 Amended Forest Plan.

In assessing cumulative impacts, the DEIS fails to consider the impacts caused by the significant changes in the 2016 Amended Forest Plan. For reasons described below, the Forest Service will violate NEPA and reach an arbitrary conclusion under NFMA if it proceeds with the Prince of Wales Project despite its impacts on goshawks.

The 2008 Amended Forest Plan classified areas within the beach<sup>219</sup> and estuary fringe<sup>220</sup> “as unsuitable for timber harvest.”<sup>221</sup> It established several important objectives regarding these areas, including:

To maintain an approximate 1,000-foot-wide beach fringe of mostly unmodified forest to provide important habitats, corridors, and connectivity of habitat for eagles, goshawks, deer, marten, otter, bear, and other wildlife species associated with the maritime-influenced habitat. Old-growth forests are managed for near-natural habitat conditions (including natural disturbances) with little evidence of human-induced influence on the ecosystem.

To maintain an approximate 1,000-foot-wide estuary fringe of mostly undisturbed forest that contributes to maintenance of the ecological integrity of the biologically rich tidal and intertidal estuary zone. Habitats for shorebirds, waterfowl, bald eagles, goshawks, and other marine-associated species are emphasized. Old-growth conifer stands, grasslands, wetlands, and other natural habitats associated with estuary areas above the mean high tide line are managed for near-natural habitat conditions with little evidence of human-induced disturbance.<sup>222</sup>

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<sup>219</sup> “The beach fringe is an area of approximately 1,000 feet slope distance inland from mean high tide around all marine coastline.” 2008 Amended Forest Plan at 4-4 (BEACH1.I.B.1).

<sup>220</sup> “The estuary fringe is an area of approximately 1,000 feet slope distance around all identified estuaries.” *Id.* at 4-4 (BEACH1.I.C.1).

<sup>221</sup> *Id.* at 4-5 (BEACH2.II.A.6.).

<sup>222</sup> *Id.* at 4-4 (BEACH1.I.A.4-5).

The Forest Service concluded that the “beach fringe was a very key feature of the overall Tongass conservation strategy,” particularly with regard to goshawks.<sup>223</sup> As Chris Iverson, the author of Appendix N to the 1997 FEIS, explained:

The most compelling argument for this extended beach fringe is that this zone of 1000 feet from the shoreline is a landscape region significantly selected by goshawks, for foraging we presumed, during our habitat selection analysis (see Goshawk [Conservation] Assessment, Figure 9, pages 52-53). When the leadership (Forest Supervisors, RF, IDT Leader) were presented with this graph and statistic—the decision was made to extend the beach fringe to 1000’ to provide additional risk reduction and confidence in goshawk conservation to contribute to a not warranted decision by the FWS for the listing petition that they were considering at the time.<sup>224</sup>

The 2016 Amended Forest Plan deletes the provisions that prevented logging in the beach (and estuary) fringe.<sup>225</sup> It now prevents most old-growth logging in these areas (with several exceptions that do not count towards the projected timber sale quantity),<sup>226</sup> but allows young-growth logging.<sup>227</sup> The DEIS, however, fails to examine the impacts of this change on the underlying conclusions regarding cumulative effects of the Prince of Wales Project on goshawks.

Like the direct and indirect effects analysis discussed above, the DEIS also fails to examine the cumulative impacts on the “three critical spatial components of the nesting home range:”<sup>228</sup> nest area, post-fledging family area, and foraging area. The agency must correct these failings to reflect the best available scientific understanding of goshawks and the unique role of each of these spatial components.

In sum, the Forest Service cannot ignore the fact that the 2016 Amended Forest Plan compromised fundamental elements of the goshawk conservation strategy. To comply with NEPA, the agency must analyze those changes in conjunction with the site-specific adverse impacts of the Prince of Wales Project. Under NFMA, the agency must account for these changes in management in reaching its conclusion to proceed with the Prince of Wales Project. To do otherwise would render the agency’s decision arbitrary and capricious.

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<sup>223</sup> 2008 Amended Forest Plan AR 603\_1127 at 2 (C. Iverson).

<sup>224</sup> *Id.*

<sup>225</sup> 2016 Plan Amendment PR 769\_01\_000088 at 4-5 (Redlined Version of Draft Forest Plan).

<sup>226</sup> 2016 Amended Tongass Forest Plan at 5-13 (June 2016).

<sup>227</sup> *See id.* at 5-4 to 5-5.

<sup>228</sup> W. P. Smith, Proposed Forest Plan Amendment Further Compromises Established Conservation Measures to Sustain Viable Northern Goshawk Populations at 3.



### III. SITKA BLACK-TAILED DEER

The DEIS's treatment of Sitka black-tailed deer is inadequate, incomplete, and arbitrary. As explained below, experts with decades of experience with Tongass management express widespread concerns regarding the DEIS's assessment of impacts on Sitka black-tailed deer. They pay special attention to the Forest Service's unexplained decision to depart from historical practices regarding deer impact analysis and the agency's failure to confront the consequences of high-grading on deer.

Dr. John Schoen begins by acknowledging that "Northern Prince of Wales Island has sustained some of the highest timber harvest of any biogeographical province on the Tongass National Forest."<sup>229</sup> "The largest proportion (31%) of contiguous high-volume forest occurred on northern Prince of Wales Island, where such forests have been reduced by 93.8 [percent]."<sup>230</sup> The Project "will target the remaining patches of old-growth forest in this province."<sup>231</sup> Logging this remaining habitat "will increase the risks of maintaining habitat quality for many wildlife species affiliated with old growth."<sup>232</sup>

With regard to deer, he raises specific concerns relating to the Forest Service's continuing pattern of high-grading on Prince of Wales Island. "[B]lack-tailed deer have already declined in some drainages on [Prince of Wales] that have had significant levels of old-growth harvest and are now transitioning into closed-canopy second growth with low habitat values."<sup>233</sup> What little old-growth habitat remains "now occurs in fragmented stands."<sup>234</sup> He explains that the conditions are exacerbated "in winters with deep snow accumulation because the high-volume, or large-tree, old growth is the most valuable winter habitat for deer and it has undergone a disproportionate harvest."<sup>235</sup>

Dr. Schoen calls on the Forest Service to "evaluate this issue relative to wildlife that are affiliated with old growth and clearly explain how this plan will maintain habitat values for those species."<sup>236</sup> He urges the agency to "recognize the shifting baseline of historic harvest levels," because "[w]hat appears to be a moderate harvest level in 2018, is a dramatic harvest since the

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<sup>229</sup> Schoen Comments at 2.

<sup>230</sup> *Id.* at 6 (quoting J. Schoen and D. Albert, "Use of Historical Logging Patterns to Identify Disproportionately Logged Ecosystems within the Temperate Rainforests of Southeastern Alaska," *Conservation Biology* (2013)).

<sup>231</sup> *Id.* at 2.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

1950s when industrial forestry began on Prince of Wales Island.” He cautions that the “cumulative impacts of clearcutting must be honestly evaluated in any EIS.”<sup>237</sup>

Like the experts discussed above, Dr. Schoen faults the Forest Service’s use of the arbitrary habitat thresholds to assess project impacts:

The DEIS stated that “Effects were assumed to be minor if the percentage of habitat type remains above 50 percent of the habitat calculated to be present in 1954.” On northern [Prince of Wales Island], many VCUs have had timber harvests of 50% or more. The DEIS uses these figures in relation to a threshold of population persistence. However, persistence of a population does not extrapolate to healthy or useable population levels. *Persistence* of deer on northern [Prince of Wales Island] will not necessarily meet *human demand* for subsistence deer harvests nor will persistence meet the needs of wolves that depend on deer as their primary prey resource. These issues must be evaluated and explained in much greater detail than has been done in the DEIS.<sup>238</sup>

Dr. Schoen also rejects the agency’s use of high volume productive old-growth in its analysis of deep snow habitat for deer. “I strongly recommend that the [Forest Service] re-evaluate winter deer habitat and impacts of the chosen alternative using the large-tree (SD67) habitat type. Continued highgrading large-tree old growth will have significant impacts on winter deer habitat and habitat for other wildlife species dependent on these forest types as well as affecting overall forest diversity.”<sup>239</sup>

Matt Kirchhoff shares Dr. Schoen’s concerns regarding the agency’s use of high volume productive old-growth in the DEIS: “I am surprised . . . that the [Forest Service] is using [high volume productive old-growth] instead of SD67 as the chosen descriptor for deep snow habitat for deer.”<sup>240</sup> Mr. Kirchhoff explains, “[t]he Forest Service has consistently objected to the use of volume class as a wildlife habitat descriptor.”<sup>241</sup> He notes that “[a] stand of older, even-aged trees may have high volume, but the closed canopy makes it poor habitat for deer . . . [and] [b]y comparison, a gap-phase old-growth stand that features tall, or large diameter trees, is good at

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<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at 3.

<sup>239</sup> *Id.* at 4.

<sup>240</sup> M. Kirchhoff letter to M. E. Stewart (Jun. 15, 2018) (Kirchhoff Comments) at 3. The undersigned incorporate the Kirchhoff Comments in their entirety.

<sup>241</sup> *Id.* (citing Caouette, J. P., Kramer, M. G., & Nowacki, G. J., *Deconstructing the Timber Volume Paradigm in Management of the Tongass National Forest*, U.S. Department of Agriculture, Forest Service, Pacific Northwest Research Station (2000)).

intercepting snow and providing forage.”<sup>242</sup> He advises the Forest Service to “defin[e] deep snow habitat for deer as ‘SD67 stands below 800 feet elevation’ [because doing so] would yield a more meaningful, accurate analysis.”<sup>243</sup>

Mr. Kirchhoff also questions the agency’s decision to depart from the definition of deep-snow habitat. He explains:

For reasons that are unclear, the DEIS departs from the definition used in the Forest Plan and redefines deep-snow habitat as [high volume productive old-growth] on south-facing slopes only (but see footnote 3). This is problematic because (a) many deer do not have access to south-facing habitat (if they inhabit [*sic*] a north-facing watershed), and (b) deer that inhabit north-facing habitat are most affected by snow, and are most dependent on deep-snow habitat.<sup>244</sup>

For these reasons, he cautions that “[n]arrowing the definition of deep-snow habitat will have significant repercussions for deer and subsistence hunters,” which the DEIS fails to explain.<sup>245</sup> He urges “[t]he FEIS should adopt the definition of deep snow habitat that includes all aspects, as in the [2016 Amended] Forest Plan.”<sup>246</sup>

Mr. Kirchhoff also questions the Forest Service’s failure to address the high-grading concerns. He explains:

The DEIS contains an important table (43, page 186) that reports (a) the percentage of large-tree old growth remaining in each analysis area, (b) the percentage that will be cut in the [Prince of Wales Project], and (c) the percentage that will remain. Six of the 10 analysis area [*sic*] will have less than half remaining. One will have just 15% remaining. If one adds the filter of “contiguous” large-tree old growth, as Albert and Schoen (2013) do, the statistics are even more alarming. While my concerns are primarily ecological—tied to the important functional role these stands play for wildlife (deer in winter, especially), the Forest Service should at least be recognizing that a sale program that is economically dependent on a rare and dwindling resource is not sustainable. The FEIS should

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<sup>242</sup> *Id.* (citing Kirchhoff, M. D., & Schoen, J. W., Forest Cover and Snow: Implications for Deer Habitat in Southeast Alaska, *The Journal of Wildlife Management*, 28-33 (1987)).

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 3.

<sup>245</sup> *Id.* at 3-4.

<sup>246</sup> *Id.* at 4.

explore this topic in more detail, and take steps to stop high-grading during these twilight years of old-growth logging.<sup>247</sup>

Table 43 only accounts for direct/indirect losses of SD67 forest and the left-hand column only accounts for National Forest Service land (although not labeled as such). The DEIS fails to provide similar table for cumulative effects, which would include past and future losses on all landownerships over time and going forward. As Mr. Kirchhoff notes, the Forest Service's unanswered questions regarding the percent of large trees that will remain after the Prince of Wales Project reflect both economic and ecological sustainability concerns. The agency must analyze and explain why it believes this is a sustainable enterprise.

Finally, the Forest Service's analysis of impacts on subsistence users is inadequate, especially in light of the recent declines in hunting opportunities and increased competition.<sup>248</sup> At the Southeast Alaska Subsistence Resource Advisory Committee's winter 2017 meeting in Craig, subsistence users described having a harder time harvesting deer during the 2016 season and the 2017 deer season has been characterized as the worst in recent memory for many hunters on Prince of Wales Island. The Forest Service must account for the Project's impacts on subsistence users, recreational hunters, as well as the economic opportunities associated with guide businesses and services.

The Forest Service must address these concerns before approving the Project. To do otherwise, the agency will act contrary to NEPA, NFMA, and the other statutes governing timber sales.

#### IV. ALEXANDER ARCHIPELAGO WOLF

Wolves on Prince of Wales Island and the surrounding islands (the Prince of Wales Archipelago) "make[] up a large percentage of wolves in Southeast Alaska, perhaps as much as 30% (Person et al. 1996)."<sup>249</sup> "Wolves inhabiting Prince of Wales Island are genetically isolated from other populations in Southeast Alaska (Person 2001; Weckworth et al. 2005, 2010, 2011)."<sup>250</sup> As a result of these considerations, "wolves on Prince of Wales Island and the Prince of Wales Archipelago are an important part of the overall wolf population in the Tongass."<sup>251</sup>

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<sup>247</sup> *Id.* at 7.

<sup>248</sup> See generally Alaska Rainforest Defenders Scoping Comments on the Prince of Wales Landscape Level Analysis Project 19-23 (Aug. 2017); Alaska Rainforest Defenders Scoping Comments on the Prince of Wales Landscape Level Analysis Project 12-13, 15-16, 31 (Dec. 2017).

<sup>249</sup> D. Person, Big Thorne Appeal Statement at ¶13.d (Aug. 15, 2013) (Person Big Thorne Statement). The undersigned incorporate the Person Big Thorne Statement, as well as Dr. Person's statement regarding the Big Thorne Draft Supplemental Information Report (Jun. 23, 2014) in their entirety.

<sup>250</sup> Big Thorne FEIS at 3-113; see also Person Big Thorne Statement at ¶13.d (explaining they are a "genetically and morphologically distinct group of the wolves within the Tongass").

<sup>251</sup> Person Big Thorne Statement at ¶13.d.

The population of wolves on Prince of Wales Island has declined substantially since the middle of the 1990s, especially within the north-central portion of Prince of Wales Island.<sup>252</sup> The Forest Service explained in the Big Thorne FEIS that in the mid-1990s “approximately 250-350 wolves were estimated to inhabit Prince of Wales Island and the surrounding islands (Person et al. 1996).”<sup>253</sup> By 2016, the U.S. Fish and Wildlife Service concluded that all of Game Management Unit 2 only had 50-159 wolves remaining wolves.<sup>254</sup>

As explained below, the Forest Service’s analysis of the impacts of this record-breaking timber sale project on wolves is inadequate, arbitrary, and unlawful.

A. The Forest Service’s Approach Fails to Comply With the 2016 Amended Forest Plan and Arbitrarily Departs From Decades of Wolf Management.

For decades the Forest Service’s management of wolves on the Tongass has been premised on three fundamental conservation measures (*i.e.*, maintaining deer habitat capability in the matrix, habitat reserves, and wolf mortality management). Experts have long concluded that the reserves do not provide sufficient wolf habitat to ensure wolf viability on the Tongass: “Ensuring long-term viability of . . . gray wolf populations will also require management actions beyond the establishment of [reserves] . . . .”<sup>255</sup> As a result, matrix and mortality management play critical roles evaluating impacts on wolves.

With regard to matrix management, beginning with the 1997 Forest Plan, the Forest Service has sought to ensure wolf viability on the Tongass by adopting a forest plan guideline that seeks to maintain sufficient deer habitat capability to support a density of deer to: (1) sustain current wolf populations, (2) support human deer hunting, and (3) meet current levels of wolf hunting and trapping. The 2016 Amended Forest Plan continues to rely on this habitat guideline:

Provide, where possible, sufficient deer habitat capability to first maintain sustainable wolf populations, and then to consider meeting estimated human deer harvest demands. This is generally considered to equate to the habitat capability to support 18 deer per square mile (using habitat capability model outputs) in biogeographic provinces where deer are the primary prey of wolves.<sup>256</sup>

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<sup>252</sup> Person Big Thorne Statement at ¶15.

<sup>253</sup> Big Thorne FEIS at 3-113; *see also* Person Big Thorne Statement at ¶15 (explaining that Dr. Person “estimated the wolf population on the Prince of Wales Archipelago during autumn 1995 to be approximately 300-350 animals”).

<sup>254</sup> 81 Fed. Reg. at 435, 440 (Jan. 6, 2016).

<sup>255</sup> L. H. Suring *et al.*, A Proposed Strategy for Maintaining Well-Distributed, Viable Populations of Wildlife Associated with Old- Growth Forests in Southeast Alaska, Review Draft (May 1993) at 27; *see also* 2008 FEIS, Appendix D at D-4.

<sup>256</sup> 2016 Amended Forest Plan at 4-91 (WILD1.XIV.A.2).

Yet the Forest Service's analysis of the Prince of Wales Project fails to explain the agency's conclusions in light of this long-standing approach to wolf management and the governing plan provisions.

Most notably, the Forest Service never explains how many wolf packs are in the project area and whether wolf packs on Prince of Wales Island will remain sustainable after the Project is implemented.<sup>257</sup> The 2016 Amended Forest Plan prescribes: "Local knowledge of habitat conditions, spatial location of habitat, and other factors need to be considered by the biologist rather than solely relying upon model outputs." The Forest Service's use of "condition-based NEPA" fails to account for local knowledge of habitat conditions or spatial location of that habitat, because the agency is not telling anyone where the logging and road building will take place. The agency is supposed to use the "[u]se the most recent version of the interagency deer habitat capability model and field validation of local deer habitat conditions to assess deer habitat."<sup>258</sup> Again, the DEIS fails to provide this information.

Recent work by the Alaska Department of Fish and Game (ADFG) suggests that "60 wolves were hunted or trapped last year, 2 illegally [on Prince of Wales Island,]" but the "[t]he total number of wolves killed without permits is, of course, impossible to obtain."<sup>259</sup> According to ADFG, "231 wolves inhabited Prince of Wales and surrounding smaller islands in the fall of 2017."<sup>260</sup> Researchers studied seven wolf packs on Prince of Wales Island.<sup>261</sup>

After studying the habitat preferences of the wolves, Gretchen Roffler, a wildlife research biologist with ADFG, concluded wolves "are really strongly avoiding the older clear-cuts on Prince of Wales Island. And that's significant because there's a lot of land area moving into that kind of forest."<sup>262</sup> Researcher also learned that "thinning treatments . . . haven't been very effective at creating better habitat for wolves. And when we say better habitat for wolves, we probably really mean better habitat for deer, because that's why wolves would most likely be going into these forests."<sup>263</sup> ADFG researchers concluded "the amount of habitat available to wolves could decline with an increasing proportion of the forest transitioning to the stem exclusion phase, with potential population-level consequences."<sup>264</sup> To assess the potential for

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<sup>257</sup> See DEIS at 193-94.

<sup>258</sup> 2016 Amended Forest Plan at 4-91 (WILD1.XIV.A.2).

<sup>259</sup> F. Rudebusch, *Wolves are Losing Ground to Industrial Logging in Southeast Alaska*, EcoWatch at 2 (2018); see also G. Roffler, D. Gregovich, K. Larson, *Resource Selection by Coastal Wolves Reveals the Seasonal Importance of Seral Forest and Suitable Prey Habitat*, 409 *Forest Ecology & Mgmt.* 190-201 (2018).

<sup>260</sup> Rudebusch, *supra* note 247.

<sup>261</sup> *Id.* at 3.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* at 4.

<sup>264</sup> G. Roffler *et al.*, *Resource Selection by Coastal Wolves Reveals the Seasonal Importance of Seral Forest and Suitable Prey Habitat* at 199 (2018).

population level effects on Prince of Wales Island, the researchers explained “it is necessary to gain further knowledge about wolves’ use of alternative prey,” which will “provide insights for understanding the potential consequences of landscape-level management practices.”<sup>265</sup>

The DEIS fails to account for any of these considerations. As explained above, the Forest Service’s analytical approach regarding the Prince of Wales Project also stands in marked contrast to the agency’s recent analysis of the Big Thorne Project.<sup>266</sup> The agency must explain the impacts of the Project in a manner that is consistent with the 2016 Amended Forest Plan. If the agency concludes that habitat loss from the Project means that any or all of the wolf packs on Prince of Wales Island will not be sustainable, then the agency must disclose that fact. The agency must also explain its conclusions regarding the need for additional scientific research given the stem-exclusion and the population-level impacts of the wolf packs on Prince of Wales Island.

The DEIS also reaches arbitrary conclusions regarding the impacts on wolves due to the loss of habitat. It concludes the “[o]verall effects to wolves would be ‘moderate’ due to effects to deep snow habitat,”<sup>267</sup> based on the arbitrary habitat thresholds of 20-50 percent described above. Mr. Kirchhoff calls this conclusion “startlingly naïve, and based on an ecologically indefensible analysis.”<sup>268</sup> He cautions:

We have spent millions of dollars in research, produced 3 PhD studies, published dozens of peer reviewed papers, and authored population viability analyses (the latest now in review). Factors driving wolf numbers on POW are multiple, and complex. They involve deer habitat, human access, and human motivation. Yet the DEIS creates, and leans on, an overly simplistic habitat index to conclude any effect on wolves will be only ‘moderate’.<sup>269</sup>

Dr. Cook and his colleagues echo these concerns in their comments: “The Forest Service’s reliance on habitat thresholds for endemic mammals has no basis in the contemporary science of conservation biology of island endemics . . . [and] unsubstantiated based on the available science.”<sup>270</sup> With regard to wolves, they specifically fault the Forest Service for failing to examine the distribution of forest stands and connectivity between stands, which “can have dramatic effects on the survivorship” of wolves because they have large home range territories.<sup>271</sup> For these reasons, the site-specific “geography of the proposed logging on [Prince

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<sup>265</sup> *Id.*

<sup>266</sup> *See supra* pp. 22-23.

<sup>267</sup> DEIS at 197.

<sup>268</sup> Kirchhoff Comments at 8.

<sup>269</sup> *Id.*

<sup>270</sup> Cook Comments at 6.

<sup>271</sup> *Id.*

of Wales Island] is essential to evaluating the impact[s]” on wolves.<sup>272</sup> The Forest Service must correct the arbitrary nature of its analysis.

The Forest Service’s suggestion that the Prince of Wales Project will have only moderate effects on wolves is unsubstantiated and arbitrary. The agency must conduct a meaningful analysis of the impacts of the Project on wolves, including the likelihood of maintaining sustainable wolf packs on Prince of Wales. To do otherwise, the agency will act contrary to NEPA, NFMA, and the other statutes governing timber sales.

B. The USFWS Wolf Finding Raises Important and Unanswered Questions Regarding the Forest Service’s Ability to Maintain Viable Well-Distributed Wolves on the Tongass.

In light of the agency’s failure to explain whether the wolf packs on Prince of Wales Island will be sustainable after the Prince of Wales Project is implemented, there are serious concerns that the Forest Service is failing to ensure well-distributed wolf populations remain viable on the Tongass. Thus before it can approve the Project, the Forest Service also must address the very troubling information from the U.S. Fish and Wildlife Service regarding the status of the wolf on the Tongass.<sup>273</sup>

According to the Forest Service, the wolves on Prince of Wales Island play a unique role in maintaining viable and well-distributed populations of wolves forest wide:

Recent research (*Alexander Archipelago Wolf*, presented at the Tongass Conservation Strategy Review Workshop 2006) has shown that the population on [Prince of Wales] Island is genetically isolated from other Tongass populations, *which presents profound implications for maintaining well-distributed wolf populations* in light of local declines, given that these populations are are [*sic*] more sensitive to human activity and habitat disturbance than wolf populations elsewhere in the state (Schoen and Person 2007).<sup>274</sup>

In 2016, the U.S. Fish and Wildlife Service concluded there was reasonable risk that wolves could be significantly reduced, or perhaps even extirpated, from Prince of Wales Island and the

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<sup>272</sup> *Id.*

<sup>273</sup> See generally 81 Fed. Reg. 435 (Jan. 6, 2016).

<sup>274</sup> 2008 FEIS at 3-281 (emphasis added); see also 2008 TLMP AR 603\_0879 (B.V. Weckworth *et al.*, *A Signal for Independent Coastal and Continental histories among North American wolves*, MOLECULAR ECOLOGY 14: 917-931 (2005)); Big Thorne PR 769\_05\_000489 (B.V. Weckworth *et al.*, *Phylogeography of wolves (Canis lupus) in the Pacific Northwest*, JOURNAL OF MAMMALOGY, 91(2):363-375 (2010)); B.V. Weckworth *et al.*, *Genetic distinctiveness of Alexander Archipelago wolves (Canis lupus ligoni): Reply to Cronin et al. (2015)*, JOURNAL OF HEREDITY 1-3 (2015); E. A. Lacey, Ph.D. President, American Society of Mammalogists, Letter to Dr. Kimberley Titus, Alaska Department of Fish and Game (Nov. 1, 2015).



smaller surrounding islands as a result of declining prey abundance and increasing density of roads and subsequent human-induced mortality risk to wolves.<sup>275</sup>

The Service echoed the Forest Service's conclusions that the unique nature of the wolves on Prince of Wales presents challenging management considerations. As an initial matter, "[o]nly one Alexander Archipelago wolf population, the GMU 2 population, relies solely on deer as an ungulate prey species and therefore it is more vulnerable to declines in deer numbers compared to all other populations."<sup>276</sup> Additionally, because logging "has occurred disproportionately in this area . . . deer are projected to decline by approximately 21 to 33 percent over the next 30 years, and, correspondingly, the wolf population is predicted to decline by an average of 8 to 14 percent (Gilbert et al. 2015, pp. 19, 43)."<sup>277</sup>

Further, "the GMU 2 wolf population already has been reduced by about 75 percent since 1994."<sup>278</sup> The U.S. Fish and Wildlife Service reported that Game Management Unit 2 only has 50-159 wolves.<sup>279</sup> In 1995, the wolf population in that area was 300-350 animals.<sup>280</sup>

In light of the considerations, the U.S. Fish and Wildlife Service concluded:

These findings indicate that for this wolf population, availability of non-ungulate prey does not appear to be able to compensate for declining deer populations, especially given other present stressors such as wolf harvest . . . Therefore, we conclude that timber harvest is affecting the GMU 2 wolf population by reducing its ungulate prey and likely will continue to do so in the future.<sup>281</sup>

The Forest Service must account for the U.S. Fish and Wildlife Service's concerns regarding the wolf populations on Prince of Wales Island. Notably, the Forest Service has never analyzed and evaluated what it means to have well-distribute wolf populations across the Tongass. Thus the implications of losing wolves on Prince of Wales (or even most of the wolves) remains unexamined. The agency must account for these considerations both in terms maintaining sustainable wolf packs on Prince of Wales Island as contemplated in the 2016 Amended Forest Plan, as well as the substantive obligation to ensure wolves remain viable *and* well-distributed on the Tongass. The agency cannot approve the Prince of the Wales Project without conducting this analysis.

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<sup>275</sup> 81 Fed. Reg. at 440, 452, 455-56, 458.

<sup>276</sup> 81 Fed. Reg. at 444.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* at 444-45.

<sup>279</sup> *Id.* at 440.

<sup>280</sup> Person Big Thorne Statement at PDF 9.

<sup>281</sup> 81 Fed. Reg. at 445.

C. Failing to Implement the Wolf Management Program Recommendations in the Project is Arbitrary and the 2016 Amended Forest Plan Violates NFMA's Obligations to Ensure the Viability of the Wolf.

When wolf mortality concerns are identified, 2016 Amended Forest Plan directs the Forest Service to develop and implement a “Wolf Management Program.” As the Prince of Wales Project makes clear, however, the Forest Service contends it can disregard that program and fail to implement the recommendations, including those relating to habitat management and access. Approving the Prince of Wales Project without complying with those wolf recommendations would be arbitrary and violate NFMA’s substantive viability obligations.

Since 1997, the Forest Service has included provisions aimed at maintaining sustainable wolf populations. “Among these is a standard to develop and implement an interagency Wolf Habitat Management Program in cooperation with the Alaska Department of Fish and Game (ADF&G) and U.S. Fish and Wildlife Service (USFWS), where wolf mortality concerns have been identified.”<sup>282</sup> The 2016 Amended Forest Plan includes that standard: “Where wolf mortality concerns have been identified, *develop and implement* a Wolf Habitat Management Program in conjunction with ADF&G.”<sup>283</sup>

In 2017, after an interagency finding of unsustainable wolf mortality on Prince of Wales Island, the Forest Service, U.S. Fish and Wildlife, and Alaska Department of Fish and Game published the GMU 2 Wolf Recommendations. The agencies concluded:

Because deer are the principle prey of wolves in GMU 2, factors affecting deer habitat and deer populations are integral to wolf population dynamics in GMU 2. Therefore, key components of successful wolf habitat management in GMU 2 include managing deer habitat capability, especially in important winter deer habitats; and minimizing human-caused wolf mortality via road management and regulatory mechanisms through consultation with advisory committees, advisory councils, and the public. In addition, consideration of den management and human dimensions are critical to successful wolf management and are included as key components. Each key component of management is discussed in the following sections, with associated recommendations concluding each section.<sup>284</sup>

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<sup>282</sup> 833\_0847 (USDA Forest Service, USDI Fish and Wildlife Service, and Alaska Department of Fish and Game, Wolf Technical Committee, Interagency Wolf Habitat Management Program: Recommendations for Game Management Unit 2, Management Bulletin R10-MB-822, ii (2017) (GMU 2 Wolf Recommendations)).

<sup>283</sup> 2016 Amended Forest Plan at 4-91 (WILD1.XIV.A.1) (emphasis added).

<sup>284</sup> GMU 2 Wolf Recommendations at 3-4.

The agencies provide numerous recommendations for habitat management (both old-growth and young-growth), road management, and wolf management and mortality.

According to the Forest Service, it can disregard the recommendations altogether when it approves the Prince of Wales Project. Under Alternative 2, for example, the agency plans to ignore all of the recommendations, saying it “[w]ill meet Forest Plan Direction.”<sup>285</sup> Alternative 3 only implements the young-growth recommendations.<sup>286</sup>

The Forest Service’s position is that the 2016 Amended Forest Plan apparently requires the agency to develop the management measures when confronting unsustainable wolf mortality, but does not require the agency to actually implement those conservation measures. Such a conclusion is arbitrary in light of the record before the agency. It is contrary to the 2016 Amended Forest Plan. It also violates NFMA because the Forest Service’s viability conclusions regarding the wolf are based in part on these provisions, and the 2016 Amended Forest Plan must be interpreted in a way that requires the agency to manage in a manner that accounts for these concerns, consistent with NFMA requirements. An alternative interpretation renders the 2016 Amended Forest Plan unlawful under NFMA. The Forest Service cannot approve the Prince of Wales Project and disregard the GMU 2 Wolf Recommendations.

## TIMBER ECONOMICS

### I. THE FOREST SERVICE FAILS TO PROVIDE A CLEAR ASSESSMENT OF THE COSTS AND BENEFITS OF THE PRINCE OF WALES PROJECT.

The DEIS provides an incomplete and misleading characterization of the Project’s cost to taxpayers. The DEIS fails to provide information relating to the Forest Service Financial Efficiency Analysis as required by FSH 2409.18, which compares the agency’s direct expenditures with estimated financial revenues. The Forest Service justifies the Prince of Wales Project (and the entire Tongass timber sale program) exclusively on the grounds of purported economic benefits, but the Forest Service fails to disclose to the public and the decision-maker the true cost of its timber sale program. Failing to disclose this analysis in the DEIS is misleading and impermissible.

The required Financial Efficiency Analysis, for example, should have compared the revenue from the project with Forest Service expenditures (*i.e.*, costs to the taxpayer) expected to result.<sup>287</sup> In this analysis, FSH 2409.18\_32.22 directs the Forest Service to “[i]nclude *all costs* that are anticipated as a result of the project,” such as but not limited to “direct costs associated with . . . [h]arvest administration . . . [s]ale preparation . . . [and] [r]oad design and

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<sup>285</sup> DEIS at 40.

<sup>286</sup> *See id.*

<sup>287</sup> U.S. Forest Service, Forest Service Handbook, FSH 2409.18 – Timber Sale Preparation Handbook, Chp. 30 at 2409.18\_32.11 (Jan. 31, 2002) (FSH 2409.18).

engineering.”<sup>288</sup> In the DEIS, however, the agency fails to conduct the analysis. It is notable that unlike other Forest Service analyses for timber sale projects on Prince of Wales Island,<sup>289</sup> the DEIS fails to compare these costs to anticipated revenues or explain to the public and the decision-maker the net value of Prince of Wales Project.

Recent history illustrates the importance of this obligation. With regard to the Wrangell Island Project, the Forest Service explained that the “Total project costs” for Alternative 2 were approximately \$4.1 million,<sup>290</sup> but this did not include the NEPA costs of \$3.2 million for the Gate 2 analysis.<sup>291</sup> Thus, the total estimated cost of the Wrangell Island Project to taxpayers would be \$7.3 million (in addition to all of the costs associated with the Gate 1 work, roughly \$2.7 million (56,000 MBF multiplied by \$48/MBF)).<sup>292</sup> The results show that by the Forest Service’s own estimate Alternative 2’s cost to taxpayers, net of revenues, is \$10.3 million<sup>293</sup> (indicated advertised value of –\$3.0 million minus (\$4.1 million total project costs plus \$3.2 million in Gate 2 NEPA costs)).<sup>294</sup> The Forest Service never disclosed that Wrangell Island Project costs taxpayers more than 10 million dollars.

Here, the DEIS provides even less information. None of the estimates of net value are disclosed in the DEIS; not even to the extent they were disclosed in other recent timber sale projects.<sup>295</sup> As a result, the DEIS presents an incomplete and misleading picture of the Project’s economic value.

The Forest Service’s failure to conduct this analysis for the Prince of Wales Project violates NFMA and the failure to disclose a complete and accurate analysis in the DEIS violates NEPA. As Forest Service consistently explains, “financial efficiency . . . is one tool decision-makers use when making comparisons between alternatives.”<sup>296</sup> The economic analysis associated with the Prince of Wales Project is fundamental to the Forest Supervisor’s decision and public costs are critical to the agency’s analysis. The underlying policy question is whether the jobs created by

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<sup>288</sup> FSH 2409.18\_32.22 (emphasis added).

<sup>289</sup> *See, e.g.*, Big Thorne FEIS at 3-37, Tbl. TSE-14; Logjam Final Environmental Impact Statement at 3-84–3-85.

<sup>290</sup> Wrangell Island Project Final Environmental Impact Statement (Wrangell FEIS) at 68, Tbl. 6.

<sup>291</sup> *Id.* at 68.

<sup>292</sup> *Id.* at 67-68.

<sup>293</sup> Wrangell FEIS PR 634\_1428 at 15, Tbl. 5 (N. Stearns, Wrangell Island Project Resource Report: Timber Economics (Jun. 2107)).

<sup>294</sup> Wrangell FEIS at 68, Tbl. 6.

<sup>295</sup> *Compare* Wrangell FEIS at 67-70 *with* Big Thorne FEIS at 3-37, Tbl. TSE-14.

<sup>296</sup> Wrangell FEIS at 67; *see also* Big Thorne FEIS at 3-37.

the project are worth both the high cost to taxpayers and the extreme ecosystem risks the project poses. Failing to provide accurate information on costs and benefits skews this analysis.<sup>297</sup>

Additionally, the Forest Service's NFMA obligations require the agency to consider these costs and benefits in deciding whether and how to proceed with this project given the adverse impacts to old-growth ecosystems, wildlife, fisheries, subsistence, and forest-dependent industries, such as fishing, tourism, and recreation.<sup>298</sup> The agency must provide this analysis and provide an accurate picture of the enormous negative cost-benefit analysis of the Prince of Wales Project to the public and the decision-maker.

## II. THE FOREST SERVICE FAILS TO ACCOUNT FOR ITS OWN MISMANAGEMENT OF LOGGING ON PRINCE OF WALES ISLAND, INCLUDING HIGHGRADING OF THE MOST VALUABLE HABITAT.

The likely outcome of the dire economic reality of the Tongass timber program is that the Forest Service will continue to offer timber sales that highgrade the available volume to meet requirements for positive economic appraisals. As explained below, the DEIS fails to address this damaging practice despite the fact that the Forest Service's own internal review confirms it is part of the agency's larger pattern of mismanagement of the Tongass timber program on Prince of Wales Island. The agency must correct these failings or it will act unlawfully under NEPA, NFMA, and the other statutes governing timber sales.

Evidence of the Forest Service's mismanagement of logging on Prince of Wales Island came to public light through the work of Public Employees for Environmental Responsibility (PEER). PEER released agency reports that confirm that the Big Thorne and Tonka sales "have been financial as well as ecological debacles."<sup>299</sup> As PEER explained: "In violation of its own policies, the U.S. Forest Service let timber operators benefit by cherry-picking more valuable trees and leaving intended salvage trees standing."<sup>300</sup> PEER's Adam Carlesco, Staff Counsel, prepared a declaration explaining PEER's investigation and the resulting conclusions regarding

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<sup>297</sup> *Nat. Res. Defense Council*, 421 F.3d at 811 ("Inaccurate economic information may defeat the purpose of an EIS by 'impairing the agency's consideration of the adverse environmental effects' and by 'skewing the public's evaluation' of the proposed agency action." (quoting *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 446 (4th Cir.1996))); see also *id.* at 811-12 ("An EIS that relies upon misleading economic information may violate NEPA if the errors subvert NEPA's purpose of providing decisionmakers and the public an accurate assessment upon which to evaluate the proposed project." (quoting *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 235 F.Supp.2d 1143, 1157 (W.D. Wash. 2002))).

<sup>298</sup> See *Nat. Resources Defense Council*, 421 F.3d at 811.

<sup>299</sup> PEER, Forest Service Scalped on Tongass Timber Sales: Bad Sales Cost Taxpayers & Alaska Schools Big Money and Hurt the Forest, Public Employees for Environmental Responsibility (Apr. 3, 2017), <https://www.peer.org/news/news-releases/forest-service-scalped-on-tongass-timber-sales.html>.

<sup>300</sup> *Id.*

the Forest Service's mismanagement of the Tongass timber program, which the undersigned incorporate in its entirety.<sup>301</sup>

The June 20, 2016 Forest Service "Washington Office Activity Review" examined the Big Thorne and Tonka timber sales and found "[s]taggering monetary losses in each," close to \$2 million in Tonka, an amount more than double the original stumpage, and in Big Thorne a reduction in sale value exceeding \$1,700,000.<sup>302</sup> As the agency review concluded, "[o]verall it would appear that there is a tendency for the purchaser to remove less than the prescribed BA by species, favoring removal in the larger diameter, more valuable species groups such as western red cedar and spruce."<sup>303</sup> Thus, the agency's internal review concluded that (1) the Forest Service allowed Viking Lumber Company to highgrade the most ecologically valuable trees rather than the trees intended for removal to achieve the desired forest ecosystem health effects; (2) the agency failed to conduct timber-theft prevention inspections; and, (3) the only monitoring and reports of timber removals, etc. were self-reported by Viking Lumber Company.

The Forest Service's misadministration of these timber sales not only cost taxpayers, but it demonstrates that the agency's balancing of interests under NFMA is heavily skewed in favor of the timber operator. In Tonka, post-NEPA changes made the actual logging and haul costs under the Tonka contract lower than estimated by the Forest Service and the appraisal methods resulted in artificially low appraisal rates for higher value species such as Alaska Yellow Cedar and Sitka Spruce, resulting in additional windfalls to Viking Lumber.<sup>304</sup> In Big Thorne, the agency apparently over-estimated tow and haul costs<sup>305</sup> and Viking Lumber Company demanded that the Forest Service reimburse the costs and the loss of revenue resulting from the reduction in appraised rate.

In May 2017, Acting Regional Forester Becky Nourse provided a response to the Washington Office's review of the timber sale program and specifically addressed the Big Thorne integrated resource timber sale contract (Nourse Memo). The Nourse Memo concluded that the agency's

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<sup>301</sup> Declaration of Adam Carlesco (Jun. 13, 2018), Attachments A-D (Carlesco Declaration).

<sup>302</sup> PEER Forest Service Scalped on Tongass Timber Sales: Bad Sales Cost Taxpayers & Alaska Schools Big Money and Hurt the Forest, Public Employees for Environmental Responsibility (Apr. 3, 2017), <https://www.peer.org/news/news-releases/forest-service-scalped-on-tongass-timber-sales.html>; *see also* PEER Tonka Timber Sale DXPRE Post Harvest Monitoring Results, [https://www.peer.org/assets/docs/fs/4\\_3\\_17\\_Post\\_Harvest\\_Monitoring.pdf](https://www.peer.org/assets/docs/fs/4_3_17_Post_Harvest_Monitoring.pdf); Washington Office Activity Review of Timber Sale Administration, Sale Preparation, Stewardship Contracting, NEPA and Timber Theft Prevention Region 10 (Jun. 12-20, 2016) (Washington Office Activity Review), [https://www.peer.org/assets/docs/fs/4\\_3\\_17\\_Timber\\_Sale\\_Review.pdf](https://www.peer.org/assets/docs/fs/4_3_17_Timber_Sale_Review.pdf).

<sup>303</sup> Washington Office Activity Review at 10 (Finding 2 - Discussion).

<sup>304</sup> *See generally* PEER, Tonka Timber Sale DXPRE Post Harvest Monitoring Results, [https://www.peer.org/assets/docs/fs/4\\_3\\_17\\_Post\\_Harvest\\_Monitoring.pdf](https://www.peer.org/assets/docs/fs/4_3_17_Post_Harvest_Monitoring.pdf)

<sup>305</sup> B. Pendleton, Regional Forester, Forest Service Memorandum, Correction of Material Error in the Big Thorne Stewardship Contract Haul Cost Appraisal (Aug. 22, 2016), [https://www.peer.org/assets/docs/ak/7\\_10\\_17\\_Pendleton\\_U-turn.pdf](https://www.peer.org/assets/docs/ak/7_10_17_Pendleton_U-turn.pdf).

“independent review shows unexplained departures from policy, which puts the Forest Service (FS) at risk of significant damages should [Viking Lumber Company] pursue a claim.”<sup>306</sup> The Nourse Memo recommended that the agency modify the Big Thorne contract to reflect the validated volumes and value that should have been offered and enter into settlement negotiations with Viking Lumber Company.<sup>307</sup> Notably, the Nourse Memo concluded: “Correcting the situation on Big Thorne IRTC is high priority. Equally important is correcting the underlying causes for the errors locally. Corrective actions are planned and will be implemented.”<sup>308</sup> The Nourse Memo sought permission to “modify the contract and make the revised rates retroactive to the beginning of harvest activities.”<sup>309</sup>

In response to PEER’s investigation, the Forest Service reportedly released a statement to media outlets, claiming the agency had addressed these concerns.<sup>310</sup> After the agency apparently “refused to answer questions or grant interview requests,” however, PEER submitted a Freedom of Information Act (FOIA) “request for documents detailing these claimed reforms, as well as for a copy of its press statement which was not posted on its website.”<sup>311</sup> In June 2017, PEER sued the Forest Service for its failure to produce the requested records.<sup>312</sup>

As the Carlesco Declaration explains, it appears the Forest Service has failed to take any documented steps to address the mismanagement of the Tongass timber program:

In reviewing the materials provided, PEER could find no documentation showing concrete actions meant to increase accountability or suggest programmatic changes; nor did our reviewer, a trained forestry professional, find any Action Plan, as

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<sup>306</sup> R. Nourse, Acting Regional Forester, Forest Service Memorandum, Results of the Big Thorne IRTC Supplemental Review at 1-2 (May 31, 2017), [https://www.peer.org/assets/docs/ak/7\\_10\\_17\\_Nourse\\_memo%20\(1\).pdf](https://www.peer.org/assets/docs/ak/7_10_17_Nourse_memo%20(1).pdf); *see also* Forest Service Wants to Pay More in Money-Losing Timber Sale: Alaska Region Urges Off-the-Books Cash to Logger to Sweeten Tongass Contract (Jul. 10, 2017), <https://www.peer.org/news/news-releases/forest-service-wants-to-pay-more-in-money-losing-timber-sale.html>.

<sup>307</sup> R. Nourse, Acting Regional Forester, Forest Service Memorandum, Results of the Big Thorne IRTC Supplemental Review at 2 (May 31, 2017), [https://www.peer.org/assets/docs/ak/7\\_10\\_17\\_Nourse\\_memo%20\(1\).pdf](https://www.peer.org/assets/docs/ak/7_10_17_Nourse_memo%20(1).pdf).

<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> Lawsuit Filed to Force USFS to Disclose the Fate of Promised Timber Reforms, SitNews, Stories in the News (July 1, 2017), [http://www.sitnews.us/0717News/070117/070117\\_timber\\_sales.html](http://www.sitnews.us/0717News/070117/070117_timber_sales.html).

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

mentioned in the USFS's press release, or steps used to complete those actions.<sup>313</sup>

“As of the date of this declaration, to the best of my knowledge, I have not seen anything produced through Tongass [National Forest]’s FOIA production that would demonstrate a good faith effort to make significant changes to its timber sale administration program as directed by the 2016 [Washington Office] Review.”<sup>314</sup> To the contrary, PEER’s work reveals an ongoing pattern of mismanagement, including “improper appraisal practices”<sup>315</sup> and the Forest Service improperly allowing timber sales to proceed in violation of the gate system.<sup>316</sup>

The Forest Service’s own documented mismanagement of the Tongass timber program (*e.g.*, appraisal process, volume calculations, sale administration activities, theft prevention, and monitoring etc.) has direct bearing on the agency’s obligations under NFMA and the other statutes governing timber sales to balance the competing interests. The public is losing important habitat and the biggest, most valuable trees on the Tongass, but not obtaining the full value of the timber sales, making the agency’s assessment and disclosure of impacts, costs and benefits, and the balancing of competing interests arbitrary and misleading.

Yet the DEIS fails to even mention the Washington Office Activity Review or attempt to account for the Forest Service’s ongoing misadministration of timber sales. The DEIS fails to explain what improvements, if any, the Forest Service actually adopted to prevent these practices in the future. Additionally, the agency fails to disclose the problems caused by these practices and presents incomplete and misleading information in the DEIS, rendering it unlawful under NEPA. The Forest Service must account for this practice and the resulting impacts before it reaches any final decision regarding the Prince of Wales Project.

With regard to NFMA, the 2016 Amended Forest Plan and the Prince of Wales Project run contrary to the Forest Service’s obligation to manage the Tongass logging program in an economically sustainable fashion. Portions of the 2016 Amended Forest Plan were developed under the 2012 Planning Rule,<sup>317</sup> and as such “must include plan components . . . to guide the plan area’s contribution to social and economic sustainability.”<sup>318</sup> The term “sustainability” means the “capability to meet the needs of the present generation without compromising the ability of future generations to meet their needs.”<sup>319</sup>

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<sup>313</sup> Carlesco Declaration, ¶12

<sup>314</sup> *Id.*, ¶16.

<sup>315</sup> *Id.*, ¶13.

<sup>316</sup> *Id.*, ¶15.

<sup>317</sup> *See generally* 2016 Amended Forest Plan, Chapter 5; 36 C.F.R. 219.8.

<sup>318</sup> 36 C.F.R. 219.8(b).

<sup>319</sup> *Id.* at § 219.19; *see id.* (defining “economic sustainability” as capability of society to produce and consume or otherwise benefit from goods and services including contributions to jobs and market and nonmarket benefits”).



The Forest Service's documented pattern of mismanagement of the Tongass timber program, including allowing its largest timber operator to consistently highgrade the biggest and best trees from timber sales violates this obligation. The Prince of Wales Project exacerbates that mismanagement, as it seeks to log what little old-growth habitat remains in the timber base on Prince of Wales Island. To avoid acting in an arbitrary fashion, the agency must address its internal findings or the consequences of allowing the best habitat to be selectively logged and whether this practice can continue and still allow the next generation to meet its needs for the best habitat.

In short, the Forest Service will act arbitrarily and unlawfully if it fails to account for the fact that the agency's own investigation confirms misadministration of the Tongass timber program, including the fact that highgrading is a repeated and ongoing practice in Tongass timber sales on Prince of Wales Island. The agency will act unlawfully if it fails to disclose the consequences of this practice and arbitrarily under NFMA in failing to address these concerns and explain how the management of the Tongass has changed since the internal review brought these concerns to light.

### III. THE FOREST SERVICE FAILS TO DISCLOSE THE COSTS, IMPACTS, AND ALTERNATIVES TO PUBLICLY SUBSIDIZING ROADS AND ACCESS MANAGEMENT.

Given the uncertainty of the "condition-based" analysis, the Forest Service's assessment, disclosure, and consideration of road costs and impacts (including construction, maintenance, and decommissioning) is incomplete and misleading. This renders the DEIS unlawful under NEPA and would render any decision arbitrary under NFMA and the other statutes governing timber sales.

The DEIS contemplates public subsidies for transportation infrastructure: "In some years, public works funds are available to pay for all, or a portion of, [National Forest System] road construction or reconditioning costs for roads that would be used for a timber sale as well as the long-term administration of the national forest."<sup>320</sup> In an attempt to counteract the troubling economic realities of the Tongass timber program, the Forest Service appears poised to take an extraordinary and costly measure; the agency might contract to perform most, if not all, of the road construction and reconstruction required for the project at public expense, reducing the costs to the logger but shifting them to the taxpayer. This decision must be analyzed and disclosed in a new DEIS and the implications of this decision explained in the agency's balancing of competing interests under NFMA and the other statutes governing timber sales.

Based on recent experience, the Forest Service's decision whether to pay for some or all of the road costs associated with Tongass timber sale projects directly affects the agency's balancing of competing interests. By way of illustration, in advance of the North Kuiu Timber Sale, advertised in 2018 at 13.5 MMBF,<sup>321</sup> the Forest Service spent \$3.1 million to construct and

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<sup>320</sup> DEIS at 102.

<sup>321</sup> U.S Forest Service, Bid Letter for North Kuiu #2 Sale (May 5, 2018).

recondition over 80 miles of roads on Kuiu Island.<sup>322</sup> This amount more than quadrupled the road costs the agency projected for the Kuiu sale in its EIS.<sup>323</sup> By pre-roading the sale, the agency shifted these road costs from the purchaser to the public. Moreover, the fact the North Kuiu sale had a minimum bid of less than \$200,000 demonstrates the arbitrary nature of the Forest Service's balancing of competing interests.<sup>324</sup>

In sum, the Forest Service's decisions in this regard have direct bearing on the agency's analysis of the costs and benefits of the Prince of Wales Project, as well as the resulting impacts and alternatives. The DEIS admits that the Forest Service might force the public to pay for some or all of the road costs for the Prince of Wales Project over the next 15 years, but then fails to examine those costs and the resulting impacts of that decision (*i.e.*, making it more likely that a timber sale will be offered in any given location) and justify the decision to move ahead. Thus the information presented in the DEIS is incomplete and presents an inaccurate assessment. The agency must prepare a new DEIS that corrects these failings and examine the impacts that approach will have on the Prince of Wales Project. To do otherwise, the agency will violate NEPA and reach an arbitrary conclusion under NFMA.

#### IV. THE FOREST SERVICE FAILS TO ADDRESS THE IMPLICATIONS OF, AND ALTERNATIVES TO, ITS DECISIONS TO ADOPT AND IMPLEMENT THE EXPORT POLICIES.

The Forest Service's decisions to adopt various versions of the Export Policy has had direct environmental effects because the agency admits it increases the volume of logging on the Tongass, thereby increasing adverse environmental impacts, while decreasing the number of jobs created per unit of timber cut. The Export Policy has, however, never been subject to NEPA review or public notice, review and comment pursuant to the APA. By attempting to evade public review of the adoption and implementation of these policy decisions at both the forest plan and project level, the Forest Service is acting contrary NEPA, NFMA, and the other timber sale statutes governing timber sale decisions.

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<sup>322</sup> See Kuiu Rd & Bridge Replacement, AG-0120-S-14-0011, Amendment 003, Replacement Pages Section B, Kuiu Contract\_Redacted at PDF 11-25 (2014) (identifying roadwork covered by the base bid and options 1-7); Amendment of Solicitation/Modification of Contract (Apr. 23, 2014), Kuiu\_sf30\_Mod\_6\_Redacted (Modification 6) (adding roadwork to one road and providing the final contract total of \$3,083,813.00).

<sup>323</sup> Compare U.S. Forest Service, Kuiu Timber Sale Area, Final Environmental Impact Statement at 2-15 (Tbl. 2-2, Alt 5), 3-60 (Tbs. 3-19 & 3-20, Alt 5) (July 2007) (projecting road costs of \$54.09/MBF) with Amendment of Solicitation/Modification of Contract (Apr. 23, 2014), Kuiu\_sf30\_Mod\_6\_Redacted (Modification 6) (providing \$3,083,813.00 road cost, which, divided by the current proposed timber sale volume of 13,643 MBF, yields a cost of \$226.04/MBF).

<sup>324</sup> U.S Forest Service, Bid Letter for North Kuiu #2 Sale (May 5, 2018).

As explained in the objections to the 2016 Amended Forest Plan,<sup>325</sup> the Forest Service violated NEPA because the Forest Plan FEIS fails to disclose and analyze the significant environmental and economic impacts of the agency's decisions to adopt export policies. The agency's decisions to adopt various export policies also raises infirmities under NFMA and the other statutes under which the Forest Service operates, as the decisions directly influence the agency's ability to balance multiple competing interests when managing the national forests, including the agency's decision to select an alternative that maximizes the amount of large-scale old-growth logging approved.<sup>326</sup> The undersigned incorporate those previous arguments in their entirety.

At the project level, the "Current Region 10 Export Policy" has a significant, if not the most important, impact on the likelihood that various alternatives could be sold and, therefore, on the environmental impacts of the Prince of Wales Project. Thus, it has a direct effect on the environmental impacts and economic impacts for Southeast Alaska and, as a result, the Forest Service must evaluate and disclose those impacts in a new DEIS.

The DEIS, however, fails to consider alternatives in which the agency's Export Policy is not adopted and/or applied to the Prince of Wales Project.<sup>327</sup> Variations on the Limited Export Policy are not even included among the "Alternatives Considered But Eliminated From Detailed Review."<sup>328</sup> The DEIS fails to explain why domestic alternatives with smaller volumes could not fulfill the Project's purpose and need. The DEIS offers no explanation why the agency did not consider these variations and the resulting differential environmental impacts. By excluding variations on the "Current Region 10 Export Policy," the DEIS excludes reasonable alternatives that fall within the project's "purpose and need," in violation of NEPA.<sup>329</sup>

The Forest Service's decision to apply any export policy, including the "Current Region 10 Export Policy," to the Prince of Wales Project requires analysis of the resulting impacts in a new DEIS. The agency must provide a "full and fair discussion of significant environmental impacts" of the decision to allow exports, including but not limited to resultant increases in

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<sup>325</sup> See SEACC Forest Plan Objection at 25-35; ARD Forest Plan Objection at 85-90.

<sup>326</sup> See 16 U.S.C. § 1604(e) (NFMA); *id.* § 529 (Multiple-Use Sustained-Yield Act); *id.* § 539d(a) (Tongass Timber Reform Act); *id.* § 3120(a)(3)(A) (Alaska National Interest Lands Conservation Act); *see also* *Natural Res. Def. Council*, 421 F.3d at 808-09 (explaining balancing of timber and other goals in the Tongass).

<sup>327</sup> DEIS at 24-31.

<sup>328</sup> *Id.* at 32-34.

<sup>329</sup> See *City of Carmel-By-The-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997) ("Project alternatives derive from an Environmental Impact Statement's 'Purpose and Need' section, which briefly defines the underlying purpose and need to which the agency is responding in proposing the alternatives . . . [and which] necessarily dictates the range of reasonable alternatives." (quotation marks omitted)); *Natural Res. Def. Council*, 421 F.3d at 814.

logging and the impacts on ecosystems that will follow from the resultant logging.<sup>330</sup> At one end, with no export, there would be less logging but more jobs per unit of timber logged and greater protection of wildlife, biological diversity, carbon stores, carbon sequestration, subsistence uses, and the recreation, tourism, and fishing sectors of the economy. At the other end is the “Current Region 10 Export Policy,” which emphasizes timber production with fewer jobs and higher adverse impacts and costs on all other values. The agency must analyze these impacts in the new DEIS; the failure to do so will violate NEPA. It will also violate NFMA and the other statutes under which the Forest Service operates when it approves a timber sale given the inherent tradeoffs and balancing the agency must make in deciding how to pursue competing objectives.

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For the reasons stated above, the Prince of Wales Project accomplishes nothing more than mirroring Southeast Alaska in the destructive and controversial practices of industrial-scale old-growth logging. As the Project demonstrates with vivid clarity, the Tongass timber program is economically and environmentally unsustainable and, as a result, the Forest Service should not move ahead with the logging aspects of the Project. If the Forest Service decides to move ahead with logging, then the agency must prepare a new DEIS that correct the deficiencies described above.



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<sup>330</sup> See *Conservation Cong. v. Finley*, 774 F.3d 611, 616 (9th Cir. 2014) (quoting 40 C.F.R. § 1502.1).

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**DOCUMENTS IN SUPPORT OF ALASKA RAINFOREST DEFENDERS *ET AL.*'S  
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## **PRINCE OF WALES ISLAND TIMBER SALES**

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**ALASKA RAINFOREST DEFENDERS – ALASKA WILDERNESS LEAGUE  
CENTER FOR BIOLOGICAL DIVERSITY – DEFENDERS OF WILDLIFE  
NATURAL RESOURCE DEFENSE COUNCIL – SIERRA CLUB  
SOUTHEAST ALASKA CONSERVATION COUNCIL – THE BOAT COMPANY  
WOMEN’S EARTH AND CLIMATE ACTION NETWORK**

December 21, 2018

**VIA ELECTRONIC MAIL AND HAND-DELIVERY**

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Re: Objection to the Prince of Wales Landscape Level Analysis Project

Dear Regional Forester Schmid:

Pursuant to 36 C.F.R. Part 218, Alaska Rainforest Defenders, Alaska Wilderness League, Center for Biological Diversity, Defenders of Wildlife, Natural Resource Defense Council, Sierra Club, Southeast Alaska Conservation Council, The Boat Company, and Women’s Earth and Climate Action Network, through counsel, hereby object to the Final Environmental Impact Statement (FEIS) and Draft Record of Decision (Draft ROD) for the Prince of Wales Landscape Level Analysis Project (the Prince of Wales Logging Project or Project).

With this one decision, the Forest Service is authorizing the largest logging project in the entire country in more than a generation. The agency is approving logging roughly 43,000 acres of the Tongass, equating to more than 650 million board feet of timber and roughly 150 miles of roadbuilding. The amount of old-growth forest alone (23,269 acres) that will be lost equals an area one and a half times the size of Manhattan or 159 times the size of the National Mall in Washington, D.C.

The agency tries to soften the blow of this record-breaking logging project, suggesting it could pursue some habitat restoration efforts and improve recreational opportunities, but the agency admits none of those aspects of the Project having any funding. This leaves the agency to claim the logging will “improve forest ecosystem health.” The suggestion is at best nonsensical and worst disingenuous—if the agency would stop clearcutting old-growth forests in the first place, then it would not have to advance desperate pretenses.

Even more troubling, however, the Forest Service’s approach to the Project—what the agency terms “condition-based” analysis—runs contrary to the National Environmental Policy Act (NEPA), the National Forest Management Act (NFMA), and decades of cases interpreting those laws. The agency is refusing to tell affected communities, subsistence users, or members of the public any of the details regarding the Project, including where within the 2.3 million-acre project area and when during the 15-year project timeframe the logging and road building will take place. According to the agency, it is going to approve all of the logging and roadbuilding first and then tell people when, where, and how much of particular areas of the Tongass will be logged without explaining the adverse impacts associated with that logging in any given location. Failing to disclose and examine site-specific information leaves the Forest Service unable to analyze the impacts of, alternatives to, or mitigation measures for the Project, and, more fundamentally, deprives the public its right to participate meaningfully in the planning process.

The Forest Service also plows ahead undaunted by the scores of independent scientific experts expressing uniform opposition to the Project. Most of these scientists have served as Forest Service experts, many with decades of expertise on the Tongass. Yet now that those same experts are telling the Forest Service they do not support the Project and that the agency is acting arbitrarily and contrary to the best scientific information, the agency ignores their opinions. As one recently retired Tongass Forest Service employee with more than 20 years NEPA experience explained, the agency’s analysis of the Project “may have fallen off the cliff of interdisciplinary science that is mandated by NEPA.”<sup>1</sup>

Finally, like the rest of the Tongass old-growth logging program, the Forest Service bases the Project on a faulty economic analysis. Indeed, the dire economic reality is so bad the agency refuses to disclose its cost-benefit analysis in the FEIS. The Forest Service also fails to address the fact that its own investigation revealed pervasive agency mismanagement of logging projects on the Tongass and, more importantly, whether and how the agency fixed those systemic problems. Ultimately, the Forest Service refuses to explain to the public that taxpayers are being forced to subsidize the Tongass logging program tens of millions of dollars every year,<sup>2</sup> up to and potentially including paying for all of the logging roads authorized by the Project.

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<sup>1</sup> PR 833\_1524 (J. Kelly Comments to the Prince of Wales Landscape Level Analysis Project Draft EIS at 9 (Jun. 12, 2018)); *see also id.* at 2-3 (“[T]he Forest Service seeks to use the landscape of Prince of Wales Island and the Tongass National Forest as a checking account for timber harvest log export without balancing the concomitant resources (of [Multiple Use Sustained Yield Act] (MUSYA)) such as black bear, deer and wolves and local jobs in the long term as both MUSYA and [Council for Environmental Quality] regulations would require.”).

<sup>2</sup> *See* Center for American Progress, *Fraud in the Tongass* (Oct. 3, 2018); U.S. Government Accountability Office, *Tongass National Forest, Forest Service’s Actions Related to Its Planned Timber Program Transition* at 7 (2016); *see also* Taxpayers for Common Sense, *Money Losing Timber Sales: Tongass National Forest* at 1 (Mar. 2015); U.S. Forest Service, *State of the Tongass National Forest (FY 2009 – 2013)*; Headwaters Economics, *The Tongass National Forest and the Transition Framework: A New Path Forward?* at 4-5 (Nov. 2014).



All of this, of course, continues an enormous decades-long drain on the public's financial resources. From 1982 to 2012, the Forest Service spent \$1 billion more to log the Tongass than it received in timber revenues.<sup>3</sup> Despite these massive public subsidies, the logging industry consistently contributes less than one percent in total employment earnings for Southeast Alaska.<sup>4</sup>

In short, the Prince of Wales Logging Project reflects a reckless approach even by the wasteful and unsustainable standards of the Tongass logging program. Like all old-growth logging on the Tongass, the Project threatens values important to residents of Prince of Wales Island, Southeast Alaska, and the nation. Tongass communities depend upon the forest's old-growth stands to support the region's fish, wildlife, and outdoor recreation industries. Clear-cutting these ancient trees also compromises the United States' climate preparedness, and reduces the country's ability to address the effects of climate change worldwide. Now, however, the Forest Service is abandoning long-standing legal and scientific principles in a poorly veiled attempt to approve a massive giveaway to the timber industry based on as little analysis and public disclosure as possible. We strongly urge the Forest Service to take a different approach with regard to the Prince of Wales Logging Project, because to do otherwise, the agency will violate the law.

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<sup>3</sup> J. Mehrkens, Scoping Comments for Proposed TLMP Amendment at 2 (June 19, 2014).

<sup>4</sup> See Southeast Conference, Southeast Alaska by the Numbers 2017 at 4 (Sept. 2017); Southeast Conference, Southeast Alaska by the Numbers 2016 at 4 (Sept. 2016); Southeast Conference, Southeast Alaska by the Numbers 2015 at 4 (Sept. 2015); Southeast Conference, Southeast Alaska by the Numbers 2014 at 4 (Sept. 2014); Southeast Conference, Southeast Alaska by the Numbers 2013 at 4 (Sept. 2013); *see also* Southeast Conference, The Arts Economy of Southeast Alaska at 1 (Sept. 2014) (“[i]n terms of workforce earnings, the arts sector is nearly twice the size of the regional timber industry”).

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## DESCRIPTION OF THE OBJECTING PARTIES

On June 18, 2018, the objecting parties submitted substantive comments (the DEIS Comment Letter) on the Prince of Wales Logging Project and the associated Draft Environmental Impact Statement (the DEIS).<sup>5</sup> The Forest Service plans to implement the Prince of Wales Logging Project in the Thorne Bay Ranger District and the Craig Ranger District of the Tongass National Forest.<sup>6</sup> M. Earl Stewart, Forest Supervisor is the Responsible Official.<sup>7</sup>

Many of the undersigned groups also commented on, and objected to the 2016 Amendment to the Tongass Land and Resource Management Plan Final Environmental Impact Statement (2016 Amended Forest Plan FEIS) and the 2016 Amendment to the Tongass Land and Resource Management Plan (2016 Amended Forest Plan), which now governs the Prince of Wales Logging Project. The undersigned organizations reiterate the arguments and issues raised regarding the 2016 Amended Forest Plan in their entirety.<sup>8</sup>

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<sup>5</sup> See Alaska Rainforest Defenders, *et al.*, Letter to D. Brigham, Project Leader, Re. Prince of Wales Landscape Level Analysis Project Draft Environmental Impact Statement (Jun. 18, 2018). Given the Forest Service inexplicably failed to include all of the material the undersigned provided in support of the DEIS Comment Letter, they provide those documents (except for the Big Thorne and Logjam planning records) again to ensure they are included in the planning record. See DEIS Comment Letter, Documents in Support of Alaska Rainforest Defenders *et al.*'s Comments on Prince of Wales Landscape Level Project Draft Environmental Impact Statement (Jun. 18, 2018).

Additionally, all documents cited in this objection will be hand-delivered to the Forest Service Alaska Regional Office on December 21, 2018 (with the exception of statutes, regulations, Forest Service documents (forest plans, Forest Service Handbook, etc.), and documents cited in the planning documentation) with this objection. See 36 C.F.R. § 218.8(b). When citing to specific documents included in the Prince of Wales Logging Project Planning Record or other Forest Service planning records, the objection refers to the relevant record citation (*e.g.*, PR 833\_, PR 769\_, PR 603\_, etc.) and also includes them with the objection for the agency's convenience.

<sup>6</sup> See generally 36 C.F.R. § 218.8(d)(4).

<sup>7</sup> *Id.*

<sup>8</sup> See Southeast Alaska Conservation Council *et al.*, Letter to B. Pendleton, Regional Forester, Re: Objection 2016 Amended Tongass Land Management Plan (Aug. 30, 2016) (SEACC Forest Plan Objection); Alaska Wilderness League *et al.*, Letter to E. Stewart, Tongass Forest Supervisor (Feb. 22, 2016) (SEACC Forest Plan Comment Letter); Alaska Rainforest Defenders (formerly known as Greater Southeast Alaska Conservation Community) *et al.*, Letter to B. Pendleton, Regional Forester (Aug. 30, 2016) (ARD Forest Plan Objection); Alaska Rainforest Defenders (formerly known as Greater Southeast Alaska Conservation Community) *et al.*, Letter to E. Stewart, Tongass Forest Supervisor (Feb. 22, 2016) (ARD Forest Plan Comment Letter).

The 2016 Amended Forest Plan is an amendment to the Tongass Land and Resource Management Plan the Forest Service adopted in 1997 (the 1997 Forest Plan).<sup>9</sup> In 2008, the Forest Service adopted an earlier amendment to the 1997 Forest Plan, the 2008 Amended Tongass Land Management Plan (2008 Amended Forest Plan).<sup>10</sup> Groups participated in the administrative processes for the 1997 Forest Plan and the 2008 Amended Forest Plan.

Following Secretary of Agriculture Thomas Vilsack's issuance of Memorandum 1044-009 in 2013, "[t]he Forest Service determined that it [was] necessary to amend the 2008 Forest Plan," to accomplish the Secretary's directive to transition forest management on the Tongass.<sup>11</sup> The 2016 Amended Forest Plan made some "substantive changes,"<sup>12</sup> but retained most of the 2008 Amended Forest Plan: "All the new or modified components have been placed in Chapter 5 of the 2016 Forest Plan Amendment . . . ."<sup>13</sup> Thus, Chapters 1 through 4 of the 2008 Amended Forest Plan remain substantively unchanged. "Only those changes that were made to the 2008 Forest Plan are described and analyzed in [the 2016 Amended Forest Plan FEIS]."<sup>14</sup>

When it adopted the 2016 Amended Forest Plan, the Forest Service explained the relationship between the three forest planning efforts as follows:

[The 2016 Forest Plan] FEIS describes and analyzes changes to the 2008 Forest Plan and tiers to and incorporates by reference the 1997 Tongass Land Management Plan Revision FEIS . . . the 2003 Final Supplemental EIS (SEIS) for Roadless Area Evaluation for Wilderness Recommendations . . . and the 2008 Tongass Land and Resource Management Plan Amendment FEIS . . . and the 2008 Record of Decision . . . . Where appropriate, information in these documents that is relevant to analysis in this FEIS is cited and incorporated by reference.<sup>15</sup>

As the Forest Service explained, these earlier forest plans, decision documents, environmental reviews, and the associated planning records (including all comments and administrative appeals) serve as the scientific and management predicate for the 2016 Amended Forest. In June, the Forest Service notified Earthjustice the agency failed to include them in the Prince of

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<sup>9</sup> 2016 Amended Forest Plan FEIS at 1-1.

<sup>10</sup> *Id.* at 1-1.

<sup>11</sup> *Id.* at ES-1 to 2.

<sup>12</sup> U.S. Forest Service, Tongass Land and Resource Management Plan, Record of Decision at 2 (Dec. 2016) (2016 Amended Forest Plan ROD).

<sup>13</sup> *Id.* at 13.

<sup>14</sup> 2016 Amended Forest Plan FEIS at 1-4.

<sup>15</sup> *Id.* at ES-2.

Wales Project DEIS project record.<sup>16</sup> As a result, the undersigned provided all of these materials to the Thorne Bay Ranger District on June 18, 2018, as part of their DEIS Comment Letter. The planning record, however, still does not include in these materials. Thus, the objectors once again provide the Forest Service the environmental impact statements (EISs), records of decisions (RODs), and the planning or administrative records for the 1997 Forest Plan, the 2008 Amended Forest Plan, and the 2016 Amended Forest Plan to ensure they are part of the agency's planning record for the Prince of Wales Logging Project.<sup>17</sup>

For purposes of 36 C.F.R. § 218.8(d)(1), the objecting parties may be contacted at the names, addresses and telephone numbers indicated in the signature block. For purposes of 36 C.F.R. § 218.8(d)(3), Earthjustice is the "lead objector."

#### STATEMENT OF ISSUES, INCONSISTENCY, AND ILLEGALITY

As explained below, this objection addresses the Prince of Wales Logging Project, as well as the supporting FEIS and the Draft ROD. The objection addresses the specific issues of concern below.<sup>18</sup>

The objection identifies: (1) the various ways that implementation of the Prince of Wales Logging Project based upon the FEIS, the Draft ROD, and the 2016 Amended Forest Plan (itself based on the 2016 Amended Forest Plan FEIS and 2016 Amended Forest Plan ROD), will be inconsistent with law, regulation, and policy; and, (2) how the Forest Service's decision and supporting documents must be improved to correct the infirmities for purposes of 36 C.F.R. § 218.8(d)(5). As explained below, each substantive section also demonstrates the connection between specific sections of the DEIS Comment Letter and/or explains that a specific issue arose after the opportunity for formal comment.<sup>19</sup>

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<sup>16</sup> See D. Brigham, Forest Service, Email to H. Harris, Earthjustice, Re. POW LLA Project DEIS Planning Record (Jun. 13, 2018).

<sup>17</sup> The Forest Service's decision to not include the forest plan planning records, forest plans, and environmental analysis in the planning record for the Project is contrary to the agency's past practice concerning timber sale projects on the Tongass National Forest. In the past, the agency acknowledged that the environmental analyses supporting those timber sales tier to the governing forest plan, and as such, the forest plan planning records were included in the timber sales planning records. See, e.g., R. Dale, Forest Service, Email to H. Harris, Earthjustice, Re. Wrangell Island Planning Record (July 1, 2016); Certification of the Administrative Record, Tongass Conservation Society v. Cole, Case no. 1:09-cv-00003-JWS (D. Alaska, May 18, 2008) (challenge to the Sea Level Timber Sale).

<sup>18</sup> See generally 36 C.F.R. § 218.8(d)(5).

<sup>19</sup> See 36 C.F.R. § 218.8(c).

## UNLAWFUL CONDITION-BASED NEPA REVIEW

The Forest Service characterizes the FEIS as “a project-level analysis”<sup>20</sup> that “will result in the decision whether or not to authorize integrated management activities on the Prince of Wales Island over the next 15 years.”<sup>21</sup> According to the agency, this “condition-based NEPA” analysis “means that while the range of treatments or activities authorized will be described and analyzed in [the EIS], the specific locations and methods will be determined during implementation based on defined conditions in the alternative selected in the Decision and activity cards (Appendix A).”<sup>22</sup> In the FEIS’s Response to Comments, the agency explains that “condition-based” analysis means “it is not possible to determine all of the direct, indirect, or cumulative impacts to wildlife habitat or connectivity that could result from this project before implementation.”<sup>23</sup> The FEIS also makes clear the Forest Service expects to approve the ROD for the Prince of Wales Logging Project “*without the need for additional NEPA analysis.*”<sup>24</sup>

The Forest Service’s use of “condition-based NEPA” in the FEIS runs contrary to NEPA, the Council for Environmental Quality’s (CEQ) implementing regulations, and decades of case law interpreting NEPA’s requirements.<sup>25</sup> As explained below, the FEIS fails to address required issues, including the direct, indirect, or cumulative impacts of this enormous logging project, reasonable alternatives to the logging proposal, and specific mitigation measures that would reduce the adverse impacts on Southeast Alaska communities and the Tongass ecosystem.

### I. NEPA REQUIRES THE FOREST SERVICE TO PRODUCE A SPATIALLY AND TEMPORALLY SPECIFIC ANALYSIS BECAUSE THIS IS A PROJECT-LEVEL DECISION.

NEPA is “our basic national charter for protection of the environment.”<sup>26</sup> In enacting NEPA, Congress recognized the “profound impact” of human activities, including “resource exploitation,” on the environment and declared a national policy “to create and maintain conditions under which man and nature can exist in productive harmony.”<sup>27</sup> The statute has two fundamental two goals: “(1) to ensure that the agency will have detailed information on

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<sup>20</sup> FEIS at 7.

<sup>21</sup> *Id.*, Abstract at PDF 5; *see also id.* at 61-62 (FEIS describing the Project’s “Irreversible and Irretrievable Commitments of Resources”).

<sup>22</sup> *Id.* at i.

<sup>23</sup> *Id.*, Appendix D at D-58.

<sup>24</sup> *Id.*, Appendix B at B-1 (emphasis added) (stating that the Implementation Plan in Appendix B “in conjunction with the Activity Cards in Appendix A [provides] a linkage from the FEIS to the project-specific work”).

<sup>25</sup> *See* DEIS Comment Letter at 9-14.

<sup>26</sup> *Center for Biological Diversity v. United States Forest Serv.*, 349 F.3d 1157, 1166 (9th Cir. 2003) (quoting 40 C.F.R. § 1500.1).

<sup>27</sup> 42 U.S.C. § 4331(a).



significant environmental impacts when it makes decisions; and (2) to guarantee that this information will be available to a larger audience.”<sup>28</sup>

“NEPA promotes its sweeping commitment to ‘prevent or eliminate damage to the environment and biosphere’ by focusing Government and public attention on the environmental effects of proposed agency action.”<sup>29</sup> Stated more directly, NEPA’s “‘action-forcing’ procedures . . . require the [Forest Service] to take a ‘hard look’ at environmental consequences,”<sup>30</sup> *before* the agency approves an action. “By so focusing agency attention, NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.”<sup>31</sup>

NEPA’s review obligations are more stringent and detailed at the project level, or “implementation stage,” given the nature of “individual site specific projects.”<sup>32</sup> “[G]eneral statements about possible effects and some risk do not constitute a hard look, absent a justification regarding why more definitive information could not be provided.”<sup>33</sup> NEPA requires the agency to provide the public “‘the underlying environmental data’ from which the Forest Service develop[ed] its opinions and arrive[d] at its decisions.”<sup>34</sup> “The agency must explain the conclusions it has drawn from its chosen methodology, and the reasons it considered the underlying evidence to be reliable.”<sup>35</sup> In the end, “vague and conclusory statements, without any supporting data, do not constitute a ‘hard look’ at the environmental consequences of the action as required by NEPA.”<sup>36</sup>

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<sup>28</sup> *Env’tl. Prot. Info. Ctr. v. Blackwell*, 389 F. Supp. 2d 1174, 1184 (N.D. Cal. 2004) (quoting *Neighbors of Cuddy Mt. v. Alexander*, 303 F.3d 1059, 1063 (9th Cir. 2002)); *see also Earth Island v. United States Forest Serv.*, 351 F.3d 1291, 1300 (9th Cir. 2003) (“NEPA requires that a federal agency ‘consider every significant aspect of the environmental impact of a proposed action . . . [and] inform the public that it has indeed considered environmental concerns in its decision-making process.’”).

<sup>29</sup> *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989) (quoting 42 U.S.C. § 4321).

<sup>30</sup> *Metcalf v. Daley*, 214 F.3d 1135, 1141 (9th Cir. 2000) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989)).

<sup>31</sup> *Marsh*, 490 U.S. at 371 (citation omitted).

<sup>32</sup> *Ecology Ctr., Inc. v. United States Forest Serv.*, 192 F.3d 922, 923 n.2 (9th Cir. 1999); *see also Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 800-01 (9th Cir. 2003).

<sup>33</sup> *Or. Natural Res. Council Fund v. Brong*, 492 F.3d 1120, 1134 (9th Cir. 2007) (citation omitted); *see also Or. Natural Res. Council Fund v. Goodman*, 505 F.3d 884, 892 (9th Cir. 2007) (holding the Forest Service’s failure to discuss the importance of maintaining a biological corridor violated NEPA, explaining that “[m]erely disclosing the existence of a biological corridor is inadequate” and that the agency must “meaningfully substantiate [its] finding”).

<sup>34</sup> *WildEarth Guardians v. Mont. Snowmobile Ass’n*, 790 F.3d 920, 925 (9th Cir. 2015).

<sup>35</sup> *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1075 (9th Cir. 2011) (citation omitted).

<sup>36</sup> *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 973 (9th Cir. 2006).

CEQ's regulations establish specific ways agencies must analyze proposed actions, including project-level decisions. In addition to a detailed discussion of alternatives, adverse environmental effects, and irreversible commitments of resources, the regulations require agencies to address:

- (a) Direct effects and their significance;
- (b) Indirect effects and their significance;
- (c) Possible conflicts between the proposed action and the objectives of Federal, regional, State, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned;
- (d) The environmental effects of alternatives including the proposed action;
- (e) Energy requirements and conservation potential of various alternatives and mitigation measures;
- (f) Natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures.<sup>37</sup>

The Prince of Wales Logging Project is a project-level decision and, as a result, the FEIS must include the detailed information and analysis that NEPA and the CEQ regulations require because the Forest Service admits there will not be any further NEPA analysis.<sup>38</sup> Here, as discussed in detail below, the Forest Service violates NEPA because the FEIS fails to describe the characteristics of the specific logging and road-building projects (*e.g.*, when, where, how much, what sequence, old-growth versus young-growth, location and length of roads, etc.) and

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<sup>37</sup> 40 C.F.R. § 1502.16.

<sup>38</sup> FEIS, Appendix B at B-1. Prior to the Prince of Wales Logging Project, the Forest Service consistently prepared resource reports and biological evaluations/assessments that helped inform the agency's NEPA review of timber sale projects. *See, e.g.*, PR 736\_2222 (Big Thorne Botany Resource Report); PR 736\_2223 (Big Thorne Climate Change Resource Report); PR 736\_2224 (Big Thorne Timber Economics Resource Report); PR 736\_2230 (Big Thorne Land and Wild and Scenic Rivers Resource Report); PR 736\_2232 (Big Thorne Scenery Resource Report); PR 736\_2233 (Big Thorne Timber and Silviculture Resource Report); PR 736\_2234 (Big Thorne Socioeconomics Resource Report); PR 736\_2237 (Big Thorne Watershed Resource Report); PR 736\_2229 (Big Thorne Karst Resource Report); PR 736\_2236 (Big Thorne Transportation Resource Report); PR 736\_2240 (Big Thorne Inventoried Roadless Area and Wilderness Resource Report). A review of the planning record reveals the Forest Service prepared none of these documents for the Prince of Wales Logging Project, so groups submitted a Freedom of Information Act request to confirm the agency failed to prepare any of these materials in this case.

then analyze the specific impacts, alternatives, and necessary mitigation associated with those implementation decisions.

## II. THE FOREST SERVICE'S CONDITION-BASED NEPA APPROACH FAILS TO ANALYZE THE PROJECT'S DIRECT AND INDIRECT IMPACTS.

The Prince of Wales Logging Project is a project-level decision that the Forest Service is implementing, pursuant to the 2016 Amended Forest Plan, to authorize logging 656 million board feet (MMBF) and building 164 miles of roads<sup>39</sup> over the next 15 years in a geographic area that encompasses 2.3 million acres.<sup>40</sup> The Forest Service, however, has not decided where, when, or how much any of those activities will take place across the 1.8 million acres of Forest Service lands in the project area,<sup>41</sup> because the agency is only going to make those decisions *after* it authorizes the Project.<sup>42</sup> As described below, the FEIS fails to disclose the resulting direct and indirect impacts of those logging and roadbuilding activities, including the adverse impacts on particular communities, subsistence users, geographic areas and watersheds, and bird and wildlife populations, rendering it unlawful under NEPA.

The FEIS does not disclose any of characteristics of the specific logging projects that the ROD will authorize and, as a result, fails to examine the associated impacts of those choices. The agency does not explain, for example, when particular logging activities will occur (*e.g.*, years 1, 2, and 3 or years 1, 10, and 15). It also fails to explain the location of those logging activities or their relation to nearby logging activities across the 2.3 million-acre project area. The agency fails to explain the sequence of logging or the concentration of logging activities (*e.g.*, will logging in a particular portion of the island take place all at that the same time or distributed over several years). The agency fails to explain whether and when it will offer old-growth sales versus young-growth sales and the sizes of those sales to facilitate the transition outlined in the 2016 Amended Forest Plan.<sup>43</sup>

Similarly, the FEIS fails to explain where, when, and in what sequence and spatial relationship any of the roads will be constructed or reconstructed as well as the nature of those roads (*i.e.*, length, etc.), making it impossible to explain the site-specific impacts of any given road or combination of roads. The FEIS states simply: “It is unknown where on the landscape the road building would occur.”<sup>44</sup> It fails to explain which roads will be permanent and which will be

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<sup>39</sup> *Id.* at 23, Tbl. 2 (describing Alternative 2).

<sup>40</sup> *Id.* at 229.

<sup>41</sup> *Id.* at 2; *see also id.* at 8, Tbl. 1.

<sup>42</sup> *Id.* at 1.

<sup>43</sup> *Id.* at 120 (The Forest Service plans to authorize the entire Prince of Wales Logging Project first and then “[t]he size of both old-growth and young-growth timber offerings will be determined during implementation.”).

<sup>44</sup> *Id.* at 234.

temporary roads, making it impossible to understand the direct and indirect effects.<sup>45</sup> The FEIS also does not explain the costs of the individual roads or disclose whether the agency will force the public to pay for any of those roads through pre-roading.<sup>46</sup>

The Forest Service’s “condition-based” approach to the Prince of Wales Logging Project gives the decision-maker and the public virtually no information regarding the direct and indirect impacts. Indeed, examining Chapter 3 (Environment and Effects) of the FEIS reveals the agency’s impact analysis is identical in many instances and all but meaningless for understanding the adverse impacts of the Project in every instance.

Overall, the FEIS bases the agency’s entire impacts analysis, including cumulative impacts, on two basic approaches. In the first, the FEIS offers generic, superficial assessments of generalized impacts that fail to explain what will actually occur because of this project and frequently provides identical descriptions for every action alternative. In the second, the FEIS simply catalogs acres, or percent, of habitat types remaining, again without explaining the consequences and adverse impacts of that habitat loss.

For example, the FEIS describes the direct and indirect effects of roads and timber harvest and provides virtually identical descriptions of the action alternatives:

	ALTERNATIVE 2	ALTERNATIVE 3	ALTERNATIVE 5
<b>ROADS</b>	“If all 122 miles of new road were to be constructed in this alternative effects to aquatic resources are expected to range from minor to moderate. The 122 miles of new road are made up of small segments spread across the entire project area as	“If all 122 miles of new road were to be constructed in this alternative effects to aquatic resources are expected to range from minor to moderate. The 122 miles are made up of small segments spread across the entire project area as opposed to long	“If all 118 miles of new road were to be constructed in this alternative effects to aquatic resources are expected to range from minor to moderate. The 118 miles is made up of small segments spread across the entire project area as opposed to long

<sup>45</sup> *Id.* at 22 (“maximum miles of road construction under any one alternative is expected to change based on the logging systems used and where harvest occurs on the landscape”); *id.* at 331 (“The total road miles needed will be determined by the specific harvest units offered and the needed transportation network.”); *id.* at 35 (“Temporary roads may remain open for a set period of time post-activities.”); *id.*, Appendix A at 113 (“Roads identified through analysis as not needed are candidates for road decommissioning.”).

<sup>46</sup> *See, e.g., id.* at 114, Tbl. 16 (providing one estimated transportation infrastructure cost for each alternative); *id.* at 334, Tbl. 90 (providing total estimated road development costs of each alternative). Even those generic costs estimates “are not exact values” and “are presented to provide a relative comparison between the alternatives” rather than explaining the costs and impacts of any given road. *Id.*

	opposed to long continuous segments within a floodplain. Where these segments do occur near fish habitat, there is a higher risk of sediment related impacts to aquatic habitat.” <sup>47</sup>	continuous segments within a floodplain. Where these segments do occur near fish habitat, there is a higher risk of sediment related impacts to aquatic habitat.” <sup>48</sup>	continuous segments within a floodplain. Where these segments do occur near fish habitat, there is a higher risk of sediment related impacts to aquatic habitat.” <sup>49</sup>
<b>TIMBER HARVEST</b>	“The timber harvest proposed in this alternative could have minor adverse effects on water quality, fish habitat, and aquatic organisms. While timber harvest can have adverse effects on water quality, fish habitat and fish by altering the amount and timing of runoff, sediment transport/deposition regimes (Sullivan <i>et al.</i> 1987), average substrate size (Ross 2013), and stream temperature (Beschta <i>et al.</i> 1987), mandatory no-harvest riparian management areas (RMA) and other protections outlined in the Activity Cards (Appendix A) would minimize these adverse effects.” <sup>50</sup>	“The timber harvest proposed in Alternative 3 could have minor adverse effects on water quality, fish habitat, and aquatic organisms. While timber harvest can have adverse effects on water quality, fish habitat and fish by altering the amount and timing of runoff, sediment transport/deposition regimes (Sullivan <i>et al.</i> 1987), average substrate size (Ross 2013), and stream temperature (Beschta <i>et al.</i> 1987), mandatory no-harvest riparian management areas (RMA) and other protections outlined in the Activity Cards (Appendix A) would minimize these adverse effects.” <sup>51</sup>	“The timber harvest proposed in this alternative could have minor adverse effects on water quality, fish habitat, and aquatic organisms. While timber harvest can have adverse effects on water quality, fish habitat and fish by altering the amount and timing of runoff, sediment transport/deposition regimes (Sullivan <i>et al.</i> 1987), average substrate size (Ross 2013), and stream temperature (Beschta <i>et al.</i> 1987), mandatory no-harvest riparian management areas (RMA) and other protections outlined in the Activity Cards (Appendix A) would minimize these adverse effects.” <sup>52</sup>

<sup>47</sup> *Id.* at 156.

<sup>48</sup> *Id.* at 161

<sup>49</sup> *Id.* at 164.

<sup>50</sup> FEIS at 156.

<sup>51</sup> *Id.* at 162.

<sup>52</sup> *Id.* at 164-65.

In another example of the agency's generic assessment, the FEIS analyzes describes the direct and indirect effects on non-winter deer habitat in only three paragraphs:

Alternative 2 will result in about a 2 percent decline in non-winter habitat at the project area scale, followed by Alternatives 3 and 5, both with a 1 percent decline or less. At the project area scale, this results in about a 10 percent reduction since 1954 for Alternative 2 (90 percent remaining), and a 9 percent reduction in Alternatives 3 and 5 (91 percent remaining).

Assuming all POG harvest acres are also non-winter habitat acres, the effects post-project result in one [wildlife analysis area (WAA)], 1525 (46 percent remaining), retaining less than 50 percent of the estimated 1954 non-winter habitat.

Proposed activities that could result in less than 50 percent remaining by WAA would have greater effects if these WAAs were adjacent to each other or on islands. WAA 1525 is on Kosciusko Island; however, the other half of Kosciusko Island is WAA 1526, which has an estimated 96 percent non-winter habitat remaining, somewhat mitigating the effects in WAA 1525 relative to WAAs that are isolated or surrounded by other WAAs with less habitat remaining.<sup>53</sup>

The FEIS's discussion of direct and indirect effects on productive old-growth habitat is equally generic:

For this analysis it is assumed that all potential harvest acres are [productive old-growth (POG)] acres and all would be clearcut. The assumption of all clearcut harvest likely over estimates the effects because the timber analysis indicates more helicopter logging (assumed harvest other than clearcut) than tradition harvest (assumed clearcut). The assumption that all harvest acres were clearcut was done to display maximum effects.

The direct and indirect effects analysis includes [National Forest System] land acres only. At the project area scale, Alternative 2 harvests about 23,269 acres (3 percent of current) of POG, Alternative 3 harvests about 13,014 acres (2 percent of current), and Alternative 5 about 6,365 acres (1 percent of current). At the project area scale, this results in about a total reduction since 1954 of about 21 percent for Alternative 2, a 20 percent reduction since 1954 in Alternative 3, and about a 19 percent reduction since 1954 for Alternative 5. The specific location and amount of harvest in each

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<sup>53</sup> *Id.* at 178.

WAA would be determined during implementation and vary by alternative.

Post-project, four WAAs 1003 (40 percent remaining), 1317 (48 percent remaining), 1422 (47 percent remaining) and 1525 (33 percent remaining) drop from having more than 50 percent original POG to less than 50 percent due to the activities proposed in the POW LLA Project. Two WAAs, WAA 1315 (28 percent remaining) and WAA 1420 (30 percent remaining), drop from more than 50 percent POG remaining to 30 percent or less. WAAs 1315 and 1420 are adjacent to each other. WAA 1315 is also adjacent to WAA 1319 (65 percent POG remaining) and WAA 1316 (99 percent POG remaining). WAA 1420 is also adjacent to WAA 1421 (67 percent POG remaining) and WAA 1319 (65 percent POG remaining).

WAA 1003 includes [volume comparison units (VCUs)] that would have legacy structure retention as well as peak flow rate mitigation measures. WAAs 1315 and 1420 would receive limited harvest in all alternatives due to mitigation measures in Alternative 2 that includes wildlife centric prescriptions within 5 miles of subsistence communities, Alternative 3 that includes only 25 percent removal by STS in south-facing stands below 800 feet in elevation, and Alternative 5 that does not allow old-growth harvest in south-facing stands below 800 feet in elevation as well as legacy forest structure retention and peak flow mitigation measures. WAA 1317 includes measures included in Alternatives 3 and 5 as well as both legacy structure retention and peak flow rate measures. WAA 1422 includes measures included in Alternative 2 as well as legacy and peak flow rate measures. WAA 1525 includes the measures in place in Alternative 2, legacy structure retention, and peak flow rate measures.

The levels of tolerance to habitat change determined by research (see Affected Environment above) of 30 and 50 percent of the original habitat remaining are dependent in part on the dispersal capabilities of the species associated with that habitat type. Species with greater dispersal capabilities such as the bear may be less affected by WAAs with less habitat if these areas are adjacent to areas that have more habitat. Both reduction in habitat and distance between habitats would likely have a greater impact to species with more limited dispersal capabilities such as the shrew and ermine. Species such as the shrew and ermine may be impacted even more when areas of past effects are concentrated or on islands. The fact that WAAs 1315 and 1420 are both effected by habitat loss and are

adjacent to each may exacerbate the local effects to species like the shrew and ermine.<sup>54</sup>

Elsewhere the FEIS lumps the analysis of the direct and indirect effects into the same section with little or no analysis of the differences between the action alternatives<sup>55</sup> and repeats this pattern throughout the entire discussion.<sup>56</sup> For example, the direct and indirect effects analysis of the Project's adverse effects on the most productive, large-tree old-growth (SD67) amounts to little more than a catalog of data on acres of habitat remaining, with no meaningful discussion of the consequences:

### **Alternative 1**

Alternative 1 will have no direct or indirect effect to SD67 habitat.

### **Alternatives 2, 3, and 5**

Alternative 2 could harvest about 4,421 acres of SD67 resulting in about a retention of about 97 percent of the current SD67 habitat and about 71 percent of the estimated 1954 SD67 habitat. Alternative 3 could harvest about 1,162 acres of SD67 habitat and Alternative 5 about 568 acres both resulting in about a 99 percent retention of current SD67 habitat and 73 percent of the estimated 1954 SD67 habitat.

Table 44 shows the effects of timber harvest proposed in the [Prince of Wales Logging] Project on the current estimated SD67 habitat.

As a result of the proposed activities in the POW LLA Project, WAAs 902, 1105, 1106, 1107, 1108, 1209, 1210, 1211, 1212, 1213, 1316, 1323, 1524, 1526, and 5015 all retain more than 80 percent of the estimated 1954 SD67 habitat (48 percent of project area WAAs). Of these WAAs, only two retain less than 90 percent of the estimated 1954 SD67 habitat.

Post-project WAAs with between 60 to 80 percent of the estimated 1954 SD67 habitat include 901, 1214, 1318, 1319, 1525, 1528, and 1529 (23 percent of project area WAAs).

Post-project WAAs with between 50 to 60 percent of the estimated 1954 SD67 habitat include 1421, 1527, and 1531 (10 percent of project area WAAs).

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<sup>54</sup> FEIS at 181.

<sup>55</sup> *See, e.g., id.* at 191, 195-98, 204-06, 212-14, 241, 246-47.

<sup>56</sup> *See, e.g., id.* at 184-85, 191, 195-96, 204-05, 250-251.



Post-project WAAs with between 30 to 50 percent of the estimated 1954 SD67 habitat include 1003, 1332, 1420, and 1422 (13 percent of project area WAAs).

Post-project WAAs with less than 30 percent of the estimated 1954 SD67 habitat include WAA 1315, 1317, and 1530 (about 10 percent of the project area WAAs).

Alternative 2 includes wildlife centric prescriptions for harvest activities within 5 miles of subsistence communities within the project area (WAAs 1315, 1317, 1318, 1420, 1421, 1422, 1525, 1529, and 1530).

Alternative 3 allows for 25 percent removal by single tree selection (STS) for old-growth harvest on south-facing stands below 800 feet in elevation in WAAs with 10 percent or more deer harvested of the estimated [deer habitat capability (DHC)]: 1214, 1315, 1317, 1318 and 1420. Alternative 5 allows no harvest of old-growth harvest in south-facing stands below 800 feet in elevation. The proposed timber harvest mitigation in Alternatives 2, 3, and 5 will help to offset the effects of harvest of SD67 habitat.<sup>57</sup>

In one final example, the FEIS describes the direct and indirect impacts to wolves as follows:

	ALTERNATIVE 2	ALTERNATIVE 3	ALTERNATIVE 5
<b>WOLF MORTALITY</b>	“Alternative 2 proposes to build about 35 miles of NFS road and 129 miles of temporary road at the project area scale. It is unknown where on the landscape the road building would occur.” <sup>58</sup>	“Alternative 3 proposes to build about 48 miles of NFS road and about 175 miles of temporary road at the project area scale. It is unknown where on the landscape the road building would occur.” <sup>59</sup>	“Alternative 5 proposes to build about 49 miles of NFS road and about 180 miles of temporary road at the project area scale. It is unknown where on the landscape the road building would occur.” <sup>60</sup>

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<sup>57</sup> FEIS at 212.

<sup>58</sup> *Id.* at 234.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<p><b>WOLVES</b></p>	<p>“Alternative 2 includes timber harvest mitigation in timber harvest polygons within 5 miles of a subsistence community in WAAs with 10 percent or more deer harvested of the estimated DHC. This would occur in WAAs 1214, 1315, 1317, 1318, and 1420. See discussion on deer habitat above. See discussion above for impacts to non-winter, average snow, and deep snow deer habitat and the effects of young-growth treatments and harvest.”<sup>61</sup></p>	<p>“In WAAs with 10 percent or more deer harvested of the estimated DHC, allow only 25 percent removal by single tree selection (STS) for old-growth harvest on south-facing stands below 800 feet in elevation. This would occur in WAAs 1214, 1315, 1317, 1318, and 1420. WAAs 1315, 1317, and 1420 are also areas where more than 50 percent of the original deep snow deer habitat has been harvested. In Alternative 3, effects to DHC in these three WAAs (1315, 1317, and 1420) would be mitigated by the restrictions in these three WAAs. These WAAs may also include other mitigation measures such as the Legacy Standard and Guideline or peak flow rate measures (See Issue 5). See discussion above for impacts to non-winter, average snow, and deep snow deer habitat and the effects of young-growth treatments and harvest. Alternative 3 incorporates portions of the Wolf Plan.”<sup>62</sup></p>	<p>“Alternative 5 we would propose no harvest in south-facing stands below 800 feet in elevation in WAAs with 10 percent or more deer harvested of the estimated DHC (WAAs 1214, 1315, 1317, 1318, and 1420). WAAs 1315, 1317, and 1420 are also areas where more than 50 percent of the original deep snow deer habitat has been harvested. This mitigation will help to offset the effects to deer habitat capability. These WAAs may also include other mitigation measures such as the Legacy Standard and Guideline or peak flow rate measures (see Issue 5). See discussion above for impacts to non-winter, average snow, and deep snow deer habitat and the effects of young-growth treatments and harvest. Alternative 5 incorporates the Wolf Plan in its entirety.”<sup>63</sup></p>
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<sup>61</sup> *Id.* at 225.

<sup>62</sup> *Id.* at 225

<sup>63</sup> *Id.* at 226.

As these examples demonstrate, the Forest Service’s condition-based analysis is meaningless because the FEIS describes generic direct and indirect impacts from logging or roadbuilding but fails to explain, disclose, and analyze the actual direct and indirect effects associated with the implementation of the Project in any particular area at any given time. And in other cases, the FEIS simply catalogs the amount of habitat remaining without explaining the consequences of the habitat loss on birds, wildlife, subsistence users, and communities. The FEIS provides none of the detailed information that must be in a project-level analysis, meaning the Forest Service fails to assess the direct and indirect project-level impacts prior to authorizing the Project.<sup>64</sup>

In so doing, the Forest Service acts contrary to the admonishment of the Ninth Circuit, which previously faulted the agency for failing to provide meaningfully detailed information in a landscape level analysis. The Court explained the agency “stymied the public’s ability to challenge agency action” by providing only “paltry information” that “d[id] not provide the information necessary to determine how specific land should be allocated to protect particular habitat important to . . . wildlife.”<sup>65</sup> The Court rebuked the Forest Service for failing to provide site-specific information because “the public [is] limited to two-dimensional advocacy—interested persons c[an] argue only for the allocation of more or less land” for a particular use, “but not for the protection of particular areas.”<sup>66</sup> By depriving the public of a detailed, project-specific analysis, the agency “does not allow the public to ‘play a role in both the decisionmaking process and the implementation of that decision.’”<sup>67</sup>

In sum, the FEIS violates NEPA because the Forest Service fails to examine the direct or indirect impacts of the Prince of Wales Logging Project (or indeed to even explain which are direct and which are indirect effects). NEPA requires the agency to analyze the site-specific impacts and that analysis is not in the FEIS. For these reasons, the agency violates NEPA.

### III. THE FOREST SERVICE’S CONDITION-BASED NEPA APPROACH FAILS TO ASSESS CUMULATIVE IMPACTS.

The Forest Service also fails to consider the cumulative impacts of the Prince of Wales Logging Project in violation of CEQ’s NEPA regulations.<sup>68</sup> The agency must address those “impacts which result[] from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions”<sup>69</sup> taken by the agency or others, including all of the

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<sup>64</sup> As explained below, the 2016 Amended Forest Plan requires that some of this site-specific information be provided in unit and road cards that must be included with the DEIS and FEIS. The Forest Service violated those requirements by failing to providing any of the information. *Infra* pp. 27-31.

<sup>65</sup> *WildEarth Guardians v. Montana Snowmobile Ass’n*, 790 F.3d 920, 927 (9th Cir. 2015)

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 928 (quoting *Methow Valley Citizens Council*, 490 U.S. at 349).

<sup>68</sup> 40 C.F.R. § 1508.25(a)(2).

<sup>69</sup> *Id.* § 1508.7.

historical, current, and future logging on Prince of Wales. The agency, however, provides no meaningful explanation of the cumulative consequences on Prince of Wales Logging Project (e.g., Will the Prince of Wales flying squirrel continue to persist and, if so, at what population levels? Will the Alexander Archipelago wolf remain at sustainable population levels on Prince of Wales Island or in Game Management Unit 2 (GMU)?). As explained below, in most cases, the FEIS's cumulative impacts analysis amounts to nothing more than a catalog of percentages of how much habitat will remain, rather than an explanation of the impacts on species, hunters, and communities.

With regard to the Alexander Archipelago wolf, the FEIS devotes only one paragraph to describe the cumulative effects due to the loss of habitat from the Prince of Wales Logging Project:

Harvest on non-NFS lands would move both young-growth acres and old-growth into the early seral stage, assuming clearcut harvest would be used. It is assumed that while some acres of young-growth on non-NFS land would continue to move from early seral stage stands into stem exclusion stands, other acres would likely be treated in some way that would improve wildlife habitat over the current condition. The amount of acres that would be treated is unknown, but any acres converted from stem exclusion back into the early seral stage would be assumed to provide a beneficial effect to deer and thus wolves.<sup>70</sup>

The FEIS provides only an eight-sentence description of the cumulative effects on wolf mortality.<sup>71</sup> The FEIS ultimately admits: "Overall, 89 percent of the [2.3 million acre] project area [wildlife analysis areas] have some level of wolf mortality concern as defined by Person and Logan 2012."<sup>72</sup> The FEIS, however, never explains how many wolf packs will remain after the Project is implemented and whether the Forest Service believes any of those wolf packs will be sustainable.

Elsewhere the FEIS purports to describe the Project's cumulative impacts on deer and marten, deep snow habitat but never even mentions the resulting impacts on deer or marten:

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<sup>70</sup> FEIS at 228.

<sup>71</sup> *Id.* at 234.

<sup>72</sup> *Id.* at 235.

For the project area as a whole, about 8 percent of POG is low elevation [high-volume productive old-growth (HPOG)] on south-facing stands. Using that percentage for estimated harvest on non-NFS lands, about 7,518 acres of this habitat type could be harvested in addition to the [Prince of Wales Logging] Project; this would result in the project area having about 54 percent remaining of the original estimated HPOG below 800 feet elevation on south-facing stands.

WAAs that remain above the 70 percent of the original deep snow habitat level include WAAs in Wilderness, LUD II and other non-development LUDs, and some WAAs that have less proposed harvest. These WAAs include 901 (86 percent), 902 (97 percent), 1105 (82 percent), 1108 (99 percent), 1209 (92 percent), 1210 (91 percent), 1212 (97 percent), 1316 (100 percent), 1323 (75 percent), 1524 (100 percent), 1526 (82 percent), 1528 (78 percent), and 5015 (100 percent).

WAAs with between 50 and 70 percent of the estimated 1954 deep snow habitat include WAAs 1107 (61 percent), 1211 (59 percent), 1213 (65 percent), 1319 (53 percent), 1332 (64 percent), and 1529 (61 percent).

WAAs with between 30 and 50 percent of the estimated 1954 deep snow habitat include WAAs 1003 (43 percent), 1214 (31 percent), 1421 (36 percent), and 1527 (40 percent).

WAAs with less than 30 percent of the estimated 1954 deep snow habitat include WAAs 1106 (29 percent), 1315 (20 percent), 1317 (13 percent), 1318 (15 percent), 1422 (21 percent), 1525 (19 percent), 1530 (28 percent), and 1531 (26 percent). These WAAs are all estimated to have less than 30 percent of the estimated original deep snow habitat remaining. This is the threshold below which where Thompson and Harestad 1994 has said marten are absent.

The GIS calculations for WAA 1420 for deep snow habitat show that all the deep snow habitat in this WAA could be lost.

Timber harvest mitigation measures would be applied on NFS lands (Alternatives 3 and 5) (see direct and indirect effects above). WAAs 1315, 1317, 1318, 1420, 1422, 1525, 1529, and 1530 all would have wildlife centric prescriptions applied within 5 miles of subsistence communities in Alternative 2. On NFS lands, WAAs 1003, 1214, 1315, 1317, 1420, 1422, 1525, 1529, and 1530 are WAAs that include VCUs where the Legacy Standard and Guideline will be applied, requiring the retention of structure in harvested stands over

20 acres in size. Peak flow rate restrictions would occur in Alternatives 3 and 5 in WAAs 1003, 1214, 1315, 1317, 1318, 1420, 1421, 1422, 1525, 1530, and 1531.

The proposed young-growth treatments and harvest on both NFS land and non-NFS lands as well as the timber harvest mitigation measures in some WAAs on NFS lands could help to offset some of these effects.

Activities on both NFS and non-NFS lands would contribute to the cumulative effects; see Appendix C.<sup>73</sup>

Consistently, the FEIS purports to describe the cumulative effects of the Project on habitat types<sup>74</sup> and a handful of species while ignoring others completely,<sup>75</sup> but the discussions amount to nothing more than a catalog of wildlife analysis areas with varying percentages of habitat remaining. The Forest Service never even mentions the species in most cases or describes the condition of those populations after implementation of the Project.

Elsewhere, the FEIS provides nothing more than a “copy and paste” explanation. For example, the FEIS provides a virtually identical one-paragraph description of the cumulative effects of roads on watershed function and aquatic resources:

	ALTERNATIVE 2	ALTERNATIVE 3	ALTERNATIVE 5
<b>ROADS</b>	“Project road building brings the total up to 4,408 miles of road in the project area (Table 29). Cumulatively, 907 miles of road will be located within 300-feet of fish streams. An additional 432 fish stream crossings are proposed, bringing the total to 1,809 fish stream crossings in the project area (Table 30). Roads can cause moderate	“Project road building brings the total up to 4,408 miles of road in the project area (Table 29). Cumulatively, 907 miles of road will be located along fish streams on all lands. An additional 432 fish stream crossings are proposed, bringing the total to 1,809 fish stream crossings in the project area (Table 30). Roads can cause moderate	“Project road building brings the total up to 4,385 miles of road in the project area (Table 29). Cumulatively, 907 miles of road will be located along fish streams. An additional 432 fish stream crossings are proposed, bringing the total to 1,802 fish stream crossings in the project area (Table 30). Roads can cause moderate

<sup>73</sup> FEIS at 206-07.

<sup>74</sup> See, e.g., *id.* at 182 (productive old-growth habitat); see also *id.* at 178 (non-winter deer habitat).

<sup>75</sup> See, e.g., *id.* at 189-99 (goshawks, marbled murrelets, Prince of Wales flying squirrels, and Prince of Wales spruce grouse); *id.* at 214 (Brown creepers and the endemic bat Keen’s myotis).

	adverse cumulative effects on aquatic resources by increased sedimentation, and these effects can be minimized by following Activity Cards.” <sup>76</sup>	adverse cumulative effects on aquatic resources by increased sedimentation; these effects can be minimized by following Activity Card direction.” <sup>77</sup>	adverse cumulative effects on aquatic resources by increased sedimentation, and these effects can be minimized by following Activity Card direction.” <sup>78</sup>
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The FEIS’s entire discussion of cumulative impacts amounts to the generic assertion that roads can cause adverse cumulative effects on aquatic resources. The Forest Service, however, never explains what will happen in this particular situation in any given location.

As these examples reveal, the Forest Service’s cumulative effects analysis amounts to little more than a recitation of the percent or amount of habitat that the agency expects will remain after the Prince of Wales Logging Project. The agency never explains the resulting consequences for a particular species or a particular area due to that habitat loss. The FEIS states some wildlife analysis areas “could be at greater risk for not being able to support species that depend on [high volume productive old growth].”<sup>79</sup> Yet the agency never explains, for example, the agency’s expectations for which species will or will not remain sustainable after full implementation. The Forest Service also fails to explain whether or how site-specific logging and roadbuilding decisions will avoid risks to those wildlife populations or what the cumulative impacts of such siting decisions would be as logging continues over the 15-year period of the Project.

In the end, the Forest Service’s entire approach to the cumulative impacts of the Prince of Wales Logging Project is inconsistent with NEPA. The agency fails to provide any site-specific or species-specific cumulative impact analysis, opting instead for empty disclosures of percentages and numbers. In *Natural Resources Defense Council v. United States Forest Service*, the Court faulted the Forest Service for providing empty disclosures that lacked any analysis, explaining the agency “d[id] not disclose the effect” of continued logging on the Tongass and “d[id] not give detail on whether or how to lessen the cumulative impact” of the logging.<sup>80</sup> For all of these reasons, the FEIS violates NEPA’s obligations regarding cumulative impacts analysis.

#### IV. THE FEIS’S ALTERNATIVES ANALYSIS VIOLATES NEPA.

“Under NEPA’s applicable regulations, a federal agency’s EIS must ‘[r]igorously explore and objectively evaluate all reasonable alternatives [to a proposed action], and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been

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<sup>76</sup> FEIS at 159.

<sup>77</sup> *Id.* at 163.

<sup>78</sup> *Id.* at 165.

<sup>79</sup> *Id.* at 197.

<sup>80</sup> *Natural Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 815 (9th Cir. 2005).

eliminated.”<sup>81</sup> An agency’s consideration of alternatives becomes meaningless if the agency arbitrarily constrains the range of alternatives considered and fails to consider alternatives that avoid the adverse effects of the proposed action, frustrating NEPA’s goal of protecting the environment.<sup>82</sup> As the Ninth Circuit has made clear, courts “have repeatedly recognized that if the agency fails to consider a viable or reasonable alternative, the EIS is inadequate.”<sup>83</sup>

As explained below, and discussed in the DEIS Comment Letter,<sup>84</sup> the FEIS violates NEPA because the Forest Service fails to analyze reasonable alternatives to the Prince of Wales Logging Project.

A. The Forest Service’s Condition-Based Analysis Fails to Consider Site-Specific and Temporal Alternatives.

The Prince of Wales Logging Project is a single decision to authorize logging projects and road construction across vast swaths of Prince of Wales Island and the adjacent islands over the next 15 years. The FEIS violates NEPA because it fails to examine any alternatives to the location, timing, sequencing, and sizes of the specific logging and road construction activities the decision will authorize.

Given the Forest Service’s reliance on the “condition-based” analysis, the agency never describes the location, configuration, sizes, and timing of the logging and road construction activities. The FEIS reiterates that the details regarding the logging will only come after the agency approves the Prince of Wales Logging Project:

The DEIS contains maps showing the specific areas (context) where potential commercial timber harvest and other activities may occur. No alternative will harvest all of the stands identified (DEIS, p. 20). No activities will occur outside of the areas delineated on the maps, with the exception of invasive plant removal on non-NFS lands at the request of the landowners. Detailed maps and information will be provided during implementation when specific harvest units are identified during activity development. The Implementation Process specifically describes additional opportunities for public input and involvement (Appendix B-1). The time frame for implementation is 15 years. The site-specific areas where projects may occur and the

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<sup>81</sup> *Se. Alaska Conservation Council v. Fed. Highway Admin.*, 649 F.3d 1050, 1056 (9th Cir. 2011) (quoting 40 C.F.R. § 1502.14(a)).

<sup>82</sup> *See Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1123 (9th Cir. 2002); *Cal v. Block*, 690 F.2d 753, 765-69 (9th Cir. 1982).

<sup>83</sup> *Se. Alaska Conservation Council*, 649 F.3d at 1056.

<sup>84</sup> *See* DEIS Comment Letter at 5-7.



defined time frame give the resource specialists specificity to analyze the activities proposed in the action alternatives.<sup>85</sup>

Thus because, the Forest Service will not make decisions about when, where, and how much habitat will be logged (or where roads will be built) until some undisclosed point in the future, the FEIS fails to analyze alternatives to those specific logging and road construction activities.<sup>86</sup>

For example, the Forest Service fails to examine the impacts and alternatives to logging any particular watershed or forgoing logging in favor of improved habitat connectivity in a particular location. Similarly, the agency fails to examine variations in the timing of the logging projects and the sequencing of timber sale projects on any particular portion of the Prince of Wales project area (*e.g.*, will a given area experience repeated years of adverse impacts, etc.). The FEIS also fails to consider whether the agency will allow a particular sale for export as compared to domestic processing (*e.g.*, might a smaller logging project in a particular area support a larger number of Alaskan jobs with fewer adverse impacts). With regard to roads, the FEIS fails to analyze the impacts of alternatives to particular roads and routes (*e.g.*, building a permanent road versus a temporary road in any particular location, varying lengths and locations of that road, taxpayers paying for the roads instead of the timber operator, etc.). Finally, the FEIS fails to examine the site-specific impacts on communities and subsistence users arising from alternative locations, sizes, and timing of any particular timber sale project and road building.

The FEIS amounts to little more than a disclosure that the Forest Service is approving 15 years of logging and road building somewhere within a 2.3 million acre project area. The Forest Service violates NEPA by refusing to examine alternatives to individual logging and/or road construction projects in the FEIS (*e.g.*, location, distribution, connectivity, sizes, characteristics, timing, etc.). The agency's all or nothing approach skews the consideration of alternatives in favor of the environmentally-damaging generic logging and road building alternatives, entirely frustrating NEPA's goals of fostering informed decision making and protecting the environment.<sup>87</sup> In so doing, the Forest Service violates NEPA.

B. The Forest Service Fails to Analyze Different Action Alternatives to Achieve the Transition Outlined in the 2016 Amended Forest Plan.

The Forest Service violates NEPA because the FEIS fails to examine alternatives that implement the 2016 Amended Forest Plan's objective to transition the Tongass away from a predominant old-growth industry. As explained below, the agency fails to consider any alternatives that vary the amount and timing of old-growth timber sales over the 15 years.

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<sup>85</sup> FEIS, Appendix D at D-14.

<sup>86</sup> FEIS at 181 ("The specific location and amount of harvest in each [wildlife analysis area] would be determined during implementation and vary by alternative.").

<sup>87</sup> See *Kootenai Tribe*, 313 F.3d at 1123 (NEPA's purpose "is first and foremost to protect the natural environment"); *Block*, 690 F.2d at 765-69 (9th Cir. 1982) (considering a range of alternatives becomes meaningless if the range is skewed by arbitrary constraints).

The Forest Service adopted the 2016 Amended Forest Plan in response to the Secretary of Agriculture's Memorandum 1044-009,<sup>88</sup> which directed the Tongass National Forest "to expedite the transition away from old-growth timber harvesting and towards a forest products industry that uses predominantly second-growth . . . forests."<sup>89</sup>

The 2016 Amended Forest Plan contains several objectives to accomplish the Secretary's directed transition, including:

- **"O-YG-01:** During the 15 years after plan approval, the amount of young-growth offered would gradually increase to exceed 50 percent of the timber offered annually."<sup>90</sup>
- **"O-YG-02:** During the 15 years after plan approval, offer increasing annual volumes of economically viable young-growth timber. Old-growth timber harvest would gradually be reduced to an average of 5 million board feet (MMBF) annually, to support Southeast Alaska mills."<sup>91</sup>

The 2016 Amended Forest Plan makes clear that "[s]pecific activities and projects will be planned and implemented to carry out the direction in this Forest Plan."<sup>92</sup>

Groups raised several concerns regarding the Forest Plan FEIS and its consideration of alternatives at the forest plan stage.<sup>93</sup> Among those concerns, groups explained that all of the alternatives in the 2016 Amended Forest Plan FEIS offered the same purported transition out of old-growth logging to bring about the transition, including: (1) all of the action alternatives lacked any means of limiting old-growth timber sales to bring about the transition; (2) all of the action alternatives offered 10-15 years transition timeframes; (3) all of the action alternatives established a projected timber sale quantity of 46 MMBF per year; (4) all of the alternatives contemplated continued application of the Limited Export Policy.<sup>94</sup> The undersigned reiterate these concerns given the Forest Service's project-level decision-making manifests these failings.

Now at the implementation stage, the Forest Service again fails to consider any alternatives that contemplate different approaches to the transition with regard to the Prince of Wales Logging Project (*e.g.*, limiting the amount of old-growth logging every year on a declining basis, etc.).

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<sup>88</sup> 2016 Amended Forest Plan FEIS at 1-8 to 1-9; *see also* PR 769\_01\_000046 at PDF 1 (U.S. Department of Agriculture, Office of the Secretary, Secretary's Memorandum 1044-009 Addressing Sustainable Forestry in Southeast Alaska at 1-5 (July 2, 2013)) (Secretary's Transition Memorandum).

<sup>89</sup> 2016 Amended Forest Plan FEIS at 1-9; *see generally* Secretary's Transition Memorandum.

<sup>90</sup> 2016 Amended Forest Plan at 5-2.

<sup>91</sup> *Id.* at 5-3.

<sup>92</sup> *Id.* at 1-2.

<sup>93</sup> *See* SEACC Forest Plan Objection at 12-19; ARD Forest Plan Objection at 29-40.

<sup>94</sup> *See* SEACC Forest Plan Objection at 12.

All of the action alternatives allow for old-growth logging across the same timeframe (*e.g.*, the entire length of the Project), instead of allocating amounts to varying timeframes for example. They are all based on the same market demand projections, despite the fact the agency itself acknowledges it cannot predict future market demand with any degree of reliability more than a few years out. And finally, all of the action alternatives contemplate the same treatment with regard to the Limited Export Policy.

The Forest Service also arbitrarily rejects calls to evaluate alternatives that would offer no old-growth sales,<sup>95</sup> as well as an alternative that would “limit old-growth to 5 MMBF . . . annually for small purchasers and cottage industry only.”<sup>96</sup> The agency explains a no old-growth alternative “was eliminated because timber volumes under this alternative would not sustain a local timber industry to meet the purpose and need of this project . . . [and] [i]t does not meet the need for a sustainable level of forest products to contribute to the economic viability of Prince of Wales area communities.”<sup>97</sup> The agency explains that it rejected the five MMBF annual alternative because “Alternatives 3 and 5 have a reduced amount of old-growth harvest that would support local small mills or ‘cottage industry’ while providing a limited time for larger mills to increase their utilization of young-growth or locate another source of old-growth to supplement their timber supply.”<sup>98</sup> The FEIS provides no support for these conclusions, rendering the agency’s treatment of alternatives arbitrary.

In short, the Forest Service violates NEPA because the FEIS and 2016 Amended Forest Plan FEIS unlawfully analyze only action alternatives that are virtually identical in fundamental ways. As the Ninth Circuit has explained, agencies cannot make an informed decision on a project’s environmental impacts when “[t]here is no meaningful difference between the . . . alternatives considered in detail[.]”<sup>99</sup> The Forest Service’s failures render the FEIS and the 2016 Amended Forest Plan FEIS unlawful under NEPA.

### C. The FEIS’s Action Alternatives Are Too Similar.

The FEIS also violates NEPA because the action alternatives are too similar to one another in fundamental ways with regard to logging and road construction activities.

The Forest Service acknowledges the total logging volumes are virtually identical amongst the alternatives considered in the FEIS. In defending the agency’s refusal to include a cost-benefits analysis for logging, the FEIS states:

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<sup>95</sup> FEIS at 35.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1051 (9th Cir. 2013).

The Forest Service administrative costs for timber harvest projects were not included in the DEIS because of the closeness of the range of timber volume among alternatives from 604 million board feet (MMBF) for Alternative 5 to 656 MMBF for Alternative 2 would not result in a useful measure to compare alternatives.<sup>100</sup>

Similarly, the agency's analysis of alternatives with regard to roads is almost uniform. Alternatives 3 and 5 contemplate 48 and 49 miles of new Forest Service roads, respectively.<sup>101</sup> They contemplate 173 miles and 180 miles of temporary roads, respectively.<sup>102</sup> Alternative 2 varies from these only slightly with 35 miles of new roads and 129 miles of temporary roads.<sup>103</sup>

The young-growth volume alternatives are essentially the same, if not identical in most cases. For example, Alternatives 3 and 5 provide for the identical volume of young-growth logging, 529 MMBF.<sup>104</sup> They are also identical with regard to the total acreage of young-growth logging, 36,670 acres.<sup>105</sup> They also provide identical acres of even-aged and uneven-aged management, 15,630 and 21,040 acres, respectively.<sup>106</sup>

NEPA requires the Forest Service to examine meaningful differences between the action alternatives. The agency should have examined differences in the sizes of individual sales, the locations of those sales, and the timing and sequence of the sales. With regard to roads, the agency should have evaluated how varying individual road alternatives would serve the multiple uses. The agency also should have considered how varying approaches to total volume alternatives affected these choices.

Instead, the FEIS's alternatives analysis offers little, if any, variation in many instances. The Forest Service's alternatives analysis is unlawful under NEPA.

#### V. THE FOREST SERVICE'S CONDITION-BASED NEPA APPROACH FAILS TO PROVIDE REQUIRED INFORMATION REGARDING MITIGATION MEASURES.

Finally, the FEIS violates NEPA because it fails to address the effects of, and need for, site-specific mitigation measures. As with the various impact analyses discussed above, this failure stems from the Forest Service's reliance on "condition-based" analysis. The agency's failure to explain when, where, and how much logging and roadbuilding will take place in any given

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<sup>100</sup> FEIS, Appendix D at D-13.

<sup>101</sup> *Id.* at 23.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

location means the agency is also failing to assess the necessary mitigation in that particular location. This renders the FEIS unlawful.

NEPA requires agencies to consider potential mitigation measures during the planning process.<sup>107</sup> When an agency omits a discussion of mitigation measures in an EIS, it undermines NEPA's "action-forcing" purpose and leaves the public unable to evaluate the adverse effects of a proposed action and whether those effects are critical to the action.<sup>108</sup>

Here, the FEIS acknowledges that "[r]esource concerns and mitigation measures may be refined further . . . during final project design when specific activity locations and details are identified."<sup>109</sup> Any mitigation measures developed at that stage, however, would occur after the completion of the NEPA process and would therefore not satisfy the statute's requirements.

The Forest Service's meager attempts to discuss generic mitigation measures in the FEIS proves meaningless without spatially and temporally specific information. The FEIS only references *possible* mitigation measures, but never explains or commits to specific measures in particular locations or watersheds because the agency has not identified the logging and roadbuilding locations.<sup>110</sup> At best, the FEIS provides generic mitigation measures for broad categories of activities.<sup>111</sup> The Activity Cards explain, for example, "mitigation actions may be required,"<sup>112</sup> the agency will "determine ways to lessen disturbance to wildlife,"<sup>113</sup> and "other mitigation measures" will be applied.<sup>114</sup> None of these are spatially or temporally specific or even identified with particularity, and, most importantly, the Forest Service fails to commit to taking any of these measures. This leaves site-specific mitigation unexamined.

Thus, the FEIS fails to consider mitigation measures adequately, in contravention of NEPA and its regulations.

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In sum, the Forest Service's "condition-based" approach to the Prince of Wales Logging Project is unlawful. NEPA's fundamental purpose is to guarantee that the Forest Service's "hard look"

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<sup>107</sup> 40 C.F.R. § 1502.16(h); 1508.25(b)(3); 1508.20 (defining various forms of mitigation).

<sup>108</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

<sup>109</sup> FEIS at x.

<sup>110</sup> *See, e.g., id.* at 241 (discussing need for botanical mitigation); *id.* at 243 (discussing need for historic site mitigation).

<sup>111</sup> *See, e.g., id.*, Appendix A at A-17 (describing three categories of streams that could be located in harvest areas and providing bullet points with potential mitigation measures).

<sup>112</sup> *Id.*, Appendix A at A-44.

<sup>113</sup> *Id.*, Appendix A at A-71.

<sup>114</sup> *Id.*, Appendix A at A-30.

evaluation of site-specific impacts, alternatives, and necessary mitigation be completed and disclosed to the public and the decision-maker *before* the agency makes “a decision to authorize integrated management action on Prince of Wales Island over the next 15 years.”<sup>115</sup> “NEPA promotes its sweeping commitment to ‘prevent or eliminate damage to the environment and biosphere’ by focusing Government and public attention on the environmental effects of *proposed* agency action.”<sup>116</sup> “By so focusing agency attention, NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.”<sup>117</sup> “Similarly, the broad dissemination of information mandated by NEPA permits the public and other government agencies to react to the effects of a proposed action at a meaningful time.”<sup>118</sup> The Forest Service’s entire analytical approach to the Prince of Wales Project is inconsistent with the fundamental principles of NEPA and contrary to almost 50 years of case law.

### UNLAWFUL CONDITION-BASED NFMA DECISION-MAKING

NFMA requires the Forest Service to meet multiple use objectives including to “provide for diversity of plants and animal communities, based on the suitability and capability” of each national forest.<sup>119</sup> The agency’s “duty to protect wildlife” imposes a “substantive limitation on timber production.”<sup>120</sup> Here, the Forest Service plans to approve the single largest logging project in more than a generation, but the agency fails to justify its balancing of logging and other multiple use objectives, under NFMA or the other substantive statutes governing timber sales,<sup>121</sup> based on the condition-based analysis.

The Forest Service regulations implementing NFMA’s requirement to provide for diversity require the agency to manage fish and wildlife habitat “to maintain viable populations of existing native and desired non-native vertebrate species in the planning area.”<sup>122</sup> The agency characterizes a viable population, for planning purposes, “as one which has the estimated

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<sup>115</sup> *Id.* at Abstract.

<sup>116</sup> *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989) (quoting 42 U.S.C. § 4321) (emphasis added).

<sup>117</sup> *Id.* (citation omitted).

<sup>118</sup> *Id.*

<sup>119</sup> 16 U.S.C. § 1604(g)(3)(B).

<sup>120</sup> *Seattle Audubon Soc. v. Moseley*, 798 F. Supp. 1484, 1489 (W.D. Wash. 1992), *aff’d sub nom.*, *Seattle Audubon Soc. v. Espy*, 998 F.2d 699 (9th Cir. 1993) (quoting Charles F. Wilkinson & H. Michael Anderson, *Land and Resource Planning in the National Forests*, 64 Or. L. Rev. 1, 296 (1985)).

<sup>121</sup> *See* 16 U.S.C. § 1604(e) (National Forest Management Act); *id.* § 529 (Multiple-Use Sustained-Yield Act); *id.* § 539d(a) (Tongass Timber Reform Act); *id.* § 3120(a)(3)(A) (Alaska National Interest Lands Conservation Act); *see also* *Natural Res. Def. Council*, 421 F.3d at 808-09 (explaining balancing of timber and other goals in the Tongass).

<sup>122</sup> 36 C.F.R. § 219.19 (2000).

numbers and distribution of reproductive individuals to insure its continued existence is well distributed in the planning area.”<sup>123</sup>

This means the Forest Service must “insure that viable populations will be maintained, habitat must be provided to support, at least, a minimum number of reproductive individuals and that habitat must be well distributed so that those individuals can interact with others in the planning area.”<sup>124</sup> And NFMA “requires planning for the entire biological community,”<sup>125</sup> rather than only select species.

The 2016 Amended Forest Plan incorporates these viability obligations: “Provide the abundance and distribution of habitat necessary to maintain viable populations of existing native and desirable non-native species well-distributed in the planning area (*i.e.*, the Tongass National Forest).”<sup>126</sup> It incorporates the Forest Service planning regulations and extends the “viable populations” mandate to “implementation . . . of forest plans,” such as through timber sales.<sup>127</sup> All “[r]esource plans, permits, contracts and other instruments for the use and occupancy of National Forest System lands” must be consistent with the applicable Forest Plan.<sup>128</sup> Accordingly, the agency adopts the obligation to “[m]aintain the abundance and distribution of habitat . . . to sustain viable populations” as one of the planning goals for the Project, “especially old-growth forests.”<sup>129</sup>

Here, the Forest Service’s condition-based approach to the Prince of Wales Logging Project renders the decision arbitrary and unlawful under NFMA and the other substantive statutes governing timber sale projects.<sup>130</sup> First, the agency violates standards established in the 2016 Amended Forest Plan to understand, disclose, and mitigate the adverse impacts of logging and roadbuilding. Second, the FEIS’s condition-based analysis fails to provide a rational basis for the agency’s conclusions regarding competing interests, rendering the decision arbitrary and capricious.

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Seattle Audubon Soc’y v. Moseley*, 798 F. Supp. 1473, 1483 (W.D. Wash. 1992), *aff’d sub nom.*, *Seattle Audubon Soc’y v. Espy*, 998 F.2d 699 (9th Cir. 1993).

<sup>126</sup> *See* 2016 Amended Forest Plan at 4-85.

<sup>127</sup> 36 C.F.R. § 219.27(a)(6) (1982); *see* 2016 Amended Forest Plan at 2-6.

<sup>128</sup> 16 U.S.C. § 1604(i).

<sup>129</sup> FEIS at 5.

<sup>130</sup> *See* DEIS Comment Letter at 14-27; *see also id.* at 27-49 (species specific-considerations).

I. THE FOREST SERVICE VIOLATES NFMA AND THE 2016 AMENDED FOREST PLAN.

The Forest Service violates NFMA when it acts contrary to a governing forest plan.<sup>131</sup> Standards established in forest plans “are binding limitations typically designed to prevent degradation of current resource conditions.”<sup>132</sup> Thus, “[a] site-specific project must comply with the standards set forth in the governing forest plan, and a project’s deviation from a standard requires amendment to the forest plan.”<sup>133</sup>

A. The Forest Service Violates Forest Plan Standards Requiring Site-Specific Timber and Road Resource Data, Including Unit Cards and Road Cards.

The 2016 Amended Forest Plan establishes standards that require the Forest Service to provide site-specific information regarding the Prince of Wales Logging Project to inform the agency’s environmental analysis prior to approval and prevent habitat degradation. As explained below, the agency violates those standards, rendering the Project unlawful under NFMA.<sup>134</sup>

The 2016 Amended Forest Plan defines a “standard” as follows:

A course of action or level of attainment required by the Forest Plan to promote achievement of goals and objectives.

A mandatory constraint on project and activity decision-making, established to help achieve or maintain the desired condition or conditions, to avoid or mitigate undesirable effects, or to meet applicable legal requirements. (36 CFR 219.12)[.]<sup>135</sup>

It explains that:

Standards in Chapters 3 and 4, which can usually be identified by words such as ‘must’ or ‘will,’ are *mandatory requirements or minimums that must be met*.

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<sup>131</sup> See 16 U.S.C. § 1604(i) (“Resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans.”).

<sup>132</sup> *All. for the Wild Rockies v. United States Forest Serv.*, 907 F.3d 1105, 1113 (9th Cir. 2018)

<sup>133</sup> *Id.*

<sup>134</sup> Alternatively, if one or more of these provisions is a guideline, then the agency acts arbitrarily in failing to provide the information prior to approving the Project. *Supra* pp. 31-32.

<sup>135</sup> 2016 Amended Forest Plan at 7-59.



Project-level analysis may determine that additional requirements beyond these minimums are necessary.<sup>136</sup>

“The Forest Service must strictly comply with a forest plan’s ‘standards,’ which are considered binding limitations . . . .”<sup>137</sup> To do otherwise, the agency violates NFMA.

With regard to logging, the 2016 Amended Forest Plan establishes standards that require the Forest Service to assess site-specific conditions, logging impacts, and mitigation and include that information in its NEPA analyses before it approves a project. For example, it states:

Timber harvest unit cards *will* document resource concerns and protection measures. The unit cards, including a map with relevant resource features, *will be provided electronically when Draft or Final NEPA documents and decisions are published.* (Consult Tongass National Forest Supplement 1909.15-2015-1.)<sup>138</sup>

It also requires the agency to provide other site-specific “timber resource information”, including “inventories, analysis of data, and input *for environmental analysis.*”<sup>139</sup> It requires the agency to provide information to “[d]etermine operability based on *site-specific project conditions.*”<sup>140</sup> The agency must evaluate “management prescriptions . . . within the project area in project design and *environmental analysis* for timber activities.”<sup>141</sup> It requires the agency to “[c]omplete all [silvicultural] prescriptions *before* project implementation where implementation is defined as . . . the Final Record of Decision . . . .”<sup>142</sup>

The Forest Service fails to provide any of the information required by these standards. The agency admits it will not even prepare unit cards until after it completes the NEPA process and a Final ROD authorizes the logging.<sup>143</sup> Thus, the agency has not: (1) assessed site-specific project conditions and impacts; (2) evaluated site-specific management prescriptions and silvicultural

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<sup>136</sup> 2016 Amended Forest Plan at 1-4 (emphasis added).

<sup>137</sup> *All. for the Wild Rockies v. United States Forest Serv.*, 907 F.3d 1105, 1110 (9th Cir. 2018); *see also id.* at 1113 (rejecting the Forest Service’s argument that its approach was “substantially similar” to the forest plan standard).

<sup>138</sup> 2016 Amended Forest Plan at 4-68 (TIM3.I.C) (emphasis added).

<sup>139</sup> *Id.* at 4-68 (TIM3.I.A) (emphasis added).

<sup>140</sup> *Id.* at 4-68 (TIM3.I.B) (emphasis added).

<sup>141</sup> *Id.* at 4-68 (TIM3.I.C) (emphasis added).

<sup>142</sup> *Id.* at 4-67 (TIM2.C) (emphasis added); *see also id.* at 4-49 (RIP2.C.1.) (“Logging engineers and aquatic specialists should conduct joint reviews of preliminary harvest unit designs to ensure that site-specific stream protection measures meet riparian objectives.”).

<sup>143</sup> FEIS, Appendix D at D-7-8.

prescriptions; and (3) used that information to inform the agency's environmental analysis and justify its substantive decision-making.

With regard to road construction and reconstruction, the 2016 Amended Forest Plan also establishes standards that inform the environmental review and the agency's decisions. For example, "[d]uring project planning, [the Forest Service must] identify *resource concerns and site-specific mitigation measures*."<sup>144</sup> The 2016 Amended Forest Plan lists specific habitats for which impacts must be minimized.<sup>145</sup> The agency is directed to "[c]learly document these mitigation measures" prior to approval "to facilitate project implementation and monitoring."<sup>146</sup> The agency must "[p]erform route or site selection, location, geotechnical investigations, survey, and design to a technical level sufficient to meet the intended use and commensurate with both ecological objectives and the investment to be incurred."<sup>147</sup> "When stream crossings are required to harvest timber," the agency must "assess the environmental effects of road crossings versus yarding corridors, and select the action of least environmental impact where practicable."<sup>148</sup> Once again, the Forest Service concedes it did not provide road cards with the DEIS or the FEIS and will not even prepare those cards until after it approves the Prince of Wales Logging Project.<sup>149</sup> The agency fails to evaluate site-specific concerns and mitigation measures of any particular road before the agency concludes the NEPA review and approves the ROD. The agency fails to assess the route and site selection, including the length and character, of any of the roads and fails to demonstrate how those individual decisions are commensurate with the ecological objectives and the investment for any given road approved by the Project. The agency fails to provide the specific road information that the 2016 Amended Forest Plan requires. In response to these concerns, the Forest Service does not dispute that the Prince of Wales Logging Project fails to adhere to the provisions of the 2016 Amended Forest Plan described in this section. Indeed, the agency's only defense is that "the Implementation Process specifically describes additional opportunities for public input and involvement" (after the NEPA review is concluded and the ROD is signed) and that "opportunity for input and feedback on the proposed activities . . . meets the intent of Forest Plan TIM3.I.C[.]"<sup>150</sup> As explained above, forest plan standards are binding limitations.

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<sup>144</sup> 2016 Amended Forest Plan at 4-77 (TRAN3.I.D).

<sup>145</sup> See *id.* at 4-78 (TRAN4.II.A.); *id.* at 4-79 (TRAN4.III.A.); *id.* at 4-91 (WILD1.XIV.A.3.A) ("No road construction is permitted within 600 feet of a [wolf] den unless site-specific analysis indicates that local landform or other factors will alleviate potential adverse disturbance.").

<sup>146</sup> *Id.* at 4-77 (TRAN3.I.D).

<sup>147</sup> *Id.* at 4-77 (TRAN4.I.A.).

<sup>148</sup> *Id.* at 4-51 (RIP.II.E.5).

<sup>149</sup> FEIS, Appendix D at D-7-8.

<sup>150</sup> FEIS, Appendix D at D-7 (emphasis added). The Response to Comments ignores the remaining concerns regarding unit cards, road cards, and site-specific logging and road-building information.

In short, the Forest Service violates NFMA by failing to comply with the 2016 Amended Forest Plan’s standards governing logging and road building. The Forest Service is required to provide unit and road cards and make other site-specific assessments and evaluations of timber resources, logging and road building impacts, and the necessary mitigation measures to inform the NEPA analysis and *prior* to project approval. The Forest Service fails to comply with these standards, rendering the decision unlawful under NFMA.

Alternatively, to the extent one or more of the provisions described in this section is a guideline rather than standard, then the Forest Service acts in an arbitrary and capricious manner in failing to comply and provide the information. Failing to provide this information is arbitrary because it violates longstanding agency guidance in the Forest Service Handbook for the Tongass: “Unit and road cards will be provided electronically *when Draft or Final NEPA documents and decisions are published.*”<sup>151</sup> The guidance continues: “*For Draft Environmental Impact Statements (DEIS’s) . . . completed unit and road shall be published on the project webpage . . . in bookmarked PDF format for review by other agencies or interested parties when the NEPA document is published.*”<sup>152</sup> Elsewhere it explains that road cards must be developed during the NEPA process to “[d]escribe or display site specific application of required resource protection measure . . . [d]emonstrate field knowledge pertaining to site specific Forest Plan standards and guidelines, [p]rovide a tracking tool for project implementation and monitoring, and [p]rovide road level information for the public and other agencies.”<sup>153</sup> In this case, the Forest Service provides none of this information and, in so doing, fails to assess the project-level impacts, necessary mitigation, and alternatives prior to authorizing the Project.

Additionally, the Forest Service also acts arbitrarily because it is departing from decades of consistent agency practice regarding Tongass management without a reasonable explanation. As the Forest Service explained in the Big Thorne FEIS: “Site-specific descriptions and resource considerations for each potential harvest unit are included as unit cards.”<sup>154</sup> The unit cards “describe site-specific concerns, and how these concerns would be mitigated or avoided in the design of each unit and road segment.”<sup>155</sup> Prior to this project, the Forest Service prepared site-specific analyses to inform the public and affected communities of the adverse impacts of

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<sup>151</sup> FSH 1909.15-2015-1, Environmental Policy and Procedures Handbook, Chapter 10 (Apr. 27, 2015), 13.1 (emphasis added).

<sup>152</sup> FSH 1909.15-2015-1, Environmental Policy and Procedures Handbook, Chapter 10 (April 27, 2015), 13.1 (emphasis added); *see also id.* at 13.2c (directing the Forest Service to “display unit-specific information necessary for project implementation on one unit card map representing the selected alternative or alternatives in a DEIS”).

<sup>153</sup> FSH 1909.15-2015-1, Environmental Policy and Procedures Handbook, Chapter 10 (Apr. 27, 2015), 13.3; *see also id.* at 13.3a, c-e.

<sup>154</sup> Big Thorne FEIS at S-2; *see also* Logjam FEIS at S-1, S-7 to S-8.

<sup>155</sup> *Id.* at S-9.

logging and road building before it approved projects.<sup>156</sup> For this additional reason, the Forest Service acts arbitrarily under NFMA because it provides none of that information to explain and justify its decision.

In sum, the 2016 Amended Forest Plan requires the Forest Service must conduct a site-specific assessment, analysis of impacts and mitigation measures relating to logging and road activities to inform the NEPA review and *before* it approves the Prince of Wales Logging Project. The agency is violating those provisions and, as a result, is violating NFMA. For the same reason, the Forest Service reaches arbitrary conclusions under the other statutes governing timber sale projects on the Tongass.

#### B. The Forest Service Fails to Provide Required Clearcutting Analyses.

The Forest Service also fails to comply with the 2016 Amended Forest Plan's standards governing the site-specific impacts analysis for clearcutting. In so doing, the agency violates NFMA.

Under NFMA, the Forest Service cannot approve clearcutting unless an interdisciplinary review of "impacts on each advertised sale area has been assessed, as well as the consistency of the sale with the multiple use of the general area."<sup>157</sup> The 2016 Amended Forest Plan implements this by requiring the Forest Service to assess site-specific considerations and impacts before it authorizes clearcutting in the Tongass,<sup>158</sup> including limitations on the size of clearcuts, openings, and leave strips.<sup>159</sup> For example "[w]here it is determined by an environmental analysis that exceptions to the size limit are warranted, the actual size of openings may be up to 200 acres."<sup>160</sup> Similarly, the "[l]eave strips between openings must be of sufficient size and composition to be managed as a separate stand."<sup>161</sup> Elsewhere, the 2016 Amended Forest Plan requires the agency to "[s]elect a silvicultural system that meets the resource and vegetation management objectives of the area, including objectives for biological diversity, long-term site productivity, scenic integrity, and forest health."<sup>162</sup>

These considerations depend upon a site-specific analysis that the Forest Service fails to do in this case. Instead the agency simply asserts the logging will require clearcutting and states "[a]ll

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<sup>156</sup> See, e.g., Big Thorne DEIS, Vol. III (Unit Cards 1-120), IV (Unit Cards 121-476), V (Unit Cards 500-582), VI (Road Cards); Big Thorne FEIS, Appendix C; Logjam DEIS, Appendix B (Unit Cards); Logjam DEIS, Appendix C (Road Cards); Logjam FEIS, Appendix C.

<sup>157</sup> 16 U.S.C. § 1604(g)(3)(F).

<sup>158</sup> 2016 Amended Forest Plan at 4-68 (TIM4.II).

<sup>159</sup> *Id.* at 4-68 (TIM4.III).

<sup>160</sup> *Id.* at 4-68 (TIM4.III.C).

<sup>161</sup> *Id.* at 4-68 (TIM4.III.F).

<sup>162</sup> *Id.* at 4-67 (TIM2.I.I).

alternatives include the clearcut harvest of old-growth acres.”<sup>163</sup> Even if the Activity Cards recognize there could be some restrictions on clearcutting and the Implementation Plan contemplates further public input on site-specific factors as logging is proposed,<sup>164</sup> the Forest Service violates the forest plan provisions requiring the agency to provide the site-specific analysis before it approves the Project.

The 2016 Amended Forest Plan requires the Forest Service to assess the site-specific impacts during the environmental analysis and describe how it made particular silvicultural determinations based on the specific assessment in a given area. Here, the agency reaches only generic conclusions that cover the entire 2.3 million acre project area, rather than basing decisions and prescriptions on the site-specific analysis required by the 2016 Amended Forest Plan. For this reason, the agency violates NFMA and acts arbitrarily under the other statutes governing timber sale projects on the Tongass.

## II. THE FOREST SERVICE’S CONDITION-BASED ANALYSIS RENDERS ITS DECISION-MAKING ARBITRARY UNDER NFMA AND THE OTHER LAWS GOVERNING TIMBER SALES.

As explained above, NFMA and the other statutes under which the Forest Service operates when the agency evaluates a timber sale project require the agency to balance logging objectives with other forest values such as wildlife, recreation, and subsistence.<sup>165</sup> Here, the Forest Service acts arbitrarily because the agency fails to explain when, where, and how the logging and road building authorized by the Project will occur and how the agency balances competing uses and interests in those locations and at a given time. Stated more directly, the agency fails to balance the adverse impacts caused by logging or road building in any particular location at any given time, rendering the conclusions regarding the balance of impacts and values arbitrary.

The Forest Supervisor appears to have attempted a balancing here, basing his decision to proceed with the Prince of Wales Logging Project on “tradeoffs between resource effects and benefits,”<sup>166</sup> and finding that “the Selected Alternative best addresses the issues and concerns raised because it incorporates a wide range of activities and mitigation measures to address the Purpose and Need of the project.”<sup>167</sup> He acknowledged the “effects of this project on resources,

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<sup>163</sup> FEIS at 97. The agency also identifies clearcutting as a method in its Activity Cards, and advises that NFMA and the Forest Plan place some restrictions on how clearcutting can be implemented, but it does not purport to make any findings about clearcutting any particular site here either. *Id.*, Appendix A at 23, 28, 70.

<sup>164</sup> *Id.*, Appendix A at A-23, A-28, A-70; *id.*, Appendix D at D-31.

<sup>165</sup> See 16 U.S.C. § 1604(e) (National Forest Management Act); *id.* § 529 (Multiple-Use Sustained-Yield Act); *id.* § 539d(a) (Tongass Timber Reform Act); *id.* § 3120(a)(3)(A) (Alaska National Interest Lands Conservation Act); see also *Natural Res. Def. Council*, 421 F.3d at 808-09 (explaining balancing of timber and other goals in the Tongass).

<sup>166</sup> Draft ROD at 6.

<sup>167</sup> *Id.* at 7.

including soils, wetlands, watersheds, fisheries, timber, wildlife, scenery, recreation; rare, sensitive, and invasive plants; climate change, and heritage”<sup>168</sup> and the fact that the “direct, indirect, and cumulative effects associated with the project may present a significant possibility of a significant restriction of subsistence use of deer.”<sup>169</sup> But his balancing was not based on the kind of site and temporally-specific information about impacts and alternatives that must underlie those choices.

The Administrative Procedure Act (APA) requires that “the agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”<sup>170</sup> A decision is arbitrary if the agency “entirely failed to consider an important aspect of the problem” or “offered an explanation for its decision that runs counter to the evidence before the agency.”<sup>171</sup> Similarly, an action may be arbitrary if the record does not support the agency’s reasoning.<sup>172</sup>

For the reasons described above and in the subsistence and wildlife sections that follow,<sup>173</sup> the Forest Service’s failure to conduct a spatially and temporally specific analysis means the agency’s conclusions lack a rational connection regarding the impacts and tradeoffs of the Prince of Wales Logging Project. The agency’s decision-making also ignores important aspects of the Project (*e.g.*, site-specific impacts, alternatives, etc.), fails to provide a rational connection between the facts found and the decision to proceed, and offers an explanation that runs contrary to the evidence. As such, the Forest Service’s decision to approve the Prince of Wales Logging Project based on the “condition-based analysis” is arbitrary and unlawful under NFMA and the other statutes governing timber sale projects.

## SUBSISTENCE

The Forest Service offers little more than bare conclusions regarding the Prince of Wales Logging Project’s impacts on subsistence users over the next 15 years.<sup>174</sup> The agency cannot explain why particular adverse impacts on subsistence users are necessary because it has not even identified the adversely affected users, particular locations, or the reasonable steps the agency will take to minimize adverse impacts. The agency’s meager analysis fails to provide the required ANILCA findings or NFMA justification and violates the 2016 Amended Forest Plan.

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<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 8.

<sup>170</sup> *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

<sup>171</sup> *Id.* at 43.

<sup>172</sup> *See, e.g., Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1201-03 (9th Cir. 2008); *Pac. Coast Fed’n of Fishermen’s Ass’ns v. NMFS*, 265 F.3d 1028, 1037-38 (9th Cir. 2001).

<sup>173</sup> *Supra* pp. 4-26; *infra* pp. 34-73.

<sup>174</sup> *See* DEIS Comment Letter at 23, 40-42.

The 2016 Amended Forest Plan asserts an objective, in accordance with the Alaska National Interest Lands Conservation Act (ANILCA) Section 810, to “[c]ontribute to the habitat capability of fish and wildlife resources to support sustainable human subsistence and recreational uses.”<sup>175</sup> Furthermore, it requires:

[T]he Forest Service shall:

In determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of NFS lands, evaluate the effect of such use, occupancy, or disposition on subsistence uses and needs, the availability of other lands, and other alternatives that would reduce or eliminate the use, occupancy, or disposition of NFS lands needed for subsistence purposes.<sup>176</sup>

If an agency determines its action has a significant possibility of restricting subsistence use, then it must make the following findings: (1) the “restriction is necessary, consistent with sound management principles for the utilization of public lands,” (2) the activity affects “the minimum amount of public lands necessary to accomplish the purposes of the use,” and (3) “reasonable steps will be taken to minimize adverse impacts on subsistence uses and resources resulting from such actions.”<sup>177</sup>

To advance ANILCA’s purpose, the 2016 Amended Forest Plan contains specific provisions requiring the Forest Service to account for, and protect, subsistence use needs. For example, when “assess[ing] habitat improvement project opportunities and priorities,” the agency must do so based on consideration of “meet[ing] subsistence use needs.”<sup>178</sup> Elsewhere, the 2016 Amended Forest Plan requires the agency to avoid siting log transfer facilities in areas of established subsistence fishing activity (among many others)<sup>179</sup> and specifically requires the agency to “seek opportunities to provide for subsistence users (*e.g.*, anchorages and shelters),” explaining “[s]uch access and facility opportunities should be identified and planned with local subsistence users.”<sup>180</sup> The 2016 Amended Forest Plan requires the Forest Service to consider the particular needs of specific subsistence users and the agency fails to do so in this case, because it fails to explain where and when it plans to conduct logging and road building activities.

Here, the Forest Service acknowledges that implementation of the Prince of Wales Logging Project may significantly affect subsistence users. In the Draft ROD, the Forest Supervisor explains the “direct, indirect, and cumulative effects associated with the project may present a

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<sup>175</sup> 2016 Amended Forest Plan at 3-58.

<sup>176</sup> *Id.* at 4-65.

<sup>177</sup> 16 U.S.C. § 3120(a)(3).

<sup>178</sup> 2016 Amended Forest Plan at 4-86 (WILD1.III.A.1.b).

<sup>179</sup> *Id.* at 4-81 (TRAN4.V.C.3).

<sup>180</sup> *Id.* at 4-66 (SUB.I.L.)

significant possibility of a significant restriction of subsistence use of deer.”<sup>181</sup> The FEIS explains the Project’s “direct and indirect effects may result in a significant possibility of a significant restriction for subsistence uses of deer in some of the project area wildlife analysis areas (WAA).”<sup>182</sup> For example, it admits that the selected alternative “would likely result in the greatest negative effect to deer habitat in that it harvests the most acres of old growth,” but only suggests that impacts “could be reduced somewhat” through management—without providing any discussion of where or how it plans to do so.<sup>183</sup> The FEIS also states that increased road access can have negative consequences, depending on the community,<sup>184</sup> but of course, the agency fails to analyze those impacts because it has not determined where logging and road building will occur and, as a result, which communities would be affected and what negative consequences any particular community will experience.

As Donald Hernandez, a long-time resident of Point Baker and 15-year member of the Southeast Regional Subsistence Advisory Council, describes, the Forest Service’s condition-based analysis provides subsistence users with little meaningful information.<sup>185</sup> Mr. Hernandez attended and testified at the subsistence hearing held in Point Baker for the Project and explains:

I do not believe that local residents were given adequate information prior to that hearing about the implement of proposed projects, specifically timber harvest that they needed to give meaningful comments on how those activities would affect their subsistence uses. At the time of the hearing the only information available to us was what lands could potentially be suitable for timber harvest. Without more precise information on where logging units would occur it is impossible for hunter to convey how they will be affected by that logging activity. If you the decision maker is not getting worthwhile information on how subsistence uses are going to be affected by projects which will be implemented under [the Prince of Wales Logging Project], then you are making an uninformed decision.<sup>186</sup>

The Forest Service’s lack of meaningful analysis of impacts on subsistence users is all the more troubling in light of the recent declines in hunting opportunities and increased competition. On August 16, 2018, the Federal Subsistence Board took an “emergency special action [to] restrict[] the harvest limit of deer by non-Federally qualified users to up to two male deer on Federal

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<sup>181</sup> Draft ROD at 8.

<sup>182</sup> FEIS at v, vi (also identifying possible significant effects from cumulative impacts).

<sup>183</sup> *Id.* at 95, 99.

<sup>184</sup> *Id.* at 91.

<sup>185</sup> D. Hernandez letter to Tongass Forest Supervisor Earl Stewart.

<sup>186</sup> *Id.*



Public lands in Unit 2.”<sup>187</sup> The Forest Service’s District Ranger “t[ook] this action based on extensive public testimony and traditional ecological knowledge provided to the Federal Subsistence Board, showing subsistence needs for deer were not being met.”<sup>188</sup> This follows the earlier disclosures at the Southeast Alaska Subsistence Resource Advisory Committee’s winter 2017 meeting in Craig, when subsistence users described having a harder time harvesting deer during the 2016 season and characterized the 2017 deer season as the worst in recent memory for many hunters on Prince of Wales Island.<sup>189</sup> The Forest Service errs in failing to account for the Project’s impacts on subsistence users, recreational hunters, as well as the economic opportunities associated with guide businesses and services.

For all of these reasons, the Forest Service’s entire approach to the Prince of Wales Logging Project deprives subsistence users of the opportunity for meaningful information and input, making it impossible to understand the adverse impacts on specific subsistence users and locations. In so doing, the agency reaches arbitrary conclusions under ANILCA, NFMA, and the other statutes governing timber sale projects. The agency also violates NEPA because the FEIS presents misleading and incomplete information regarding the Project’s adverse impacts on subsistence users and resources.

## WILDLIFE

The Forest Service based the 2016 Amended Forest Plan on the peer-reviewed science adopted in the 1997 and 2008 Forest Plans, which has served as the agency’s wildlife conservation strategy for more than two decades.<sup>190</sup> This wildlife conservation strategy has two basic components: (1) a forest-wide old-growth reserve system and (2) management of the important habitat in those lands where logging might occur (the matrix or matrix lands).<sup>191</sup>

The reserve system protects “old-growth forest by retaining blocks of intact, largely undisturbed habitat.”<sup>192</sup> In the matrix, old-growth forest is “maintained by standards and guidelines to protect important areas and provide old-growth forest habitat connectivity.”<sup>193</sup> Thus, the “standards and guidelines regulate how development will occur” in the matrix lands and “incorporate a species-by-species approach that addresses issues that are more localized or not accounted for in the

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<sup>187</sup> Federal Subsistence Board, Harvest Limit for Non-Federally Qualified Users Reduced to Two Male Deer in Unit 2 at PDF 1 (Aug. 16, 2018).

<sup>188</sup> *Id.* at PDF 2.

<sup>189</sup> See generally Alaska Rainforest Defenders Scoping Comments on the Prince of Wales Landscape Level Analysis Project 19-23 (Aug. 2017); Alaska Rainforest Defenders Scoping Comments on the Prince of Wales Landscape Level Analysis Project 12-13, 15-16, 31 (Dec. 2017).

<sup>190</sup> 1997 ROD at 1; 2008 ROD at 1.

<sup>191</sup> See 2008 ROD at 15-16; 2008 FEIS at 3-174-75; 2016 ROD at 21-22; 2016 FEIS at 3-200-01.

<sup>192</sup> 2008 FEIS at 3-174.

<sup>193</sup> *Id.* at 3-175.

broad, ecosystem context approach that was incorporated into the old-growth reserve system.”<sup>194</sup> The Forest Service adopted the matrix approach “to provide a sufficient amount and distribution of habitat to maintain viable populations of old-growth associated species after 100 years of Plan implementation.”<sup>195</sup> Thus the conservation strategy, now reflected in the 2016 Amended Forest Plan, has served as the foundation of the Forest Service’s management of the Tongass since the adoption of the 1997 Forest Plan and matrix management, including site and species specific considerations, and it has been essential to the agency meeting NFMA’s obligations since that time.

As explained below, the Forest Service is acting in an arbitrary and unlawful manner with regard to the Prince of Wales Logging Project’s impacts on wildlife.<sup>196</sup> The Forest Service has not demonstrated that it has “use[d] all the scientific data currently available”<sup>197</sup> to meet its stringent obligation to “ensure” that its forest plans and timber sales authorized pursuant to those plans maintain viable wildlife populations.<sup>198</sup> The agency is ignoring contemporary science, disregarding conflicting expert opinion, relying on arbitrary habitat thresholds, and basing decision on viability analyses from more than 20 years ago.

#### I. THE 2016 AMENDED FOREST PLAN AND 2016 FEIS ARE UNLAWFUL AND ARBITRARY.

As the undersigned groups previously explained, the 2016 Amended Forest Plan violates NFMA because it fails to comply with the diversity obligations and ensure the continued presence of well-distributed, viable wildlife populations in the Tongass.<sup>199</sup> The Forest Service also acted arbitrarily based on the record before the agency, including contrary expert opinions.<sup>200</sup> The 2016 FEIS, moreover, violates NEPA because it fails to take a hard look at the effects of the

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<sup>194</sup> 2008 ROD at 16.

<sup>195</sup> 1997 FEIS, Appendix N at N-30.

<sup>196</sup> See DEIS Comment Letter at 9-49.

<sup>197</sup> *Inland Empire Pub. Lands Council v. U.S. Forest Serv.*, 88 F.3d 754, 762 (9th Cir. 1996).

<sup>198</sup> See *Idaho Sporting Congress v. Rittenhouse*, 305 F.3d 957, 961 (9th Cir. 2002) (“In providing for multiple uses, the forest plan must comply with the substantive requirements of [NFMA] designed to ensure . . . the continued viability of wildlife in the forest . . .” (citing 16 U.S.C. § 1604(g)(3)(B); 36 C.F.R. § 219.19 (1999))).

<sup>199</sup> See SEACC Forest Plan Objection at 73-128; ARD Forest Plan Objection at 95-194.

<sup>200</sup> See, e.g., W. Smith, Comments on the Wildlife Conservation Strategy as represented in the Proposed Land and Resource Management Plan (Feb. 2016); W. Smith, Proposed Forest Plan Amendment Further Compromises Established Conservation Measures to Sustain Viable Northern Goshawk Populations (Feb. 2016); W. Smith, Proposed Forest Plan Amendment Further Compromises Established Conservation Measures to Sustain Viable Populations of Endemic Small Mammals (Feb. 2016); J. Schoen, Comments on the Tongass Land Management Plan Amendment and Draft EIS (Feb. 2016).

2016 Amended Forest Plan on wolves, fails to respond to opposing viewpoints, and fails to identify missing information necessary to a reasoned choice among alternatives.<sup>201</sup>

The Forest Service is implementing the Prince of Wales Logging Project pursuant to the 2016 Amended Forest Plan and, therefore, plan-level infirmities plague the agency's project-specific implementation. For these reasons, both the 2016 Amended Forest Plan and the Prince of Wales Logging Project are unlawful.

## II. THE FOREST SERVICE'S ANALYSIS AND CONCLUSIONS REGARDING WILDLIFE ARE ARBITRARY AND UNLAWFUL.

The Forest Service's approach to the Prince of Wales Logging Project unlawfully departs from the 2016 Amended Forest Plan's provisions governing matrix management. And even if the agency could depart from this decades-long foundation (which it cannot in this case) and rely instead on the habitat threshold concept, the Forest Service acts arbitrarily given the record before the agency and the agency failure to examine spatial and temporal relationships of the various logging and roadbuilding efforts and their resulting impacts on individual species. As a result, the Forest Service acts in an unlawful and arbitrary fashion.

### A. The Forest Service's Failure to Comply With the 2016 Amended Forest Plan's Standards and Guidelines Governing Matrix Management is Unlawful.

The 2016 Amended Forest Plan establishes standards and guidelines governing wildlife, but the agency fails to comply with those provisions in this case. In so doing, the agency acts arbitrarily and unlawfully under NFMA (and unlawfully under NEPA given the information is reflected the FEIS).

First, with regard to the loss of wolf habitat, the Forest Service fails to reach any conclusions regarding the Prince of Wales Logging Project's compliance with the 2016 Amended Forest Plan's prescriptions governing wolves.<sup>202</sup> With regard to habitat loss, the agency fails to explain how many wolf packs are in the 2.3 million acre project area and whether sufficient habitat will remain after implementation to "maintain sustainable wolf populations."<sup>203</sup> The Forest Service also fails to obtain local knowledge of habitat conditions and spatial habitat location,<sup>204</sup> instead of relying solely on model outputs.<sup>205</sup> This leads the agency to a generic conclusion regarding the loss of habitat: "Timber harvest with removal of [productive old-growth], and the associated fragmentation and road building which increases access, could affect the local distribution and abundance of . . . wolves."<sup>206</sup>

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<sup>201</sup> See SEACC Forest Plan Objection at 8-19, 26-30.

<sup>202</sup> See 2016 Amended Forest Plan at 4-91 (WILD1.XIV).

<sup>203</sup> *Id.* at 4-91 (WILD1.XIV.A.2).

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> FEIS at 86.

Here, the Forest Service never explains whether the wolf populations on Prince of Wales Island and the surrounding areas will be unsustainable after the Prince of Wales Logging Project, as the 2016 Amended Forest Plan requires. In the Big Thorne FEIS, for example, the agency concluded:

Thus, although portions of the larger landscape surrounding the Big Thorne project area would continue to provide sufficient deer habitat to maintain a sustainable wolf population, there remain substantial areas (including the project area WAAs) with lower quality habitat that, on their own, would not be able to support a local population (i.e., population sinks). In these areas, local population persistence would continue to rely on dispersal of wolves from surrounding areas (source populations).<sup>207</sup>

In this case, the agency simply concludes, “there would be some reduction in the ability of project area [wildlife analysis areas] to maintain a sustainable wolf population, based on deer habitat capability alone.”<sup>208</sup> This conclusion fails to comply with the forest plan requirement to explain whether the wolf populations will be sustainable. It is also arbitrary given the Forest Service already concluded that significant portions of the Project area were unable to support sustainable wolf populations even before the agency approves the Prince of Wales Logging Project.

The Forest Service also fails to analyze the loss of deer habitat capability in a manner consistent with the 2016 Amended Forest Plan and the agency’s past practices. The FEIS admits the agency fails to analyze changes in deer habitat in the manner prescribed by the 2016 Amended Forest plan because the agency is using a condition-based analysis: “Due to lack of site specificity, we used literature habitat thresholds and estimated deer habitat capability to describe effects to deer habitat (winter and summer) at the WAA and GMU 2 scale.”<sup>209</sup> The lack of site-specific information also means the Forest Service also fails to assess the loss of deer habitat capability at varying geographic scales (*e.g.*, wildlife analysis areas, Prince of Wales Island, and the North Central Prince of Wales biogeographic province) and the resulting impacts on wolves and deer, as it has done for past timber sale projects.<sup>210</sup>

Here, as explained in detail below,<sup>211</sup> the FEIS provides only generic statements about deer habitat capability and logging and relies on arbitrary habitat thresholds. For example:

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<sup>207</sup> Big Thorne FEIS at 3-181.

<sup>208</sup> FEIS at 235.

<sup>209</sup> FEIS, Appendix D at D-51.

<sup>210</sup> *Compare* FEIS at 170 *with* Big Thorne FEIS at 3-96 *and* Big Thorne ROD at 28; *see also* PR 736\_0419 at 36-37, 116-141 (Big Thorne Wildlife and Subsistence Report) (describing impacts to deer, deer habitat capability, and wolves); *id.* at 81-93 (describing impacts to corridors)).

<sup>211</sup> *Infra* pp. 66-71.

In the first 20 to 30 years following timber harvest, deer habitat capability tends to increase due to more available forage. However, after this timeframe, populations tend to decline due to forage availability as the canopy in even-aged managed stands closes, resulting in lower habitat quality (less forage).<sup>212</sup>

Elsewhere the FEIS lumps all of the action alternatives into one section of a table on impacts to subsistence related to effects to deer habitat and states: “The Forest Plan estimates that some WAAs in the project area may retain 50 percent or less of the estimated deer habitat capability; WAAs 1420 and 1422.”<sup>213</sup> The FEIS later concludes effects to wolves from reductions in deer habitat capability would occur under all alternatives, and would be similar under all action alternatives. In so doing, the FEIS fails analyze the impacts the Prince of Wales Logging Project will have on wolves, deer, and human hunters in the manner prescribed in the 2016 Amended Forest Plan.

Second, with regard to increased access and wolf mortality, the Forest Service also fails to comply with the 2016 Amended Forest Plan’s requirement to “*implement* a Wolf Habitat Management Program.”<sup>214</sup> The agency not only refuses to implement the Wolf Habitat Management Plan,<sup>215</sup> but then fails to examine the impacts of that decision at either the island level (*i.e.*, whether the wolf populations on Prince of Wales will be sustainable) or the Tongass as a whole (*i.e.*, whether wolves will be well-distributed and viable). The FEIS concludes “about 89 percent of the project area WAAs have some level of wolf mortality concern” related to road density.<sup>216</sup> The Forest Service acknowledges that increased road density negatively affects wolves,<sup>217</sup> but fails to explain whether and how it decides it is acceptable to pursue logging and roadbuilding in a specific location in light of those concerns. The agency, for example, does not examine connectivity concerns between wolf pack locations or travel corridors, or state whether it will maintain the 1200 and 600-foot road buffers around wolf dens or disclose the adverse impacts that will result if those buffers are not maintained.<sup>218</sup>

Third, the Forest Service fails to comply with the 2016 Amended Forest Plan’s provisions governing other endemic terrestrial mammals. The agency is required to “[a]ssess the impacts of the proposed project relative to the distinctiveness of the taxa, the population status, degree of isolation, island size, and habitat associations.”<sup>219</sup> The FEIS fails to conduct any of this analysis

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<sup>212</sup> FEIS at 3-91.

<sup>213</sup> *Id.* at 2-40.

<sup>214</sup> 2016 Amended Forest Plan at 4-91 (XIV.A.1) (emphasis added).

<sup>215</sup> Draft ROD at 10-12.

<sup>216</sup> FEIS at 235.

<sup>217</sup> FEIS at 228.

<sup>218</sup> 2016 Amended Forest Plan at 4-91 (WILD1.XIV.A.3).

<sup>219</sup> *Id.* at 4-93 (WILD1.XIX).

with regard to the Prince of Wales Logging Project and the endemic species found on Prince of Wales Island and the smaller surrounding islands.

The Forest Service also fails to comply the 2016 Amended Forest Plan's requirement that "[w]here distinct taxa are located" the agency must "design projects to provide for their long-term persistence on the island."<sup>220</sup> The agency fails to explain how or whether it is designing the logging and road-building activities authorized by the Project to provide for the "long-term persistence" of the endemic species on these islands.

Finally, the 2016 Amended Forest Plan states: "If existing information is lacking, surveys for endemic mammals maybe be necessary prior to any project that proposes to substantially alter vegetative cover (*e.g.*, road construction, timber harvest, etc.)."<sup>221</sup> Those "[s]urveys should emphasize . . . medium sized (ermine and squirrels) endemic mammals with limited dispersal capabilities . . . ."<sup>222</sup> Here, the FEIS concludes, "[c]urrently there is an incomplete understanding of the ermine distribution and habitat needs."<sup>223</sup> Elsewhere the Forest Service explains that ermine and flying squirrels both have "limited dispersal capabilities."<sup>224</sup> Yet, the Forest Service fails to comply with the 2016 Amended Forest Plan's provisions to conduct population surveys for endemic mammals to assess project-level impacts.

For these reasons, the Forest Service is proceeding unlawfully under NFMA and the 2016 Amended Forest Plan. And because it presents this misleading and incomplete information in the FEIS, the agency violates NEPA.

B. The Forest Service's Reliance on Arbitrary Habitat Thresholds is Unsupported, Contrary to the Record, and Unlawful.

For the first time ever, the Forest Service bases a project-specific analysis of wildlife impacts on generic habitat thresholds (*e.g.*, percent of habitat remaining after implementation) that relate to species "persistence."<sup>225</sup> In the more than 20 years since the Forest Service adopted the 1997 Forest Plan, the agency has never handled a wildlife impact analysis in this manner and ignores expert criticism faulting the agency's reliance on habitat thresholds in this instance. In so doing, the agency ignores an important aspect of the problem, contradicts the evidence before the agency, and fails to provide a rational justification for the agency's conclusions regarding the Prince of Wales Logging Project.

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<sup>220</sup> *Id.* at 4-93 (WILD1.XIV.A.3).

<sup>221</sup> *Id.* at 4-91 (WILD1.XIV.A.2).

<sup>222</sup> *Id.* at 4-91 (WILD1.XIV.A.1.c).

<sup>223</sup> FEIS at 180.

<sup>224</sup> *Id.*; *see also id.* at 182, 197, 200.

<sup>225</sup> Draft ROD at 10.

The DEIS based the agency's entire impacts on analysis on the conclusion that a bird or wildlife population will "persist" after the Prince of Wales Project based on whether 20-50 percent of any given type of habitat will remain.<sup>226</sup> The DEIS explained that:

The likelihood of a population persisting over time has been suggested to be related to some threshold level of habitat loss on the landscape (Fahrig 1997, 1999, 2003; Flather *et al.* 2002; Andren 1994). After reaching this threshold, the rate of population decline, and thus the likelihood of extinction, may increase (Haufler 2007). Reported threshold levels (percentage of habitat maintained or remaining on the landscape) range from 20 percent (Fahrig 1997) to 50 percent (Soule and Sanjayan 1998), depending in part on the dispersal capability of the species under consideration.<sup>227</sup>

During the comment period, experts and groups alike pointed out the flaws with the Forest Service's position.<sup>228</sup> In Soule and Sanjayan (1998), for example, the authors addressed whether 50 percent of habitat worldwide would conserve *global* biodiversity and Fahrig (1997) acknowledged that the simulation model was just a simple algorithm based on assumptions, rather than a specific understanding of species habitat needs.

Despite these concerns, the FEIS still relies exclusively on habitat thresholds for its impacts analysis. The FEIS deletes the paragraph identified above and all of the assertions citing Soule and Sanjayan (1998) and Fahrig (1997), but continues to rely on the thresholds of 20 and 50 percent.<sup>229</sup> Elsewhere the agency admits it lacks habitat thresholds for several Tongass and in other cases appears to select threshold research randomly from other parts of the world and from different applications, including Brazil,<sup>230</sup> urban planning,<sup>231</sup> and the Atlantic Forest in South America.<sup>232</sup> Indeed most of the time, the FEIS admits the agency has no habitat thresholds, but the agency proceeds ahead undaunted. For example:

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<sup>226</sup> See, e.g., DEIS at 165 (describing impacts on deer and marten persistence given remaining thresholds of average snow habitat), 197 (describing "minor" to "moderate" effects on wolves).

<sup>227</sup> DEIS at 157-58.

<sup>228</sup> See, e.g., DEIS Comment Letter at 18-20; W. P. Smith, Prince of Wales Landscape Level Analysis Project – Comments (June 11, 2018) (Smith Prince of Wales Comments) at 2 (Jun. 11, 2018).

<sup>229</sup> See, e.g., DEIS at viii.

<sup>230</sup> See FEIS at 179 ("The Estavillo *et al.* (2013) study in Brazil proposed a threshold amount in small mammals was 30 percent of remaining forest.").

<sup>231</sup> See *id.*, at 210 ("Blewett and Marzluff (2005) suggested that urban planners in the Pacific Northwest design developments have 27 percent to 60 percent.").

<sup>232</sup> See *id.* ("Martensen *et al.* 2012 indicated a threshold of between 30 percent and 50 percent for understory birds in Atlantic Forest.").

- “No literary habitat thresholds have been identified for deer; 50 percent was used in this analysis.”<sup>233</sup>
- “While no habitat thresholds have been identified for shrews . . . the 30 percent defined for chipmunks was used.”<sup>234</sup>
- “No thresholds were determined for ermine.”<sup>235</sup>

In still other examples, the agency’s planning record provides no support for the adopted thresholds. With regard to bears, for example, the FEIS states “[r]esearch by Mikusinski and Angelstram [*sic*] (2000) indicated a habitat threshold for bears (brown) of about 50 percent habitat remaining.”<sup>236</sup> Elsewhere, the FEIS states: “WAAs with more than 20 percent HPOG habitat should be capable of providing habitat for the Prince of Wales flying squirrel (Mikusinski and Angelstram [*sic*] 2000) and spruce grouse (Angelstam 2001).”<sup>237</sup> The FEIS also explains: “The levels of tolerance to habitat change determined by research of 30 (Heinen 1998 and Estavillo et al. 2013) and 50 percent (Mikusinski and Angelstram [*sic*] 2000) of the original habitat remaining are dependent in part on the dispersal capabilities of the species associated with that habitat type.”<sup>238</sup> With the exception of Estavillo 2013,<sup>239</sup> none of this information is included in the planning record, making it impossible for the public to understand the agency’s analysis. With no record support, the bare assertions are meaningless.

The fact is that prior to the Prince of Wales Logging Project, the Forest Service has consistently recognized that it must examine the quantity, quality, distribution, and connectivity of habitat when evaluating adverse impacts on species and reaching conclusions regarding wildlife viability.<sup>240</sup> In 1997, the Forest Service did not rely on generic habitat thresholds to support its

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<sup>233</sup> *Id.* at 183; *see also id.* at 177 (“No habitat thresholds have been determined for deer.”).

<sup>234</sup> *Id.* at 179.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 201.

<sup>238</sup> *Id.* at 180.

<sup>239</sup> The agency also acts arbitrarily in relying on Estavillo 2013, given the authors explained explicitly the research addressed overall biodiversity not species-level impacts. *See, e.g.*, PR 833\_2147 at 8 (“It is important to note, however, that the spatial scale at which such thresholds are observed should depend on the group of organisms under consideration.”); *id.* (“our landscape-scale sampling design . . . allowed us to demonstrate the potential for biodiversity thresholds”).

<sup>240</sup> In the past, the agency has referenced thresholds only briefly with regard to generalized concepts of biodiversity, habitat connectivity, and fragmentation and even then, the agency admitted: “No specific threshold has been determined for the Tongass.” 2008 Forest Plan FEIS at 3-289.



conclusions regarding wildlife impacts, including its viability conclusions.<sup>241</sup> And in 2008 and 2016, consistent with the original effort, the Forest Service also did not rely on habitat thresholds.<sup>242</sup> As the agency explained in the 2008 Forest Plan FEIS:

Patches of old-growth forest sometimes serve as the only habitat in a landscape for . . . small-bodied animals, all of which contribute to the biodiversity and productivity of the forest ecosystem. These patches may be critical for species that are locally endemic, occur only in very specific conditions of forest structure or soil, or have limited dispersal capabilities. These issues are typically assessed in detail during project-level analysis.<sup>243</sup>

Based on this understanding, the 2016 Amended Forest Plan requires the agency to “[d]esign projects to maintain landscape connectivity”<sup>244</sup> and “[d]uring the environmental analysis for [logging] projects” to evaluate whether there is “sufficient productive old-growth forest connectivity.”<sup>245</sup> As the Forest Service explained in the 2016 Amended Forest Plan FEIS, this is especially true on Prince of Wales Island:

As development continues through timber harvest and associated activities such as road building, and community expansion, particularly in areas where extensive development has already occurred (i.e., Prince of Wales Island), maintaining connectivity and roadless refugia will become increasingly important, particularly for wide-ranging species whose distribution depends on some level of connectivity across the landscape.<sup>246</sup>

And for all of these reasons, the Forest Service did not rely on habitat thresholds when it assessed impacts to birds and wildlife relating to the Big Thorne and Logjam timber sale projects.<sup>247</sup>

As explained in detail below, the Forest Service also ignores expert criticism regarding the agency’s use of the arbitrary habitat thresholds to assess project impacts and reach conclusions

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<sup>241</sup> See 1997 Forest Plan FEIS, Chapter 3; *id.*, Appendix N; 1997 Forest Plan ROD; 1997 Forest Plan.

<sup>242</sup> See 2008 Forest Plan FEIS, Chapter 3; 2008 Forest Plan FEIS, Appendix D; 2008 Forest Plan ROD; 2008 Forest Plan; 2016 Amended Forest Plan FEIS, Chapter 3; 2016 Amended Forest Plan ROD; 2016 Amended Forest Plan.

<sup>243</sup> 2008 Forest Plan FEIS at 3-168.

<sup>244</sup> 2016 Amended Forest Plan at 4-87 (WILD.VI.A.).

<sup>245</sup> 2016 Amended Forest Plan at 4-87 (WILD.VI.A.2).

<sup>246</sup> 2016 Amended Forest Plan FEIS at 3-217.

<sup>247</sup> See Big Thorne FEIS, Chapter 3; Logjam FEIS, Chapter 3.

regarding compliance with NFMA and the 2016 Amended Forest Plan. Both the FEIS (including the appendices) the Draft ROD are devoid of any mention of the extensive expert concerns regarding the agency's reliance on habitat thresholds both generally as an approach and with regard to specific species. The experts noted the Forest Service is departing from long-standing from historical practice, the 2016 Amended Forest Plan, and the scientific predicate underlying Tongass habitat management without explanation. For these reasons alone, the Forest Service's decision is arbitrary under NFMA and the other statutes governing timber sale projects and because the information is not in the FEIS, the agency violates NEPA.

Finally, even if it were appropriate to rely on the habitat threshold concept, which it is not here, the Forest Service's newfound reliance on habitat thresholds is arbitrary because the condition-based approach means the agency fails to examine spatial and temporal relationships of the various logging efforts and their resulting impacts on individual species.<sup>248</sup> This leads the agency to admit, for example, that it bases its wolf impact analysis on "literature habitat thresholds . . . describe the effects to deer habitat" "[d]ue to [the] lack of site specificity."<sup>249</sup> As an initial matter, the agency errs because the FEIS admits the agency does not have a habitat threshold for deer habitat.<sup>250</sup> Moreover, the lack of temporal and spatial specificity is a problem of the Forest Service's own making given the agency's decision to use a "condition-based" approach to the Prince of Wales Logging Project for the very first time, instead of using site-specific analysis. Elsewhere the FEIS states that the adverse effects will be even greater on islands, where two or more wildlife analysis areas fall below the arbitrary 50 percent threshold are adjacent to one another, or for animals with more limited dispersal capabilities.<sup>251</sup> It acknowledges, however, "[a]ll WAAs with current HPOG habitat concerns are adjacent to at least one other WAA with HPOG concerns or are on islands thereby potentially having a greater effect to species with more limited dispersal capabilities."<sup>252</sup> Thus the Forest Service concedes significant adverse impacts to birds and wildlife depend upon the spatial and temporal decisions the agency makes about logging and road building (*e.g.*, where, when, and how much), but then fails to assess impacts based on that understanding.

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<sup>248</sup> See PR 833\_1962 at 475 (P.K. Angelstam *et al.*, *Habitat thresholds for focal species at multiple scales and forest biodiversity conservation—dead wood as an example*, 40 ANN. ZOOL. FENNICI 473-82, 475 (2003) (Habitat thresholds for dead wood) ("To detect a response of habitat loss in living organisms, it is necessary to identify the appropriate spatial and temporal scale at which a particular species responds.").

<sup>249</sup> FEIS, Appendix D at 53; *see also id.* at 54-55 ("Due to lack of site specificity, we used literature habitat thresholds and estimated deer habitat capability to describe effects to deer habitat . . .").

<sup>250</sup> The FEIS provides no habitat thresholds for wolves and admits there are no habitat thresholds for deer. FEIS at 183; *see also id.* at 177 ("No habitat thresholds have been determined for deer.").

<sup>251</sup> *Id.* at 178, 180.

<sup>252</sup> *Id.* at 194.

In sum, the agency bases its impacts analysis and its conclusions regarding the Prince of Wales Logging Project on little more than generic recitations of remaining habitat. The agency, instead of assessing site-specific information or in most cases even basing its conclusions on species-specific information,<sup>253</sup> offers little more than conclusory assumptions. Based on the record before the Forest Service, the agency acts arbitrarily in selecting an approach that is inconsistent with the agency's wildlife conservation strategy, scientific understanding (both historical and contemporary) with regard to individual species and the Tongass as a whole. The agency also ignores conflicting expert opinion and fails to provide a rational connection between the facts and the decision to approve the Project. For all of these reasons, the Forest Service's decision to approve the Project is arbitrary.

### III. THE FOREST SERVICE'S ASSESSMENT OF THE PROJECT'S IMPACTS ON ENDEMIC SPECIES GENERALLY, INCLUDING VIABILITY, IS ARBITRARY AND UNLAWFUL.

According to the Forest Service, "[e]ndemic species are species that are isolated to islands or specific geography that potentially have an increased risk of adverse effects associated with management or natural disturbance" and, as result, "there is a higher probability of extinction on islands."<sup>254</sup> "A disproportionate percentage of documented [species] loss [due to extinction] during the past 400 years has occurred on islands, with some estimates suggesting that world-wide, 63% of mammalian, 95% of reptilian, and 80% of avian extinctions have been insular endemics."<sup>255</sup> Insular endemics "are prone to extinction because they are vulnerable to demographic stochasticity, random climatic events, and anthropogenic disturbance."<sup>256</sup> Experts also note that endemic "[s]pecies assemblages vary spatially (i.e., from island to island) and temporally."<sup>257</sup> The Forest Service and experts alike recognize the Prince of Wales Island complex of islands (*i.e.*, the Project area) "as an important center of endemism."<sup>258</sup>

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<sup>253</sup> *Id.*; *id.* at 170.

<sup>254</sup> 2008 Forest Plan FEIS at 3-170.

<sup>255</sup> PR 603\_0375 at 207 (J.A. Cook, S. O. MacDonald, Should Endemism be a Focus of Conservation Efforts Along the North Pacific Coast of North America, Biological Conservation 97 at 207 (2001)).

<sup>256</sup> *Id.*

<sup>257</sup> PR 603\_140 at 8 (J. Cook, N. Dawson, S. MacDonald, Conservation of Highly Fragmented Systems: The North Temperate Alexander Archipelago, Biological Conservation 133 at 8 (2006)).

<sup>258</sup> *Id.* at 9; *see also id.* at 8 (Table 2); *see also* PR 0990-Present10-Mammals-Endemics.pdf at 22 (Conservation Strategy Review: An Assessment of New Information Since 1997, Other Mammals – Including Endemics) at 22 (Forest Service characterizing Prince of Wales complex as the hottest of biodiversity hotspots); Big Thorne FEIS at 3-126 to 3-127.

In 1997, the Forest Service convened experts to assess wildlife viability and examined “endemic taxa associated with productive old-growth (endemic group).”<sup>259</sup> The 1997 FEIS explained that:

The panel predicted that all of the proposed alternatives had some likelihood of causing extirpation within the endemic group. This prediction was attributed to both historical and proposed timber related activities. These likelihoods increased with higher levels of timber harvest proposed.

...

The panel also predicted that most of the alternatives have a relatively high likelihood of creating conditions where wildlife populations of at least one of the species in the group may be no longer well distributed and viability could be compromised.<sup>260</sup>

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<sup>259</sup> 1997 Forest Plan FEIS at 3-410 (Prince of Wales Island flying squirrel, beaver, Keen’s mouse, red-backed vole, meadow vole, ermine); *see also* PR 603\_0216 (C. Iverson, U.S. Forest Service, Memorandum to TLMP Revision Planning File, Re. American Marten Viability Assessment Panel Summary (Jan. 31, 1996)); PR 603\_0421 (G. DeGayener, U.S. Forest Service, Memorandum to TLMP Revision Planning File, Re. Summary of the 1997 American Marten Risk Assessment Panel (May 6, 1997)); PR 603\_0423 (C. Iverson, U.S. Forest Service, Memorandum to TLMP Revision Planning File, Re. Summary of the 1997 Other Terrestrial Mammals Assessment Panel (May 19, 1997)); PR 603\_1322 (U.S. Forest Service, Pacific Northwest Research Station, Assessments of Wildlife Viability, Old-growth Timber Volume Estimates, Forested Wetlands, and Slope Stability, Gen. Tech. Rep. PNW-GTR-392 (1997)); PR 10\_00102 (L. H. Suring *et al.*, A Proposed Strategy for Maintaining Well-Distributed, Viable Populations of Wildlife Associated with Old- Growth Forests in Southeast Alaska, Review Draft (May 1993)); PR 11\_jlm067 (A. R. Kiester and C. Eckhardt, Review of Wildlife Management and Conservation Biology on the Tongass National Forest: A Synthesis with Recommendations (Mar. 1994)).

<sup>260</sup> 1997 Forest Plan FEIS at 3-242 and 3-410; *see also* 2008 Forest Plan at 3-170 (describing the 1997 panel conclusions).

Prior to its adoption of the 2008 Amended Forest Plan, the Forest Service conducted a conservation strategy review to assess new scientific information arising since 1997, including a review of endemics on the Tongass.<sup>261</sup>

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<sup>261</sup> See, e.g., PR 603\_0140 (J. Cook *et al.*, *Conservation of Highly Fragmented Systems: The North Temperate Alexander Archipelago*, 133 BIOLOGICAL CONSERVATION 1 (2006)); PR 603\_0147 (T.A. Hanley *et al.*, *Maintaining wildlife habitat in southeastern Alaska: implications of new knowledge for forest management and research*, 72 LANDSCAPE AND URBAN PLANNING 113 (2005)); PR 603\_0374 (J.A. Cook *et al.*, *A phylogeographic perspective on endemism in the Alexander Archipelago of southeast Alaska*, 97 BIOLOGICAL CONSERVATION 215 (2001)); PR 603\_0375 (J. Cook, *et al.*, *Should Endemism be a Focus of Conservation Efforts along the North Pacific Coast of North America?* (2001)); PR 603\_0381 (W.P. Smith & J.V. Nichols, *Demography of the Prince of Wales flying squirrel, an endemic of southeastern Alaska temperate rain forest*, 84 JOURNAL OF MAMMALOGY 1044 (2003)); PR 603\_0382 (W.P. Smith & J.V. Nichols, *Demography of two endemic forest-floor mammals of southeastern Alaskan temperate rain forest*, 85 JOURNAL OF MAMMALOGY 540 (2004)); PR 603\_0383 (W.P. Smith *et al.*, *Correlates of microhabitat use and density of Clethrionomys gapperi and Peromyscus keeni in temperate rain forests of Southeast Alaska*, 51 ACTA ZOOLOGICA SINICA 973 (2005)); PR 603\_0384 (W.P. Smith *et al.*, *Ecological correlates of flying squirrel microhabitat use and density of in temperate rainforests of southeastern Alaska*, 85 JOURNAL OF MAMMALOGY 663 (2004)); PR 603\_0386 (W.P. Smith, *Evolutionary diversity and ecology of endemic small mammals of southeastern Alaska with implications for land management planning*, 72 LANDSCAPE AND URBAN PLANNING 135 (2005)); PR 603\_0417 (M. P. Small *et al.*, *American marten (Martes americana) in the Pacific Northwest: population differentiation across a landscape fragmented in time and space*, 12 MOLECULAR ECOLOGY 89 (2003)); PR 603\_0419 (J. Szacki, *Spatially structured populations: how much do they match the classic metapopulation concept?*, 14 LANDSCAPE ECOLOGY 369 (1999)); PR 603\_0797 (N. Dawson *et al.*, *Endemic mammals of the Alexander Archipelago*, in *Southeast Alaska Conservation Assessment*); PR 603\_0808 (J.R. Demboski *et al.*, *Phylogeography of the dusky shrew, Sorex monticolus (Insectivora, Soricidae): insight into deep and shallow history in northwestern North America*, 10 Molecular Ecology 1227-1240 (2001)); PR 603\_0809 (J.R. Demboski *et al.*, *Phylogenetic diversification within the Sorex Cinereus group (Soricidae)* 84 J. Mammalogy 144-158 (2003)); PR 603\_0816 (M.A. Fleming *et al.*, *Phylogeography of endemic ermine (mustela erminea) in Southeast Alaska*, 11 Molecular Ecology 795-807 (2002)); PR 603\_0819 (R.W. Flynn *et al.*, *Ecology of Martens in Southeast Alaska*, Alaska Department of Fish and Game, Federal Aid in Wildlife Restoration Report July 2000-June 2001 (Dec. 2001)); PR 603\_0820 (R. W. Flynn *et al.*, *Ecology of Martens in Southeast Alaska*, Alaska Department of Fish and Game, Federal Aid in Wildlife Restoration Report July 1998-June 1999 (Dec. 1999)); PR 603\_0829 (T. A. Hanley, *Small mammals of even-aged, red alder-conifer forests in southeastern Alaska*, in *The Canadian Field-Naturalist* (1997)) . . . (continues next page).

During this review, the Forest Service asked and answered following questions:

Does the current taxonomy adequately reflect biological diversity and thus provide a firm foundation for the [Forest Plan's] Standards and Guidelines? *No*

Are distributions [of endemics] adequately documented? *No*

Are there species, subspecies or distinct populations of conservation concern? *Yes*

What special problems does an island archipelago create for management? *Several*

Are we managing at the right scales? *Not likely*<sup>262</sup>

Prior to its adoption of the 2016 Amended Forest Plan, the Forest Service concluded

There are roughly 24 mammal species or subspecies considered endemic to Southeast Alaska (Smith et al. 2005). Mammal surveys on the Tongass have resulted in the documentation of new

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PR 603\_0832 (C. D. Hargis *et al.*, *The Influence of Forest Fragmentation and Landscape Pattern on American Martens*, 36 JOURNAL OF APPLIED ECOLOGY 157 (Feb. 1999)); PR 603\_0843 (M.K. Lucid & J.A. Cook, *Phylogeography of Keen's Mouse (Peromyscus keeni) in a Naturally Fragmented Landscape*, 85 JOURNAL OF MAMMALOGY 1149 (2004)); PR 603\_0977 (S. Fadden, Survey of Goshawk and Marten Standard and Guidelines for Forest Plan Implementation Consistency (June 11, 2007)); PR 603\_0985 (R. Flynn *et al.*, Presentation, Conservation Strategy Review – An Assessment of New Information Since 1997, American Marten (undated)); PR 603\_0987 (K. Titus *et al.*, Presentation, Conservation Strategy Review: An Assessment of New Information Since 1997 Northern Goshawks on the Tongass National Forest – Summary of Study Findings Related to Forest Management (undated)); 603\_0988 (U.S. Forest Service *et al.*, Presentation, Conservation Strategy Review: An Assessment of New Information Since 1997 Goshawk and Marten Standards and Guidelines: Implementation Challenges (undated)); PR 603\_0990 (J. Cook *et al.*, Presentation, Conservation Strategy Review: An Assessment of New Information Since 1997, Other Mammals – Including Endemics (undated)); PR 603\_0998 (R. Flynn *et al.*, Marten abundance, prey abundance, and seasonal diets in selected areas of Southeast Alaska, Wildlife Research Progress Report Sept. 2001-Dec. 2002 (Apr. 23, 2003)); PR 603\_1222 (T. Benna, U.S. Forest Service, Email to L. Kramer, U.S. Forest Service, Re: FP s&g reminder/concerns (July 26, 2007)); PR 603\_1302 (R. Flynn, Alaska Department of Fish & Game, Letters to C. Iverson, U.S. Forest Service, Re. Recommendations for revisions to marten habitat capability model (1995)); PR 603\_1900 (U.S. Forest Service, Meeting Minutes: Tongass Wildlife Standard and Guide (S&G) Meeting (Aug. 15-16, 2006)).

<sup>262</sup> PR 0990-Present10-Mammals-Endemics.pdf at 12 (J. Cook *et al.*, Presentation, Conservation Strategy Review: An Assessment of New Information Since 1997, Other Mammals – Including Endemics (undated) at 12) (emphasis added).

distributions, new species. However, there continue to be gaps in knowledge about the natural history and ecology of wildlife subspecies indigenous to Southeast Alaska (Hanley et al. 2005). Within Southeast Alaska, roughly 20 percent of known mammal species and subspecies have been described as endemic to the region. *The long-term viability of these endemic populations is unknown, but of increasing concern* since island endemics are extremely susceptible to extinction because of restricted ranges, specific habitat requirements, and sensitivity to human activities such as species introductions (<http://msb.unm.edu/isles/>).<sup>263</sup>

Notably, the FEIS does not disavow (or even acknowledge) any of these concerns.

The fact is that for more than 20 years, the Forest Service has concluded that it has special concerns regarding the impacts of logging on the endemic species of the Tongass. But, the agency has done next to nothing since that time to address those concerns or modify its management of old-growth logging, especially on Prince of Wales Island, to account for those concerns. And despite its own conclusions regarding the vulnerability of endemics, the Forest Service steadfastly refuses to conduct species-specific viability analyses, relies on outdated and incomplete science, and ignores conflicting expert opinion. And now, in the Tongass's most important hotspot for endemic biodiversity, the Forest Service plans to log for another 15 years based on a "condition-based" analysis, using arbitrary habitat thresholds, ignoring its own experts and contemporary science, and acting contrary to the 2016 Amended Forest Plan. As explained below, the Forest Service's analysis and conclusions regarding the 2016 Amended Forest Plan and the Prince of Wales Logging Project's impacts on endemic species are arbitrary and unlawful.<sup>264</sup>

A. The Forest Service Acts Unlawfully by Ignoring Missing Information Regarding Endemic Species.

The Forest Service violates NEPA's obligations governing the agency's approach to missing information regarding endemic species and the resulting impacts of the Project on those species. The agency also reaches arbitrary conclusions under NFMA and the other substantive statutes governing timber sale projects.

When an agency confronts incomplete or unavailable information as part of the environmental review process, NEPA regulations dictate how the agency must address that information.<sup>265</sup> "[T]he agency shall include the information in the environmental impact statement," if the missing information is: (1) "relevant to reasonably foreseeable significant adverse impacts;" (2) "essential to a reasoned choice among alternatives;" and (3) "the overall

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<sup>263</sup> Wrangell Island Project DEIS at 83 (emphasis added).

<sup>264</sup> See DEIS Comment Letter 27-38, 42-49.

<sup>265</sup> See *Mont. Wilderness Ass'n v. McAllister*, 666 F.3d 549, 559-61 (9th Cir. 2011).

costs of obtaining it are not exorbitant.”<sup>266</sup> According to CEQ, “[t]he evaluation of impacts under § 1502.22 is an integral part of an EIS and should be treated in the same manner as those impacts normally analyzed in an EIS.”<sup>267</sup> Consistent with the regulation, courts require agencies to make these determinations and explain the rationale regarding any missing information.<sup>268</sup>

Here, the Forest Service admits it is missing information about virtually every aspect of endemics species, including, but not limited to:

- species-specific viability analyses (*i.e.*, what constitutes a viable population of any given species, what does it mean for a particular species to be well-distributed);
- population estimates;
- population distributions;
- project-level populations surveys;
- species-specific habitat requirements (*e.g.*, quantity, quality, and distribution of habitat);
- species-specific habitat thresholds;
- current taxonomic understanding;
- adequate documentation of species distribution;
- understanding of the species, subspecies or of distinct populations of conservation concern; and,
- determination of the appropriate spatial scale for impact and viability analyses.

The agency, however, never conducts the missing information analysis required by 40 C.F.R. § 1502.22, including determining whether the missing information regarding the impacts on endemics is relevant to adverse impacts, essential to the Prince of Wales Logging Project decision, or that the costs of obtaining that information are not exorbitant. “[T]he plain language of § 1502.22 . . . requires the [Forest Service] to make the[se] findings.”<sup>269</sup> In failing to do so here, the agency violates NEPA.

The Forest Service also acts arbitrarily under NFMA and the other statutes governing timber sale projects. The agency acknowledges this is important information and, nevertheless, plans to approve the Prince of Wales Logging Project without obtaining the information. The decision to do so is arbitrary based on the record before the agency.

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<sup>266</sup> 40 C.F.R § 1502.22(a).

<sup>267</sup> 51 Fed. Reg. 15,618, 15,621 (Apr. 25, 1986).

<sup>268</sup> See *Native Vill. of Point Hope v. Jewell*, 740 F.3d 489, 496-97 (9th Cir. 2014) (explaining the agency must conduct the analysis required by § 1502.22); *Montana Wilderness*, 666 F.3d at 554; *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm’n*, 449 F.3d 1016, 1033 (9th Cir. 2006); *Lands Council v. Powell*, 395 F.3d 1019, 1031-32 (9th Cir. 2004).

<sup>269</sup> *Native Vill. of Point Hope v. Salazar*, 730 F. Supp. 2d 1009, 1018 (D. Alaska 2010).



B. The Forest Service Acts Arbitrarily and Unlawfully By Ignoring Expert Concerns Regarding the Endemics Impact Analysis and Conclusions.

The Forest Service ignores all of the expert commentary calling for the agency to conduct project-specific analysis to understand the impacts of the Prince of Wales Logging project on endemic species, including, but not limited to, the ability to maintain sufficient old-growth habitat to provide for well-distributed viable populations of those species throughout the forest.<sup>270</sup> As a result, and as explained in greater detail below, the Forest Service acts in an arbitrary and unlawful manner under NEPA, NFMA, and the other statutes governing timber sale projects.

The Forest Service ignores the concerns Dr. Winston Smith raised regarding the agency's approach to endemic impacts analysis. Dr. Smith gave specific, detailed reasons for faulting the agency's endemic analysis, including the "condition-based" review, use of habitat thresholds, lack of species-specific analysis, and endemic viability.<sup>271</sup> Yet, neither the FEIS nor the Draft ROD even discloses Dr. Smith's conflicting expert opinions regarding the agency's analysis of endemic species, let alone explain how the agency considered his expert opinions and ultimately reached contrary conclusions.<sup>272</sup>

The agency also errs in ignoring the expert opinions of Drs. Joseph Cook and Natalie Dawson and Jocelyn Colella, Ph.D. Candidate, regarding the Forest Service's flawed approach to assessing the Project's impacts on endemics.<sup>273</sup> Like Dr. Smith, they faulted the "Forest Service's reliance on habitat thresholds for endemic mammals," explaining it "has no basis in the contemporary science of conservation biology of island endemics."<sup>274</sup> They faulted the Forest Service's condition-based approach and the lack of project-specific analysis.<sup>275</sup> Citing the agency's lack of site-specific information, they called on the agency to conduct the project-specific analysis outlined in the 2016 Amended Forest Plan, including population surveys. They ultimately concluded: "In sum, the Prince of Wales project, if approved, represents an unacceptable risk to the long-term persistence of endemic mammals on Prince of Wales Island."<sup>276</sup> Again, the Forest Service fails to disclose and address these expert concerns.<sup>277</sup>

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<sup>270</sup> See DEIS Comment Letter at 28-31.

<sup>271</sup> See generally Smith Prince of Wales Comments.

<sup>272</sup> See FEIS at 179-83; *id.*, Appendix D at D-57 to D-62.

<sup>273</sup> See generally J. Cook *et al.* Statement on DEIS Prince of Wales Landscape Level Analysis, and attachments at PDF 7 (Jun. 11, 2018) (Cook Comments).

<sup>274</sup> Cook Comments at PDF 7.

<sup>275</sup> See *id.*

<sup>276</sup> *Id.*

<sup>277</sup> See FEIS at 179-183; *id.*, Appendix D at D-57 to D-62.

The Forest Service also fails to confront the experts' concerns regarding the agency's outdated viability analyses for endemic species. As an initial matter, the FEIS concedes the agency has only conducted a single analysis of endemic viability and it dates back to the 1997 Forest Plan.<sup>278</sup> And as experts pointed out, that analysis "lumped all endemics species (rodents, carnivores, bats, etc.) into one category, rendering the analysis all but useless in understanding the habitat quality and quantity that must be retained to ensure the viability of endemic species."<sup>279</sup> The Forest Service appears to concede this point, admitting in the FEIS that "[t]he primary cause of the response of species to habitat change is the loss of habitat" and "[s]pecies-level details such as movement, behavior, and life history traits show that *responses vary by species*."<sup>280</sup> Nonetheless, the Forest Service refuses to conduct updated viability analyses to account for species-specific considerations based on the premise that it was good enough in 1997, so it must still be good enough today.

In light of these failings, the Forest Service reached arbitrary conclusions regarding the Prince of Wales Logging Project's compliance with NFMA (and the other statutes governing timber sale projects) and the 2016 Amended Forest Plan, including the provisions governing endemics.<sup>281</sup> Here the agency admits it lacks any species-specific information or understanding of the habitat needs of endemics (e.g., quantity, quality, distribution, etc.), rendering the agency's conduct unlawful and arbitrary. The record before the agency reveals unexamined (and even undisclosed) expert concerns regarding the impacts of the Project on endemics, including the reliance on condition-based analysis, arbitrary habitat thresholds, the lack of any site-specific information, and an outdated and generic viability analysis. In light of these concerns, experts called for population surveys given the existing and proposed fragmentation on Prince of Wales Island, but the agency ignores those concerns as well. Additionally, the agency violates NFMA's obligation to demonstrate it is maintaining the sufficient quantity and quality of habitat to ensure well-distributed, viable populations of endemics remain on the Tongass. The Forest Service also violates NEPA because it fails to disclose these conflicting expert opinions, explain why the agency chose to disregard the concerns, and ultimately to describe the impacts of the Prince of Wales Logging Project on endemic species.

#### IV. THE FOREST SERVICE'S ANALYSIS OF THE PRINCE OF WALES FLYING SQUIRREL IS ARBITRARY AND UNLAWFUL.

The Forest Service violates NEPA and reaches arbitrary and unlawful conclusions regarding the Prince of Wales Logging Project's compliance with NFMA (and the other statutes governing timber sales) with regard to the Prince of Wales Flying Squirrel.<sup>282</sup> The agency ignores important aspects of the problem when it admits it lacks critical information, fails to conduct a site-specific impact analysis, ignores Dr. Smith's expert concerns regarding the adverse impacts

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<sup>278</sup> See *id.*, Appendix D at D-58.

<sup>279</sup> Cook Comments at PDF 3-4.

<sup>280</sup> FEIS, Appendix D at D-58 (emphasis added).

<sup>281</sup> 2016 Amended Forest Plan at 4-93 (WILD.1.XIX.).

<sup>282</sup> See DEIS Comment Letter at 31-33.

on the flying squirrel, including viability, and fails to justify its overall conclusions based on the record before the agency.

As an initial matter, the Prince of Wales Flying Squirrel is an endemic subspecies. Thus, the previous discussion regarding the Forest Service's concerns for, treatment of endemics generally also applies.<sup>283</sup>

Based on the FEIS and the planning record, the Forest Service concedes (or does not dispute due to omission) critical expert conclusions regarding the agency's treatment of the Prince of Wales Flying Squirrel:

- The entire geographic range of the Prince of Wales flying squirrel is limited to Prince of Wales Island and nearby islands of Prince of Wales Island's western coast (*i.e.*, the Prince of Wales Logging Project area).
- Productive old-growth forest is the primary habitat for the Prince of Wales Flying Squirrel.
- The Prince of Wales Flying Squirrel has the lowest genetic diversity of all northern flying squirrels in North America, making it especially vulnerable to inbreeding and additional demographic consequences due to habitat fragmentation and limited dispersal.
- The agency has never determined what constitutes a viable population of the Prince of Wales Flying Squirrel subspecies (or northern flying squirrels as a species) on the Tongass.
- The agency has not determined the quantity or quality of habitat that must remain on Prince of Wales Island to ensure the Prince of Wales Flying Squirrel remains viable and well-distributed.
- The Forest Service has not determined the contributions the Prince of Wales Flying Squirrel makes toward ensuring viable and well-distributed populations of northern flying squirrels across the Tongass.<sup>284</sup>

In light of these undisputed facts, the Forest Service's failure to address or even disclose the concerns raised by Dr. Smith proves damning. The agency fails to disclose or confront Dr. Smith's conclusions that:

[T]he . . . Prince of Wales Landscape Level Project . . . will contribute to an increasing downward trajectory of population decline, raising significant viability concerns regarding the future of

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<sup>283</sup> *Supra* pp. 47-54.

<sup>284</sup> *Compare* Smith Prince of Wales Comments at 5-7 with FEIS at 173, 193-94, Appendix D at D-61 to D-62.

this island endemic on the Tongass and the sustainability of the squirrel on Prince of Wales Island.<sup>285</sup>

The agency fails to disclose that Dr. Smith's concerns led him to advise the Forest Service to conduct a project-specific impact analysis (rather than the condition-based analysis), including the population surveys contemplated by the 2016 Amended Forest Plan before it approves the Project.<sup>286</sup> Again, the FEIS and the Draft ROD ignores all of these concerns.

The Forest Service has relied on Dr. Smith's expertise regarding endemics for decades, and continues to rely on his opinions in the FEIS when those historical conclusions support the agency, but then ignores Dr. Smith completely when he reaches conclusions that do not support the agency decision to pursue the Project. The Forest Service's inadequate analysis and disclosure render the Draft ROD arbitrary and FEIS unlawful. The agency also reaches arbitrary and unlawful conclusions regarding the Forest Service's ability to ensure the viability of flying squirrels, and the Prince of Wales subspecies, on the Tongass. Based on the undisputed record, the agency also acts arbitrarily in deciding to proceed with the Prince of Wales Project despite lacking essential site-specific information regarding these squirrels, including population surveys and ability to maintain a sustainable population on Prince of Wales. Additionally, the Forest Service's conclusions regarding the impacts of the Prince of Wales Logging Project on the Forest Service's ability to maintain sufficient habitat ensure the Prince of Wales Flying Squirrel (and northern flying squirrels generally) remains well-distributed and viable is arbitrary and violates NFMA. In short, the Forest Service acts unlawfully and arbitrarily under NEPA, NFMA, and the other statutes governing timber sale projects with regard to the Prince of Wales Logging Project's impacts on the Prince of Wales Flying Squirrel.

#### V. THE FOREST SERVICE'S ANALYSIS OF THE PRINCE OF WALES ERMINE IS ARBITRARY AND UNLAWFUL.

The Forest Service also acts arbitrarily and unlawfully with regard to the impacts of the Prince of Wales Logging Project on the Prince of Wales ermine.<sup>287</sup> The agency fails to conduct a site-specific impact analysis, ignores expert criticism and concerns, ignores important aspects of problem, and reaches conclusions that are unsupported by the record. In so doing, the agency acts arbitrarily and unlawfully under NEPA, NFMA, and the other statutes governing timber sale projects.

The Prince of Wales ermine is a newly discovered endemic subspecies. As a result, the discussion above regarding the Forest Service's concerns and treatment of endemics generally also applies.<sup>288</sup>

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<sup>285</sup> Smith Prince of Wales Comments at 7.

<sup>286</sup> *See id.*; 2016 Amended Forest Plan at 4-93 (WILD1.XIX (Endemic Terrestrial Mammals)).

<sup>287</sup> *See* DEIS Comment Letter at 33-34.

<sup>288</sup> *Supra* pp. 47-54.

The Forest Service also fails to address (or even disclose) that Drs. Joe Cook and Natalie Dawson and Jocelyn Colella, Ph.D. Candidate, have discovered an ermine with a “distinct evolutionary origin and unique genetic properties” that the experts believe “is only found on Prince of Wales Island, and potentially a very few nearby islands (not yet fully assessed).”<sup>289</sup> These experts, based on the best available scientific information gathered just in the last couple of years, concluded that the Prince of Wales ermine “is distinctive, but closely related to the subspecies *Mustela erminea haidarum* . . . [which is] listed under the Canadian Federal Species at Risk Act (SARA) and COSEWIC (Committee on the Status of Endangered Wildlife in Canada; S2--Imperiled or Rare) and is subject to protections and prohibitions under the British Columbia Wildlife Act.”<sup>290</sup>

The Forest Service does not dispute that it knows virtually nothing about the Prince of Wales ermine. As the experts explained “[t]he Forest Service lacks understanding of the distribution, habitat needs, or viability requirements of the Prince of Wales ermine.”<sup>291</sup> They explained this lack of information coupled with the generic condition-based analysis means “[i]t is not possible to determine the direct, indirect, or cumulative impacts to wildlife habitat or connectivity that could result from the logging.”<sup>292</sup> Given lack of scientific understanding and the Prince of Wales ermine’s restricted geographic distribution, these experts implored the agency to conduct a project-specific analysis that assessed impacts “relative to the distinctiveness of the taxa, population status, degree of isolation, island size, and habitat associations relative to the proposed management activity,”<sup>293</sup> as the 2016 Amended Forest Plan requires.

The Forest Service ignores all of those concerns. Unlike the DEIS, the FEIS now at least mentions the Prince of Wales ermine.<sup>294</sup> Yet the agency never acknowledges the discovery of the Prince of Wales ermine as a distinct subspecies known to inhabit only Prince of Wales Island. The agency fails to analyze the site-specific impacts of the Project on the Prince of Wales ermine, including whether sustainable populations of the ermine will persist on Prince of Wales Island after the Project. The agency, for example, fails to demonstrate how it is designing the timber sales and road building activities to provide for the long-term persistence of the Prince of Wales ermine on Prince of Wales.<sup>295</sup>

Elsewhere the FEIS speaks generally to ermine across the Tongass, but even at this level, the agency concedes, “[c]urrently there is an incomplete understanding of the ermine distribution

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<sup>289</sup> Cook Comments at 6 (Prince of Wales Ermine, *Mustela erminea celenda*).

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> *Id.* at 7 (quoting the 2016 Amended Forest Plan at WILD1.XIX.A.2).

<sup>294</sup> See FEIS, Appendix D at D-60 to D-61.

<sup>295</sup> *Id.*, Appendix D at D-60 to D-61.

and habitat needs.”<sup>296</sup> Despite this acknowledgement, however, the agency regurgitates the same generic story regarding the conservation strategy and the agency’s original assessment of endemic viability from the 1997 Forest Plan almost verbatim from other parts of the FEIS. The agency ultimately fails to assess the impacts of the Project on the Prince of Wales ermine, including whether the population will remain sustainable after implementation. The agency also fails to explain how many individuals must remain to constitute a viable population on Prince of Wales Island (or the Tongass as whole). The agency also fails to explain the quantity and quality of habitat that must remain on Prince of Wales Island to ensure the viability of the Prince of Wales ermine (or the ermine generally). The agency also fails to explain whether ermine will remain viable and well-distributed across the Tongass if the Prince of Wales ermine is extirpated from Prince of Wales Island. The agency makes no attempt to assess consequences of the Project on the Prince of Wales ermine as a distinct and apparently unique subspecies on the Tongass or assess its distribution and contribution to ermine across the Tongass.

For all of these reasons, the agency acts arbitrary and unlawfully under NEPA and NFMA and the other statutes governing timber sale projects. The Forest Service’s impacts analysis for the Prince of Wales ermine is non-existent, rendering the FEIS unlawful under NEPA. The FEIS ignores expert concerns and makes clear that the agency refuses to conduct the type of project-specific impacts analysis contemplated by the 2016 Amended Forest Plan, including a population survey. Additionally, the Forest Service’s conclusions regarding the impacts of the Prince of Wales Logging Project on the agency’s ability to maintain sufficient habitat to ensure the Prince of Wales ermine (and ermine generally) remain well-distributed and viable is arbitrary and violates NFMA. Given the lack of analysis, the agency cannot approve the Project without acting in an arbitrary and unlawful manner.

## VI. THE FOREST SERVICE’S ANALYSIS OF THE ALEXANDER ARCHIPELAGO WOLF IS ARBITRARY AND UNLAWFUL.

Wolves on Prince of Wales Island have declined substantially since the middle of the 1990s, especially within the north-central portion of Prince of Wales Island.<sup>297</sup> As explained below, the Forest Service’s analysis of the adverse impacts of the Prince of Wales Logging Projects on wolves is inadequate, arbitrary, and unlawful under NEPA, NFMA, and the other timber sale statutes.<sup>298</sup>

As an initial point, the Alexander Archipelago wolf is also an endemic subspecies. As a result, the previous discussion regarding the Forest Service’s concerns for, treatment of endemics generally also applies to the wolf.<sup>299</sup>

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<sup>296</sup> *Id.* at 180.

<sup>297</sup> *See, e.g.*, 81 Fed. Reg. at 435, 440 (Jan. 6, 2016) (U.S. Fish and Wildlife Service concluding that all of Game Management Unit 2 only had 50-159 wolves remaining wolves); Big Thorne FEIS at 3-113; D. Person, Big Thorne Appeal Statement at ¶15 (Aug. 15, 2013) (Person Big Thorne Statement).

<sup>298</sup> *See* DEIS Comment Letter at 42-49.

<sup>299</sup> *Supra* pp. 47-54.

A. The Forest Service's Impact Analysis Violates NEPA and Is Arbitrary Under NFMA.

The FEIS violates NEPA because it fails to disclose conflicting expert opinion regarding the agency's condition-based analysis and reliance on arbitrary habitat thresholds to assess impacts to wolves. The FEIS is also misleading and incomplete, it provides no basis for the agency's reliance on wolf habitat thresholds and the resulting direct, indirect, and cumulative impacts analyses, and conflicts with evidence in the record. For all of these reasons, the Forest Service reaches arbitrary conclusions regarding the impacts on wolves.

According to the FEIS, "there would be some reduction in the ability of project area [wildlife analysis areas] to maintain a sustainable wolf populations, based on deer habitat capability alone."<sup>300</sup> Elsewhere the agency acknowledges that "[o]verall, about 89 percent of the project area WAAs have some level of wolf mortality concern as defined by Person and Logan 2012."<sup>301</sup> The Forest Service's conclusions regarding the Project's impacts on wolves prove arbitrary.

First, the FEIS fails to disclose any of the conflicting expert opinions challenging the arbitrary nature of the Forest Service's wolf impact analysis. The DEIS concluded the "[o]verall effects to wolves would be 'moderate' due to effects to deep snow habitat,"<sup>302</sup> based on the arbitrary habitat thresholds of 20-50 percent described above. Mr. Kirchhoff called this conclusion "startlingly naïve, and based on an ecologically indefensible analysis."<sup>303</sup> He cautioned:

We have spent millions of dollars in research, produced 3 PhD studies, published dozens of peer reviewed papers, and authored population viability analyses (the latest now in review). Factors driving wolf numbers on POW are multiple, and complex. They involve deer habitat, human access, and human motivation. Yet the DEIS creates, and leans on, an overly simplistic habitat index to conclude any effect on wolves will be only 'moderate'.<sup>304</sup>

Dr. Cook and his colleagues echoed these concerns in their comments: "The Forest Service's reliance on habitat thresholds for endemic mammals has no basis in the contemporary science of conservation biology of island endemics . . . [and] unsubstantiated based on the available science."<sup>305</sup> They faulted the Forest Service for failing to examine the distribution of forest stands and connectivity between stands, which "can have dramatic effects on the survivorship"

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<sup>300</sup> FEIS at 235.

<sup>301</sup> *Id.*

<sup>302</sup> DEIS at 197.

<sup>303</sup> M. Kirchhoff, Comments on the Prince of Wales Landscape Level Analysis Project, Draft Environmental Impact Statement, and attachment, at 8 (June 15, 2018) (Kirchhoff Comments).

<sup>304</sup> *Id.*

<sup>305</sup> Cook Comments at 7.

of wolves because they have large home range territories.<sup>306</sup> For these reasons, they explained that the site-specific “geography of the proposed logging on [Prince of Wales Island] is essential to evaluating the impact[s]” on wolves.<sup>307</sup>

The Alaska Department of Fish and Game (ADFG) research suggests that “60 wolves were hunted or trapped last year, 2 illegally [on Prince of Wales Island,]” but the “[t]he total number of wolves killed without permits is, of course, impossible to obtain.”<sup>308</sup> According to ADFG, “231 wolves inhabited Prince of Wales and surrounding smaller islands in the fall of 2017.”<sup>309</sup> Researchers studied seven wolf packs on Prince of Wales Island.<sup>310</sup>

After studying the habitat preferences of the wolves, Gretchen Roffler, a wildlife research biologist with ADFG, concluded wolves “are really strongly avoiding the older clear-cuts on Prince of Wales Island . . . And that’s significant because there’s a lot of land area moving into that kind of forest.”<sup>311</sup> Researchers also learned that “thinning treatments . . . haven’t been very effective at creating better habitat for wolves. And when we say better habitat for wolves, we probably really mean better habitat for deer, because that’s why wolves would most likely be going into these forests.”<sup>312</sup> ADFG researchers concluded “the amount of habitat available to wolves could decline with an increasing proportion of the forest transitioning to the stem exclusion phase, with potential population-level consequences.”<sup>313</sup> To assess the potential for population level effects on Prince of Wales Island, the researchers explained “it is necessary to

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<sup>306</sup> *Id.*

<sup>307</sup> *Id.* The Forest Service’s use of “condition-based NEPA” fails to account for local knowledge of habitat conditions or spatial location of habitat, because the agency is not telling anyone where the logging and road building will take place. The 2016 Amended Forest Plan prescribes: “Local knowledge of habitat conditions, spatial location of habitat, and other factors need to be considered by the biologist rather than solely relying upon model outputs.” 2016 Amended Forest Plan at 4-91 (WILD1.XIV.A.2). The agency is required to use the “[u]se the most recent version of the interagency deer habitat capability model and field validation of local deer habitat conditions to assess deer habitat.” *Id.* It acts unlawfully in failing to do so in this case.

<sup>308</sup> F. Rudebusch, *Wolves are Losing Ground to Industrial Logging in Southeast Alaska*, EcoWatch at 1-2 (2018); see also G. Roffler, D. Gregovich, K. Larson, *Resource Selection by Coastal Wolves Reveals the Seasonal Importance of Seral Forest and Suitable Prey Habitat*, 409 Forest Ecology & Mgmt. 190-201 (2018).

<sup>309</sup> Rudebusch, *supra* note 308 at 2.

<sup>310</sup> *Id.* at 3.

<sup>311</sup> *Id.*

<sup>312</sup> *Id.* at 4.

<sup>313</sup> G. Roffler *et al.*, *supra* note 308 at 199.



gain further knowledge about wolves' use of alternative prey," which will "provide insights for understanding the potential consequences of landscape-level management practices."<sup>314</sup>

The FEIS fails to address (or even disclose) any of these conflicting expert opinions. This violates NEPA and renders the agency's analysis arbitrary under NFMA.

Second, the FEIS still relies on the arbitrary habitat thresholds of 20 and 50 percent to assess impacts to wolves.<sup>315</sup> The Forest Service, however, provides no support whatsoever for this position. The FEIS states:

If a habitat threshold has been identified for the species chosen for this analysis, those thresholds are used in the analysis; however, sometimes no thresholds have been identified for a specific species and in those cases, a threshold was used for a similar species. These thresholds are discussed under the habitats the species are associated with.<sup>316</sup>

The FEIS, however, never explains why the Forest Service relies on habitat thresholds of 20 and 50 percent for wolves. It appears the agency simply never updated the analysis after it deleted the references to Soule and Sanjayan (1998) and Fahrig (1997).<sup>317</sup> In the more than 20 years since the agency adopted the 1997 Forest Plan, the agency has never relied on habitat thresholds of any percent to assess the impacts of logging on wolves.<sup>318</sup> The Forest Service's reliance on

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<sup>314</sup> *Id.*

<sup>315</sup> *See* FEIS at 235.

<sup>316</sup> *Id.* at 173.

<sup>317</sup> *Supra* pp. 42-43.

<sup>318</sup> *See, e.g.*, PR 10\_00102 (L. H. Suring *et al.*, A Proposed Strategy for Maintaining Well-Distributed, Viable Populations of Wildlife Associated with Old-Growth Forests in Southeast Alaska, Review Draft (May 1993)); PR 603\_1610 (U.S. Forest Service, Tongass National Forest Land and Resource Management Plan, Interagency Conservation Strategy Review: An Assessment of New Information Since 1997, Workshop Summary Report (Jan. 2008)); PR 603\_427 (C. Iverson, U.S. Forest Service, Memorandum to Tongass Land Management Plan (TLMP) Planning File, Re. Alexander Archipelago Wolf Viability Assessment Panel Summary (Jan. 31, 1996)); PR 603\_0424 (C. Iverson, U.S. Forest Service, Summary of the 1997 Alexander Archipelago Wolf Risk Assessment Panel (May 7, 1997)); PR 10\_00101 (A. R. Kiester and C. Eckhardt, Review of Wildlife Management and Conservation Biology on the Tongass National Forest: A Synthesis with Recommendations (Mar. 1994)); PR 603\_0190 (D. K. Person *et al.*, The Alexander Archipelago Wolf: A Conservation Assessment, U.S. Forest Service General Technical Report PNW-GTR-384 (Nov. 1996)); PR 603\_6029 (D. K. Person *et al.*, Letter to Beth Pendleton, U.S. Forest Service (Sept. 19, 1997)); PR 736\_3739 (D. K. Person, Statement of David K. Person Regarding the Big Thorne Project, Prince of Wales Island (Aug. 15, 2013) (Person Big Thorne Statement)); D. Person, Big Thorne Draft Supplemental Information Report (Jun. 23, 2014); PR 736\_3243 (D. K. Person, Eleven messages by Dave Person and others at ADF&G about the Big Thorne Project (Feb. 28 to Apr. 18, 2011)) . . . (continues next page).

habitat thresholds for wolves is arbitrary given there is no support for the agency's position and it runs contrary to the record.

Third, the Forest Service's analysis of direct and indirect effects on wolves is arbitrary and incomplete. The agency's entire impacts analysis regarding the Project's direct and indirect impacts on wolf mortality amounts to only two sentences:

Alternative 2 proposes to build about 35 miles of NFS road and 129 miles of temporary road at the project area scale. It is unknown where on the landscape the road building would occur.<sup>319</sup>

Elsewhere the agency provides a single paragraph to characterize the direct and indirect impacts arising from the loss of wolf habitat:

Alternative 2 includes timber harvest mitigation in timber harvest polygons within 5 miles of a subsistence community in WAAs with 10 percent or more deer harvested of the estimated DHC. This would occur in WAAs 1214, 1315, 1317, 1318, and 1420. See discussion on deer habitat above. See discussion above for impacts to non-winter, average snow, and deep snow deer habitat and the effects of young-growth treatments and harvest.<sup>320</sup>

Fourth, the Forest Service's analysis of cumulative effects on wolves is non-existent. With regard to the cumulative effects, the FEIS does not assert that the overall effects to wolves would be moderate, as the DEIS did.<sup>321</sup> Now the agency fails to include any conclusion regarding the overall effects on wolves. With regard to habitat loss, the FEIS states only: "Overall effects to wolves are due to effects to deep snow habitat (deer); see discussion above under deep snow habitat."<sup>322</sup> But the cumulative effects section and the conclusion section addressing "deep snow habitat" both ignore wolves altogether.<sup>323</sup> With regard to road building and wolf mortality, the agency never explains the impacts on wolves.<sup>324</sup>

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PR 736\_4322 (D. K. Person and T. J. Brinkman, *Succession Debt and Roads: Short- and Long-Term Effects of Timber Harvest on a Large-Mammal Predator-Prey Community in Southeast Alaska, in North Pacific Temperate Rainforests: Ecology & Conservation* 143-167 (Gordon H. Orians and John W. Schoen, eds., Univ. of Wash. Press 2013)).

<sup>319</sup> FEIS at 234.

<sup>320</sup> FEIS at 225.

<sup>321</sup> DEIS at 197.

<sup>322</sup> FEIS at 228.

<sup>323</sup> *See id.* at 206-09.

<sup>324</sup> *Id.* at 234.

Fifth, the Forest Service fails to analyze the impacts to wolves in the manner required by the 2016 Amended Forest Plan.<sup>325</sup> The agency fails to examine the Project's resulting impacts on deer habitat capability at any meaningful level. The agency also fails to examine or explain whether the Project will destroy so much wolf habitat that the wolf populations are unsustainable.

The Forest Service violates NEPA because the FEIS fails to account for any of these considerations, including conflicting expert opinions regarding Forest Service's approach to the wolf impact analysis and the agency's conclusions. The agency also acts arbitrarily under NFMA because the agency ignores expert opinions, fails to justify its conclusions, and reaches conclusions that are unsupported by the record.

B. The Forest Service Acts Unlawfully By Failing to Implement the Wolf Management Program.

The 2016 Amended Forest Plan includes a standard that requires the Forest Service to develop and implement a "Wolf Habitat Management Program." The agency is refusing to implement that program. Approving the Prince of Wales Logging Project without implementing the Wolf Habitat Management Program is arbitrary and violates NFMA, including the agency's substantive viability obligations.

Since 1997, the Forest Service has included forest plan provisions aimed at maintaining sustainable wolf populations. "Among these is a standard to develop and implement an interagency Wolf Habitat Management Program in cooperation with the Alaska Department of Fish and Game (ADF&G) and U.S. Fish and Wildlife Service (USFWS), where wolf mortality concerns have been identified."<sup>326</sup> The 2016 Amended Forest Plan includes that standard: "Where wolf mortality concerns have been identified, *develop and implement* a Wolf Habitat Management Program in conjunction with ADF&G."<sup>327</sup>

In 2017, after an interagency finding of unsustainable wolf mortality on Prince of Wales Island, the Forest Service, U.S. Fish and Wildlife, and Alaska Department of Fish and Game published the GMU 2 Wolf Recommendations. The agencies concluded:

Because deer are the principle prey of wolves in GMU 2, factors affecting deer habitat and deer populations are integral to wolf population dynamics in GMU 2. Therefore, key components of successful wolf habitat management in GMU 2 include managing deer habitat capability, especially in important winter deer habitats; and minimizing human-caused wolf mortality via road management

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<sup>325</sup> *Supra* pp. 39-41.

<sup>326</sup> 833\_0847 (U.S. Forest Service *et al.*, Wolf Technical Committee, Interagency Wolf Habitat Management Program: Recommendations for Game Management Unit 2, Management Bulletin R10-MB-822 at 1 (2017) (GMU 2 Wolf Recommendations)).

<sup>327</sup> 2016 Amended Forest Plan at 4-91 (WILD1.XIV.A.1) (emphasis added).

and regulatory mechanisms through consultation with advisory committees, advisory councils, and the public. In addition, consideration of den management and human dimensions are critical to successful wolf management and are included as key components.<sup>328</sup>

The agencies provide numerous recommendations for habitat management (both old-growth and young-growth), road management, and wolf management and mortality.

The Forest Service is refusing to implement any of these components when it approves the Prince of Wales Project, saying it will only “meet Forest Plan Direction.”<sup>329</sup> In doing so, the agency violates the 2016 Amended Forest Plan. It also violates NFMA because the Forest Service’s viability conclusions regarding the wolf are based in part on this standard, and the 2016 Amended Forest Plan must be interpreted in a way that requires the agency to manage in a manner that accounts for these concerns, consistent with NFMA requirements. To the extent it is only a guideline, then the agency acts arbitrarily in basing its conclusions on deer habitat capability and wolf habitat management on optional guidelines. Such an alternative interpretation renders the 2016 Amended Forest Plan unlawful under NFMA.

C. The Forest Service Acts Unlawfully in Failing to Address the USFWS Wolf Finding.

The U.S. Fish & Wildlife Service raised troubling concerns regarding the status of wolves on Prince of Wales Island and Game Management Unit 2.<sup>330</sup> In light of these concerns, the Forest Service acts arbitrarily when it concludes it can approve the Prince of Wales Logging Project for two reasons. First, the Forest Service fails to explain whether/why wolves will remain sustainable on Prince of Wales Island or Game Management 2 given the additional loss of habitat and prey due to logging and the increases in wolf mortality due to roadbuilding. Second, the agency reaches an arbitrary conclusion that it can approve the Project and still fulfill its substantive obligation to ensure well-distributed wolf populations remain viable on the Tongass.

By way of background, the Forest Service has long recognized that the wolves on Prince of Wales Island play a unique role in the agency’s ability to maintain viable and well-distributed populations of wolves forest wide:

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<sup>328</sup> GMU 2 Wolf Recommendations at 3-4.

<sup>329</sup> FEIS at 48 (Alternative 2).

<sup>330</sup> See generally 81 Fed. Reg. 435 (Jan. 6, 2016).

[T]he population on [Prince of Wales] Island is genetically isolated from other Tongass populations, *which presents profound implications for maintaining well-distributed wolf populations* in light of local declines, given that these populations are are [*sic*] more sensitive to human activity and habitat disturbance than wolf populations elsewhere in the state (Schoen and Person 2007).<sup>331</sup>

Yet according to the U.S. Fish and Wildlife Service, the wolves on Prince of Wales Island are facing the threat of extirpation due to old-growth logging even without the record-breaking loss of habitat relating to the Prince of Wales Logging Project. In 2016, the U.S. Fish and Wildlife Service concluded that logging is responsible for the declining wolf populations in the Project area:

These findings indicate that for this wolf population, availability of non-ungulate prey does not appear to be able to compensate for declining deer populations, especially given other present stressors such as wolf harvest . . . Therefore, we conclude that timber harvest is affecting the GMU 2 wolf population by reducing its ungulate prey and likely will continue to do so in the future.<sup>332</sup>

Given the adverse impacts from old-growth logging:

[T]he U.S. Fish and Wildlife Service (USFWS) concluded there was a reasonable risk that wolves could be reduced, or perhaps even extirpated, from Prince of Wales Island and the smaller surrounding islands as a result of declining prey abundance and increasing density of roads and subsequent human-induced mortality risk to wolves.<sup>333</sup>

The U.S. Fish and Wildlife Service also echoed the concerns that the unique nature of the wolves on Prince of Wales presents challenging management considerations. As an initial matter, “[o]nly one Alexander Archipelago wolf population, the GMU 2 population, relies solely on deer as an ungulate prey species and therefore it is more vulnerable to declines in deer numbers

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<sup>331</sup> 2008 FEIS at 3-281 (emphasis added); *see also also* PR 603\_0879 (B.V. Weckworth *et al.*, *A Signal for Independent Coastal and Continental histories among North American wolves*, MOLECULAR ECOLOGY 14: 917-931 (2005); PR 769\_05\_000489 (B.V. Weckworth *et al.*, *Phylogeography of wolves (Canis lupus) in the Pacific Northwest*, JOURNAL OF MAMMALOGY, 91(2):363-375 (2010); B.V. Weckworth *et al.*, *Genetic distinctiveness of Alexander Archipelago wolves (Canis lupus ligoni): Reply to Cronin et al. (2015)*, JOURNAL OF HEREDITY 1-3 (2015)); E. A. Lacey, Ph.D. President, American Society of Mammalogists, Letter to Dr. Kimberley Titus, Alaska Department of Fish and Game (Nov. 1, 2015).

<sup>332</sup> 81 Fed. Reg. at 445.

<sup>333</sup> FEIS at 223; *see also* 81 Fed. Reg. at 440, 452, 455-56, 458.

compared to all other populations.”<sup>334</sup> Additionally, because logging “has occurred disproportionately in this area . . . deer are projected to decline by approximately 21 to 33 percent over the next 30 years, and, correspondingly, the wolf population is predicted to decline by an average of 8 to 14 percent (Gilbert et al. 2015, pp. 19, 43).”<sup>335</sup> Further, “the GMU 2 wolf population already has been reduced by about 75 percent since 1994.”<sup>336</sup> The U.S. Fish and Wildlife Service reported that Game Management Unit 2 only has 50-159 wolves.<sup>337</sup>

Based on this record, the Forest Service fails to explain whether (or why) sufficient old-growth habitat (and deer) will remain on Prince of Wales Island to support sustainable wolf populations as the 2016 Amended Forest Plan contemplates.<sup>338</sup> The agency errs by failing to account for these considerations in reaching a conclusion regarding the Project’s impacts on the relationship between wolves, deer, and human deer hunters.

For similar reasons, the Forest Service reaches an arbitrary conclusion that it can approve the Prince of Wales Logging Project and still meet NFMA’s substantive obligation to manage habitat in such a way as to ensure that wolves remain well-distributed and viable on the Tongass. The agency has never analyzed and evaluated what it means to have well-distributed wolf populations across the Tongass. Thus, the implications of losing wolves on Prince of Wales Island (or even most of the wolves) remains unexamined. The Forest Service acts arbitrarily and unlawfully by approving the Prince of the Wales Logging Project without conducting this analysis and updating its viability analysis for wolves based on the contemporary understanding that wolves are already at risk of extirpation on Prince of Wales Islands and Game Management Unit 2. The Prince of Wales Logging Project and the agency’s failure to examine the resulting adverse impacts makes a bad situation dire.

## VII. THE FOREST SERVICE’S ANALYSIS OF SITKA BLACK-TAILED DEER IS ARBITRARY AND UNLAWFUL.

Like the DEIS, the FEIS’s treatment of Sitka black-tailed deer is inadequate, incomplete, and arbitrary. As explained below, the Forest Service ignores experts with decades of experience with Tongass management express widespread concerns regarding the agency’s assessment of the Prince of Wales Logging Project’s impacts on deer.<sup>339</sup>

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<sup>334</sup> 81 Fed. Reg. at 444.

<sup>335</sup> *Id.*; see Person Big Thorne Statement at PDF 9 (explaining the wolf population in that area was 300-350 animals in 1995).

<sup>336</sup> *Id.* at 444-45.

<sup>337</sup> *Id.* at 440.

<sup>338</sup> To the extent the Forest Service believes it provides such an explanation, then the agency reaches an arbitrary conclusion based on the evidence before the agency.

<sup>339</sup> See DEIS Comment Letter at 39-42.

First, like the other species, the Forest Service bases its impacts analysis for deer on an arbitrary habitat threshold. In the FEIS, the agency explains, “[n]o habitat thresholds have been determined for deer.”<sup>340</sup> Undaunted by the lack of the scientific support, the FEIS states: “No literary habitat thresholds have been identified for deer; 50 percent was used in this analysis.”<sup>341</sup> The FEIS never explains why the agency selected 50 percent.

Like the experts discussed above, Dr. John Schoen faulted the Forest Service’s use of the arbitrary habitat thresholds to assess the Prince of Wales Logging Project’s impacts on deer:

The DEIS stated that “Effects were assumed to be minor if the percentage of habitat type remains above 50 percent of the habitat calculated to be present in 1954.” On northern [Prince of Wales Island], many VCUs have had timber harvests of 50% or more. The DEIS uses these figures in relation to a threshold of population persistence. However, persistence of a population does not extrapolate to healthy or useable population levels. *Persistence* of deer on northern [Prince of Wales Island] will not necessarily meet *human demand* for subsistence deer harvests nor will persistence meet the needs of wolves that depend on deer as their primary prey resource. These issues must be evaluated and explained in much greater detail than has been done in the DEIS.<sup>342</sup>

In the response to comments, the FEIS defends the reliance on habitat thresholds, explaining the agency’s condition-based analysis fails to provide site-specific information that the 2016 Amended Forest Plan requires the agency to base its impacts analysis:

The Forest Plan says to provide where possible, sufficient deer habitat and to not solely rely on the 18 deer per square mile and to also use local knowledge, spatial location, and other factors. Due to lack of site specificity, we used literature habitat thresholds and estimated deer habitat capability to describe effects to deer habitat (winter and summer) at the WAA and GMU 2 scale.<sup>343</sup>

In response to concerns that the Forest Service is managing deer for mere persistence (rather than accounting for the interactions between deer, wolves, and human hunters),<sup>344</sup> the FEIS states: “Persistence is the continued or prolonged existence of something.”<sup>345</sup> Based on the record

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<sup>340</sup> FEIS at 177; *id.* at 201 (similar), 204 (similar).

<sup>341</sup> FEIS at 183.

<sup>342</sup> J.W. Schoen, Ph.D., Comments on Prince of Wales Landscape Level Analysis at 3 (June 14, 2018) (Schoen Comments).

<sup>343</sup> FEIS, Appendix D at D-54 to D-55.

<sup>344</sup> Schoen Comments at 3.

<sup>345</sup> FEIS, Appendix D at D-76.

before the agency, the Forest Service acts unlawfully in basing its impacts analysis on habitat thresholds, managing deer for persistence, and failing to disclose or account for Dr. Schoen's criticism of the agency's approach.

Second, the Forest Service fails to account for expert concerns regarding the agency's reliance on high volume productive old-growth for its deer impact analysis, instead of large-tree productive old-growth (known as SD67). For decades prior to the Prince of Wales Logging Project, the Forest Service consistently based its impacts analysis on large-tree productive old-growth. As the agency explained in the 2016 Amended Forest Plan FEIS, "[t]here are approximately 5 million acres of [productive old-growth] forest on the Tongass National Forest," and "42 percent is high-volume [productive old-growth] . . . of which 25 percent is large-tree [productive old-growth] (SD 67 type)." <sup>346</sup> Importantly, "[l]arge-tree [productive old-growth] is not well-distributed across the Forest, with close to 40 percent concentrated in the North Central Prince of Wales and Admiralty Island biogeographic provinces." <sup>347</sup> The Forest Service has consistently explained that "[e]levation is considered one of the most significant landscape variables influencing the distribution and availability of [productive old-growth] forest" with stands at or below 800 feet hold[ing] the highest value for many wildlife species." <sup>348</sup> In 2008, "[a]pproximately 10 percent of the remaining [productive old-growth in Southeast Alaska is mapped as the largest tree category (SD67)." <sup>349</sup>

Given the importance of large-tree productive old-growth, Dr. Schoen explained:

I strongly recommend that the [Forest Service] re-evaluate winter deer habitat and impacts of the chosen alternative using the large-tree (SD67) habitat type. Continued highgrading large-tree old growth will have significant impacts on winter deer habitat and habitat for other wildlife species dependent on these forest types as well as affecting overall forest diversity. <sup>350</sup>

Matt Kirchhoff also expressed concerns regarding the agency's use of high volume productive old-growth in the DEIS: "I am surprised . . . that the [Forest Service] is using [high volume productive old-growth] instead of SD67 as the chosen descriptor for deep snow habitat for deer." <sup>351</sup> Mr. Kirchhoff explained, "[t]he Forest Service has consistently objected to the use of

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<sup>346</sup> 2016 Amended Forest Plan FEIS at 3-191.

<sup>347</sup> *Id.*

<sup>348</sup> *Id.*; see also 2008 FEIS at 3-149 ("large-tree [productive old-growth] is considered of highest value" for wildlife and aesthetics).

<sup>349</sup> 2008 FEIS at 3-152.

<sup>350</sup> Schoen Comments at 4.

<sup>351</sup> Kirchhoff Comments at PDF 3.



volume class as a wildlife habitat descriptor.”<sup>352</sup> He noted that “[a] stand of older, even-aged trees may have high volume, but the closed canopy makes it poor habitat for deer . . . [and] [b]y comparison, a gap-phase old-growth stand that features tall, or large diameter trees, is good at intercepting snow and providing forage.”<sup>353</sup> He advised the Forest Service to “defin[e] deep snow habitat for deer as ‘SD67 stands below 800 feet elevation’ [because doing so] would yield a more meaningful, accurate analysis.”<sup>354</sup> The FEIS ignores these concerns.

Third, the FEIS fails to disclose that Mr. Kirchhoff also questioned the agency’s decision to depart from the definition of deep-snow habitat. He explained:

For reasons that are unclear, the DEIS departs from the definition used in the Forest Plan and redefines deep-snow habitat as [high volume productive old-growth] *on south-facing slopes only* . . . This is problematic because (a) many deer do not have access to south-facing habitat (if they inhabit [sic] a north-facing watershed), and (b) deer that inhabit north-facing habitat are most affected by snow, and are most dependent on deep-snow habitat.<sup>355</sup>

For these reasons, he cautioned “[n]arrowing the definition of deep-snow habitat will have significant repercussions for deer and subsistence hunters,” which the DEIS failed to explain.<sup>356</sup> He urged “[t]he FEIS should adopt the definition of deep snow habitat that includes all aspects, as in the [2016 Amended] Forest Plan.”<sup>357</sup>

Despite all of these concerns, the FEIS also relies on high volume productive old-growth instead of large-tree habitat type.<sup>358</sup>

Fourth, the Forest Service ignores expert concerns regarding the agency’s failure to account for the impacts of high-grading. Dr. John Schoen raised detailed concerns relating to the Forest Service’s continuing pattern of high-grading on Prince of Wales Island and consequences of the

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<sup>352</sup> *Id.* (citing J.P. Caouette *et al.*, *Deconstructing the Timber Volume Paradigm in Management of the Tongass National Forest*, U.S. Department of Agriculture, Forest Service, Pacific Northwest Research Station (2000)).

<sup>353</sup> *Id.* (citing M.D. Kirchhoff & J.W. Schoen, *Forest Cover and Snow: Implications for Deer Habitat in Southeast Alaska*, 51 JOURNAL OF WILDLIFE MANAGEMENT 28 (1987)).

<sup>354</sup> *Id.* (emphasis omitted).

<sup>355</sup> *Id.* at PDF 3 (internal reference omitted).

<sup>356</sup> *Id.*

<sup>357</sup> *Id.* at 4 (emphasis omitted).

<sup>358</sup> *See, e.g.*, FEIS at viii (“deep snow habitat (HPOG on south-facing stands below 800 feet in elevation”), 16 (describing units of measure, including “[a]cres harvested of HPOG habitat in south-facing stands below 800 feet in elevation (deep snow habitat)”).

Prince of Wales Logging Project in light of that historical practice.<sup>359</sup> He explained, for example, that deer have already declined in some heavily logged drainages on Prince of Wales Island, forcing deer “into closed-canopy second growth with low habitat values.”<sup>360</sup> He urged the agency to “recognize the shifting baseline of historic harvest levels,” because “[w]hat appears to be a moderate harvest level in 2018, is a dramatic harvest since the 1950s when industrial forestry began on Prince of Wales Island.”<sup>361</sup> He cautioned that the “cumulative impacts of clearcutting must be honestly evaluated in any EIS.”<sup>362</sup>

Mr. Kirchhoff also questioned the Forest Service’s failure to address the high-grading concerns. He explained:

The DEIS contains an important table (43, page 186) that reports (a) the percentage of large-tree old growth remaining in each analysis area, (b) the percentage that will be cut in the [Prince of Wales Logging Project], and (c) the percentage that will remain. Six of the 10 analysis area [*sic*] will have less than half remaining. One will have just 15% remaining. If one adds the filter of “contiguous” large-tree old growth, as Albert and Schoen (2013) do, the statistics are even more alarming. While my concerns are primarily ecological—tied to the important functional role these stands play for wildlife (deer in winter, especially), the Forest Service should at least be recognizing that a sale program that is economically dependent on a rare and dwindling resource is not sustainable. The FEIS should explore this topic in more detail, and take steps to stop high-grading during these twilight years of old-growth logging.<sup>363</sup>

Table 43 only accounted for direct/indirect losses of SD67 forest and the left-hand column only accounts for National Forest Service land (although not labeled as such).<sup>364</sup> The DEIS failed to provide similar table for cumulative effects, which would include past and future losses on all landownerships.

In response, the comparable table in the FEIS now accounts for habitat thresholds of less than 30 percent, 30-50 percent, 50-60 percent, 60-80, and greater than 80.<sup>365</sup> The Forest Service, however, provides no basis for relying on these thresholds and still fails to analyze and explain why the agency believes this is a sustainable enterprise. As Mr. Kirchhoff noted, the Forest

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<sup>359</sup> See Schoen Comments at 2.

<sup>360</sup> *Id.*

<sup>361</sup> *Id.*

<sup>362</sup> *Id.*

<sup>363</sup> Kirchhoff Comments at PDF 6-7 (emphasis and internal reference omitted).

<sup>364</sup> DEIS at 186 & Tbl. 43.

<sup>365</sup> FEIS at 213, Tbl. 414.

Service's unanswered questions regarding the percent of large trees that will remain after the Prince of Wales Logging Project reflect both economic and ecological sustainability concerns.<sup>366</sup> The FEIS fails to address this reality.

Ultimately, the Forest Service's only response to the experts' concerns regarding the continuing pattern of high-grading on Prince of Wales Island is to promise that "[d]uring implementation of the POW LLA Project, more site-specific information for timber harvest activities will be provided to the public."<sup>367</sup> This is the very problem. The agency fails to conduct the necessary analysis and justify its substantive conclusions before it approves the Prince of Wales Logging Project.

In sum, the Forest Service fails to address any of these concerns and in so doing ignores important aspects of the problem. In so doing, the agency acts contrary to NEPA, NFMA, and the other statutes governing timber sales.

#### VIII. THE FOREST SERVICE'S ANALYSIS OF QUEEN CHARLOTTE GOSHAWKS IS ARBITRARY AND UNLAWFUL.

The Forest Service fails to evaluate the consequences of the Prince of Wales Logging Project on the population of goshawks on Prince of Wales Island in any credible way. The agency ignores harmful information, including changes caused by the 2016 Amended Forest Plan and instead only discloses information that is supportive of its logging decision. As explained below, the agency violates NEPA and acts arbitrarily and unlawfully under NFMA and the other statutes governing timber sales.<sup>368</sup>

As an initial matter, "the Queen Charlotte goshawk is recognized as a distinct subspecies, and is endemic to coastal rainforests from Vancouver Island to northern Southeast Alaska."<sup>369</sup> Thus, the discussion above regarding the Forest Service's concerns for, treatment of, endemics generally also applies to goshawks.<sup>370</sup>

As Dr. Smith explained in his comments on the DEIS, "maintaining sufficient habitat to support a [Queen Charlotte goshawk] breeding population on [Prince of Wales] is fundamental to maintaining the viability of the [Queen Charlotte goshawk]."<sup>371</sup> The FEIS, however, fails to address the fact that a spatially explicit analysis of the 2016 Amended Forest Plan's conservation strategy concluded that the Forest Service is failing to retain sufficient habitat to account for

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<sup>366</sup> Kirchhoff Comments at PDF 6-7.

<sup>367</sup> FEIS, Appendix D at D-31 ("Site-specific stand data, along with IDT input, will be used to develop a prescription for treatments of the stand and its long-term goals.")

<sup>368</sup> See DEIS Comment Letter at 35-38.

<sup>369</sup> 2008 Amended Forest Plan FEIS at 3-226.

<sup>370</sup> *Supra* pp. 47-54.

<sup>371</sup> Smith Prince of Wales Comment at 9-10.

three critical spatial components of the nesting home range: nest area, post-fledging family area, and foraging area.<sup>372</sup> As Dr. Smith explained, the Forest Service’s “expectation that, in intensively managed landscapes, preferred habitat contributed by other elements of the TLMP conservation strategy (e.g., old-growth reserves, riparian or shoreline buffers) will mitigate this deficiency was *not supported* by a spatially explicit analysis of 136 virtual [post-fledging family areas] created from actual nest sites.”<sup>373</sup> The FEIS fails to grapple with the fact that Forest Service is failing to maintain sufficient habitat (instead of presenting it in terms of arbitrary thresholds or total amount) in the three critical spatial components of the nesting home range. As Dr. Smith explained in his comments, this leads to a variety of fundamental questions the agency must answer regarding the role Prince of Wales Island and the Queen Charlotte Goshawk play to overall goshawk distribution and viability on the Tongass.<sup>374</sup>

The Forest Service acts unlawfully and arbitrarily because it fails to disclose or reconcile any of these expert concerns. Instead, the agency claims it added information to the Biological Evaluation,<sup>375</sup> but the agency did not make this document available to the public in the planning record.

The Forest Service also fails to disclose or confront Dr. Smith’s concerns regarding the agency’s flawed justification that goshawks will not be as adversely affected by logging impacts as other species because goshawks can disperse.<sup>376</sup> As Dr. Smith explained: “This conclusion demonstrates a lack of understanding in two fundamental areas: 1) the biology and breeding habitat requirements of Queen Charlotte Goshawks; and 2) the fundamentals of wildlife habitat assessments.”<sup>377</sup> The agency’s lack of understanding led Dr. Smith to fault the agency’s dispersal assumption because it “places the emphasis on the well-being of a breeding pair rather than the suitability of remaining breeding habitat, which is what ultimately determines breeding success and viability of Queen Charlotte Goshawks (Reynolds et al. 1994).”<sup>378</sup> Dr. Smith also explained that the Forest Service’s failure to conduct any site-specific analysis further erodes this assumption.<sup>379</sup> The agency’s dispersal theory “requires that there is a suitable nest site within their existing breeding home range that has not been rendered unsuitable by current or cumulative vegetation management actions . . . and requires there is a vacant, suitable breeding home ranges that goshawks can find and occupy to breed successfully . . . .”<sup>380</sup>

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<sup>372</sup> W. P. Smith, Proposed Forest Plan Amendment Further Compromises Established Conservation Measures to Sustain Viable Northern Goshawk Populations at 3 (2016).

<sup>373</sup> Smith Prince of Wales Comments at 10.

<sup>374</sup> *Id.* at 12-13.

<sup>375</sup> FEIS at 193.

<sup>376</sup> *Cf.* DEIS at 170 *with* FEIS at 192.

<sup>377</sup> Smith Prince of Wales Comments at 2.

<sup>378</sup> *Id.* at 2-3.

<sup>379</sup> *Id.* at 3.

<sup>380</sup> *Id.*

The agency acts unlawfully and arbitrarily in failing to confront any of these contrary expert concerns.<sup>381</sup> Indeed, based on the “condition-based” analysis, the Forest Service fails to examine any of these considerations because it has not decided where, when, or how specific logging projects will transpire. Absent that site-specific analysis, it is arbitrary to base the impacts analysis on the assumption that goshawks will simply fly away from logging disturbance—there is no evidence to suggest that habitat is available and not already inhabited.

In the end, the Forest Service fails to address conflicting expert opinion (addressing the both site-specific impacts and the 2016 Amended Forest Plan related impacts), empirical data and analyses that the agency is failing to maintain sufficient breeding habitat for goshawk pairs in managed landscapes of the Tongass. The agency fails to assess the site-specific impacts of the Prince of Wales Logging Project. The Forest Service violates NEPA because it fails to explain to the public or decision-maker what impacts the Project will have on the goshawk population, including the ability to maintain well-distributed viable populations. The Forest Service also proffers an arbitrary and unlawful decision under NFMA and the other statutes governing timber sales.

#### ALASKA ROADLESS RULE

Since the DEIS comment period,<sup>382</sup> the Forest Service initiated a process to evaluate exempting the Tongass National Forest from the Roadless Rule or otherwise limiting or changing the scope of the Roadless Rule’s application to the forest. The FEIS, however, fails to evaluate the impacts of the activity as a reasonably foreseeable activity. The agency violates NEPA in failing to consider the consequences of the possible change in land management. Additionally, the agency based its viability conclusions underling the 2016 Amended Forest Plan, in part, on the fact that the Roadless Rule protected more of the Tongass than the 1997 Forest Plan when the agency prepared its viability analyses.

In August 2018, the Forest Service announced it was “initiating an environmental impact statement (EIS) and public rulemaking to address the management of inventoried roadless areas on the Tongass National Forest within the State of Alaska.”<sup>383</sup> The agency explained that the “rulemaking is the result of a petition submitted by Governor Bill Walker’s administration in January 2018 on behalf of the State of Alaska.”<sup>384</sup> In the petition, the State of Alaska “request[ed] that the Secretary of Agriculture grant this petition and direct the USDA and USFS

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<sup>381</sup> FEIS at 192-93.

<sup>382</sup> The DEIS Comment Letter did not address this issue given the Forest Service acted after the close of the comment period.

<sup>383</sup> 83 Fed. Reg. 44,252 (Aug. 30, 2018).

<sup>384</sup> *Id.*

to immediately undertake a rulemaking to consider once again exempting the Tongass from the Roadless Rule.”<sup>385</sup> The Forest Service expects to publish a final rule in June 2020.<sup>386</sup>

Despite these actions, however, the FEIS fails to analyze the impacts of the rulemaking effort. In Appendix C to the FEIS, the Forest Service analyzes present and reasonably foreseeable future activities,<sup>387</sup> but fails to include the Forest Service’s rulemaking.<sup>388</sup> As explained below, the Forest Service acts arbitrarily and capriciously in failing to examine the impacts of the rulemaking effort, which results in a faulty analysis of the possible cumulative impacts from reasonably foreseeable activities.

“NEPA requires that where several actions have a cumulative ... environmental effect, this consequence must be considered in an EIS.”<sup>389</sup> The CEQ regulation defines cumulative impact as follows:

Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.<sup>390</sup>

The Courts make clear “projects need not be finalized before they are reasonably foreseeable.”<sup>391</sup> Indeed, “reasonably foreseeable future actions need to be considered even if they are not specific proposals.”<sup>392</sup>

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<sup>385</sup> Governor B. Walker, Letter to Secretary Sonny Perdue, U.S. Department of Agriculture, with attached State of Alaska Petition for USDA Rulemaking to Exempt the Tongass National Forest From Application of the Roadless Rule and Other Actions at 2 (Jan. 19, 2018).

<sup>386</sup> 83 Fed. Reg. at 44,253.

<sup>387</sup> FEIS, Appendix C at C-1; *see also id.* at 2 (“Appendix C lists other activities on all ownerships that are present and reasonably foreseeable in the project area, which were considered during the analysis for this project”).

<sup>388</sup> *See id.* at C-1 to C

<sup>389</sup> *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1076 (9th Cir. 2011) (quoting *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep’t of Interior*, 608 F.3d 592, 602 (9th Cir.2010) (citation and internal quotation marks omitted)).

<sup>390</sup> 40 C.F.R. § 1508.7.

<sup>391</sup> *N. Plains Res. Council*, 668 F.3d at 1078.

<sup>392</sup> *Id.* at 1079 (quoting EPA, Consideration of Cumulative Impact Analysis in EPA Review of NEPA Documents, Office of Federal Activities, 12–13 (May 1999)); *see also* EPA,

By failing to consider the impacts of the new roadless rulemaking and the change in land management to allow logging on even more parts of Prince of Wales Island and the surrounding area, the Forest Service acts in an arbitrary fashion. NEPA requires the agency to evaluate the complete scope of cumulative impacts to make an informed decision. For example, if the agency had examined the impacts of the rulemaking, the agency might have selected different alternatives for consideration in the FEIS given the additional loss of habitat on Prince of Wales Island and the surrounding islands.<sup>393</sup> As it stands, the agency's analysis is incomplete and misleading.

Additionally, the Forest Service acts arbitrarily under NFMA by failing to consider the impacts of the rulemaking. When the agency adopted the 2016 Amended Forest Plan, it defended its conclusions regarding the ongoing validity of the wildlife conservation strategy and the decades old viability conclusions based on the Roadless Rule's protections. In the Record of Decision adopting the 2016 Amended Forest Plan, the Tongass Forest Supervisor concluded:

Thus, the transition to young-growth harvest, together with other changes to Tongass forest management (especially the 2001 Roadless Rule), would result in about 400,000 acres of old-growth forest remaining in 2095 than was projected to have been harvested by the panels assessing viability for the 1997 plan . . . Therefore, many OGRs and non-Development LUDs would be surrounded by additional unharvested areas of POG forest and matrix lands would contain a substantially greater amount of POG forest than the amounts assumed during the development of the Forest Plan Conservation Strategy. Thus, panel assessment conclusions were based on assumptions that the Tongass would support far less old-growth forest than will be realized under the Selected Alternative.

. . .

The Selected Alternative will retain the ability of the Conservation Strategy to maintain a functional and interconnected old-growth ecosystem across the planning area and the overall functioning of the Conservation Strategy in terms of its ability to maintain viable, well-distributed populations of wildlife across the planning area will not be affected. The amended Plan is consistent with the NFMA requirement to "provide for diversity of plant and animal communities based on the suitability and capability of the specific

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Consideration of Cumulative Impact Analysis in EPA Review of NEPA Documents, Office of Federal Activities at PDF 13 (May 1999).

<sup>393</sup> See CEQ, *Considering Cumulative Effects Under the National Environmental Policy Act* at v (Jan. 1997) ("it is also critical to incorporate cumulative effects analysis into the development of alternatives . . . [and] essential to developing appropriate mitigation and monitoring").

land area to meet overall multiple-use objectives” (16 U.S.C. 1604(g)(3)(B)).<sup>394</sup>

The Forest Service also explained in the 2016 Amended Forest Plan FEIS that the agency justified its conclusions regarding the continuing validity of the conservation strategy, wildlife impacts, and NFMA viability, in part, on the fact that the Roadless Rule protected additional areas from logging than the 1997 Forest Plan and original wildlife panels contemplated.<sup>395</sup> For example, “[a]lthough [inventoried roadless areas] were not part of the original 1997 Conservation Strategy, they add value by providing large expanses of roadless refugia, which are important to wide-ranging wildlife species such as wolves, brown bears, marten, and less mobile species such as flying squirrels and amphibians.”<sup>396</sup>

As the Ninth Circuit has explained to the Forest Service before: “The absence of a reasoned explanation for disregarding previous factual findings violates the APA.”<sup>397</sup> Stated more directly, the agency “cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate.”<sup>398</sup>

In sum, the Forest Service’s decision to initiate rulemaking aimed at exempting or rolling back Roadless Rule protections in Alaska creates a cascade of problems for the agency. The Forest Service cannot ignore the consequences of that effort on the logging and roadbuilding authorized by the Prince of Wales Logging Project. To do so, the agency acts unlawfully and arbitrarily under NEPA, NFMA, and other statutes governing timber sale projects.

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<sup>394</sup> 2016 Amended Forest Plan ROD at 25; *see also* Tongass National Forest Land and Resource Management Plan Amendment, Reviewing Officer Response to Objections at 71 (Nov. 28, 2016) (accepting the Forest Service’s reliance on the Roadless Rule for the agency’s conclusion regarding the ongoing validity of the wildlife conservation strategy).

<sup>395</sup> *See* 2016 Amended Forest Plan FEIS at 3-291 to 3-296.

<sup>396</sup> *Id.* at 3-255.

<sup>397</sup> *Organized Vill. of Kake v. U.S. Dep’t of Agric.*, 795 F.3d 956, 969 (9th Cir. 2015).

<sup>398</sup> *Id.* (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 537 (2009)). (Kennedy, J., concurring)).



## FINANCIAL AND ECONOMIC CONSIDERATIONS

### I. THE FOREST SERVICE ACTS IN AN ARBITRARY MANNER WITH REGARD TO MARKET DEMAND.

As explained previously,<sup>399</sup> the Forest Service's flawed market demand analysis led the agency to adopt an improperly rigid timber objective of 46 MMBF per year in the 2016 Amended Forest Plan regardless of actual demand.<sup>400</sup> These errors unlawfully restricted the range of alternatives considered in the 2016 Amended Forest Plan FEIS, misrepresented the economic benefits from logging under the plan, and will lead to wasteful expenditure of resources on timber sales. The Prince of Wales Logging Project epitomizes those concerns in their entirety.

The FEIS not only fails to correct these errors, it fails to justify the Prince of Wales Logging Project altogether. Prior to this project, the Forest Service consistently explained why it selected a particular logging project and how the agency decided how much volume should be offered.<sup>401</sup> In doing so, the agency provided the public and the decision-maker essential information, including how a particular project fits into the broader Tongass Timber Program and the agency's analysis of future timber market demand.<sup>402</sup> The FEIS fails to provide any of this information and, as a result, the Forest Service acts arbitrarily in failing to provide its rationale for the Project.

Here the Forest Service is authorizing logging for the next 15 years. The Forest Service seeks to justify the Prince of Wales Logging Project in large part based on the stated need to provide a sustainable level of timber. "The underlying need for the [Prince of Wales Logging] Project comes in part from the Forest Service's obligation, subject to applicable law, to seek to provide a supply of timber from the Tongass National Forest that meets market demand annually and for the planning cycle."<sup>403</sup> The FEIS also explains the Project responds to the timber goals and objectives of the 2016 Amended Forest Plan, which include "provid[ing] about three years supply of volume under contract to local mills and then establish[ing] NEPA-cleared volume to maintain flexibility and stability in the sale program."<sup>404</sup>

The Forest Service explained its approach to estimating annual market demand when it adopted the 2016 Amended Forest Plan as follows: "The Forest Service adopted the Morse methodology

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<sup>399</sup> See DEIS Comment Letter at 7-9; *see also* Alaska Rainforest Defenders Comments on the Prince of Wales Island Landscape Level Analysis Project at 23-29 (Jun. 18, 2018); Alaska Rainforest Defenders Comments on the Prince of Wales Landscape Level Analysis Project – Draft Issue Statement and Alternatives (Dec. 5, 2017) at 16-22, 31-32-34.

<sup>400</sup> See SEACC Forest Plan Objection at 22-24; ARD Forest Plan Objection at 80-85.

<sup>401</sup> See, e.g., Big Thorne FEIS, Appendix A; Logjam FEIS, Appendix A; Wrangell FEIS, Appendix A; Saddle Lakes FEIS, Appendix A; North Kuiu FEIS, Appendix A.

<sup>402</sup> See, e.g., Big Thorne FEIS, Appendix A at A-1.

<sup>403</sup> FEIS at 5.

<sup>404</sup> *Id.*

as the means by which the agency complies *year-by-year with the annual demand portion of the [Tongass Timber Reform Act (TTRA)]* ‘seek to meet’ requirement.”<sup>405</sup> The agency intends to “to comply with the requirement to seek to meet demand ‘for each planning cycle’ through a series of *annual applications* of the Morse methodology.”<sup>406</sup> As the FEIS explains, the Forest Service continues to rely on the Morse methodology for estimating annual market demand.<sup>407</sup>

The FEIS, however, fails to explain the agency’s conclusions regarding how much total old-growth should be authorized in this decision and how, when, what size, and why individual timber sales will contribute to meeting market demand either as a whole or on an annual basis. The FEIS concedes “[i]t is difficult to estimate market demand for timber from the Tongass National Forest, even a year or two in advance.”<sup>408</sup> Stated more directly, the Forest Service is deciding today how much logging it will authorize over the next 15 years based on information that the agency concedes is not a reliable estimate more than a year or two in advance.

As the Forest Service explained in the Big Thorne FEIS: “For planning and scheduling purposes, the Tongass uses a 5-year timber sale plan, which is consistent with Forest Service Manual 2430 . . . and provides a plan that can be adjusted in response to changing market conditions.”<sup>409</sup> Elsewhere in that document the agency explained:

Making judgments about when to start preparing timber sale projects based on estimates of demand in the future is very difficult. It is no easier to estimate demand for timber than it is to predict the stock market for a given year.<sup>410</sup>

Here the Forest Service bases its decision to approve the Prince of Wales Logging Project on annual demand information of 58 MMBF<sup>411</sup> for Fiscal Year 2018 (despite the fact it is now the end of the first quarter of Fiscal Year 2019), which, of course, also fails to account for annual market demand in the years that will follow.<sup>412</sup> The agency also fails to explain how the Project

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<sup>405</sup> 2016 Amended Forest Plan ROD at 27 (emphasis added).

<sup>406</sup> *Id.*

<sup>407</sup> FEIS, Appendix D at D-48.

<sup>408</sup> FEIS at 108.

<sup>409</sup> Big Thorne FEIS, Appendix A at A-9.

<sup>410</sup> Big Thorne FEIS, Appendix B at B-33.

<sup>411</sup> FEIS at 3-107.

<sup>412</sup> See FEIS at 3-107 (“Grewe, 2018 displays the most recent annual demand calculation and the factors used in these calculations in the document Briefing Paper April 2018 FY18 Annual TNF Timber Demand-Grewe-Final which is located in the project record.”); 833\_0904 at 2 (U.S. Forest Service, Estimating the Range of Expected Tongass National Forest Timber Purchase and Sale Offer at 2 (Model Item Q, Scenario 1 Young Growth Transition)).

fits into the larger old-growth timber program on the Tongass.<sup>413</sup> Ultimately, the Forest Service fails to explain how authorizing a record-breaking amount of old-growth logging over the next 15 years encourages the timber industry to accomplish the 2016 Amended Forest Plan's aspiration of transitioning out of old-growth logging. The most likely outcome is obvious—Viking Lumber will simply log all of the old-growth authorized by the Project and then close its doors, leaving the residents of Prince of Wales Island to suffer the adverse consequences for decades to come. For these reasons, the agency violates TTRA, NFMA, and NEPA by not showing how this project is consistent with a current annual market demand analysis.

The Ninth Circuit has specifically addressed the Forest Service's obligation to provide complete and accurate market demand information to conduct a proper analysis of proposed timber sales in the Tongass: "Presenting accurate market demand information [is] necessary to ensure a well-informed and reasoned decision, both of which are procedural requirements under NEPA."<sup>414</sup> Indeed, "inaccurate economic information may defeat the purpose of an EIS by impairing the agency's consideration of the adverse environmental effects and by skewing the public's evaluation of the proposed agency action."<sup>415</sup>

The Forest Service cannot sign a ROD for the Prince of Wales Logging Project without a more realistic and justified approach to market demand. If the agency approves the Project without conducting this analysis, it will act unlawfully under NEPA, misapply the market demand provision of the TTRA, and skew the multiple-use balancing choices under NFMA and the Multiple-Use Sustained-Yield Act.<sup>416</sup>

## II. THE FOREST SERVICE FAILS TO PROVIDE A CLEAR ASSESSMENT OF THE COSTS AND BENEFITS OF THE PRINCE OF WALES LOGGING PROJECT.

The Forest Service is required to conduct and disclose a Financial Efficiency Analysis comparing the agency's direct expenditures with estimated financial revenues for the Prince of Wales Project pursuant to NEPA, NFMA, and the agency's own guidance.<sup>417</sup> The Forest Service's NFMA obligations require the agency to consider these costs and benefits in deciding whether and how to proceed with this project given its adverse impacts to old-growth ecosystems, wildlife, fisheries, subsistence, and forest-dependent industries, such as fishing, tourism, and recreation. Accordingly, the Forest Service Handbook directs the Forest Service to

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<sup>413</sup> The FEIS purports to provide a link to the Five Year Timber Sale Plan, but the link fails to provide any information. *See* FEIS at 107 ("The Tongass National Forest posts the five-year plan on the public website at: <https://www.fs.usda.gov/tongass/>.") (last visited Dec. 13, 2018).

<sup>414</sup> *Natural Res. Def. Council*, 421 F.3d at 812 (citation omitted).

<sup>415</sup> *Id.* at 811.

<sup>416</sup> *See* 16 U.S.C. § 1604(e) (NFMA); *id.* § 529 (Multiple-Use Sustained-Yield Act); *id.* § 539d(a) (TTRA); *id.* § 3120(a)(3)(A) (Alaska National Interest Lands Conservation Act); *see also* *Natural Res. Def. Council* 421 F.3d at 808-09 (explaining balancing of timber and other goals in the Tongass).

<sup>417</sup> *See* DEIS Comment Letter at 49-51.

“[i]nclude *all costs* that are anticipated as a result of the project,” such as but not limited to “direct costs associated with . . . [h]arvest administration . . . [s]ale preparation . . . [and] [r]oad design and engineering.”<sup>418</sup> NEPA compels the disclosure of all this information to ensure the agency engages in informed decision-making and the public can evaluate the proposed action.<sup>419</sup>

Here, in an unexplained departure from the Forest Service Handbook and decades of consistent agency practice,<sup>420</sup> the Forest Service fails to conduct or disclose the financial efficiency analysis in this case. Instead, the agency summarizes types of costs and discusses factors that could affect economic viability as the agency proposes timber sales over the 15-year implementation phase.<sup>421</sup> In the FEIS’s Response to Comments, for example, the agency acknowledges how the entire approach to the Project makes it difficult to determine costs and disclose the tradeoffs in a meaningful way:

The Forest Service administrative costs for timber harvest projects were not included in the DEIS because of the closeness of the range of timber volume among alternatives from 604 million board feet (MMBF) for Alternative 5 to 656 MMBF for Alternative 2 would not result in a useful measure to compare alternatives. Also, with all other costs and values, these will indubitably change over the 15-year time period. Nor would they reflect all of the Forest Service administrative costs for other resource projects. The administrative costs have been computed and added to the Project Record to respond to a public comment on the DEIS. Because there is so much fluctuation in the value of timber species, the values were also considered too speculative to display.<sup>422</sup>

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<sup>418</sup> U.S. Forest Service, Forest Service Handbook, FSH 2409.18 – Timber Sale Preparation Handbook, Ch. 30 at 2409.18\_32.22 (Jan. 31, 2002) (emphasis added).

<sup>419</sup> *Nat. Res. Def. Council*, 421 F.3d at 811 (“Inaccurate economic information may defeat the purpose of an EIS by ‘impairing the agency’s consideration of the adverse environmental effects’ and by ‘skewing the public’s evaluation’ of the proposed agency action.” (quoting *Hughes River Watershed Conservancy*, 81 F.3d at 446)); *see also id.* at 811-12 (“An EIS that relies upon misleading economic information may violate NEPA if the errors subvert NEPA’s purpose of providing decisionmakers and the public an accurate assessment upon which to evaluate the proposed project.” (quoting *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 235 F.Supp.2d 1143, 1157 (W.D. Wash. 2002))).

<sup>420</sup> *See* Big Thorne FEIS at 3-36 to 3-37 (financial efficiency analysis); Logjam Timber Sale FEIS at 3-84 to 3-85 (financial efficiency analysis); Wrangell Island Project FEIS at 67 to 68 (financial efficiency analysis); Saddle Lakes Timber Sale FEIS at 71 to 72 (financial efficiency analysis); Kuiu Timber Sale FEIS at 65 to 66 (financial efficiency analysis).

<sup>421</sup> FEIS at 113-16.

<sup>422</sup> *Id.*, Appendix D at D-13.

Failing to provide accurate information on costs and benefits skews the analysis, and brings into question whether the jobs created by the Project are worth both the high cost to taxpayers and the extreme ecosystem risks the Project poses. The Forest Service acts arbitrarily under NFMA and unlawfully under NEPA by failing to provide a complete economic analysis and an accurate picture of the enormous negative cost-benefit analysis of the Prince of Wales Logging Project to the public and the decision-maker.

### III. THE FOREST SERVICE FAILS TO ACCOUNT FOR ITS OWN MISMANAGEMENT OF LOGGING ON PRINCE OF WALES ISLAND, INCLUDING HIGHGRADING OF THE MOST VALUABLE HABITAT.

As explained previously,<sup>423</sup> the Forest Service's own documented mismanagement of the Tongass logging program (including problems related to highgrading available volume, appraisal processes, volume calculations, sale administration activities, theft prevention, and monitoring etc.) has direct bearing on the agency's obligations under NFMA and the other statutes governing timber sales to balance the competing interests.<sup>424</sup> The public is losing important habitat and the biggest, most valuable trees on the Tongass, but not obtaining the full value of the timber sales, making the agency's assessment and disclosure of impacts, costs and benefits, and the balancing of competing interests arbitrary and misleading.

With regard to NFMA, the 2016 Amended Forest Plan and the Prince of Wales Project run contrary to the Forest Service's obligation to manage the Tongass logging program in an economically sustainable fashion. The agency developed portions of the 2016 Amended Forest Plan under the 2012 Planning Rule,<sup>425</sup> and as such "must include plan components . . . to guide the plan area's contribution to social and economic sustainability."<sup>426</sup> The term "sustainability" means the "capability to meet the needs of the present generation without compromising the ability of future generations to meet their needs."<sup>427</sup> Yet the Forest Service does not explain how the Prince of Wales Project fulfills these NFMA obligations. The FEIS ignores this review and fails to account for the Forest Service's ongoing misadministration of timber sales. The FEIS fails to explain what improvements, if any, it actually adopted to prevent continued mismanagement and fulfill the agency's NFMA obligation to ensure sustainable timber harvest.

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<sup>423</sup> See DEIS Comment Letter at 51-55.

<sup>424</sup> See Public Employees for Environmental Responsibility (PEER), *Forest Service Scalped on Tongass Timber Sales: Bad Sales Cost Taxpayers & Alaska Schools Big Money and Hurt the Forest* (Apr. 3, 2017); see also U.S. Forest Service, Tonka Timber Sale DXPRE Post Harvest Monitoring Results; U.S. Forest Service, Washington Office Activity Review of Timber Sale Administration, Sale Preparation, Stewardship Contracting, NEPA and Timber Theft Prevention Region 10 (June 2016).

<sup>425</sup> See generally 2016 Amended Forest Plan, Chapter 5; 36 C.F.R. 219.8.

<sup>426</sup> 36 C.F.R. 219.8(b).

<sup>427</sup> *Id.* at § 219.19; see *id.* (defining "economic sustainability" as "the capability of society to produce and consume or otherwise benefit from goods and services including contributions to jobs and market and nonmarket benefits").

The Forest Service is acting arbitrarily by authorizing this massive program without first addressing documented management problems. The agency must disclose how it will address these issues before it reaches any final decision regarding the Prince of Wales Logging Project or it will act unlawfully under NEPA, NFMA, and the other statutes governing timber sales.

#### IV. THE FOREST SERVICE FAILS TO DISCLOSE THE COSTS, IMPACTS, AND ALTERNATIVES TO PUBLICLY SUBSIDIZING ROADS AND ACCESS MANAGEMENT.

Given the uncertainty of the “condition-based” analysis, the Forest Service’s assessment, disclosure, and consideration of road costs and impacts (including construction, maintenance, and decommissioning) is incomplete and misleading.<sup>428</sup> This renders the FEIS unlawful under NEPA and renders any decision arbitrary under NFMA and the other statutes governing timber sales.

In addition to failing to explain how much individual roads will cost, the Forest Service fails to explain whether it will use public funds to pay for road costs associated with the Prince of Wales Logging Project. Both of those considerations have direct bearing on the agency’s analysis of the costs and benefits, as well as the resulting impacts and alternatives. By way of illustration, in advance of the Kuiu Timber Sale, advertised in 2018 at 13.5 MMBF,<sup>429</sup> the Forest Service spent \$3.1 million to construct and recondition over 80 miles of roads on Kuiu Island.<sup>430</sup> This amount more than quadrupled the road costs the agency projected for the Kuiu sale in its EIS.<sup>431</sup> By pre-roading the sale, the agency shifted these road costs from the purchaser to the public. Moreover, the fact the Kuiu sale had a minimum bid of less than \$200,000 demonstrates the arbitrary nature of the Forest Service’s balancing of competing interests.<sup>432</sup>

The Forest Service is poised to undertake a similar approach here. The agency appears to be planning to perform road construction and reconstruction required for the Project at public expense, reducing the costs to the logger but shifting them to the taxpayer: “In some years,

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<sup>428</sup> See DEIS Comment Letter at 55-56.

<sup>429</sup> U.S Forest Service, Bid Letter for North Kuiu #2 Sale (May 5, 2018) (Kuiu Bid Letter).

<sup>430</sup> See Kuiu Rd & Bridge Replacement, AG-0120-S-14-0011, Amendment 003, Replacement Pages Section B, Kuiu Contract\_Redacted at PDF 11-25 (2014) (identifying roadwork covered by the base bid and options 1-7); Amendment of Solicitation/Modification of Contract (Apr. 23, 2014), Kuiu\_sf30\_Mod\_6\_Redacted (Modification 6) (adding roadwork to one road and providing the final contract total of \$3,083,813.00).

<sup>431</sup> Compare U.S. Forest Service, Kuiu Timber Sale Area, Final Environmental Impact Statement at 2-15 (Tbl. 2-2, Alt 5), 3-60 (Tbls. 3-19 & 3-20, Alt 5) (July 2007) (projecting road costs of \$54.09/MBF) with Amendment of Solicitation/Modification of Contract (Apr. 23, 2014), Kuiu\_sf30\_Mod\_6\_Redacted (Modification 6) (providing \$3,083,813.00 road cost, which, divided by the current proposed timber sale volume of 13,643 MBF, yields a cost of \$226.04/MBF).

<sup>432</sup> Kuiu Bid Letter.

public works funds are available to pay for all, or a portion of, [National Forest System] road construction or reconditioning costs for roads that would be used for a timber sale as well as the long-term administration of the national forest.”<sup>433</sup> The agency attempts to deflect this issue in its response to comments by stating there are currently no congressional appropriations slated for the Project, but immediately acknowledges that Congress has and could provide for such.<sup>434</sup>

Thus, the FEIS admits that the Forest Service might force the public to pay for some or all of the road costs for the Prince of Wales Logging Project over the next 15 years, but then fails to examine those costs and the resulting impacts of that decision (*i.e.*, making it more likely that a timber sale will be offered in any given location) and justify the decision to move ahead. By failing to explain these potential costs, the Forest Service violates NEPA in its FEIS and reaches an arbitrary conclusion under NFMA in its Draft ROD.

#### V. THE FOREST SERVICE FAILS TO ADDRESS THE IMPLICATIONS OF, AND ALTERNATIVES TO, ITS DECISIONS TO ADOPT AND IMPLEMENT THE EXPORT POLICIES.

The Forest Service’s decisions to adopt various versions of the Export Policy has had direct environmental effects because the agency admits it increases the volume of logging on the Tongass, thereby increasing adverse environmental impacts, while decreasing the number of jobs created per unit of timber cut. By failing to subject those policy decisions to environmental review, the Forest Service is acting contrary NEPA, NFMA, and the other timber sale statutes governing timber sale decisions.<sup>435</sup>

As explained in the objections to the 2016 Amended Forest Plan,<sup>436</sup> the Forest Service violated NEPA because the 2016 Amended Forest Plan FEIS fails to disclose and analyze the significant environmental and economic impacts of the agency’s decisions to adopt export policies. The agency’s decisions to adopt various export policies also raises infirmities under NFMA and the other statutes under which the Forest Service operates, as the decisions directly influence the agency’s ability to balance multiple competing interests when managing the national forests, including the agency’s decision to select an alternative that maximizes the amount of large-scale old-growth logging approved.<sup>437</sup> For all of these reasons, the Forest Service is implementing the Prince of Wales Logging Project pursuant to an unlawful forest plan rendering the Project unlawful for the same reasons.

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<sup>433</sup> FEIS at 114.

<sup>434</sup> *Id.*, Appendix D at D-80 to D-81.

<sup>435</sup> See DEIS Comment Letter at 56-58.

<sup>436</sup> See SEACC Forest Plan Objection at 25-35; ARD Forest Plan Objection at 85-90.

<sup>437</sup> See 16 U.S.C. § 1604(e) (NFMA); *id.* § 529 (Multiple-Use Sustained-Yield Act); *id.* § 539d(a) (TTRA); *id.* § 3120(a)(3)(A) (Alaska National Interest Lands Conservation Act); see also *Natural Res. Def. Council*, 421 F.3d at 808-09 (explaining balancing of timber and other goals in the Tongass).

The FEIS also fails to examine implications of and alternatives to the current Region 10 Export Policy being applied to the Prince of Wales Logging Project. The agency fails to consider alternatives in which the Export Policy is not adopted and/or applied.<sup>438</sup> Variations on the Export Policy are not even included among the “Alternatives Considered But Eliminated From Detailed Review.”<sup>439</sup> The agency acts unlawfully because the FEIS fails to explain why the agency did not consider alternatives based on domestic processing with smaller volumes variations and the resulting differential environmental impacts.

Additionally, the Forest Service acts arbitrarily under NFMA and the other statutes under which the Forest Service operates when it approves a timber sale given the inherent tradeoffs and balancing the agency must make in deciding how to pursue competing objectives. The agency never even considers smaller volume logging alternatives processed in region. In so doing, the agency acts in an arbitrary manner.

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The Prince of Wales Logging Project is a sad chapter in the Tongass logging program. It accomplishes nothing more than mire Southeast Alaska in the destructive and controversial practices of industrial-scale old-growth logging for the next 15 years. Logging Tongass old-growth is economically and environmentally unsustainable and, as a result, the Forest Service should not move ahead. To do otherwise, based on the FEIS and Draft ROD, the Forest Service will act in an arbitrary and unlawful manner.



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<sup>438</sup> FEIS at 21-34.

<sup>439</sup> *Id.* at 34-36.



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May 13, 2019

**VIA FOREST SERVICE COMMENT PORTAL**

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Thorne Bay Ranger District  
Tongass National Forest  
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Re: Prince of Wales Landscape Level Analysis Project Out-year Plan Comments

Dear Ms. Brigham:

The Forest Service is soliciting comments on the proposed Out-year Plan issued for the implementation phase of the Prince of Wales Landscape Level Analysis Project (the Project). Earthjustice submits these comments on behalf of its clients Southeast Alaska Conservation Council, Alaska Rainforest Defenders, Center for Biological Diversity, Sierra Club, Sierra Club Alaska Chapter, Defenders of Wildlife, Alaska Wilderness League, National Audubon Society, Audubon Alaska, and Natural Resources Defense Council.

As we have explained in comments throughout the planning process, the final environmental impact statement (FEIS) for the Project violates the National Environmental Policy Act (NEPA), Alaska National Interest Lands Conservation Act (ANILCA) and National Forest Management Act (NFMA) because it does not provide site-specific information. The Forest Service must withdraw those portions of the Record of Decision authorizing Vegetation Management Activities and road construction, immediately stop implementing them, and prepare a site-specific EIS with a new record of decision before proceeding with any Vegetation Management Activities or new roads.<sup>1</sup>

Despite its failure to disclose site-specific information about the proposed activities or impacts in the draft or final environmental impact statements, the Forest Service has stated that it has completed the environmental review process required by NEPA. The agency formalized its decision to proceed with the Project in the Record of Decision, signed March 16, 2019, thereby authorizing logging up to 656 million board feet (mmbf) of timber and building about 164 miles of roads over 15 years.

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<sup>1</sup> We do not object to the Watershed Improvement and Restoration or Sustainable Recreation Management components of the Out-year Plan.

The proposed Out-year Plan initiates the Project's implementation phase. Under the Vegetation Management Activities heading, it lists "Commercial Timber Harvest,"<sup>2</sup> which would apparently include a 50 mmbf old-growth timber sale<sup>3</sup> and a still-undisclosed amount of new road construction.

The timber sale and roads in the Out-year Plan would cause significant harm to the people of Prince of Wales Island and surrounding areas, to wildlife, and to old-growth ecosystems. The people of Prince of Wales Island use the land for many purposes and are connected to it in a variety of ways. There are commercial and recreational hunters and fishers who use the area. There are many who maintain deep cultural connections to the land through subsistence practices and artistic traditions, such as carving and weaving. And there are many who use the area for wildlife viewing, photography, and education. For all of these people, Prince of Wales Island and the surrounding areas contain vital ecosystems.

There has already been a massive amount of old-growth logging on Prince of Wales Island, significantly jeopardizing these uses. Namely, it has caused significant restrictions to subsistence hunting of deer, a vitally important resource use for the rural communities of the project area. It has significantly damaged the habitat of wolves, goshawks, and endemic species such as flying squirrels and grouse. To cut another 50 mmbf of old-growth timber from the island will only worsen these harms. Similarly, road densities are already too high, a circumstance that places wolf populations in peril. While the site-specific harms will vary—a critical factor that was never analyzed in the FEIS—the additional habitat loss and road construction is unacceptable in all of the areas proposed in the Out-year Plan.

We raised objections to the lack of site-specific information for this huge timber sale project throughout the planning process.<sup>4</sup> The Forest Service failed to provide unit and road cards as required by the 2016 Amended Land and Resource Management Plan for the Tongass, with which NFMA requires compliance. These cards would normally provide the type of site-specific information that is missing here. The Forest Service did not disclose where in the 1.8 million acres of national forest land in the project area any of the logging or roadbuilding would occur. In the absence of basic locational information, it was not possible to analyze the site-specific impacts of the proposed action or any of its alternatives on the human environment, as required by NEPA, or on subsistence uses, as required by section 810 of ANILCA. Given this lack of information, the public was left wholly unable to provide meaningful input or understand what activities the agency was planning to authorize.

Even now, the Forest Service continues to lack information necessary to implement the Project in an informed way. The proposed Out-year Plan makes clear that the agency will not have that information until after all opportunities for public engagement are over: "The final prescriptions,

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<sup>2</sup> U.S. Forest Serv., Out-year Plan at 1 (Apr. 2019) (Out-year Plan).

<sup>3</sup> U.S. Forest Serv., POW LLA: Implementation Workshop – Proposed Timber Activities (Apr. 2019) (map).

<sup>4</sup> See, e.g., Earthjustice, Comments on Prince of Wales Landscape Level Analysis Project Draft Environmental Impact Statement, 9-17 (June 18, 2019); Earthjustice, Objection to the Prince of Wales Landscape Level Analysis Project, 4-33 (Dec. 21, 2018).

including detailed sale layout and marking instructions for any harvest units, will be completed after field reviews are completed by specialists, public workshop, and Out-year Plan comment period.”<sup>5</sup> Without this information, the public is unable to provide comments on activity design components, locations, methods, mitigation measures, and integration opportunities as the Forest Service requests.

The Out-year Plan itself merely lists proposed activities, without clear information on where or how they will be implemented or what the impacts of logging or road construction will be. The Forest Service has provided over 200 Implementation Unit Cards, but has not explained the relationship of these unit cards to the current implementation process, such as whether they will all be offered for timber sale at this time. There are no road cards.

Moreover, for most of the proposed activities, including commercial timber harvest and precommercial thinning, the Out-year Plan indicates the surveys will not even be completed until well after the comment period on the plan and associated documents closes.<sup>6</sup> The unit cards themselves reflect this. They are incomplete, and the Forest Service readily states: “All required surveys have not [sic] completed for these units.”<sup>7</sup> For example, in the card for Unit 3, the Forest Service states as to silviculture, engineering/system roads, wildlife, and several other categories: “All resource-specific information, protections and mitigations will be determined before harvest activities are implemented.”<sup>8</sup> The same is generally true for all of the unit cards. Though providing the information at this stage would not cure the violations of NEPA, ANILCA, and NFMA, the persisting lack of information continues to hamper the public’s ability to understand the project or provide meaningful input.

As we also pointed out throughout the NEPA process, the forest plan requires unit cards and site-specific road prescriptions to be included in the planning process.<sup>9</sup> In the response to objections released with the Record of Decision, the Forest Service concluded that the requirement of forest plan standard TIM3.I.C to include the unit cards in the draft and final EISs is no longer applicable because the Chief directed rescission of a related Forest Service Handbook provision.<sup>10</sup> This is not a lawful procedure to amend or revise a forest plan.<sup>11</sup> Until the Forest Service lawfully amends the plan, TIM3.I.C remains in effect.

These forest plan requirements were adopted specifically to ensure compliance with NEPA and ANILCA. In the 1980s, the Forest Service prepared timber sale EISs like the FEIS here—

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<sup>5</sup> U.S. Forest Serv., Out-year Plan Draft Unit Cards at 4 (Apr. 2019) (Draft Unit Cards).

<sup>6</sup> Out-year Plan at 1 (setting end of survey timeframe in September 2019).

<sup>7</sup> Draft Unit Cards at 2. In fact, in combination, the unit cards repeat almost 2,000 times that surveys have not been completed—reflecting an alarming amount of information collection remaining to be done.

<sup>8</sup> Draft Unit Cards at Unit 3, p. 21 of 623.

<sup>9</sup> U.S. Forest Serv., Tongass National Forest Amended Forest Plan at 4-68 (TIM3.I.C) (2016 Amended Forest Plan); *Id.* at 4-77 (TRAN3.I.D).

<sup>10</sup> U.S. Forest Serv., Objection Response POWLLA # 19-10-00-0011, at 3 (Mar. 1, 2019).

<sup>11</sup> See 16 U.S.C. § 1604(f)(4)-(5); 36 C.F.R. § 219.13.

lacking site-specific information—but the courts struck them down as unlawful.<sup>12</sup> It was not until the Forest Service began providing detailed information in the EISs, including maps and descriptions of the logging and roads for each proposed unit in the sale, that the courts upheld the EISs.<sup>13</sup> The unit cards for those EISs were also more complete than the unit cards provided with the Out-year Plan here. The unit cards in the EISs contained complete information about multiple resources (see attached examples), while those in the Out-year Plan are still lacking surveys for most resources as described above.

In 1997, to formalize the practice established through these court decisions, the Forest Service revised its land resource and management plan for the Tongass to include standards and guidelines requiring site-specific information about timber cutting units and roads in project planning.<sup>14</sup> The Forest Service included and strengthened these provisions in the 2008 and 2016 plan amendments, including standard TIM3.I.C in the current plan.<sup>15</sup>

These forest plan requirements maintain compliance with NEPA and ANILCA, ensuring the Forest Service plans site-specific projects in a way that meets those statutes' mandates for informed decisionmaking and public participation. The process the Forest Service has undertaken in the Prince of Wales project ignores all of this; the agency plans to embark upon the largest timber sale in 30 years without providing site-specific information or understanding of impacts. In short, the Forest Service has not lawfully amended the forest plan to remove these provisions, and even if it did so, equivalent site-specific information would be needed in project EISs to ensure compliance with NEPA and ANILCA.

For the reasons stated above, the Out-year Plan does not and cannot cure the violations of NEPA, ANILCA, and NFMA inherent in the FEIS and the Record of Decision. The Forest Service still has not provided sufficient information for informed public comment, analysis of impacts, or a choice among alternatives. The Forest Service must withdraw those portions of the Record of Decision authorizing Vegetation Management and road construction, immediately stop implementing them, and prepare a site-specific EIS with a new record of decision before proceeding with any Vegetation Management Activities or new roads.

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<sup>12</sup> *City of Tenakee Springs v. Block*, 778 F.2d 1402 (9th Cir. 1985); *City of Tenakee Springs v. Courtright*, No. J86-024-CIV, 1987 WL 90272 (D. Alaska June 26, 1987).

<sup>13</sup> *See, e.g., Stein v. Barton*, 740 F. Supp. 743, 748-49 (D. Alaska 1990); *City of Tenakee Springs v. Clough*, 750 F. Supp. 1406, 1422-23 (D. Alaska 1990), *rev'd on other grounds* 915 F.2d 1308 (9th Cir. 1990). Examples of the maps, unit cards, and road cards from the EISs at issue in those cases are attached hereto.

<sup>14</sup> U.S. Forest Service, Tongass National Forest Land and Resource Management Plan at 4-98 (TIM114.XII.A) (1997); *Id.* at 4-103 (TRAN212.I.D) (attached).

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Sincerely,

A handwritten signature in black ink, appearing to read 'Olivia Glasscock', with a stylized, cursive script.

Olivia Glasscock  
Thomas S. Waldo  
EARTHJUSTICE

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

DOCUMENTS IN SUPPORT OF SOUTHEAST ALASKA CONSERVATION COUNCIL  
*ET AL.*'S PRINCE OF WALES LANDSCAPE LEVEL PROJECT OUT-YEAR PLAN  
COMMENTS

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

SOUTHEAST ALASKA CONSERVATION )  
COUNCIL; ALASKA RAINFOREST )  
DEFENDERS; CENTER FOR BIOLOGICAL ) Case No. 1:19-cv-00006-SLG  
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.* )

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

(5 U.S.C. §§ 701-06; 16 U.S.C. § 1604;  
16 U.S.C. § 3120; 42 U.S.C. § 4332)

## SUMMARY

1. This action challenges the Prince of Wales Landscape Level Analysis Project Record of Decision (the Record of Decision) signed by Tongass Forest Supervisor Earl Stewart on March 16, 2019, and the associated Final Environmental Impact Statement (FEIS) published on November 2, 2018. Plaintiffs bring this case under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332, the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3120, and the National Forest Management Act (NFMA), 16 U.S.C. § 1604.

2. The Prince of Wales Landscape Level Analysis Project (the Project) in the Tongass National Forest includes extensive old-growth and second-growth logging. The project area is roughly 2.3 million acres. The project area contains about 1.8 million acres of national forest land. The Project authorizes logging of up to 656 million board feet (mmbf) of timber. The U.S. Forest Service (Forest Service) estimates that this logging would occur on over 42,000 acres. The Forest Service estimates about 164 miles of roads associated with the logging would be constructed as part of the Project. The Record of Decision authorizes implementation of the Project to take place over a span of fifteen years.

3. The project area is located on Prince of Wales Island and surrounding islands. The islands in the project area have been subject to decades of old growth logging and road building. These activities have significantly reduced habitat capability

for the Alexander Archipelago wolf, Sitka black-tailed deer, and other species. Logging has significantly restricted opportunities for subsistence hunting of deer. The Project will further exacerbate these impacts. The Project will irreparably harm residents of the island who engage in subsistence and other uses of the project area.

4. The Forest Service has authorized this Project using an approach that has been soundly rejected by the courts. The agency authorized the Project before identifying specific locations for logging or road construction. As a result, the FEIS does not adequately describe the direct, indirect, or cumulative impacts of the Project on the human environment or on subsistence uses.

5. The Forest Service is required to comply with the 2016 Land and Resource Management Plan for the Tongass National Forest (2016 Amended Forest Plan). The 2016 Amended Forest Plan requires the Forest Service to provide site-specific information, such as unit cards and road planning measures, during the planning process. The Forest Service did not provide that information during its planning process. It has stated it will not do so until the implementation phase.

6. By failing to specify where logging would occur or where new roads would be built, and by failing to evaluate the impacts of these location-specific activities, the FEIS does not provide sufficient information for informed decision-making or informed public participation.

## **JURISDICTION, RIGHT OF ACTION, AND VENUE**

7. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 and may issue a declaratory judgment and further relief pursuant to 28 U.S.C. § § 2201-02. Judicial review is available under the Administrative Procedure Act. 5 U.S.C. §§ 701-06.

8. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e).

## **PLAINTIFFS**

9. Southeast Alaska Conservation Council (SEACC) is a non-profit, member-based organization, with hundreds of members, a majority of whom are Alaskans. They come from many walks of life, including commercial fishermen, Alaska Natives, tourism and recreation business owners, small timber operators, and high-value-added manufacturers, hunters, and guides. SEACC reaches out to its members and the general public through various means, including its website, Facebook and Instagram accounts, its newsletter “The Ravencall,” other publications, action alerts, and public meetings. SEACC’s mission is to protect the special places of the world’s largest temperate rainforest, promote conservation, and advocate for sustainability in human use of natural resources. Inspired by the land, wildlife, cultures, and communities of Southeast Alaska, SEACC strives to insure this interconnected whole exists for future generations. To achieve its mission, SEACC and its members have worked to protect the Tongass National Forest and advocated for balanced, sustainable use of the Tongass National Forest’s renewable forest resources, including fish and wildlife and the commercial,

recreational, and subsistence use of such resources for nearly 50 years. SEACC's public advocacy, education, and organizing efforts have created a legacy of effective partnerships with leaders within the region, and across the state and country. SEACC's community forest planning efforts, promotion of restoration, stewardship, and renewable energy projects, and land protection advocacy all contribute to its efforts to address ecological, energy, and economic needs throughout the Tongass.

10. Alaska Rainforest Defenders is a regional conservation non-profit corporation in Southeast Alaska. Alaska Rainforest Defenders was formerly known as Greater Southeast Alaska Conservation Community. The Alaska Rainforest Defenders stand together to defend and promote the biological integrity of Southeast Alaska's terrestrial, freshwater, and marine ecosystems for the benefit of current and future generations. Alaska Rainforest Defenders seeks to foster protection of southeast Alaska's fish and wildlife and their habitat. The members of Alaska Rainforest Defenders use public lands throughout southeast Alaska and the project area for commercial and subsistence fishing and hunting, professional scientific work, and a wide range of recreational activities.

11. Center for Biological Diversity is a non-profit corporation headquartered in Tucson, Arizona, with offices in a number of states. The Center has approximately 70,000 members throughout the United States, including Alaska, as well as in other countries. The Center works to ensure the long-term health and viability of animal and

plant communities across the United States and elsewhere, and to protect the habitat these species need to survive. The Center believes that the health and vigor of human societies and the integrity and wildness of the natural environment are closely linked. The Center has been actively involved in protecting Alaska's wildlife since the early 1990s. With regard to the Tongass National Forest, the Center has filed petitions to protect the Queen Charlotte goshawk and the Alexander Archipelago wolf under the Endangered Species Act. The Center closely follows the fate of these and many other species that depend upon old growth habitat in the Tongass.

12. The Sierra Club is a national nonprofit organization of approximately 780,000 members dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. Members of the Sierra Club nationally, and Sierra Club's Alaska Chapter locally, use the Tongass National Forest for recreation, commercial and recreational fishing, subsistence, wildlife viewing, and other activities. The Sierra Club has advocated for the protection of Tongass forestlands and the values therein since 1892 when the club was created by John Muir. The Sierra Club has been active in creating, opposing, or supporting Tongass land management actions for 45 years. The Alaska

Chapter of the Sierra Club has approximately 1,800 members with about 380 of them residing in Southeast Alaska.

13. National Audubon Society is a not-for-profit organization now in its second century. With its 23 state offices, 41 Centers, and 466 chapters, the mission of the National Audubon Society is to conserve and restore natural ecosystems, focusing on birds, other wildlife, and their habitats, for the benefit of humanity and the earth's biological diversity. Audubon brings scientific perspective and support to broader, collective conservation efforts to advance conservation-oriented public policies, including in Alaska. Through the Audubon Alaska state office and the five local Alaska chapters, National Audubon Society has played an important role in conserving Alaska's natural heritage and has long championed Alaska's special places, including the Tongass National Forest.

14. Defenders of Wildlife is a non-profit organization with its principal office in Washington, D.C. and field offices throughout the country. Defenders of Wildlife has approximately 1.8 million members and supporters, including over 6,000 in Alaska. The organization's primary mission is to further the protection of native wildlife and plants in their natural communities. Defenders of Wildlife has advocated for the protection of Tongass species, including the Alexander Archipelago wolf, Queen Charlotte goshawk, northern flying squirrel, marten, and bats in comments on the Tongass National Forest Management Plan amendment process, by submitting detailed comments on proposed

rules and environmental impact statements, providing information to its members and the public, and litigating.

15. Natural Resources Defense Council (NRDC) is a non-profit environmental advocacy organization with three million members and online activists. NRDC works to safeguard the earth—its people, its plants and animals, and the natural systems on which all life depends. NRDC has a long history of interest and involvement in Tongass-related management issues, dating back to the early 1970s. Over the years, NRDC has participated in numerous management and policy processes, and litigated both defending and challenging federal decisions, affecting the Tongass National Forest. Its members have filed many hundreds of thousands of comments with federal agencies advocating conservation of the Tongass. No other national forest has seen such sustained advocacy from NRDC. This commitment reflects the unique place the Tongass holds in the National Forest System, as its largest unit and the one with far and away the most natural values, and indeed one of the largest in the world’s catalogue of remaining principally intact temperate rainforest ecosystems.

16. Alaska Wilderness League (the League) is a non-profit organization with approximately 100,000 members and activists located in Alaska and throughout the United States. The League was founded in 1993 to advocate for protection of Alaska’s public lands and waters, which are threatened with environmental degradation. The League is headquartered in Washington, DC and has an Alaska office in Anchorage. The



League works to preserve Alaska's wild lands and waters by engaging citizens and decision makers with a courageous, constant, victorious voice for Alaska. The League works at the federal level on a variety of issues affecting Alaska's wild lands and waters including the Tongass National Forest. The League's rainforest program is focused on protecting old growth forest in the Tongass.

17. Members of the plaintiff organizations reside near, visit, or otherwise use and enjoy the Prince of Wales project area. Members of the plaintiff organizations use lands throughout the project area for recreation, subsistence, sport hunting and fishing, wildlife viewing, photography, education, and aesthetic and spiritual enjoyment. The plaintiffs and their members derive scientific, recreational, aesthetic, and conservation benefits and enjoyment from their use of the area. The logging and roadbuilding authorized in the Prince of Wales Project will directly and irreparably injure these interests.

18. The plaintiff organizations monitor the use of forest ecosystems and compliance with the laws respecting these ecosystems, educate their members and the public concerning management of these ecosystems, and advocate policies and practices that conserve the natural value of these ecosystems. Plaintiffs cannot achieve these organizational purposes fully without adequate information and public participation in the processes required by law. The interests and organizational purposes of the plaintiffs are

directly and irreparably injured by Defendants' violations of the laws as described in this complaint.

19. Plaintiffs participate actively in the administrative processes established for management of the Tongass National Forest and did so for the Prince of Wales Project. Plaintiff groups submitted comments on scoping and on the draft environmental impact statement (DEIS) for the Project. These groups also filed objections to the draft Record of Decision, pursuant to Forest Service regulations. Plaintiffs have exhausted administrative remedies for the decision challenged in this complaint. These organizations seek declaratory and injunctive relief preventing the Forest Service from proceeding with unlawful actions that cause harm to the environment and to subsistence uses, and thereby to their members, pending compliance with the law.

### **DEFENDANTS**

20. The full name of Defendant United States Forest Service is United States Department of Agriculture, Forest Service. It is an agency of the Department of Agriculture entrusted with the administration of the national forests, including the Tongass National Forest.

21. Defendant United States Department of Agriculture is the department of the executive branch responsible for overseeing the activities of the Forest Service.

22. Defendant David Schmid is sued in his official capacity as Regional Forester for Region 10 of the United States Forest Service. Schmid was the decision-maker on the objections to the draft Record of Decision for the Prince of Wales Project.

23. Defendant Earl Stewart is sued in his official capacity as the Forest Supervisor for the Tongass National Forest. Stewart signed the Record of Decision for the Prince of Wales Project.

### **FACTS**

24. The Tongass National Forest is part of one of the few temperate rainforest ecosystems in the world. It is this country's largest national forest. Prince of Wales Island and the other islands in the project area are part of the Alexander Archipelago. The project area provides habitat for Sitka black-tailed deer, bears, salmon, grouse, goshawks, Alexander Archipelago wolves, and small endemic mammals. Decades of clearcut logging have caused significant habitat loss in the project area.

25. The communities of Southeast Alaska depend on the Tongass National Forest and the project area for employment in commercial fishing and fish processing, recreation, and tourism. Many residents of the communities in the project area depend on subsistence hunting and fishing to meet basic needs. Residents across Prince of Wales and nearby islands use many parts of the project area for hunting, fishing, and gathering.

26. The Forest Service published the FEIS on November 2, 2018. Forest Supervisor Earl Stewart signed the Record of Decision on March 16, 2019.

27. The maximum volume of timber authorized for sale in the Record of Decision exceeds that of any other single site-specific record of decision issued by the Forest Service nationwide subsequent to 1989. The maximum volume of old-growth timber authorized for sale in the Record of Decision exceeds that of any other single site-specific record of decision issued by the Forest Service nationwide subsequent to 1989.

28. The maximum volume of timber authorized for sale in the Record of Decision exceeds that of any other single site-specific record of decision issued by the Forest Service nationwide subsequent to 1994. The maximum volume of old-growth timber authorized for sale in the Record of Decision exceeds that of any other single site-specific record of decision issued by the Forest Service nationwide subsequent to 1994.

29. The Project also includes some habitat restoration and recreation improvements.

30. The Project will result in the reduction of habitat available for several species in the project area. This includes habitat for Sitka black-tailed deer, bears, grouse, goshawks, Alexander Archipelago wolves, and small endemic mammals. The Project may cause a significant restriction of subsistence hunting for deer. The FEIS and the Record of Decision acknowledge these facts.

31. Neither the DEIS nor the FEIS provides site-specific information about logging or roadbuilding. The FEIS states: “The [Prince of Wales Landscape Level

Analysis] Project proposes to harvest timber and build roads under all action alternatives, but it is unknown at this time where on the landscape this would occur.” FEIS at 3-234.

32. The FEIS’s Response to Comments states that “it is not possible to determine all of the direct, indirect, or cumulative impacts to wildlife habitat or connectivity that could result from this project before implementation.” FEIS, Appendix D at D-58. Nevertheless, the Forest Service states that it is approving this Record of Decision “without the need for additional NEPA analysis.” *Id.*, Appendix B at B-1.

33. During implementation, the Forest Service does not intend to conduct any further subsistence hearings or findings under section 810(a)(2)-(3) of ANILCA, 16 U.S.C. § 3120(a)(2)-(3). The Implementation Plan included in the Record of Decision does not call for any further subsistence hearings or findings.

34. In the 1980’s, the Forest Service lost at least two court decisions for failure to provide adequate site-specific information and analysis in the environmental impact statements (EISs) for Tongass timber sales. *City of Tenakee Springs v. Block*, 778 F.2d 1402 (9th Cir. 1985); *City of Tenakee Springs v. Courtright*, No. J86-024-CIV, 1987 WL 90272 (D. Alaska June 26, 1987). In subsequent Tongass timber sale EISs, the Forest Service began including comprehensive, detailed quantitative and qualitative descriptions of the logging and road access plans for each harvest unit proposed for sale. When it did so, the courts upheld the adequacy of the site-specific information. *Stein v. Barton*, 740 F. Supp. 743, 748-49 (D. Alaska 1990).

35. When the Forest Service revised its programmatic land and resource management plan for the Tongass in 1997, the agency included standards and guidelines requiring site-specific information about timber cutting units and roads in project planning. For timber cutting units, the plan called for “unit cards” documenting mitigation and protection measures to be included in NEPA documents. U.S. Forest Service, Land and Resource Management Plan, Tongass National Forest at 4-98 (TIM114.XII.A) (1997). For roads, the plan required the agency, during project planning, to “identify resource concerns and site specific mitigation measures” and to “[c]learly document” them to facilitate implementation. *Id.* at 4-103 (TRAN212.I.D).

36. When the Forest Service amended the land and resource management plan in 2008, the agency restated the requirement for unit cards in NEPA documents and expanded it, requiring “a map with relevant resource features.” U.S. Forest Service, Tongass National Forest, Land and Resource Management Plan at 4-71 (TIM4.I.C) (2008). For roads, the 2008 amendment included a provision that added a hyphen but was otherwise identical to TRAN212.I.D from the 1997 plan. *Id.* at 4-81 (TRAN3.I.D).

37. When the Forest Service amended the land and resource management plan again in 2016, the agency again restated the requirement for unit cards. The 2016 Amended Forest Plan modified that standard to specify that the cards would be in electronic format and would be included with both draft and final NEPA documents. This standard also added a reference to a provision of the Forest Service Handbook.

2016 Amended Forest Plan at 4-68 (TIM3.I.C). For roads, the 2016 Amended Forest Plan included a provision identical to TRAN3.I.D as it appeared in the 2008 amendment. *Id.* at 4-77 (TRAN3.I.D).

38. The purpose of the plan provisions described in paragraphs 35-37 above was to ensure compliance with NEPA in site-specific project planning.

39. The 2016 Amended Forest Plan is the currently applicable plan for the Tongass.

40. In the DEIS and FEIS for the Prince of Wales Project, the Forest Service did not include unit cards. The agency has taken the position that the timing component of TIM3.I.C—requiring that the unit cards be included in draft and final NEPA documents—is no longer applicable. The Forest Service has never adopted a plan amendment or revision to remove or modify TIM3.I.C.

41. During the planning process for the Prince of Wales Project, the Forest Service did not identify site-specific mitigation measures for roads. The Forest Service has never adopted a plan amendment or revision to remove or modify TRAN3.I.D.

42. After issuing the FEIS and signing the Record of Decision, the Forest Service held a public workshop on April 6, 2019 in Klawock, Alaska (on Prince of Wales Island). At this workshop, the Forest Service provided maps indicating four general areas proposed for the first timber sale to take place under the Project. The agency indicated it anticipates offering 50 mmbf of old-growth timber in the first sale. This information is

currently posted online and available for a 30-day public comment period. Comments are due May 13, 2019.

43. The Forest Service anticipates offering the first timber sale under the Project by the end of fiscal year 2019. Logging or road work on the timber sale may commence before the end of fiscal year 2019.

**COUNT I**  
**(National Environmental Policy Act)**

44. NEPA requires federal agencies to prepare an EIS on any proposal for “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C).

45. NEPA regulations require federal agencies to discuss the direct, indirect, and cumulative effects of their actions in the EIS. 40 C.F.R. §§ 1502.16, 1508.8. The EIS should provide a clear basis for choice among alternatives. 40 C.F.R. § 1502.14.

46. The FEIS does not provide site-specific information about the Prince of Wales Project or its impacts. The FEIS does not disclose specific locations where logging or road construction will occur. As of March 2019, the Forest Service had not determined where within the project area the logging or road construction would take place.

47. By using this approach, the FEIS does not adequately address the direct, indirect, and cumulative effects of the Project on the human environment. The FEIS does not provide a clear basis for choice among alternatives. The FEIS does not contain



sufficient information to foster informed decision-making or informed public participation. For these reasons, the FEIS violates NEPA, 42 U.S.C. § 4332(2)(C), and is therefore “not in accordance with law” under 5 U.S.C. § 706(2)(A) and “without observance of procedure required by law” under 5 U.S.C. § 706(2)(D).

**COUNT II**  
**(Alaska National Interest Lands Conservation Act)**

48. ANILCA requires federal land agencies to evaluate the effects of, and alternatives to, any disposition of federal public land on subsistence uses and needs. 16 U.S.C. § 3120(a). Where the disposition of the land may significantly restrict subsistence uses, the agency is required to conduct hearings in the vicinity of the area involved and to make certain findings justifying the restriction. *Id.* § 3120(a)(2)-(3). When an EIS is required, the agency is required to include the hearing and the findings in the EIS. *Id.* § 3120(b).

49. The FEIS and Record of Decision acknowledge that the Prince of Wales Project may cause a significant restriction of subsistence uses of deer. The Forest Service conducted hearings and made findings under ANILCA section 810.

50. The FEIS does not provide site-specific information about the Prince of Wales Project or its effects on subsistence uses. The FEIS does not disclose specific locations where logging or road construction will occur. As of March 2019, the Forest Service had not determined where within the project area the logging or road construction would take place.

51. By using this approach, the FEIS does not adequately address the direct, indirect, and cumulative effects of the Project on subsistence uses. The FEIS does not provide a clear basis for choice among alternatives. The FEIS does not contain sufficient information to foster informed decision-making or informed public participation. The FEIS does not provide adequate information for the required subsistence hearings or findings required by ANILCA § 810(a)(2)-(3). 16 U.S.C. § 3120(a)(2)-(3). For these reasons, the FEIS violates ANILCA section 810, 16 U.S.C. § 3120, and is therefore “not in accordance with law” under 5 U.S.C. § 706(2)(A) and “without observance of procedure required by law” under 5 U.S.C. § 706(2)(D).

**COUNT III**  
**(National Forest Management Act)**

52. NFMA requires that “[r]esource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans.” 16 U.S.C. § 1604(i). The Forest Service has adopted the 2016 Amended Forest Plan as the land management plan for the Tongass National Forest.

53. The 2016 Amended Forest Plan establishes “standards,” which are “mandatory requirements or minimums that must be met” in decision-making. 2016 Amended Forest Plan at 1-4.

54. These standards include a requirement that “[t]imber harvest unit cards...will be provided electronically when Draft or Final NEPA documents and decisions are published.” *Id.* at 4-68 (TIM3.I.C).

55. Neither the DEIS nor the FEIS included unit cards. The Forest Service stated it will not prepare unit cards until the implementation phase. Implementation began after the Record of Decision was signed.

56. For transportation, including roads, the 2016 Amended Forest Plan includes the following standard: “During project planning, identify resource concerns and site-specific mitigation measures. Clearly document these mitigation measures to facilitate project implementation and monitoring.” *Id.* at 4-77 (TRAN3.I.D).

57. During project planning for the Prince of Wales Project, the Forest Service did not identify resource concerns for the roads. During project planning for the Prince of Wales Project, the Forest Service did not identify site-specific mitigation measures for the roads. The Forest Service intends to develop site-specific design and mitigation measures during implementation.

58. The Forest Service’s failure to provide unit cards for timber cutting in the DEIS and FEIS is not consistent with the 2016 Amended Forest Plan. This failure is therefore a violation of NFMA, 16 U.S.C. § 1604(i), “not in accordance with law” under 5 U.S.C. § 706(2)(A), and “without observance of procedure required by law” under 5 U.S.C. § 706(2)(D). The Forest Service’s failure to identify resource concerns or site-

specific mitigation measures for new roads during project planning is not consistent with the 2016 Amended Forest Plan. This failure is therefore a violation of NFMA, 16 U.S.C. § 1604(i), “not in accordance with law” under 5 U.S.C. § 706(2)(A), and “without observance of procedure required by law” under 5 U.S.C. § 706(2)(D).

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully request that the Court:

1. Enter a declaratory judgment that the failure to include site-specific information about logging and roads in the FEIS violates NEPA;
2. Enter a declaratory judgment that the failure to include site-specific information about logging and roads in the FEIS violates ANILCA section 810;
3. Enter a declaratory judgment that Defendants violated NFMA and the 2016 Amended Forest Plan by failing to provide unit cards with the DEIS or FEIS or site-specific road planning information during the planning process;
4. Set aside the Record of Decision or portions of it deemed not in compliance with law;
5. Enter preliminary and permanent injunctive relief as needed to prevent irreparable harm from implementation of the Prince of Wales Project until Defendants comply with NEPA, ANILCA, NFMA, and the 2016 Amended Forest Plan;
6. Award Plaintiffs the costs of this action, including reasonable attorneys’ fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412; and

7. Grant such other relief as this Court deems just and proper.

Respectfully submitted this 7th day of May, 2019.

*s/ Thomas S. Waldo*

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Thomas S. Waldo (AK Bar No. 9007047)  
EARTHJUSTICE

*s/ Olivia Glasscock*

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

SOUTHEAST ALASKA CONSERVATION	)	
COUNCIL; ALASKA RAINFOREST	)	
DEFENDERS; CENTER FOR BIOLOGICAL	)	Case No. 1:19-cv-00006-SLG
DIVERSITY; SIERRA CLUB; DEFENDERS OF	)	
WILDLIFE; ALASKA WILDERNESS LEAGUE;	)	
NATIONAL AUDUBON SOCIETY; and	)	
NATURAL RESOURCES DEFENSE COUNCIL,	)	
	)	
<i>Plaintiffs,</i>	)	
	)	
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,	)	
	)	
<i>Defendants.</i>	)	

**PLAINTIFFS' OPENING BRIEF UNDER LOCAL RULE 16.3(C)**

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## INTRODUCTION

This action challenges the Final Environmental Impact Statement (FEIS) and Record of Decision (ROD) for the Prince of Wales Landscape Level Analysis Project (Project), a Forest Service decision authorizing 15 years of logging on Prince of Wales Island and smaller surrounding islands in the Tongass National Forest. The Project is the biggest timber sale decision authorized anywhere on the national forest system in 30 years. *See* Doc. 1 at 12, ¶27; Doc. 9 at 5, ¶27. It would cut up to 42,635 acres of mostly old-growth forest and build up to 164 miles of new roads. *See* 833\_2426 at 000440 (ROD at 1) (selecting Alt. 2); 833\_2167 at 001481 (FEIS at 23, Tbl. 2 (Alt. 2)). Yet, the Forest Service prepared an environmental impact statement (EIS) for the Project that does not disclose where any of this logging or road construction would take place and, therefore, does not contain any site-specific analysis of impacts or alternatives. 833\_2167 at 001692 (FEIS at 234). The agency made clear that, despite the lack of location-specific information, its environmental analysis was complete—there will be no subsequent EISs to provide the missing site-specific analysis. 833\_2169 at 002078 (FEIS, Appendix B at B-1). This approach violates the National Environmental Policy Act (NEPA), section 810 of the Alaska National Interest Lands Conservation Act (ANILCA), and the agency's own forest management plan adopted under the National Forest Management Act (NFMA).

The Ninth Circuit long ago rejected this approach when the Forest Service attempted to authorize large-scale Tongass logging pursuant to a 50-year pulp mill contract without providing site-specific information. *City of Tenakee Springs v. Block*, 778 F.2d 1402, 1408 (9th Cir. 1985) (“It is impossible to determine where and when harvesting will occur on the 750,000 acres of land.”). Nevertheless, the Forest Service is now reviving that approach in the Prince of Wales Project, burnishing it only with a new name: “condition-based analysis.” 833\_2167 at 001443 (FEIS at i).

In short, then, the Forest Service is using this EIS to test whether the courts will now uphold an approach rejected decades ago. They should not. Subsequent case law is entirely consistent with *City of Tenakee Springs v. Block*. Site-specific details remain an essential requirement of an EIS, and they are important for this EIS in particular.

## FACTS

### **I. The Tongass National Forest is a rare and globally significant temperate rainforest that has been depleted by decades of old-growth logging.**

At 16.7 million acres, the Tongass is the largest national forest in the country. 833\_0404 at 063052 (2016 Plan); *id.* at 063407. It is part of a coastal temperate rainforest spanning from northern California to Alaska’s Cook Inlet and provides habitat for over 300 species of birds and mammals, as well as robust fish stocks. 833\_2079 at 0071191-92 (2016 Plan FEIS at 3-7 to 3-8). Coastal temperate rainforests are rare in the world, *id.* at 071196 (2016 Plan FEIS at 3-13) (“covering less than 0.5 percent of the earth’s total forested area”), and southeast Alaska includes 19 percent of them. *Id.* This

resource is globally significant in several respects. These forests sequester vast amounts of carbon, with the result that “Southeast Alaska plays an important role in the global climate and carbon cycle” and “stores more forest carbon than any other national forest in the United States.” *Id.*; *see also id.* at 071194-99, 071202-05 (2016 Plan FEIS at 3-11 to 3-16, 3-19 to 3-22). The Tongass also contains productive and globally significant karst soils, *id.* at 071211-16 (2016 Plan FEIS at 3-33 to 3-38), and is a hotspot for endemism, including species or subspecies restricted to islands or groups of islands that are sensitive to human activity and “highly susceptible to extirpation and eventual extinction.” *Id.* at 071430 (2016 Plan FEIS at 3-247). Communities around Southeast Alaska rely on the Tongass for a variety of uses, including subsistence, recreation, tourism, and fishing. *Id.* at 071540-42, 071600, 071660, 07682-85 (2016 Plan FEIS at 3-357 to 3-359, 3-417, 3-477, 3-499 to 3-502).

Over the last century, parts of the Tongass have been heavily logged for commercial timber production. 833\_0404 at 063408 (2016 Plan at Appendix B, 2); 833\_2077 at 069553-55 (2008 Plan FEIS at 3-331 to 3-333). Timber sales have focused on the biggest trees offering the highest timber values and the most valuable wildlife habitat. *Id.* at 069359-60, 069371-76 (2008 Plan FEIS at 3-137 to 3-138, 3-149 to 3-154). Most of this logging took place under two 50-year timber sale contracts for pulp mills in Ketchikan and Sitka that operated from the 1950’s to the 1990’s. *See id.* at 069553-55 (2008 Plan FEIS at 3-331 to 3-333). The single most heavily logged part of



the Tongass is Prince of Wales Island, 833\_2079 at 071378 (2016 Plan FEIS at 3-195),<sup>1</sup> which was part of the sale area for the Ketchikan pulp mill contract. 833\_2167 at 001750 (FEIS at 292).

In 1969, when the era of pulp mill logging was near its peak, Congress passed NEPA. *See* 833\_2077 at 069553 (2008 Plan FEIS at 3-331); 833\_2074 at 065957 (1997 Plan FEIS at 3-259, Tbl. 3-73). This presented the Forest Service with the challenge of how to provide the huge volumes of timber required by those contracts while preparing the “detailed” statement of impacts required by the new law. 42 U.S.C. § 4332(2)(C). In its early attempts, the Forest Service prepared five-year operating plans, each authorizing hundreds of millions of board-feet of timber over the vast contract areas, with a single EIS for each plan. *See City of Tenakee Springs v. Block*, 778 F.2d at 1404. These ambitious EISs contained little or no site-specific information: “It is impossible to determine where and when harvesting will occur on the 750,000 acres of land.” *Id.* at 1408. When the City of Tenakee Springs and others challenged this approach, the Ninth Circuit held it inadequate for lack of site-specific detail. *Id.*; *see also City of Tenakee Springs v. Courtright*, No. J86-024-CIV, 1987 WL 90272 at \*4 (D. Alaska June 26, 1987) (“generic discussions of fish and wildlife values should be supplemented by text or

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<sup>1</sup> The cited plan EIS refers to the “North Central Prince of Wales biogeographic province.” This province occupies most of Prince of Wales Island and of the project area in this case. *See* 833\_2079 at 071369 (2016 Plan FEIS at 3-186, Fig 3.9-1); 833\_2167 at 001461 (FEIS at 3, Fig. 1).

maps showing how these considerations were or were not factored into routing and design decisions”).

To comply with these court holdings, the Forest Service began preparing site-specific EISs containing “comprehensive, detailed quantitative and qualitative descriptions of the logging and roading plans for each harvest unit” proposed for sale. *See, e.g., Stein v. Barton*, 740 F. Supp. 743, 748-49 (D. Alaska 1990). Only then did the courts uphold the EISs. *Id.*

Following *Stein v. Barton*, the Forest Service formalized a site-specific analysis requirement in its 1997 revised forest plan for the Tongass. NFMA requires the Forest Service to prepare a programmatic land and resource management plan for each national forest. 16 U.S.C. § 1604. Subsequent site-specific projects, such as timber sales, must be consistent with the plan. *See, e.g., Friends of Southeast’s Future v. Morrison*, 153 F.3d 1059, 1067-68, 1070-71 (9th Cir. 1998). The 1997 revised Tongass plan required the agency to prepare “unit cards” in NEPA documents for site-specific timber sales: “Unit cards should document mitigation and protection measures displayed and documented in NEPA documents.” 833\_2076 at 068765 (1997 Plan at 4-98 (TIM114.XII.A)). A unit card includes a map of each cutting unit in the timber sale and a list of resource attributes and prescriptions specific to that unit. *See, e.g.,* 833\_2084 at 061276, 061278-85 (sample unit cards from Kuiu timber sale). The Forest Service updated this requirement in a 2008 amendment: “The unit cards, including a map with relevant resource features, will be

included in NEPA documents.” 833\_2078 at 070798 (2008 Plan at 4-71 (TIM4.I.C)). In 2016, the agency updated the requirement again, to require including unit cards electronically with the NEPA documents: “Timber harvest unit cards will document resource concerns and protection measures. The unit cards, including a map with relevant resource features, will be provided electronically when Draft or Final NEPA documents and decisions are published.” 833\_0404 at 063265 (2016 Plan at 4-68 (TIM3.I.C)).

When followed, the unit card requirement in the forest plan helps facilitate compliance with NEPA’s requirement for site-specific detail. In the decades following *Stein v. Barton* and the adoption of the forest plan unit card requirement, the Forest Service has followed this practice successfully, until now.

## **II. In the Prince of Wales Project, the Forest Service adopted the planning approach of the defunct long-term contracts.**

In the Prince of Wales Project, the Forest Service prepared an EIS like those used for the long-term contract operating plans of the 1970’s and 1980’s: It covers a vast project area of 1.8 million acres, 833\_2167 at 001460-61 (FEIS at 2-3); it includes a volume of timber—656 million board-feet (mmbf), *id.* at 001481 (FEIS at 23, Tbl. 2 (Alt. 2))—that has not been attempted in a single EIS since the pulp mill era; and it contains no unit cards or other site-specific information about the location of logging or new roads. *Id.* at 001692 (FEIS at 234). Accordingly, the agency acknowledged “it is not possible to determine all of the direct, indirect, or cumulative impacts to wildlife

habitat or connectivity that could result from this project before implementation.”

833\_2171 at 002200 (FEIS, Appendix D, at D-58). Nevertheless, the Forest Service was clear that there will be no further NEPA analysis following the ROD. 833\_2169 at 002078 (FEIS, Appendix B at B-1). Nor does the agency intend to conduct any further subsistence hearings or findings under ANILCA section 810(a)(2)-(3), 16 U.S.C. § 3120(a)(2)-(3). *See* 833\_2426 at 000461-62, 000469 (ROD). Instead of providing site-specific information in the FEIS or any subsequent NEPA process, the Forest Service will make these decisions on a rolling basis as it implements the Project. 833\_2167 at 001459 (FEIS at 1).

The Forest Service packaged the Project as a landscape level analysis that includes “vegetation management activities” (the category for timber sales) as well as road construction, watershed restoration, and recreation improvements. 833\_2167 at 001464-65 (FEIS at 6-7). The agency released a draft EIS (DEIS) in April 2018. 833\_1198 at 002255. Plaintiffs and others submitted comments arguing that the DEIS was inadequate for failure to provide site-specific analysis, resulting in inadequate assessment of impacts to wildlife and subsistence, among other problems. 833\_1603. The Forest Service issued the FEIS together with a draft ROD in October 2018. 833\_2167; 833\_2174. In December 2018, Plaintiffs and others filed timely objections under agency regulations, raising essentially the same issues. 833\_2387. The Forest Service rejected these objections on March 1, 2019, 833\_2440, and signed the final ROD on March 16, 2019.

833\_2426 (ROD). The ROD selected the alternative that would log the greatest volume of timber, including the most old growth. 833\_2426 at 000449 (ROD at 10); 833\_2167 at 001481 (FEIS at 23, Tbl. 2 (Alt. 2)). Plaintiffs filed this case on May 7, 2019. Doc. 1.

**III. Prince of Wales Island and the surrounding areas contain vital old-growth habitat relied upon by many communities.**

Prince of Wales Island is the fourth biggest island in the United States. 833\_2167 at 001750 (FEIS at 292). Its habitat supports many species dependent on old-growth forest ecosystems, such as black bears, spruce grouse, Queen Charlotte goshawks, Alexander Archipelago wolves, Sitka black-tailed deer, and small endemic mammals. *Id.* at 001633 (FEIS at 175). The island is also home to 12 communities that depend heavily on the island for hunting, fishing, and gathering, including subsistence practices and commercial fishing. *Id.* at 001462, 001750 (FEIS at 4, 292).

Industrial-scale logging began on Prince of Wales in the 1950's, *id.* at 001750 (FEIS at 292), and over the ensuing decades made the island the most heavily logged part of the Tongass. *See supra* pp. 3-4. Logging converts old-growth habitat to young-growth, which is of lesser quality for most wildlife species. 833\_2167 at 001541 (FEIS at 83). There are seven wildlife analysis areas in the project area with only 30 to 50% of their pre-1954 old-growth habitat remaining. *Id.* at 001656 (FEIS at 198, Tbl. 41). There are about 30 watersheds in the project area with known restoration needs. 833\_2167 at 001483 (FEIS at 25).

Because this area has been so heavily targeted by past logging, it has the lowest remaining percent of intact watersheds in the Tongass, both by number of watersheds (22%) and by acreage (15%). 833\_2079 at 071395 (2016 Plan FEIS at 3-212 (Tbl. 3.9-15)).<sup>2</sup> It also has the lowest remaining percent of productive old growth (POG) (63%), *id.* at 071400 (2016 Plan FEIS at 3-217 (Tbl. 3.9-16)) and of the particularly valuable high-volume old growth (52%). *Id.* at 071401 (2016 Plan FEIS at 3-218 (Tbl. 3.9-17)). *See generally id.* at 071372 (2016 Plan FEIS at 3-189) (explaining old growth characteristics). Intact large-scale blocks of this habitat type have all but disappeared. 833\_2037 at 053975 (Albert & Schoen at 782) (“93.5% of [the island’s] highest volume landscape-scale blocks of old growth had been logged”); *see id.* at 053974 (Figs. 3(a) & 3(b)). The extensive network of logging roads built to remove all this timber has also created the highest mean road density in southeast Alaska. 833\_2064 at 445 (81 Fed. Reg. 435, 445 (Jan. 6, 2016)).<sup>3</sup>

The extensive past logging and roadbuilding has placed significant stress on wildlife populations. This province has the lowest remaining percent of deer habitat capability (54%) of any in the Tongass. 833\_2079 at 071471 (2016 Plan FEIS at 3-288, Tbl. 3.10-16). The Forest Service describes the impacts of the Project to deer as

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<sup>2</sup> As discussed above, the North Central Prince of Wales Biogeographic Province occupies most of the island and most of the project area. *See supra* note 1.

<sup>3</sup> This notice refers to the roads in “GMU 2.” 833\_2064 at 445. That means Game Management Unit 2, an area defined by the Alaska Department of Fish and Game that encompasses the project area, i.e., Prince of Wales and surrounding islands. 833\_2079 at 071420 (2016 Plan FEIS at 3-237).

“Moderate to Major” in light of this substantial pre-existing loss of habitat. 833\_2426 at 000454 (ROD at 15). For this reason, the agency also found a “significant possibility of a significant restriction” to subsistence uses of deer. 833\_2167 at 001557 (FEIS at 99).

Because deer are the principal prey of the Alexander Archipelago wolf, and because wolves are also threatened by the substantial road network on the island, the agency also predicts a “Moderate to major” impact on this species. 833\_2426 at 000452-53 (ROD at 13-14). This probably understates the risk. The FEIS notes that “[i]n 2016, the U.S. Fish and Wildlife Service (USFWS) concluded there was reasonable risk that wolves could be significantly reduced, or perhaps even extirpated from Prince of Wales Island...” 833\_2167 at 001681 (FEIS at 223). Due to alarming declines in wolf populations in the project area, Forest Service leadership in 2016 convened a team of specialists from the Forest Service, the Alaska Department of Fish and Game, and the U.S. Fish and Wildlife Service to develop a Wolf Habitat Management Program for the area, as called for in the forest plan. 833\_0847 at 046473; *see* 833\_0404 at 063288 (2016 Plan at 4-91). This blue-ribbon panel produced a report with detailed recommendations for habitat, roads, and other needs. 833\_0847. Yet the Forest Service declined to follow any of these recommendations, selecting instead the Project alternative that maximized timber production, despite the impacts to wolves. *See* 833\_2167 at 001567-68, 001629-30 (FEIS at 109-10, 171-72); 833\_2426 at 000449, 000455-56 (ROD at 10, 16-17).

Prince of Wales Island also hosts two endemic subspecies unique to the project area: The Prince of Wales flying squirrel and the Prince of Wales spruce grouse. 833\_2079 at 071432-33 (2016 Plan FEIS at 3-249 to 3-250). Both are associated with old-growth forests, *id.*, and have therefore been affected by extensive past logging. *Id.* at 071472 (2016 Plan FEIS at 3-289). Many experts are concerned about the continuing viability of the flying squirrel, arguing that the existing habitat reserves on the island are insufficient. *Id.* at 071432-33 (2016 Plan FEIS at 3-249 to 3-250). Spruce grouse are also prey for goshawks and marten, and their decline would potentially affect those species adversely. *Id.* at 071433 (2016 Plan FEIS at 3-250).

**IV. The Forest Service has begun implementation of the Project and plans to proceed with a timber sale this fall.**

The agency record filed in this case ends with the ROD and includes no information about subsequent implementation. For purposes of establishing standing and irreparable harm only, Plaintiffs note that the Forest Service has begun to implement the Project by publicly releasing materials about a potential timber sale this year. The materials included a map indicating that 50 mmbf of old-growth timber could be offered from four areas in the northern half of the island. *See* Ex. 2 at 5. Subsequently, Plaintiffs learned from counsel for Defendants that the Forest Service intends to offer a 35-mmbf sale in mid- to late-August 2019, with ground-disturbing activities beginning as early as September 27, 2019. Doc. 6 at 3-4, ¶5. On or about July 11, 2019, just before the filing of this brief, the Forest Service posted on its web site “revised draft unit cards” for the



“Twin Mountain Timber Sale,” which appears to be the sale planned for this year. *See* U.S. Forest Serv., Prince of Wales Landscape Level Analysis Project Twin Mountain Timber Sale Draft Unit Cards, [https://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/fseprd641767.pdf](https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd641767.pdf) (last visited July 12, 2019). The Forest Service has issued no notice to the public or to Plaintiffs about the Twin Mountain sale.

## ARGUMENT

### I. Plaintiffs have standing.

Plaintiffs have standing to bring this case because their members have standing in their own right, the interests at stake are germane to Plaintiffs’ organizational purposes, and the lawsuit does not require the participation of their individual members. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181 (2000).

Members of these Plaintiff organizations use Prince of Wales Island and the surrounding areas. This includes the north end of the island in the Staney, Naukati, North End, and Neck Lake areas indicated as areas proposed for the first timber sale under this project. Ex. 2 at 5. They use the project area for subsistence and commercial hunting, fishing, and gathering. Ex. 1 at 2-3, ¶¶3-4; Ex. 2 at 2, ¶3; Ex. 7 at 1-5, ¶¶4, 10, 11; Ex. 12 at 1,10, ¶¶3, 20. They also use the area for recreation, education, photography, and wildlife viewing. Ex. 1 at 5-6, ¶¶6-7; Ex. 2 at 2-3, ¶¶3, 5-7; Ex. 4 at 1, 6-7, ¶¶4, 13-14; Ex. 5 at 2-3, ¶¶6, 14; Ex. 12 at 3-4, 6-7, 9, ¶¶4-7, 13, 16; Ex. 13 at 8, ¶¶17-19. They

value the area for its aesthetic qualities, tranquility, community, and spiritual benefit. Ex. 1 at 7-8, 14-15, 18-19, ¶¶8, 17, 22; Ex. 4 at 6, ¶13; Ex. 5 at 3-7, ¶¶8, 10, 12; Ex. 7 at 8, ¶14; Ex. 12 at 6-10, ¶¶12-13, 17, 19. Plaintiffs' members intend to continue their uses of the project area. Ex. 1 at 13, 19-20, ¶¶15, 24-25; Ex. 2 at 3-4, ¶¶9-10; Ex. 4 at 2, 5, 8-9, ¶¶5, 11, 18; Ex. 5 at 7, ¶14; Ex. 7 at 4, 9, ¶¶7, 8, 16; Ex. 12 at 8-10, ¶¶15-17, 20; Ex. 13 at 8-9, ¶20.

As discussed above, this Project would cause further habitat loss in an area that has already been heavily logged. *See supra* pp. 3-4, 8-11. Despite the existing impacts from past logging, the project area remains important for old-growth dependent species and for the interests of the people who use them. Ex. 5 at 4-5, ¶10. Plaintiffs' members fear their interests in Prince of Wales, including their aesthetic enjoyment, will be harmed if this Project proceeds. Ex. 1 at 8-17, ¶¶9-14, 17-18, 20; Ex. 2 at 4, ¶11; Ex. 4 at 4-7, ¶¶9-15; Ex. 5 at 5-7, ¶¶11-12, 14; Ex. 7 at 4-6, 7, ¶¶7-11, 14; Ex. 12 at 5-6, 10-11, ¶¶11, 19, 21; Ex. 13 at 9-10, ¶¶21, 23. The Forest Service's decision to authorize this Project without complying with NEPA, ANILCA, and NFMA also harms Plaintiff members' interests in being informed about agency plans and having the opportunity to participate meaningfully in agency decisionmaking. Ex. 2 at 3, ¶8; Ex. 4 at 9-10, ¶19; Ex. 5 at ¶¶10, 11; Ex. 7 at 6-7, ¶¶12.

These imminent harms constitute concrete injury in fact, are fairly traceable to the actions taken by the Forest Service challenged in this litigation, and are redressable by

the relief sought. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1147 (9th Cir. 2000).

## **II. Standard of review.**

This challenge arises under the Administrative Procedure Act, which directs courts to “set aside” agency decisions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” or “without observance of procedure required by law.” 5 U.S.C. § 706(1), (2)(A) & (D). An agency action is arbitrary if the agency fails to “examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

## **III. The Forest Service violated NEPA by failing to provide site-specific information in the EIS.**

The Forest Service violated NEPA by failing to provide site-specific information or analysis in the draft or final EIS. The agency’s failure to analyze the impacts of the Project or its alternatives resulted in an uninformed decision, and its failure to disclose where any logging or road building will take place made it impossible for the public to participate meaningfully in the process.

### **A. NEPA requires site-specific information be provided in an EIS before the agency makes its decision.**

NEPA requires agencies to prepare a “detailed statement”—the statute’s term for an EIS—for agency actions with significant environmental impacts. 42 U.S.C. §

4332(2)(C). An EIS must assess the direct, indirect, and cumulative impacts of the proposed action and of alternatives to it. *Id.*; 40 C.F.R. §§ 1502.16, 1508.8. The EIS must provide site-specific information and analysis to serve two purposes: 1) to ensure agencies are making informed decisions before acting; and 2) to ensure the public is given a meaningful opportunity to participate in those decision-making processes.

*WildEarth Guardians v. Mont. Snowmobile Ass’n*, 790 F.3d 920, 922-25 (9th Cir. 2015); *Stein*, 740 F. Supp. at 749.

*City of Tenakee Springs v. Block* controls this case. There, the Forest Service had lumped five years of logging within a 750,000-acre project area under one of the pulp mill contracts into a single EIS, which purported to be the site-specific analysis. 778 F.2d at 1404, 1407-08. However, neither the draft nor final EIS “gave any indication of its overall plan for timber harvesting in the Baranof Islands and Chichagof Island. It is impossible to determine where and when harvesting will occur on the 750,000 acres of land.” *Id.* at 1408. The court found this fatal: “As the record now stands, the Alaska Lumber & Pulp final EIS is inadequate.” *Id.*

The Forest Service did exactly the same thing in the FEIS at issue here for an even bigger area—1.8 million acres. The FEIS candidly states that the agency “proposes to harvest timber and build roads under all action alternatives, but it is unknown at this time where on the landscape this would occur.” 833\_2167 at 001692 (FEIS at 234).

Accordingly, it is impossible for the agency to explain—or for the public to provide input

on—the site-specific environmental impacts of any of these activities, or of potential alternatives to them. *City of Tenakee Springs v. Block* held this unlawful and applies fully here. *See also Stein*, 740 F.Supp. at 749 (describing NEPA’s site-specificity requirements).

The Forest Service attempts to justify this lack of information by citing the unprecedented size, duration, and multi-activity nature of the Project. Comparing the Project to a typical site-specific timber sale EIS, the agency asserts, “[I]t is difficult to look at a landscape level analysis for various types of activities with a process that is generally set for one resource in a shorter amount of time that [sic] 15 years.” 833\_2171 at 002157 (FEIS at Appendix D, D-15). That was the exact argument the court rejected in *City of Tenakee Springs v. Block*: “Although the agency does have discretion to define the scope of its actions...such discretion does not allow the agency to determine the specificity required by NEPA.” 778 F.2d at 1407 (citing *California v. Block*, 690 F.2d 753, 765 (9th Cir. 1982)). Here, the Forest Service created a daunting task for itself by choosing to implement 15 years of multiple activities over a vast area in a single project decision. But as the courts have consistently held, this choice does not allow the agency to shirk its duty under NEPA to provide site-specific disclosure. *Id.*

*City of Tenakee Springs v. Block* and *Stein v. Barton*, though decided decades ago, rely on foundational NEPA principles that remain in effect today. As the court held in *Stein*, NEPA requires site-specificity to fulfill two basic purposes: 1) to ensure agencies

are making informed decisions prior to acting and 2) to ensure the public is given a meaningful opportunity to participate in those decision-making processes. *Stein*, 740 F. Supp. at 749; *see also City of Tenakee Springs v. Block*, 778 F.2d at 1407 (reasoning that an EIS must give decisionmakers sufficient data). These are the same touchstone criteria the Ninth Circuit applies today in evaluating whether an EIS is adequately site-specific. *See WildEarth Guardians*, 790 F.3d at 921-25 (holding EIS inadequate for failure to disclose location of moose range); *see also Or. Nat. Desert Ass’n v. Rose*, 921 F.3d 1185, 1189, 1190-91 (9th Cir. 2019) (holding environmental analysis violated NEPA by failing to establish “the physical condition” of roads and trails and authorizing activity without assessing the actual baseline conditions);. Merely disclosing the existence of particular geographic or biological features is inadequate—agencies must discuss their importance and substantiate their findings as to the impacts. *Or. Nat. Res. Council Fund v. Goodman*, 505 F.3d 884, 892 (9th Cir. 2007) (holding EIS inadequate for failure to evaluate in detail impacts of ski area expansion to acknowledged biological corridor); *Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 995 (9th Cir. 2004) (holding numeration of logging acres and road miles insufficient to describe actual environmental effects). For the same reasons the EIS in *City of Tenakee Springs v. Block* was inadequate 34 years ago, the FEIS here is inadequate today.

**B. “Condition-based” management does not save the FEIS.**

The Forest Service fares no better in its attempt to defend the Project by invoking “condition-based” management. The agency states that it can comply with NEPA by

responding to conditions on the ground with requirements specified in “Activity Cards” and an implementation plan. 833\_2171 at 002157 (FEIS at Appendix D, D-15).

“Activity Cards” are not location-specific but provide general direction on how to implement categories of activities in the Project. 833\_2426 at 000482-85, 000553-62, 000575-84 (ROD at 43-46, 114-23, 136-45). That approach might be permissible if the agency were going to prepare a subsequent EIS fulfilling the requirements of NEPA. *See* 40 C.F.R. §§ 1502.20, 1508.28 (allowing “tiering”). The Forest Service was clear and explicit, though, that there will be no additional NEPA analysis. 833\_2426 at 000692 (ROD at 253).

The subsequent non-NEPA process for implementation cannot make up for the lack of an adequate FEIS. To ensure its purposes of informed decisions and meaningful public participation are met, NEPA contains myriad requirements that will not apply to the implementation plan here. NEPA requires a detailed, site-specific analysis of the direct, indirect, and cumulative impacts of the proposed action and—importantly—of alternatives to it, including the alternative of no action. 40 C.F.R. §§ 1502.14, 1502.16, 1508.8. It requires a draft EIS that discloses “all major points of view” on these impacts. *Id.* § 1502.9(a). It requires a minimum of 45 days for members of the public, other agencies, tribes, and state and local agencies to submit comments on the draft. *Id.* § 1506.10(c). It requires the Forest Service to respond to comments in a final EIS that discusses “any responsible opposing view.” *Id.* §§ 1502.9(b), 1503.4. It requires the

agency to explain the reasons for its final choice in a ROD. *Id.* § 1505.2. Forest Service regulations require the agency to issue a draft ROD and to provide an opportunity for interested parties to file objections to the decision. 36 C.F.R. §§ 218.7(b), 218.8. The reviewing officer must submit a written response to the objections before signing a final ROD. *Id.* §§ 218.11(b)(1), 218.12(a). The objection procedure is required by the Appeals Reform Act of 1992, Pub. L. 102-381, Tit. III, § 322, 106 Stat. 1419, 16 U.S.C. § 1612 note. *See generally* 78 Fed. Reg. 18,481, 18,482 (March 27, 2013).

The implementation plan for the Project provides none of these assurances. It promises a 30-day public comment period following a workshop and a draft “Out-year Plan” that is to include unit cards. 833\_2426 at 000693 (ROD at 254). This process misses essential attributes of an EIS. It offers no analysis of site-specific impacts of the proposed timber sale or of any alternatives, no alternative of “no action,” no analysis of competing points of view, a shorter comment period than required by NEPA, no obligation to respond to comments, no ROD, and no objection process. Even the site-specific disclosure in the so-called unit cards as described in this process will be inadequate, as the implementation plan calls for fieldwork and consultation on the units only after the short public comment period and after the agency has approved the Out-year Plan. *Id.* at 000693-95 (ROD at 254-56). The unit cards will thus be unverified and lack vital information at the time of public comment and decision. Moreover, even this



limited procedure is unenforceable, as the implementation plan “is meant to be a ‘living’ document and may need to be adjusted....” *Id.* at 000469 (ROD at 30).

The Ninth Circuit has held that ascertaining baseline information during implementation is inconsistent with NEPA’s purposes because “an agency cannot carefully consider information about significant environmental impacts” and “the public is deprived of their opportunity to play a role in the decision-making process.” *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1085 (9th Cir. 2011). Indeed, proposing “to increase the risk of harm to the environment and then perform [] studies...has the process exactly backwards.” *Nat’l Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 733 (9th Cir. 2001), *abrogated on other grounds by Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010).

In short, the implementation plan is no substitute for a NEPA-compliant EIS. It fails to achieve NEPA’s core purposes of ensuring informed decisions and meaningful public participation. *See, e.g., WildEarth Guardians*, 790 F.3d at 921-25.

**C. The impacts of logging and road construction on Prince of Wales Island will vary greatly depending on where the activities are located.**

On Prince of Wales Island, as elsewhere, site-specific information in an EIS is essential for a meaningful analysis of impacts and alternatives. In the project area and in the Tongass generally, all forest stands are not created equal. They have different attributes, different habitat values, different spatial relationships to other habitats (including previously logged stands), different proximity to communities, and different

use by people, among many other variations. The FEIS admits this: “Measures of habitat area may be insufficient to predict the effects of habitat loss, because habitat loss has different effects on populations, depending on where the habitat loss occurs. Species interactions also influence responses to habitat loss.” 833\_2167 at 001631 (FEIS at 173). The attributes influencing the value of a particular forest stand for habitat and other resources—and the divergent impacts of logging those stands or building roads to them—are too numerous to catalog fully, but following are some examples.

**1. The landscape varies.**

Few attributes are more important than forest structure. “Forest structure is important because it reflects the complex spatial and temporal interactions between plant growth (e.g., dispersal and competition), environmental gradients (e.g., geology, soils, slope, aspect, elevation, and climate), and disturbance (e.g., wind and logging).” 833\_2079 at 071372 (2016 Plan FEIS at 3-189). Accordingly, scientists have developed a model based on tree size and density in the Tongass, grouping them in seven categories. Those with the highest density of large trees are most productive and most important for biodiversity. *Id.* at 071372-73 (2016 Plan FEIS at 3-189 to 3-190).

Elevation is also key. “Lower elevation stands (at or below 800 feet) hold the highest value for many wildlife species because they remain relatively accessible during winter.” *Id.* at 071374 (2016 Plan FEIS at 3-191).

Connectivity and fragmentation of forest stands can have a major impact on some wildlife species. *Id.* at 071381-82 (2016 Plan FEIS at 3-198 to 3-199). “Populations may

become isolated, and therefore at greater risk of local extirpation, if fragmentation hinders movement of individuals between subpopulations. The degree to which this occurs depends on species-specific dispersal capabilities, the distance between habitat patches, and conditions within the matrix between habitat patches.” *Id.* at 071382 (2016 Plan FEIS at 3-199).

Karst soils in southeast Alaska are uniquely productive for forest growth, have high values for wildlife and the region’s unique cave systems, are unevenly distributed, and are especially vulnerable to logging. *Id.* at 071211-19 (2016 Plan FEIS at 3-28 to 3-36). The forest plan, therefore, requires highly site-specific analysis in timber sale project planning. *Id.* at 071217 (2016 Plan FEIS at 3-34).

Logging has a big impact on stream runoff with much local variation. “Many factors influence how timber harvest and clearing of forest for road construction may affect runoff, and most are site-specific.” *Id.* at 071234 (2016 Plan FEIS at 3-51). They include hillslope gradient, topography, soil type, rainfall, and the proportion of the watershed previously logged. *Id.* at 071235 (2016 Plan FEIS at 3-52). The forest plan intended, therefore, that site-specific project planning would evaluate these and other variables. *Id.* at 071258 (2016 Plan FEIS at 3-75).

Logging and road construction may damage wetlands by “altering hydrology, changing nutrient pathways, removal of nutrients, increased sedimentation (which can diminish water quality), increased soil temperature, alteration in water yield and stream

flow patterns, change of plant species composition and growth, and reductions in available wildlife habitat.” *Id.* at 071275-76 (2016 Plan FEIS at 3-92 to 3-93).

Accordingly, “project-level analysis and planning would be used to avoid construction in wetlands, and would provide site-specific plans to minimize effects.” *Id.* at 071275 (2016 Plan FEIS at 3-92).

Two resources that are particularly location-specific, vulnerable to logging, and unknown before surveying include rare plants, *id.* at 071338 (2016 Plan FEIS at 3-155), and cultural resources, *id.* at 071616-31 (2016 Plan FEIS at 3-433 to 3-448).

## **2. Use of the landscape—by humans and by wildlife—varies.**

Subsistence use of the forest—a critical concern to the residents of Prince of Wales Island—varies greatly across the forest and is strongly affected by both logging and roads. Subsistence take varies substantially from one community to another, both by per capita harvest and by species mix. *Id.* at 071606-07 (2016 Plan FEIS at 3-423 to 3-424). “Each of the communities in Southeast Alaska has a distinct home range where concentrated use occurs, with a wide range of use typically occurring on a less concentrated scale outside the normal home range.” *Id.* at 071607 (2016 Plan FEIS at 3-424). History and clan relationships also give rise to local customary rules about use areas. *Id.* at 071607 (2016 Plan FEIS at 3-424). Subsistence users naturally focus on the areas that are most accessible, with the result that road construction has greatly changed where people go, *id.*, and brought in more competition, particularly on Prince of Wales Island. *Id.* at 071602 (2016 Plan FEIS at 3-419).

Each wildlife species has its own unique habitat needs. Sitka black-tailed deer, a species particularly important for subsistence hunting and as prey for wolves, are limited primarily by the availability of low-elevation old growth needed in winter. *Id.* at 071413 (2016 Plan FEIS at 3-230). When an old-growth stand is first logged, the resulting clearcut provides non-winter forage for about 25 years, but then grows over and creates poor habitat for 150 years. *Id.* at 071416, 071445-46 (2016 Plan FEIS at 3-233, 3-262 to 3-263).

The Alexander Archipelago wolf, in turn, preys on deer and is therefore strongly affected by deer habitat conditions. *Id.* at 071421 (2016 Plan FEIS at 3-238). In addition, roads—especially at low elevation—have a strongly negative effect of wolves, because they facilitate trapping. *Id.* at 071421-22, 071459 (2016 Plan FEIS at 3-238 to 3-239, 3-276).

The Queen Charlotte goshawk forages in mature and old-growth forest stands, with high-volume old growth providing optimal nesting and foraging. *Id.* at 071441 (2016 Plan FEIS at 3-258). Logging these stands can cause portions of the landscape to become “marginal or unsuitable for goshawks.” *Id.*

American marten—a furbearer valuable for trapping—favor large- and medium-size old-growth forests, particularly in the beach fringe and in riparian areas below 1500 feet in elevation. *Id.* at 071441, 071453 (2016 Plan FEIS at 3-235, 3-270). They are vulnerable to fragmentation and, because they are trapped, to roads. *Id.*

Black bears—a species important for hunting, tourism, and recreation—“will use habitats from sea level to the alpine but appear to prefer estuarine, riparian, and forested coastal habitats.” *Id.* at 071417 (2016 Plan FEIS at 3-234). “[D]ense young-growth stands provide poor habitat for black bears....” *Id.* They are also vulnerable to roads because of increased contacts with humans. *Id.*; *see also id.* at 071450-51 (2016 Plan FEIS at 3-267 to 3-268).

The Prince of Wales flying squirrel is endemic to the project area. *Id.* at 071432 (2016 Plan FEIS at 3-249). These unusual squirrels require old-growth forests with low levels of fragmentation. Their limited gliding ranges require a high level of connectivity, because they can become isolated by clearcuts and young forests. *Id.*; *see also id.* at 071467 (2016 Plan FEIS at 3-284). Existing reserves in the forest plan may be too far apart to protect this subspecies. *Id.* at 071432-33 (2016 Plan FEIS at 3-249 to 3-250).

The Prince of Wales spruce grouse—another endemic subspecies—uses a wider variety of habitats, including not only old growth but muskegs, scrub, and young growth with a well-developed middle story. *Id.* at 071433 (2016 Plan FEIS at 3-250). However, they avoid recent clearcuts, which can block dispersal for a small grouse that prefers walking. *Id.* They are also a game bird and “are particularly vulnerable to hunting along road systems,” where they are susceptible to overexploitation. *Id.* They are important prey for goshawks and marten, and their abundance could affect those species. *Id.*; *see also id.* at 071468 (2016 Plan FEIS at 3-285).

In short, while all of these species depend to some degree on old growth, the extent of that dependence varies, and they have different needs respecting forest structure, elevation, proximity to beaches and streams, proximity to roads, prey availability, and fragmentation of their habitat. For all these reasons and more, the specific locations proposed for new logging and road construction matter a great deal for wildlife, for hunters, and for other people who use and enjoy the forest.

**D. Lacking site-specific information, the FEIS contains no meaningful analysis of impacts and alternatives.**

Without information about the location of proposed logging and roads within the vast, 1.8 million-acre project area, the FEIS is unable to provide the detailed assessment of impacts NEPA requires. For example, the FEIS acknowledges that logging in areas with extensive past logging would have greater effects on species with limited dispersal capabilities. 833\_2167 at 001674 (FEIS at 216). “Proposed activities that could result in less than 50 percent remaining by [wildlife analysis area] would have greater effects if these [wildlife analysis areas] were adjacent to each other or on islands.” *Id.* at 001636 (FEIS at 178). The FEIS also lists wildlife analysis areas by percent of high-volume old-growth habitat remaining and indicates that the Project could leave two of these with less than 15 percent of their pre-1954 habitat. *Id.* at 001656 (FEIS at 198, Tbl. 41). However, because the Forest Service has not decided where logging or roadbuilding will take place, it cannot analyze what the impacts from any actual timber sales or roads will be.

The lack of location-specific information also results in a meaningless comparison of alternatives. The FEIS describes four alternatives: no action (Alternative 1), the selected alternative (Alternative 2), and two additional action alternatives (Alternatives 3 and 5). *Id.* at 001445 (FEIS at iii). The alternatives differ in the restoration and recreation activities authorized and in the volume of logging allowed over the 15-year life of the Project. *Id.* However, the impact analyses for many resources contain identical text with variations only in the projected numeric measures, reflecting the Forest Service's inability to identify and analyze the impacts of different alternatives in any geographic detail. For example, for the direct and indirect effects of roads, the FEIS states as to each action alternative:

If all 122 miles of new road were to be constructed in this alternative effects to aquatic resources are expected to range from minor to moderate. The 122 miles of new road are made up of small segments spread across the entire project area as opposed to long continuous segments within a floodplain. Where these segments do occur near fish habitat, there is a higher risk of sediment related impacts to aquatic habitat.

*Id.* at 001614, 001619, 001622 (FEIS at 156, 161, 164). The only variation is that Alternative 5 is 118 miles instead of 122. *Id.* at 001622 (FEIS at 164). *See also id.* at 001718-20 (karst), 001746-47 (scenery), 001781-84 (landslides) (FEIS at 260-62, 288-89, 323-26). For other resources, the FEIS simply lumps the analysis of the impacts of different alternatives in a single section with little or no analysis of the differences between them. *See, e.g., id.* at 001649 (legacy standards), 001653-56 (high-volume old



growth), 001662-64 (deep snow habitat), 001670-72 (large tree habitat), 001699 (rare plants), 001704-05 (cultural resources) (FEIS at 191, 195-98, 204-06, 212-14, 241, 246-47). Nowhere does the FEIS compare actual impacts of actual alternative timber sales, because the agency has not yet decided where within the vast project area to offer them. This is a conspicuous and unlawful omission for what is supposed to be “the heart” of the EIS. 40 C.F.R. § 1502.14; *see, e.g., Nat. Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 813-14 (9th Cir. 2005).

For these reasons, location of the logging and roads matters. The lack of any information or analysis about where 15 years of logging will occur over a vast project area renders the FEIS inadequate. It fails to achieve NEPA’s core purposes of ensuring informed decisions and meaningful public participation. *See, e.g., WildEarth Guardians*, 790 F.3d at 922-25.

#### **IV. The failure to include site-specific information violates section 810 of ANILCA.**

The lack of site-specific information in the FEIS violates not only NEPA, but also section 810 of ANILCA. Congress enacted this law to “cause the least adverse impact possible on rural residents who depend upon subsistence uses of” federal public lands in Alaska. 16 U.S.C. § 3112(a); *see Alaska Wilderness Recreation & Tourism Ass’n v. Morrison*, 67 F.3d 723, 725 (9th Cir. 1995). Section 810 contains procedural requirements parallel to NEPA’s: It requires federal land agencies to evaluate the effects of, and alternatives to, any disposition of federal public land on subsistence uses and

needs. 16 U.S.C. § 3120(a). ANILCA, though, imposes additional requirements beyond the NEPA-like disclosures and analysis. Where the disposition of the land may significantly restrict subsistence uses, the agency must conduct hearings in the project vicinity and make certain findings justifying the restriction. *Id.* § 3120(a)(2)-(3). When an EIS is required, the agency is required to include the hearing and the findings in the EIS. *Id.* § 3120(b).

In Alaska, significant actions on federal public lands typically have impacts both on subsistence uses and on the environment, and agencies address both in the same EIS. *See id.* Because of the parallel procedural requirements in both statutes, the courts have found NEPA's requirements—including those for site-specificity—to apply to the section 810 subsistence evaluations. *See, e.g., City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1310-13 (9th Cir. 1990) (evaluating adequacy of alternatives and cumulative impacts under NEPA and ANILCA together); *Alaska Wilderness*, 67 F.3d at 731 (holding failure to consider alternatives violated both NEPA and ANILCA); *City of Tenakee Springs v. Clough*, 750 F.Supp. 1406, 1422-23 (D. Alaska 1990) (applying NEPA case law to ANILCA analysis for site-specificity), *rev'd on other grounds*, 915 F.2d 1308 (9th Cir. 1990).

An analysis of impacts on subsistence uses under section 810 should be at least as site-specific as that for the environmental impacts under NEPA. Subsistence is an inherently location-specific activity rooted not only in access to resources, but in human

geography, history, and clan relationships. *See supra* p. 23. Attempting to evaluate the impacts of logging on a community's subsistence uses without knowing where the logging will occur is an empty exercise.

Section 810's hearing requirements—an obligation not in NEPA—reinforce this conclusion. Where impacts are significant, the agency is required to hold “a hearing in the vicinity of the area involved,” 16 U.S.C. § 3120(a)(2), reflecting Congressional recognition of the local nature of subsistence practices. The project area contains 12 communities spread over 2.3 million acres, 1.8 million of which are in the national forest. 833\_2167 at 0014560-62 (FEIS at 2-4). The Forest Service conducted subsistence hearings in six of these communities. 833\_2426 at 000461 (ROD at 22). Without knowing where the logging would occur, though, it was not possible to convey meaningful information about how the Project would affect them.

Similarly, site-specific information is needed to make meaningful findings, as required in section 801(a)(3). 16 U.S.C. § 3120(a)(3). Under that section, the agency may authorize the action only after determining that:

- (A) such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of the public lands,
- (B) the proposed activity will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy, or other disposition, and
- (C) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions.

*Id.* Here, the Forest Service made these findings before deciding the specific location or extent of logging or road construction over the next 15 years. 833\_2426 at 000461-62 (ROD at 22-23). In essence, this was a finding that, no matter what future choices the agency makes, they will be necessary, use the minimal amount of public lands, and include reasonable steps to minimize impacts. Such a broad, generic finding, without the benefit of any location-specific information, mocks the statute.

For these reasons, the absence of site-specific information in the FEIS violates section 810 of ANILCA.

**V. The Forest Service violated its forest plan, and hence NFMA, by failing to provide unit cards with the EIS.**

NFMA requires the Forest Service to prepare land and resource management plans for each national forest. 16 U.S.C. § 1604(a), (e)-(f). Thereafter, projects must be consistent with the plan. *Id.* § 1604(i). The courts will strike down a timber sale project decision that fails to comply with a forest plan. *See, e.g., Friends of Southeast's Future*, 153 F.3d at 1067-69 (holding unlawful a timber sale approved without following the procedures of the forest plan).

The Forest Service violated the forest plan requirement to include unit cards with the draft or final EISs for the Prince of Wales Project. The forest plan states: “Timber harvest unit cards will document resource concerns and protection measures. The unit cards, including a map with relevant resource features, will be provided electronically when Draft or Final NEPA documents and decisions are published. (Consult Tongass

National Forest Supplement 1909.15-2015-1.).” 833\_0404 at 063256 (*Id.* at 4-68 (TIM3.I.C)). A unit card typically includes a map of the cutting unit and narrative information about it including volume strata, stand conditions, silvicultural prescriptions, logging methods, roads, and concerns about fish, wildlife, vegetation, scenery, karst, wetlands, and heritage resources. *See, e.g.*, 833\_2084 at 061276, 061279-85 (sample unit cards from Kuiu timber sale).

Unit cards help attain compliance with the requirements of NEPA and ANILCA to provide site-specific information and analysis in an EIS. The unit card requirement first appeared in the 1997 forest plan revision, following a series of court decisions addressing the adequacy of site-specific analysis, or lack thereof, in Tongass timber sale EISs. *See supra* pp. 4-6; 833\_2076 at 068765-66 (1997 Plan at 4-98 to 4-99 (TIM114.XII.A)).

Here, the Forest Service failed to provide unit cards with the draft or final EISs. The agency advances two justifications, neither of which withstands scrutiny.

First, in response to comments on the DEIS, the Forest Service asserted that its post-NEPA implementation process would comply with the “intent” of this requirement. 833\_2171 at 002149 (FEIS at Appendix D, D-7). It is axiomatic, though, that “agencies must comply with their own regulations,” *Confederated Tribes & Bands of Yakima Indian Nation v. F.E.R.C.*, 746 F.2d 466, 474 (9th Cir. 1984), not with some unstated intent. There is no ambiguity in the language of the unit card requirement. In this situation, “there is no plausible reason for deference...Deference in that circumstance

would ‘permit the agency, under the guise of interpreting a regulation to create *de facto* a new regulation.’” *Kisor v. Wilkie*, 588 U.S. \_\_\_, 139 S. Ct. 2400, 2415 (2019); *see also Siskiyou Reg’l Edu. Project v. U.S. Forest Serv.*, 565 F.3d 545, 555 (9th Cir. 2009) (stating that there is no call for deference to the agency’s legal interpretation where neither the scope nor the effect of the regulation in question is ambiguous.).

Moreover, the record contains no evidence to support the agency’s bald assertion regarding the intent of the standard. The record shows that the unit card requirement formalized a planning approach the Forest Service adopted following court losses for failure to comply with NEPA’s requirements for site-specific information and analysis in the EIS. Developing the unit cards in a post-EIS implementation process is no substitute, for all the reasons discussed above. *See supra* pp. 18-20.

Second, in response to objections to the draft ROD, the Forest Service attempted another justification. The agency stated that a guidance document cited in the unit card requirement (Tongass National Forest Supplement 1909.15-2015-1) had been rescinded by the Forest Service Chief, rendering the timing provision inapplicable. 833\_2440 at 0000204.

This argument fails first because the Chief’s rescission of the guidance document did not rescind the requirement to include unit cards in EISs. The document merely provided guidance on how to format and issue unit cards. 833\_2526 at 074727-32. The requirement to actually provide them with NEPA documents is separate and stands on its

own in the plan. *See* 833\_0404 at 063256 (2016 Plan at 4-68 (TIM3.I.C)). The plan cites the guidance document only in a parenthetical directing the Forest Service to “consult” the document in implementing the standard. *Id.*

If, contrary to any indication in the record, the Chief intended rescission of the guidance to repeal the plan’s requirement to include unit cards with EISs, that intent was ineffective. The agency has not undergone a lawful process of amending or revising the plan. NFMA and associated regulations require public notice and opportunity for public participation to amend or revise forest plans. 16 U.S.C. § 1604(f)(4); 36 C.F.R. § 219.13(b)(2); *see Lands Council v. Martin*, 529 F.3d 1219, 1227 (9th Cir. 2008) (“‘Significant’ amendments require a lengthy and detailed amendment process; otherwise a simpler notice and comment process suffices.”). Here, the Forest Service undertook no public process—simple or otherwise—to amend the unit card requirement. Thus, it remains fully in effect.

The failure to follow the forest plan’s unit card requirement prevented the public from having the opportunity to review the cards and provide input before the Project decision. It also prevented any meaningful analysis of site-specific impacts or alternatives, as NEPA and ANILCA require.

## RELIEF

### **I. The Court should vacate the portions of the ROD authorizing vegetation management and road construction.**

Plaintiffs request that the Court issue a judgment: declaring that the FEIS violates NEPA, section 810 of ANILCA, and NFMA; vacating those portions of the ROD authorizing vegetation management and new road construction, *see* 833\_2426 at 000441-44 (ROD at 2-5); and vacating any contracts that may have been entered before judgment to implement those parts of the ROD. Plaintiffs do not request vacatur of those portions of the ROD authorizing watershed improvement, restoration, or sustainable recreation management, *id.* at 000443-44 (ROD at 4-5), because in the absence of timber sales and roads those activities generally do not have significant impacts on the environment and therefore do not generally require an EIS.

Vacatur is the normal remedy for unlawful agency actions. The Administrative Procedure Act provides that the reviewing court “shall...set aside” agency action that is arbitrary or not in accordance with law. 5 U.S.C. § 706(2)(A). The court will “order remand without vacatur only in ‘limited circumstances’” and “‘leave an invalid rule in place only ‘when equity demands.’” *Pollinator Stewardship Council v. U.S. Env'tl. Prot. Agency*, 806 F.3d 520, 532 (9th Cir. 2015) (quoting *Cal. Cmties. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) and *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir.1995)); *see also Humane Soc’y of U.S. v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010) (stating remand without vacatur is granted only “in rare



circumstances”). The Ninth Circuit has found these rare circumstances only where vacatur would thwart the objective of the statute at issue or trigger disastrous large-scale consequences. *See, e.g., Cal. Cmities Against Toxics*, 688 F.3d at 993-94 (denying vacatur where remedy would trigger economically disastrous blackouts across California’s south coast basin); *W. Oil & Gas Ass’n v. U.S. Env’tl. Prot. Agency*, 633 F.2d 803, 813 (9th Cir. 1980) (denying vacatur where the remedy would frustrate the aims of the Clean Air Act, under which plaintiffs sued).

No such circumstances exist here. Leaving the ROD in place, however, would have highly adverse impacts, because it authorizes a vast amount of logging and roads in habitat vital to both wildlife and human communities.

**II. In the alternative, the Court should issue a permanent injunction against the vegetation management activities and road construction in the ROD.**

If this Court declines to vacate the agency actions requested, Plaintiffs alternatively request a permanent injunction against any of the vegetation management activities and road construction authorized in the ROD, pending compliance with NEPA, section 810 of ANILCA, and the forest plan. Plaintiffs seeking a permanent injunction must show that: 1) they are likely to suffer irreparable injury in the absence of an injunction; 2) remedies available at law are inadequate to compensate for that injury; 3) a remedy in equity is warranted considering the balance of hardships between the plaintiffs and defendants; and 4) the public interest would not be harmed by a permanent injunction. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-57 (2010); *Nat’l*

*Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 886 F.3d 803, 817 (9th Cir. 2018).

Plaintiffs satisfy all four factors.

**A. Plaintiffs will suffer irreparable injury if the Project proceeds.**

Courts consistently characterize the harms to plaintiffs’ interests from proposed logging operations as irreparable. *See Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1299 (9th Cir. 2003) (citing cases); *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (“[Preventing] the use and enjoyment...of 1,652 acres of the forest...is hardly a de minimus injury.”); *Conservation Cong. v. U.S. Forest Serv.*, 803 F. Supp. 2d 1126, 1132 (E.D. Cal. 2011) (irreparable harm likely because of “loss of over 500 acres of habitat” from proposed logging project). Old-growth habitat cannot be replaced in our lifetime. *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1382 (9th Cir. 1998). Indeed, the FEIS describes the logging of old growth as an “irretrievable commitment,” because old-growth characteristics would not return “for 150 years or more.” 833\_2167 at 001519 (FEIS at 3-61).

The ROD authorizes logging of up to 42,665 acres (mostly old growth) and construction of 164 miles of new roads. 833\_2426 at 000440 (ROD at 1) (selecting Alternative 2); 833\_2167 at 001600, 001634 (FEIS at 3-142, 176). Plaintiffs and their members use the project area—particularly the areas containing old-growth forest—for subsistence and commercial fishing and gathering, recreation, research, wildlife viewing, and spiritual and aesthetic enjoyment. They rely on the integrity of the old-growth

ecosystem to support these uses and would be harmed if the timber sales or road construction authorized were to take place. *See supra* pp. 8-13.

**B. The remedies at law are inadequate.**

Plaintiffs have no adequate remedy at law. “Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable.” *Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 545 (1987). More specifically, with regard to old-growth logging, “[t]he logging of mature trees...cannot be remedied easily if at all. Neither the planting of new seedlings nor the paying of money damages can normally remedy such damage.” *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 764 (9th Cir. 2014).

**C. The balance of hardships supports an injunction.**

The Ninth Circuit has held that “when environmental injury is ‘sufficiently likely, the balance of harms will usually favor the issuance of an injunction to protect the environment.’” *Idaho Sporting Cong. v. Alexander*, 222 F.3d 562, 569 (9th Cir. 2000) (quoting *Sierra Club v. U.S. Forest Serv.*, 843 F.2d 1190, 1195 (9th Cir. 1988) (quoting *Amoco Prod. Co.*, 480 U.S. at 545)). That is true here.

The Project would harm Plaintiffs’ members and last longer than their lifetimes. *See supra* pp. 12-13. With neither vacatur nor an injunction, Plaintiffs would have no effective remedy. There is no countervailing harm to Defendants so significant that it

would warrant depriving Plaintiffs of effective relief for serious, fundamental violations of applicable law.

**D. An injunction would serve the public interest.**

“The public interest in preserving nature and avoiding irreparable environmental injury outweighs economic concerns....” *All. for the Wild Rockies*, 632 F.3d at 1138. The Ninth Circuit has also “recognized the public interest in careful consideration of environmental impacts before major federal projects go forward, and...[has] held that suspending such projects until that consideration occurs ‘comports with the public interest.’” *Id.* (quoting *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep’t of Interior*, 588 F.3d 718, 728 (9th Cir. 2009)). This interest is especially heightened when applied to a forest that will take hundreds of years to regain its old-growth characteristics. *Seattle Audubon Soc’y v. Evans*, 771 F. Supp. 1081, 1096 (W.D. Wash. 1991), *aff’d in part and rev’d in part on other grounds*, 952 F.2d 297 (9th Cir. 1991). The public also has an overarching interest in its government abiding by the laws and regulations governing it. *See, e.g. East Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219 (9th Cir. 2018); *Enyart v. Nat’l Conference of Bar Examiners, Inc.*, 630 F.3d 1153, 1167 (9th Cir. 2011).

**CONCLUSION**

For these reasons, Plaintiffs request that the Court enter judgment in their favor and grant the requested relief.

Respectfully submitted this 12th day of July, 2019.

*s/ Thomas S. Waldo*

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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 9,998 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 12th day of July, 2019.

*s/ Thomas S. Waldo*

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Thomas S. Waldo

## TABLE OF EXHIBITS

<b>Exhibit No.</b>	<b>Description</b>
1	Declaration of David Beebe
2	Declaration of Robert Claus
3	Declaration of Susan Culliney
4	Declaration of Natalie Dawson
5	Declaration of Liz Dodd
6	Declaration of Larry Edwards
7	Declaration of Don Hernandez
8	Declaration of Adam Kolton
9	Declaration of Robert E. Lindekugel
10	Declaration of Peter Nelson
11	Declaration of Dan Ritzman
12	Declaration of Elsa Sebastian
13	Declaration of Robin D. Silver, M.D.
14	Declaration of Gina Trujillo

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA**

SOUTHEAST ALASKA  
CONSERVATION COUNCIL, *et al.*,

Plaintiffs,

v.

UNITED STATES FOREST  
SERVICE, *et al.*,

Defendants.

Case No. 1:19-cv-00006-SLG

**ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION**

Before the Court at Docket 17 is 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's (collectively "Plaintiffs") Motion for Preliminary Injunction. Defendants U.S. Forest Service, U.S. Department of Agriculture, David Schmid, and Earl Stewart (collectively "Forest Service") opposed at Docket 21. Plaintiffs replied at Docket 26. Amicus curiae Alaska Forest Association filed a brief in opposition at Docket 24. Oral argument was not requested by any party and was not necessary to the Court's decision.



## BACKGROUND

The Tongass National Forest (“Tongass”) is a 16.7 million-acre forest in Southeast Alaska.<sup>1</sup> The nation’s largest National Forest,<sup>2</sup> the Tongass has seen timber harvesting of varying intensity over the past 100 years.<sup>3</sup> But logging in the Tongass has slowed since the 1980s in response to the termination of several long-term contracts—awarded by the Forest Service to “provide a sound economic base in Alaska through establishment of a permanent year-round pulp industry”<sup>4</sup>—due to market fluctuation, litigation, and other factors.<sup>5</sup>

Prince of Wales Island, a large island in the Alexander Archipelago, lies within the Tongass.<sup>6</sup> Two large pulp mills once operated on the island, where industrial scale logging occurred in the second half of the 20th century, but both mills closed in the 1990s.<sup>7</sup> There are 12 communities on the island with a total of approximately 4,300 residents, many of whom are Alaska Native.<sup>8</sup> Tourism and

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<sup>1</sup> Administrative Record (“AR”) 833\_0404 at 063052, 063054.

<sup>2</sup> AR 833\_0404 at 063052.

<sup>3</sup> AR 833\_2077 at 069553–55.

<sup>4</sup> AR 833\_2077 at 069553.

<sup>5</sup> AR 833\_2077 at 069553–55.

<sup>6</sup> AR 833\_0404 at 063054.

<sup>7</sup> AR 833\_2167 at 01750.

<sup>8</sup> AR 833\_2167 at 01753; *see also* AR 833\_2167 at 01751, tbl. 70 (showing population change).

sport and commercial fishing are important to the local economy,<sup>9</sup> and many residents rely to some degree on subsistence hunting, fishing, and gathering.<sup>10</sup>

In late 2016, the Forest Service initiated environmental planning for the Prince of Wales Landscape Level Analysis Project (“Project”).<sup>11</sup> The Project is “a large landscape-scale NEPA analysis that will result in a decision whether or not to authorize integrated resource management activities on Prince of Wales Island over the next 15 years.”<sup>12</sup> The Forest Service released a final environmental impact statement (“EIS”) for the Project on October 19, 2018<sup>13</sup> and issued a Record of Decision (“ROD”) selecting the alternative proposed therein on March 16, 2019.<sup>14</sup>

The Project covers all land on Prince of Wales Island within the National Forest System, consisting of roughly 1.8 million acres.<sup>15</sup> It authorizes four categories of activities within this area: vegetation management, including timber harvesting; watershed improvement and restoration; sustainable recreation

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<sup>9</sup> AR 833\_2167 at 001750

<sup>10</sup> See AR 833\_2167 at 00753–58 (describing different communities on the island).

<sup>11</sup> AR 833\_2167 at 001468.

<sup>12</sup> AR 833\_2167 at 001459.

<sup>13</sup> AR 833\_2167 at 001437–001863 (Final EIS).

<sup>14</sup> AR 833\_2426 at 000434–000775; see also 42 U.S.C. § 4332(2)(C) (requiring agencies to prepare a “detailed statement” for actions with significant environmental impacts).

<sup>15</sup> AR 833\_2167 at 001460–61; see also AR 833\_2426 at 000439.

management; and “associated actions.”<sup>16</sup> The Forest Service created what it calls an Activity Card for each of the 46 activities included in these broad categories.<sup>17</sup> “The Activity Cards describe each potential activity and the related resource considerations,” but do not include maps.<sup>18</sup>

The Forest Service used the Activity Cards to create a flexible planning framework intended to allow it to tailor resource management to changing conditions on the ground. Viewing the project area as a whole, each alternative considered in the EIS “describe[d] the conditions being targeted for treatments and what conditions cannot be exceeded in an area, or place[d] limits on the intensity of specific activities such as timber harvest.”<sup>19</sup> But the EIS provides that “site-specific locations and methods will be determined during implementation based on defined conditions in the alternative selected in the . . . ROD . . . in conjunction with the Activity Cards . . . and Implementation Plan . . . .”<sup>20</sup> The Forest Service has termed this approach “condition-based analysis.”<sup>21</sup>

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<sup>16</sup> AR 833\_2167 at 001443.

<sup>17</sup> AR 833\_2427 at 000848–001030.

<sup>18</sup> AR 833\_2167 at 001492; see, e.g., AR 833\_2427 at 000848–52 (Activity Card 01).

<sup>19</sup> AR 833\_2167 at 001459.

<sup>20</sup> AR 833\_2167 at 001459.

<sup>21</sup> AR 833\_2167 at 001443.

In the implementation plan accompanying the EIS, the Forest Service clarified that there would be no “need for additional NEPA analysis” under this framework.<sup>22</sup> Instead, the Project requires that the Forest Service engage in a predetermined, nine-step implementation process before taking any specific action in the project area.<sup>23</sup> This process includes checking the action against the relevant Activity Card, the final EIS, and the ROD, as well as engaging in “workshops and other public involvement techniques.”<sup>24</sup>

The final EIS considered four alternatives in detail, including a no-action alternative.<sup>25</sup> In analyzing each alternative, the Forest Service indicated that it assumed (1) that all acres proposed for harvest within the project area would be harvested and all roads proposed by the alternative would be built<sup>26</sup>; (2) that all acres would be harvested using clear-cut methods<sup>27</sup>; and (3) that each Wildlife Analysis Area would be harvested to the maximum acreage available.<sup>28</sup> The

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<sup>22</sup> AR 833\_2169 at 002078

<sup>23</sup> See AR 833\_2169 at 2081 (graphically describing process).

<sup>24</sup> AR 833\_2169 at 2081.

<sup>25</sup> AR 833\_2167 at 001479–1511.

<sup>26</sup> See, e.g., AR 833\_2167 at 001629 (“[A]ssumptions include that all harvest stands from the [Project-wide logging system and transportation analysis] would be harvested . . . .”); AR 833\_2167 at 001789–90 (discussing road construction by alternative); see also Docket 12 at 31 (describing analytical approach).

<sup>27</sup> AR 833\_2167 at 001450.

<sup>28</sup> See AR 833\_2167 at 001500.

Forest Service made these assumptions in order to consider the “maximum effects” of the Project.<sup>29</sup>

The alternative selected in the ROD—Alternative 2—included the harvest of 23,269 acres of old growth trees and 19,366 acres of young growth trees, out of 48,140 and 77,389 acres identified as potential sites of old- and young-growth harvest respectively.<sup>30</sup> It also included the construction of 164 miles of road.<sup>31</sup> But pursuant to the Project’s framework, the selected alternative did not identify the specific sites where the harvest or road construction would occur.<sup>32</sup>

The Forest Service began implementing the Project shortly after issuing the ROD. It held a public workshop on April 6, 2019<sup>33</sup> and published an “Out-Year Plan” for fiscal year 2019 that included a proposed timber sale of 1,156.34 acres, known as the Twin Mountain Timber Sale.<sup>34</sup> The Forest Service also published

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<sup>29</sup> AR 833\_2167 at 001639.

<sup>30</sup> AR 833\_2167 at 001481.

<sup>31</sup> AR 833\_2167 at 001481; *see also* AR 833\_2167 at 001485–87 (describing Alternative 2).

<sup>32</sup> *See* AR 833\_2178 (Commercial Vegetation Map identifying potential areas of timber harvest and road construction).

<sup>33</sup> *See*, U.S. FOREST SERV., PRINCE OF WALES LANDSCAPE LEVEL ANALYSIS PROJECT, DEAR PLANNING AND IMPLEMENTATION PARTICIPANT LETTER, [https://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/fseprd622020.pdf](https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd622020.pdf) (last visited Sept. 22, 2019).

<sup>34</sup> *See*, U.S. FOREST SERV., PRINCE OF WALES LANDSCAPE LEVEL ANALYSIS PROJECT, OUT-YEAR PLAN, [https://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/fseprd622075.pdf](https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd622075.pdf) (last visited Sept. 22, 2019); *see also* Docket 21-1 at 2-3, ¶ 6 (providing size of sale).

draft unit cards for the sale, which identify the specific locations and method of timber harvest in graphical and narrative form.<sup>35</sup> The parties have stipulated that ground-disturbing activities associated with the sale could begin as early as September 27, 2019.<sup>36</sup>

Plaintiffs initiated this case on May 7, 2019.<sup>37</sup> The Complaint is brought pursuant to the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 702–06, and alleges that the Project EIS violates three federal laws: (1) the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4332; (2) the Alaska National Interest Lands Conservation Act (“ANILCA”), 16 U.S.C. § 3120; and (2) the National Forest Management Act (“NFMA”), 16 U.S.C. § 1604.<sup>38</sup> The Complaint seeks declaratory judgment, vacatur of the EIS and ROD, and “preliminary and permanent injunctive relief as needed to prevent irreparable harm from implementation of the [Project].”<sup>39</sup> The parties recently completed briefing on the

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<sup>35</sup> See, U.S. FOREST SERV., TWIN MOUNTAIN SALE DRAFT UNIT CARDS, [https://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/fseprd641767.pdf](https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd641767.pdf) (last visited Sept. 22, 2019). Plaintiffs have produced an area map of the proposed timber activities. See Docket 10-2 Ex. A at 5.

<sup>36</sup> Docket 6 at 3, ¶ 3 (Stipulation and Joint Motion for Entry of Scheduling Order).

<sup>37</sup> Docket 1.

<sup>38</sup> Docket 1 at 15-19, ¶¶ 47, 51, 58.

<sup>39</sup> Docket 1 at 19, ¶¶ 1-5.

merits of the case,<sup>40</sup> and the Court intends to rule on the merits no later than March 31, 2020.

Plaintiffs filed the instant Motion for Preliminary Injunction on August 15, 2019.<sup>41</sup>

## **JURISDICTION**

The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331, which “confer[s] jurisdiction on federal courts to review agency action, regardless of whether the APA of its own force may serve as a jurisdictional predicate.”<sup>42</sup>

## **LEGAL STANDARD**

In *Winter v. Natural Resources Defense Council, Inc.*, the United States Supreme Court held that plaintiffs seeking preliminary injunctive relief must establish that “(1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) a preliminary injunction is in the public interest.”<sup>43</sup> *Winter* was focused on the second element, and clarified that irreparable harm must be likely, not just possible, for an injunction to issue.<sup>44</sup>

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<sup>40</sup> See Docket 10 (Plaintiffs’ Motion for Summary Judgment); Docket 12 (Forest Service’s Opposition); Docket 19 (Plaintiffs’ Reply).

<sup>41</sup> Docket 17.

<sup>42</sup> *Califano v. Sanders*, 430 U.S. 99, 105 (1977).

<sup>43</sup> *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1021 (9th Cir. 2009) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

<sup>44</sup> See *Winter*, 555 U.S. at 25; see also *All for the Wild Rockies v. Cottrell*, 632 F.3d

Following *Winter*, the Ninth Circuit addressed the first element—the likelihood of success on the merits—and held that its “serious questions” approach to preliminary injunctions was still valid “when applied as a part of the four-element *Winter* test.”<sup>45</sup> Accordingly, if a plaintiff shows “that there are ‘serious questions going to the merits’—a lesser showing than likelihood of success on the merits—then a preliminary injunction may still issue if the ‘balance of hardships tips *sharply* in the plaintiff’s favor.”<sup>46</sup> “Serious questions are ‘substantial, difficult, and doubtful,’ as to make them a fair ground for litigation and thus for more deliberative investigation.”<sup>47</sup> They “need not promise a certainty of success, nor even present a probability of success, but must involve a ‘fair chance on the merits.’”<sup>48</sup> All four *Winter* elements must still be satisfied under this approach,<sup>49</sup> but analyses of the

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1127, 1131 (9th Cir. 2011).

<sup>45</sup> See *All. for the Wild Rockies*, 632 F.3d at 1131–35.

<sup>46</sup> *Friends of the Wild Swan v. Weber*, 767 F.3d 936, 942 (9th Cir. 2014) (emphasis in original) (quoting *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1291 (9th Cir. 2013)).

<sup>47</sup> *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 422 (9th Cir. 1991) (quoting *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988)); see also *Fyock v. City of Sunnyvale*, 25 F. Supp. 3d 1267, 1273 (N.D. Cal. 2014) (“‘Serious questions’ refers to questions ‘which cannot be resolved one way or the other at the hearing on the injunction and as to which the court perceives a need to preserve the status quo . . . .’” (quoting *Gilder*, 936 F.2d at 422)).

<sup>48</sup> *Gilder*, 936 F.2d at 422 (quoting *Republic of the Philippines*, 862 F.2d at 1362).

<sup>49</sup> See *All. for the Wild Rockies*, 632 F.3d at 1135 (“Of course, plaintiffs must also satisfy the other *Winter* factors.”); see also, e.g., *Ass’n des Eleveurs de Canards et d’Oies du Quebec v. Harris*, 729 F.3d 937, 944 (9th Cir. 2013) (describing standard for preliminary injunction).



last two elements—harm to the opposing party and consideration of the public interest—may merge when the government is the opposing party.<sup>50</sup>

Injunctive relief is an equitable remedy, and “[t]he essence of equity jurisdiction is the power of the court to fashion a remedy depending upon the necessities of the particular case.”<sup>51</sup>

## DISCUSSION

Upon consideration of the parties’ briefing and the record in this case, the Court finds as follows:

*I. The likelihood of irreparable harm in the absence of preliminary relief*

Plaintiffs’ members use areas that would be affected by the Twin Mountain Timber Sale for hunting, fishing, gathering, and recreation.<sup>52</sup> They also enjoy the area’s aesthetic qualities.<sup>53</sup> Plaintiffs maintain that in light of these uses, the timber harvest and road construction authorized by the sale would cause them irreparable

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<sup>50</sup> *Nken v. Holder*, 556 U.S. 418, 435 (2009). The merger of the last two elements does not mean that these factors always weigh in the government’s favor. The Supreme Court recognized in *Nken* that “there is a public interest in preventing” wrongful government action. *Id.* at 435–36.

<sup>51</sup> *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1022 (9th Cir. 2009) (citing *United States v. Odessa Union Warehouse Co-op*, 833 F.2d 172, 175 (9th Cir. 1987)).

<sup>52</sup> See, e.g., Docket 10-1 at 3–6, ¶¶ 4–7 (Decl. of David Beebe); Docket 10-7 at 2–3, ¶ 4 (Decl. of Don Hernandez).

<sup>53</sup> See, e.g., Docket 10-1 at 6–7, ¶ 7; Docket 10-12 at 5–6 ¶ 11 (Decl. of Elsa Sebastian).

harm.<sup>54</sup> The record demonstrates that Plaintiffs' members value the forests in the project area.<sup>55</sup>

"Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable."<sup>56</sup> The Ninth Circuit has explained that the harvest of mature trees is "irreparable for the purposes of the preliminary injunction analysis" because it "cannot be remedied easily if at all."<sup>57</sup> Based on the foregoing, Plaintiffs have established that they will suffer irreparable harm if the harvest—particularly of old growth trees—authorized by the Twin Mountain Timber Sale occurs.

The Forest Service does not dispute that the harvest of mature trees would constitute irreparable harm.<sup>58</sup> Instead, it notes that the sale has yet to be completed, and maintains that any alleged injury is speculative until a contract is awarded and preliminary planning "indicates activities that would imminently and

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<sup>54</sup> Docket 17 at 3–4.

<sup>55</sup> For example, one member of a plaintiff organization averred that he enjoys photographing old-growth habitat and seeks out "natural visual and audio soundscapes and viewsapes with wildlife and untouched forest settings because they are regarded as quite rare, yet extremely interesting." Docket 10-1 at 6–7, ¶ 7.

<sup>56</sup> *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987).

<sup>57</sup> *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 764 (9th Cir. 2014); *see also Portland Audubon Soc. v. Lujan*, 884 F.2d 1233, 1241 (9th Cir. 1989) ("The old growth forests plaintiffs seek to protect would, if cut, take hundreds of years to reproduce.").

<sup>58</sup> In fact, the EIS concluded that the "reduction in visual quality of an area due to timber harvesting would be an irretrievable commitment of resources" that would take at least 40 years to remedy. AR 833\_2167 at 001520.

irreparable affect [Plaintiffs'] claimed use of the Sale area.”<sup>59</sup> Plaintiffs’ reply identifies several cases in which courts have enjoined timber sales before a contract was awarded.<sup>60</sup> And Plaintiffs, citing the Forest Service’s own arguments, maintain that a rule prohibiting preliminary injunctive relief until a sale is finalized could compromise the integrity of the bidding process or expose the government to contract damages.<sup>61</sup> The Forest Service has advertised the Twin Mountain Timber Sale and identified where harvesting will occur.<sup>62</sup> It plans to review the bids on the sale on September 24, 2019, and intends to award a contract soon thereafter.<sup>63</sup> The parties have stipulated that ground-disturbing activities could

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<sup>59</sup> Docket 21 at 7–8 (“Speculative possible harm is insufficient to support granting a preliminary injunction.” (citing *Caribbean Marine Servs. Co., Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988))).

<sup>60</sup> Docket 26 at 2. See *Forest Serv. Emps. for Envtl. Ethics v. U.S. Forest Serv.*, 408 F. Supp. 2d 916, 917 (N.D. Cal. 2006) (noting earlier order “issu[ing] a preliminary injunction, enjoining the Forest Service from awarding a contract for the Sims Fire Salvage Project”); *Sierra Club v. Eubanks*, 335 F. Supp. 2d 1070, 1084 (E.D. Cal. 2004) (enjoining Forest Service from “taking any further action to implement [a restoration project], including advertising, offering timber for sale, [or] awarding any timber sale contracts”).

<sup>61</sup> Docket 26 at 3. The Director of Forest Management for the region that includes the Project stated in a declaration that “[t]he disclosure of bids, or even the existence of bids, risks compromising the integrity of the bid process,” Docket 21-1 at 3, ¶ 7 (Decl. of David Harris), and that once an award had been made, the Forest Service would face “potentially significant liquidated damages” if operations were suspended. Docket 21-1 at 5, ¶ 18.

<sup>62</sup> Docket 21-1 at 2–3, ¶¶ 6–7.

<sup>63</sup> Docket 21-1 at 3–4, ¶¶ 8, 9, 11.

begin as early as September 27, 2019.<sup>64</sup> Given this immediacy, the Court finds that injury to Plaintiffs is not speculative.

The Forest Service also argues that the injury to Plaintiffs is not imminent because a mobilization period of several weeks will precede any timber harvest under the sale.<sup>65</sup> But the mobilization includes the construction of roads,<sup>66</sup> which Plaintiffs allege would itself cause irreparable harm.<sup>67</sup> Indeed, according to the EIS, “[r]oad construction is an irreversible action because of the time it takes for a constructed road to revert to natural conditions.”<sup>68</sup> The Ninth Circuit has previously ordered the entry of a preliminary injunction against “the construction of roads for future logging” in response to deficient environmental analysis.<sup>69</sup> In these circumstances, the Court therefore finds that Plaintiffs have demonstrated that they are very likely to suffer irreparable harm in the absence of preliminary injunctive relief.

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<sup>64</sup> Docket 6 at 3, ¶ 3 (Stipulation and Joint Motion for Entry of Scheduling Order).

<sup>65</sup> Docket 21 at 8; see also Docket 21-1 at 4, ¶ 14 (describing mobilization process).

<sup>66</sup> Docket 21-1 at 4, ¶ 14 (“Mobilization includes constructing the sale-site infrastructure (including any roads, log landing sites, log transfer facilities, workers’ quarters), as well as moving all necessary equipment and workers to the sale.”).

<sup>67</sup> Docket 26 at 4.

<sup>68</sup> AR 833\_2167 at 1519.

<sup>69</sup> See *City of Tenakee Springs v. Block*, 778 F.2d 1402, 1404, 1408 (9th Cir. 1985).

## *II. The likelihood of success on the merits*

Pursuant to NEPA, agencies must prepare an EIS before taking an action “significantly affecting the quality of the human environment.”<sup>70</sup> Regulations issued by the Council on Environmental Quality require an EIS to include discussion of the direct and indirect effects of the action, as well as “[t]he environmental effects of alternatives.”<sup>71</sup> “An EIS must ‘reasonably set forth sufficient information to enable the decisionmaker to consider the environmental factors and make a reasoned decision.’”<sup>72</sup> This requirement is met if the EIS “contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences.”<sup>73</sup>

Plaintiffs assert that the Project EIS, with its condition-based analysis, does not contain enough site-specific information or analysis to comply with NEPA.<sup>74</sup> They contend that this case is governed by the Ninth Circuit’s decision in *City of Tenakee Springs v. Block*.<sup>75</sup> In that case, the Circuit reversed a district court’s

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<sup>70</sup> 42 U.S.C. § 4332(2)(C) (requiring a “detailed statement” analyzing “the environmental impact of the proposed action,” among other things).

<sup>71</sup> 40 C.F.R. § 1502.16.

<sup>72</sup> *Alaska Ctr. for Env’t v. Armbrister*, 131 F.3d 1285, 1289 (9th Cir. 1997) (quoting *Or. Env’tl. Council v. Kunzman*, 817 F.2d 484, 493 (9th Cir. 1987)).

<sup>73</sup> *WildEarth Guardians v. Mont. Snowmobile Ass’n*, 790 F.3d 920, 924 (9th Cir. 2015) (quoting *City of Sausalito v. O’Neill*, 386 F.3d 1186, 1206 (9th Cir. 2004)).

<sup>74</sup> Docket 17 at 4; see also Docket 1 at 16–17, ¶¶ 44–47 (Compl.); Docket 10 at 22–36 (Motion for Summary Judgment).

<sup>75</sup> 778 F.2d 1402 (9th Cir. 1985).

decision not to enjoin “construction of an 11-mile road through the Kadashan watershed” in the Tongass.<sup>76</sup> The plaintiffs had challenged the adequacy of an EIS for a five-year operating plan that would defer logging but authorized the construction of roads for future harvest activity.<sup>77</sup> The Ninth Circuit rejected the trial court’s conclusion that the Forest Service had discretion to determine the specificity of its environmental review.<sup>78</sup> Instead, it held that “[a]lthough the agency does have the discretion to define the scope of its actions, such discretion does not allow the agency to determine the specificity required by NEPA.”<sup>79</sup> The Circuit explained that “[w]here there are large scale plans for regional development, NEPA requires both a programmatic and a site-specific EIS.”<sup>80</sup>

The Circuit then ordered the entry of a preliminary injunction, in part due to its conclusion that the plaintiffs had raised serious questions about the merits of their NEPA claim.<sup>81</sup> It explained that the challenged EIS did not “g[ive] any indication of its overall plan for timber harvesting” in the project area and that “it is impossible to determine where and when harvesting will occur on the 750,000

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<sup>76</sup> *Id.* at 1403.

<sup>77</sup> *Id.* at 1404.

<sup>78</sup> *Id.* at 1407

<sup>79</sup> *Id.* (internal citation omitted).

<sup>80</sup> *Id.* at 1407 (citing 40 C.F.R. § 1508.28, 1502.20; *Kleppe v. Sierra Club*, 427 U.S. 390, 409–14 (1976)).

<sup>81</sup> *Id.* at 1407–08.

acres of land.”<sup>82</sup> The Circuit held that the EIS was inadequate, reasoning that the location and timing of logging would affect “the locating, routing, construction techniques, and other aspects of the road, or even the need for its construction.”<sup>83</sup>

Here, Plaintiffs argue that the Project EIS is similarly deficient and that by engaging in condition-based analysis, the Forest Service impermissibly limited the specificity of its environmental review.<sup>84</sup> The EIS identified which areas within the roughly 1.8-million-acre project area could potentially be harvested over the Project’s 15-year period,<sup>85</sup> but expressly left site-specific determinations for the future.<sup>86</sup> For example, the selected alternative allows 23,269 acres of old-growth harvest, but does not specify where this will be located within the 48,140 acres of old growth identified as suitable for harvest in the project area.<sup>87</sup> Similar to the EIS found inadequate in *City of Tenakee Springs*, the EIS here does not include a determination of when and where the 23,269 acres of old-growth harvest will occur. As a result, the EIS also does not provide specific information about the amount

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<sup>82</sup> *Id.* at 1408.

<sup>83</sup> *Id.* (quoting *Thomas v. Peterson*, 753 F.2d 754, 760 (9th Cir. 1985), *abrogated on other grounds by Cottonwood Env’tl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075 (9th Cir. 2015)).

<sup>84</sup> Docket 10 at 23–25.

<sup>85</sup> See U.S. FOREST SERV., ISLAND LOGGING SYS. AND TRANSP. ANALYSIS, [https://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/fseprd622024.pdf](https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd622024.pdf) (last accessed Sept. 22, 2019).

<sup>86</sup> AR 833\_2167 at 1459.

<sup>87</sup> AR 833\_2167 at 001481.

and location of actual road construction under each alternative, stating instead that “[t]he total road miles needed will be determined by the specific harvest units offered and the needed transportation network.”<sup>88</sup>

The Forest Service argues that the relevant phrase in *City of Tenakee Springs* was factually inaccurate, citing an unreported district court order on remand.<sup>89</sup> But regardless of the decision’s factual accuracy, the reasoning of *City of Tenakee Springs* remains: An EIS must be specific enough to ensure informed decision-making and meaningful public participation.<sup>90</sup>

The Forest Service contends that the EIS provides the specificity required by NEPA because it identifies potential areas of harvest within the project area.<sup>91</sup> It cites *Stein v. Barton*, in which the district court concluded that an EIS need not provide “exact timetables and locations on the ground for planned harvesting activities within each harvest unit.”<sup>92</sup> The EIS in that case “employ[ed] a

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<sup>88</sup> AR 833\_2167 at 001789.

<sup>89</sup> Docket 12 at 27. See *City of Tenakee Springs v. Courtright*, No. J86-024 CIV., 1987 WL 90272, at \*3 (D. Alaska June 26, 1987) (“The [Ninth Circuit] opinion also contains puzzling language suggesting that the EIS did not state where and when harvesting would take place in the APC contract area. This may be an improperly-drafted allusion to the fact that the final EIS did not reveal where and when logging would take place along the Kadashan Road . . .”).

<sup>90</sup> See also *Alaska Ctr. for Env’t v. Armbrister*, 131 F.3d 1285, 1289 (9th Cir. 1997) (“An EIS must ‘reasonably set forth sufficient information to enable the decisionmaker to consider the environmental factors and make a reasoned decision.’” (quoting *Or. Envtl. Council v. Kunzman*, 817 F.2d 484, 493 (9th Cir. 1987))).

<sup>91</sup> Docket 12 at 27–28.

<sup>92</sup> 740 F. Supp. 743, 749 (D. Alaska 1990).



combination of annotated topographic maps, textual, and tabular data to describe the project alternatives and their impacts on cognizable values within the affected areas” and contained “comprehensive, detailed quantitative and qualitative descriptions of the logging and roading plans for each harvest unit.”<sup>93</sup> Similarly, in *Alliance for the Wild Rockies v. Weber*, the district court upheld the environmental analysis for a timber sale that “identif[ied] the project boundaries down to the township and range level” and used maps to “allow the Plaintiffs to identify where those activities will take place in relation to bull trout critical habitat.”<sup>94</sup> Here, the Project EIS does not identify individual harvest units; by only identifying broad areas within which harvest may occur, it does not fully explain to the public how or where actual timber activities will affect localized habitats.

Moreover, the court in *Stein* rejected the plaintiffs’ site-specificity claims because they had not argued that or “show[n] why disclosure of more details regarding site-specific impacts [was] necessary in order to ‘foster both informed decision-making and informed public participation.’”<sup>95</sup> Here, Plaintiffs contend that more detailed information about the location of timber harvest under the Project is necessary to properly assess its ecological and subsistence impacts.<sup>96</sup>

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<sup>93</sup> *Id.*

<sup>94</sup> 979 F. Supp. 2d 1118, 1125–26 (D. Mont. 2013).

<sup>95</sup> 740 F. Supp. at 749.

<sup>96</sup> See Docket 10 at 28–36. For example, Plaintiffs argue:

[W]hile all of [the species occurring within the project area] depend to some

Finally, the Forest Service argues that the EIS satisfied NEPA by analyzing the Project's maximum potential impacts.<sup>97</sup> For example, in discussing the potential impacts to wildlife, the EIS states that "[f]or purposes of analysis, assumptions include that all harvest stands from the [Project-wide logging system and transportation analysis] would be harvested."<sup>98</sup> As a result of this worst-case-scenario analysis, the Forest Service maintains that "whatever units [it] ultimately selects within the constraints outlined in the alternatives, Activity Cards, and Implementation Plan, the Project will produce environmental effects that fall within those already disclosed and analyzed in the EIS."<sup>99</sup> The Forest Service relies on *WildEarth Guardians v. Conner*.<sup>100</sup> There, the Tenth Circuit upheld an Environmental Assessment ("EA") for a tree thinning project that "evaluat[ed] the Project's effects on lynx in a worst-case scenario in which all the mapped lynx

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degree on old growth, the extent of that dependence varies, and they have different needs respecting forest structure, elevation, proximity to beaches and streams, proximity to roads, prey availability and fragmentation of their habitat. For all these reasons . . . the specific locations proposed for new logging and road construction matter a great deal for wildlife, for hunters, and for other people who use and enjoy the forest.

Docket 10 at 33–34.

<sup>97</sup> Docket 12 at 30–32.

<sup>98</sup> AR 833\_2167 at 1629.

<sup>99</sup> Docket 12 at 32.

<sup>100</sup> 920 F.3d 1245 (10th Cir. 2019).

habitat in the project area is treated.”<sup>101</sup> An EA is meant to determine whether an action will have a significant impact on the environment, such that an EIS is necessary.<sup>102</sup> In contrast, an EIS must compare the environmental impacts of different alternatives, not just determine whether environmental impacts will occur.<sup>103</sup> While the Forest Service’s analysis of the Project’s maximum potential impacts to wildlife may be appropriate for an EA, it may not be sufficient to meet the requirements for an EIS.

Based on the foregoing, the Court finds that Plaintiffs have shown that there are at least serious questions going to the merits of its NEPA claim. Accordingly, the Court does not address their ANILCA or NFMA claims for the purposes of preliminary injunctive relief.<sup>104</sup>

### *III. Balance of equities and public interest*

Although analyses of the balance of equities and public interest generally merge when the government is a party, the public interest “is better seen as an

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<sup>101</sup> *Id.* at 1258.

<sup>102</sup> *See id.* at 1251 (describing purpose of EA).

<sup>103</sup> *See id.*; *see also* 40 C.F.R. § 1502.16(d) (requiring discussion of “[t]he environmental effects of alternatives including the proposed action”); 40 C.F.R. § 1502.14(a) (requiring EIS to “[r]igorously explore and objectively evaluate all reasonable alternatives”).

<sup>104</sup> *See hiQ Labs, Inc. v. LinkedIn Corp.*, \_\_\_ F.3d \_\_\_, No. 17-16783, slip op. at 24 (9th Cir. Sept. 9, 2019) (“As that showing on the tortious interference claim is sufficient to support an injunction prohibiting LinkedIn from selectively blocking hiQ’s access to public member profiles, we do not reach hiQ’s unfair competition claim.”).

element that deserves separate attention in cases where the public interest may be affected.”<sup>105</sup> Hence, the Court will consider these elements separately.

*A. The balance of hardships tips sharply in Plaintiffs’ favor*

“If [environmental injury] is sufficiently likely . . . the balance of harms will usually favor the issuance of an injunction to protect the environment.”<sup>106</sup> If the 1,156.34 acres in the Twin Mountain Timber Sale are logged, the “recreational opportunities that would otherwise be available on that land are irreparably lost.”<sup>107</sup> Several members of the plaintiff organizations filed declarations in which they stated that harvest activities would disrupt their use and appreciation of the affected area.<sup>108</sup> The Forest Service argues that the sale implicates “a small fraction of the Project,”<sup>109</sup> as it consists of only 4.9% of the total old-growth acres authorized for commercial harvest.<sup>110</sup> But the Ninth Circuit has characterized the logging of a similar area—1,652 acres—as “hardly a de minimis injury.”<sup>111</sup>

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<sup>105</sup> *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 766 (9th Cir. 2014) (quoting *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 974 (9th Cir. 2002)).

<sup>106</sup> *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987), *abrogated in part on other grounds by Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

<sup>107</sup> *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1137 (9th Cir. 2011).

<sup>108</sup> See Docket 10-1 at 6–7, ¶ 7 (Decl. of David Beebe); Docket 10-4 at 7, ¶ 14 (Decl. of Natalie Dawson); Docket 10-7 at 5–6, ¶ 10 (Decl. of Don Hernandez).

<sup>109</sup> Docket 21 at 10.

<sup>110</sup> Docket 21-1 at 3, ¶ 6.

<sup>111</sup> *All. for the Wild Rockies*, 632 F.3d at 1135.

On the other side of the scale, the Forest Service points to the economic harm it would suffer if the sale is enjoined. It set a minimum bid of \$1.2 million on the sale,<sup>112</sup> and argues that this money is necessary to fund other Project activities.<sup>113</sup> But the Forest Service would not receive this money until harvesting is completed.<sup>114</sup> “[T]he operating season in the area of this sale usually ends in early November,”<sup>115</sup> so a preliminary injunction would only prevent roughly one month of logging and associated activities during the 2019 season. It is highly unlikely that the harvest authorized by the sale would be completed during that brief period.<sup>116</sup> And the Court intends to issue an order on the merits by March 31, 2020, before the normal operating season reopens.<sup>117</sup> Thus, the economic loss to the government caused by a preliminary injunction that would be in effect for several months is not considerable.

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<sup>112</sup> Docket 21-1 at 3, ¶ 10.

<sup>113</sup> Docket 21 at 10–11.

<sup>114</sup> Docket 21-1 at 4, ¶ 15.

<sup>115</sup> Docket 21-1 at 4, ¶ 12. *But see* Docket 24-1 at 6, ¶ 10 (Decl. of Owen Graham) (stating that “timber sale operations routinely continue into mid-December, with operations resuming early in the following year”).

<sup>116</sup> *See* Docket 21-1 at 4, ¶ 14 (stating that mobilization, which must occur before logging begins, typically takes at least two weeks).

<sup>117</sup> *See* Docket 17-2 at 2 (2004 contract indicating that the “normal operating season” runs from April 1 to October 31). *But see* Docket 24-1 at 6, ¶ 10 (Decl. of Owen Graham) (stating that “timber sale operations routinely continue into mid-December, with operations resuming early in the following year”).

The Forest Service also argues that any delay to the Twin Mountain Timber Sale would pose a serious threat to local mills, potentially erasing the market for Tongass old-growth timber.<sup>118</sup> Similarly, amicus curiae Alaska Forest Association asserts that the sale is “desperately needed to support the Southeast Alaska timber industry.”<sup>119</sup> The Court acknowledges the harm that a preliminary injunction would cause the local timber economy. But it must consider “only the portion of the harm that would occur while the preliminary injunction is in place.”<sup>120</sup> The preliminary injunction that Plaintiffs request would have a relatively short duration, intended to maintain the status quo only until the Court issues a decision on the merits. In light of this, the Court finds that the balance of harms tips sharply in Plaintiffs’ favor due to the irreparable harm they would suffer in the absence of preliminary injunctive relief.<sup>121</sup>

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<sup>118</sup> Docket 21 at 11–12.

<sup>119</sup> Docket 24 at 2. *But see* Docket 26-3 at 12–16 (describing State of Alaska’s upcoming timber sales in Southeast Alaska).

<sup>120</sup> *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 765 (9th Cir. 2014) (citing *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1023 (9th Cir. 2009)).

<sup>121</sup> *See All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127 at 1137–38 (9th Cir. 2011).

*B. A short-term injunction to maintain the status quo is in the public interest*

The Ninth Circuit has recognized “the well-established ‘public interest in preserving nature and avoiding irreparable environmental injury.’”<sup>122</sup> And “[s]uspending a project until [environmental analysis] has occurred . . . comports with the public interest,” because “the public interest requires careful consideration of environmental impacts before major federal projects may go forward.”<sup>123</sup> The Forest Service stresses that the “selected alternative is projected to support 2,657 jobs and provide \$146,620,933 in direct income,” and that this economic benefit would be jeopardized if “operators are forced out of business from a lack of timber” due to delays in implementation.<sup>124</sup> A preliminary injunction’s impact on the local economy is certainly relevant to the public interest inquiry,<sup>125</sup> but the Forest Service paints the impact too broadly by focusing on the projected economic benefit for the entire 15-year Project. As Plaintiffs point out, “permanent relief [is] not at issue in this motion,”<sup>126</sup> only a preliminary injunction of relatively short duration.

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<sup>122</sup> *Id.* at 1138 (quoting *Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008), *overruled on other grounds by Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008)).

<sup>123</sup> *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dept. of Interior*, 588 F.3d 718, 728 (9th Cir. 2009).

<sup>124</sup> Docket 21 at 12–13.

<sup>125</sup> See, e.g., *Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008) (affirming denial of preliminary injunction of logging project due in part to “the public’s interest in aiding the struggling economy and preventing job loss”), *overruled on other grounds by Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008).

<sup>126</sup> Docket 26 at 6 (Reply).

Moreover, the Project is not the only planned source of timber in Southeast Alaska, including on Prince of Wales Island. For example, the State of Alaska has scheduled two timber sales on the island for 2020, offering a cumulative 2,141 acres of old-growth harvest.<sup>127</sup> And the State anticipates awarding a local company a 10-year contract that will provide roughly 50 million board feet of timber.<sup>128</sup> These planned projects would lessen the economic impact of a short-term preliminary injunction of the Twin Mountain Timber Sale. The Court thus finds that the “public interests that might be injured by a preliminary injunction . . . do not outweigh the public interests that will be served.”<sup>129</sup>

### **CONCLUSION**

In light of the foregoing, Plaintiffs’ Motion for Preliminary Injunction at Docket 17 is GRANTED.

IT IS ORDERED that Defendants are hereby enjoined from allowing any cutting of trees, road construction, or other ground-disturbing activities implementing the Twin Mountain Timber Sale authorized in the Prince of Wales Landscape Level Analysis Project Record of Decision until further order of this Court. Defendants are further enjoined from opening any bids or awarding any contracts for the Twin Mountain Timber Sale until further order of this Court.

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<sup>127</sup> Docket 26-3 at 12 (Alaska Division of Forestry Five-Year Schedule of Timber Sales).

<sup>128</sup> Docket 26-4 at 11 (Tr. of Aug. 28, 2019 Board of Forestry Meetings).

<sup>129</sup> *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011).



This preliminary injunction is effective immediately. However, the parties have not provided the Court with sufficient information to allow the Court to determine the appropriate amount of security, if any, required by Rule 65(c), Federal Rules of Civil Procedure.<sup>130</sup> Therefore, within one week of the date of this order, the parties shall file, either separately or jointly, their positions on the amount of any required bond, and the Court shall promptly thereafter address this issue.

DATED this 23rd day of September, 2019 at Anchorage, Alaska.

/s/ Sharon L. Gleason  
UNITED STATES DISTRICT JUDGE

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<sup>130</sup> See, e.g., *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1125–26 (9th Cir. 2005) (affirming district court order requiring non-profit environmental organization to pay \$50,000 bond after enjoining development project); *Cal. ex rel. Van De Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1325–26 (9th Cir. 1985) (affirming district court order requiring no bond when non-profit environmental organization “indicate[d] it [was] unable to post a substantial bond”).

FS Agreement No. 19-CS-11100100-077

Cooperator Agreement No. \_\_\_\_\_

**CHALLENGE COST SHARE AGREEMENT**  
**Between The**  
**ALASKA DIVISION OF FORESTRY**  
**And The**  
**USDA, FOREST SERVICE**  
**ALASKA REGION**

This CHALLENGE COST SHARE AGREEMENT is hereby made and entered into by and between the Alaska Division of Forestry, hereinafter referred to as “ADOF,” and the USDA, Forest Service, Alaska Region, Tongass National Forest hereinafter referred to as the “U.S. Forest Service,” under the authority: Department of Interior and Related Agencies Appropriation act of 1992, Pub. L. 102-154

Background:

In recent years timber sale offerings and timber sales in Southeast Alaska have declined drastically. For example, in the mid 1990’s Federal timber volume offered averaged approximately 250mmbf per year, by 2017 it had dropped to 24mmbf per year. This has put the survival of southeast Alaska wood product industries at risk of failing. The reduction in timber sales and resulting low industry output has contributed to an erosion of basic forestry layout expertise for both industry and forest management agencies. Woods and field personnel have moved out of southeast Alaska to fulfill their professional expectations and livelihood elsewhere.

Historically the U.S. Forest Service and the State of Alaska have managed removal of their timber resource by utilizing numerous logging systems. Ground-based tractor, rubber-tired skidders, and recently in the smaller diameter young-growth stands the use of harvesters. Cable systems including hi-lead and the more sophisticated sky-line configurations have in the past been successfully utilized. Typically for those areas isolated from a road system some aerial method, either helicopter or balloon was used.

The U.S. Forest Service, currently engaged in two large landscape analysis projects, has identified approximately 14,000 acres of uneven-age old growth timber located outside the capabilities of conventional ground-base and cable logging systems. The State and other land managers have similar situations where a helicopter could be utilized to access these isolated areas. Among these landowners it has become collectively recognized that all-lands will require an all-hands approach to provide an adequate supply of economically viable timber. The need for a coordinated, collaborative plan to train agency field crews and to strategically locate economical sales is paramount. It would be



preferable to have coordinated actions across ownerships. This would address the current reality of our constrained timber sale layout crew field knowledge, our challenging sustainable timber supply, and our dwindling industry capacity.

Recently Southeast Alaska lost its sole helicopter contractor, Columbia Helicopters, Incorporated. Their recent business decision to no longer conduct helicopter logging operations in southeast Alaska puts local land managers in jeopardy of not being able to treat isolated timber stands. Also, at risk is the inability to employ a helicopter for future Stewardship and Good Neighbor Agreement restoration projects. It is vital to access these inaccessible uneven-aged old growth tracts of timber. The reality is that this volume is needed by the local timber industry to help transition into the future young growth program.

With inherently high operating costs associated with helicopter logging future timber offerings will need to offer conventional logging along with helicopter volume. It has been estimated that at least 8-12mmbf per year over a 10-15-year period would be necessary to keep a helicopter in southeast Alaska. Unfortunately, the field knowledge and skill sets needed to maintain such a program appears to be incomplete. Recognizing that these knowledge gaps exist, and then subsequently following up with appropriate training opportunities would be essential in building long term practical field capacity within the agencies.

Title: Uneven aged old growth helicopter opportunities in Southeast Alaska-Training

## **I. PURPOSE:**

The purpose of this agreement is to document the cooperation between the parties to develop a more technically skilled local workforce to accomplish a variety of forest management field tasks. Some of these tasks will be associated with locating, designing, understanding and incorporating economic considerations into timber sale project design and implementation. Economic old-growth 'bridge' timber is necessary during the next 15 years to sustain regional timber harvesting and manufacturing business during the transition to young growth management. There is, for example, a pressing need for agency pre-sale field personnel to advance their ability in designing economically viable helicopter logging units. This will be accomplished by offering opportunities to share knowledge through training cadres. These cadres will be made up of agency, industry, and partners having the appropriate expertise to address current deficiencies. The cadres will identify and teach necessary field skills to help stem the loss of critical on-the-ground pre-sale layout and logging expertise that is currently scarce in both agency's workforce. Practical agency knowledge of helicopter and cable logging systems associated with remote Southeast Alaska needs to be further developed.

The timber industry currently engaged in the harvest of both old and young growth forests throughout southeast Alaska has the expertise to address these needs. They can assist in identifying gaps in needed skill sets and assist in the appropriate on-the ground training. It is the desire of the U.S. Forest Service to reimburse ADOF for the U.S. Forest Service's



share of actual expenses incurred, not to exceed \$1,500,000.00 over the five year life of this agreement.

Among landowners and the Forest Service it has become collectively recognized that a more concentrated and focused training program would improve timber output by providing more economical timber sales.

This agreement will be implemented in accordance with the following provisions and the hereby incorporated Operating and Financial Plan, attached as Exhibit A.

## **II. STATEMENT OF MUTUAL BENEFIT AND INTERESTS:**

The U.S. Forest Service and Alaska Division of Forestry agree that maintaining a viable forest products industry is critical for maintaining a healthy regional economy. The forest products industry aids in promoting community development and helps forest land owners manage their forest resources, provide wildland fire suppression, and provides expertise and a workforce for restoration projects.

A viable forest products industry is reliant on economical timber sales. Both parties have concluded that they need to further increase their local forestry workforce layout skills; specifically, with identifying economical helicopter logging opportunities. The timber industry along with select agency personnel have the expertise to address and share skills needed by both ADOF and U.S. Forest Service. Both parties realize the mutual benefit of engaging stakeholders who understand and who are working regularly in wood product industry. Those who are familiar with the myriad of challenges associated with operating in the Alexander Archipelago can help provide the U.S. Forest Service and ADOF a much better opportunity for successfully developing economical timber sales. The following list presents an array of mutual benefits and interests.

- Share information and expertise to train forest management agency pre-sale personnel to accomplish all field tasks necessary to identify and mark timber sale units which can then be successfully and economically harvested by helicopter, ground-based, and cable logging systems;
- Provide opportunities to involve field-going foresters, forestry technicians and seasonal workforce with on-the-job training (OJT) that might include old growth timber cruising, unit and landing location, road location, road construction considerations, and harvest operations. Following field time with cadre members the experience gained by participating field crew members will provide them with additional skill sets allowing them to work independently with minimal supervision;
- Both agencies will benefit from on-the-job training and shared educational opportunities;
- Success will promote local timber industry retention by providing economic sales;
- Both parties share an interest in providing opportunity to continue an economic and sustainable helicopter logging program;



- Interest is shared to provide raw products to local industry before the transition to young growth begins;
- Both parties are interested and will benefit by having a helicopter located in southeast Alaska for use in current and future restoration projects.
- Both parties are committed to working with all stakeholders and landowners to improve timber harvesting knowledge, participating in cross-training, shared resources, and the ability to work across numerous land-ownerships.
- Forest management agency field-going employees would benefit from more hands-on specific training in timber sale layout, road location, evaluating logging feasibility and other field tasks necessary to prepare and offer economically viable timber sales.

In Consideration of the above premises, the parties agree as follows:

### **III. ADOF SHALL:**

- LEGAL AUTHORITY. ADOF shall have the legal authority to enter into this agreement, and the institutional, managerial, and financial capability to ensure proper planning, management, and completion of the project, which includes funds sufficient to pay the nonfederal share of project costs, when applicable.
- USE OF GOVERNMENT OWNED VEHICLES. U.S. Forest Service vehicles may be used for official U.S. Forest Service business only in accordance with FSH 7109.19, Ch. 60, the requirements established by the region in which performance of this agreement takes place, and the terms of this agreement.
- BUILDING AND COMPUTER ACCESS BY NON-U.S. FOREST SERVICE PERSONNEL. ADOF may be granted access to U.S. Forest Service facilities and/or computer systems to accomplish work described in the Operating Plan or Statement of Work. All non-government employees with unescorted access to U.S. Forest Service facilities and computer systems must have background checks following the procedures established by USDA Directives 3800 series. Those granted computer access must fulfill all U.S. Forest Service requirements for mandatory security awareness and role-based advanced security training, and sign all applicable U.S. Forest Service statements of responsibilities.
- Will provide cadre members to work with the U.S. Forest Service to help perform the tasks described. ADOF and their cadre members will work closely with the U.S. Forest Service to develop program of work and yearly complete an annual operating plan with appropriate yearly financial plan.

### **IV. THE U.S. FOREST SERVICE SHALL:**

- PAYMENT/REIMBURSEMENT. The U.S. Forest Service shall reimburse ADOF for the U.S. Forest Service's share of actual expenses incurred, with an estimated



annual expense not to exceed \$300,000.00 per year as shown in the Financial Plan. The U.S. Forest Service shall make payment upon receipt of ADOF's quarterly invoice. Each invoice from ADOF must display the total project costs for the billing period, separated by U.S. Forest Service and ADOF share. In-kind contributions must be displayed as a separate line item and must not be included in the total project costs available for reimbursement. The final invoice must display ADOF's full match towards the project, as shown in the financial plan, and be submitted no later than 90 days from the expiration date.

Each invoice must include, at a minimum:

1. ADOF name, address, and telephone number.
2. Forest Service agreement number.
3. Invoice date.
4. Performance dates of the work completed (start & end).
5. Total invoice amount for the billing period, separated by Forest Service and ADOF share with in-kind contributions displayed as a separate line item.
6. Display all costs, both cumulative and for the billing period, by separate cost element as shown on the financial plan.
7. Cumulative amount of Forest Service payments to date.
8. Statement that the invoice is a request for payment by "reimbursement."
9. If using SF-270, a signature is required.
10. Invoice Number, if applicable.

The invoice shall be forwarded to:

EMAIL: asc\_ga@fs.fed.us

FAX: 877-687-4894

POSTAL: USDA Forest Service  
Albuquerque Service Center  
Payments – Grants & Agreements  
101B Sun Ave NE  
Albuquerque, NM 87109

Send a copy to: Dave Zimmerman, POB 21628, Juneau, AK 99801

- B. Provide GIS layers and any associated data needed to provide estimates of isolated uneven aged old growth helicopter ground.
- C. Include State and Industry representatives as knowledgeable stakeholders in the review of information for specific landscapes from which future projects can be planned.
- D. Agency field crews will be made available to cadre and AFA representatives: to walk units, watersheds or landscapes from which collaborative review identifies a high probability for economical operability.



- E. Provide time for agency personnel from the Forest and Districts to evaluate project area opportunities for further consideration for a 10-15 year helicopter harvest plan.
- F. Jointly develop with ADOF an annual program of work with deliverables, operating plan, and financial plan

**V. IT IS MUTUALLY UNDERSTOOD AND AGREED BY AND BETWEEN THE PARTIES THAT:**

- A. PRINCIPAL CONTACTS. Individuals listed below are authorized to act in their respective areas for matters related to this agreement.

**Principal Cooperator Contacts:**

<b>Cooperator Program Contact</b>	<b>Cooperator Administrative Contact</b>
James A. Eleazer 550 West 7 <sup>th</sup> Suite 1450 Anchorage, AK 99501 Telephone: (907) 269-8481 Cell: (907) 205-8687 Email: jim.eleazer@alaska.gov	Joel R. Del Rosario 550 West 7 <sup>th</sup> Suite 1450 Anchorage, AK 99501 Telephone: (907) 269-8477 Cell: (907) 240-7022 Email: joel.delrosario@alaska.gov

**Principal U.S. Forest Service Contacts:**

<b>U.S. Forest Service Program Manager Contact</b>	<b>U.S. Forest Service Administrative Contact</b>
Name: Dave Zimmerman PO Box 21628 Juneau, AK 99801 Telephone: 907-586-8742F FAX: 907-586-7877 Email: david.zimmerman@usda.gov	Name: Pamela Ward Address: 709 West 9 <sup>th</sup> St. City, State, Zip: Juneau, AK 99801 Telephone: (470) 215-3437 FAX: Email: pamela.ward@usda.gov

- B. NOTICES. Any communications affecting the operations covered by this agreement given by the U.S. Forest Service or ADOF are sufficient only if in writing and delivered in person, mailed, or transmitted electronically by e-mail or fax, as follows:

To the U.S. Forest Service Program Manager, at the address specified in the agreement.

To ADOF, at the address shown in the agreement or such other address designated within the agreement.

Notices are effective when delivered in accordance with this provision, or on the effective date of the notice, whichever is later.



- C. PARTICIPATION IN SIMILAR ACTIVITIES. This agreement in no way restricts the U.S. Forest Service or ADOF from participating in similar activities with other public or private agencies, organizations, and individuals.
- D. ENDORSEMENT. Any of ADOF's contributions made under this agreement do not by direct reference or implication convey U.S. Forest Service endorsement of ADOF's products or activities.
- E. USE OF U.S. FOREST SERVICE INSIGNIA. In order for ADOF to use the U.S. Forest Service insignia on any published media, such as a Web page, printed publication, or audiovisual production, permission must be granted from the U.S. Forest Service's Office of Communications (Washington Office). A written request will be submitted by the U.S. Forest Service ADOF to the Office of Communications Assistant Director, Visual Information and Publishing Services prior to use of the insignia. The U.S. Forest Service ADOF will notify the ADOF when permission is granted.
- F. NON-FEDERAL STATUS FOR COOPERATOR PARTICIPANT LIABILITY. ADOF agree(s) that any of their employees, volunteers, and program participants shall not be deemed to be Federal employees for any purposes including Chapter 171 of Title 28, United States Code (Federal Tort Claims Act) and Chapter 81 of Title 5, United States Code (OWCP), as ADOF hereby willingly agree(s) to assume these responsibilities.
- Further, ADOF shall provide any necessary training to ADOF's employees, volunteers, and program participants to ensure that such personnel are capable of performing tasks to be completed. ADOF shall also supervise and direct the work of its employees, volunteers, and participants performing under this agreement.
- G. MEMBERS OF U.S. CONGRESS. Pursuant to 41 U.S.C. 22, no member of, or delegate to, Congress shall be admitted to any share or part of this agreement, or benefits that may arise therefrom, either directly or indirectly.
- H. NONDISCRIMINATION. In accordance with Federal civil rights law and U.S. Department of Agriculture (USDA) civil rights regulations and policies, the USDA, its Agencies, offices, and employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Persons with disabilities who require alternative means of communication for program information (e.g., Braille, large print, audiotape, American Sign Language, etc.) should





contact the responsible Agency or USDA's TARGET Center at (202) 720-2600 (voice and TTY) or contact USDA through the Federal Relay Service at (800) 877-8339. Additionally, program information may be made available in languages other than English.

To file a program discrimination complaint, complete the USDA Program Discrimination Complaint Form, AD-3027, found online at How to File a Program Discrimination Complaint and at any USDA office or write a letter addressed to USDA and provide in the letter all of the information requested in the form. To request a copy of the complaint form, call (866) 632-9992. Submit your completed form or letter to USDA by: (1) mail: U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue, SW, Washington, D.C. 20250-9410; (2) fax: (202) 690-7442; or (3) email: [program.intake@usda.gov](mailto:program.intake@usda.gov). USDA is an equal opportunity provider, employer, and lender.

- I. ELIGIBLE WORKERS. ADOF shall ensure that all employees complete the I-9 form to certify that they are eligible for lawful employment under the Immigration and Nationality Act (8 USC 1324a). ADOF shall comply with regulations regarding certification and retention of the completed forms. These requirements also apply to any contract awarded under this agreement.
- J. SYSTEM FOR AWARD MANAGEMENT REGISTRATION REQUIREMENT (SAM). ADOF shall maintain current information in the System for Award Management (SAM) until receipt of final payment. This requires review and update to the information at least annually after the initial registration, and more frequently if required by changes in information or agreement term(s). For purposes of this agreement, System for Award Management (SAM) means the Federal repository into which an entity must provide information required for the conduct of business as a Cooperative. Additional information about registration procedures may be found at the SAM Internet site at [www.sam.gov](http://www.sam.gov).
- K. STANDARDS FOR FINANCIAL MANAGEMENT.

### **1. Financial Reporting**

ADOF shall provide complete, accurate, and current financial disclosures of the project or program in accordance with any financial reporting requirements, as set forth in the financial provisions.

### **2. Accounting Records**

ADOF shall continuously maintain and update records identifying the source and use of funds. The records shall contain information pertaining to the agreement, authorizations, obligations, unobligated balances, assets, outlays, and income.

### **3. Internal Control**



ADOF shall maintain effective control over and accountability for all U.S. Forest Service funds. ADOF shall keep effective internal controls to ensure that all United States Federal funds received are separately and properly allocated to the activities described in the award/agreement and used solely for authorized purposes.

#### **4. Source Documentation**

ADOF shall support all accounting records with source documentation. These documentations include, but are not limited to, cancelled checks, paid bills, payrolls, contract documents. These documents must be made available to the U.S. Forest Service upon request.

- L. **LIMITATION OF FUNDS.** U.S. Forest Service funds in the amount of \$150,000.00 are currently available for performance of this agreement through September 30, 2023. The U.S. Forest Service's ability to provide additional funding is contingent upon the availability of appropriated funds from which payment can be made. There is no legal liability on the part of the Forest Service for any payment above this amount until ADOF receives notice of availability confirmed in a written modification by the Forest Service.

#### **M. INDIRECT COST RATES- PARTNERSHIP**

Indirect costs are approved for reimbursement or as a cost-share requirement and have an effective period applicable to the term of this agreement.

1. If the Cooperator has never received or does not currently have a negotiated indirect cost rate, they are eligible for a de minimis indirect cost rate up to 10 percent of modified total direct costs (MTDC). MTDC is defined as all salaries and wages, fringe benefits, materials and supplies, services, travel, and contracts up to the first \$25,000 of each contract.
2. For rates greater than 10 percent and less than 25 percent, the Cooperator shall maintain documentation to support the rate. Documentation may include, but is not limited to, accounting records, audit results, cost allocation plan, letter of indirect cost rate approval from an independent accounting firm, or other Federal agency approved rate notice applicable to agreements.
3. For a rate greater than 25 percent, the Forest Service may require that the Cooperator request a federally approved rate from the Cooperator's cognizant audit agency no later than 3 months after the effective date of the agreement. The Cooperator will be reimbursed for indirect costs or allowed to cost-share at the rate reflected in the agreement until the rate is formalized in the negotiated indirect cost rate (NICRA) at which time, reimbursements for prior indirect costs or cost-sharing may be subject to adjustment.
4. Failure to provide adequate documentation supporting the indirect cost rate, if requested, could result in disallowed costs and repayment to the Forest Service.



- N. OVERPAYMENT. Any funds paid to ADOF in excess of the amount entitled under the terms and conditions of this agreement constitute a debt to the Federal Government. The following must also be considered as a debt or debts owed by ADOF to the U.S. Forest Service:

- Any interest or other investment income earned on advances of agreement funds; or
- Any royalties or other special classes of program income which, under the provisions of the agreement, are required to be returned;

If this debt is not paid according to the terms of the bill for collection issued for the overpayment, the U.S. Forest Service may reduce the debt by:

1. Making an administrative offset against other requests for reimbursement.
2. Withholding advance payments otherwise due to ADOF.
3. Taking other action permitted by statute (31 U.S.C. 3716 and 7 CFR, Part 3, Subpart B).

Except as otherwise provided by law, the U.S. Forest Service may charge interest on an overdue debt.

- O. AGREEMENT CLOSEOUT. Within 90 days after expiration or notice of termination the parties shall close out the agreement.

Any unobligated balance of cash advanced to ADOF must be immediately refunded to the U.S. Forest Service, including any interest earned in accordance with 2 CFR Part 200, Subpart D, 200.305.

Within a maximum of 90 days following the date of expiration or termination of this agreement, all financial performance and related reports required by the terms of the agreement must be submitted to the U.S. Forest Service by ADOF.

If this agreement is closed out without audit, the U.S. Forest Service reserves the right to disallow and recover an appropriate amount after fully considering any recommended disallowances resulting from an audit which may be conducted later.

- P. PROGRAM PERFORMANCE REPORTS The parties to this agreement shall monitor the performance of the agreement activities to ensure that performance goals are being achieved.

Performance reports must contain information on the following:

- A comparison of actual accomplishments to the goals established for the period. Where the output of the project can be readily expressed in numbers, a computation of the cost per unit of output, if applicable.



- Reason(s) for delay if established goals were not met.
- Additional pertinent information.

ADOF shall submit annual performance reports to the U.S. Forest Service Program Manager. These reports are due 30 days after the reporting period. The final performance report shall be submitted either with ADOF's final payment request, or separately, but not later than 90 days from the expiration date of the agreement.

- Q. RETENTION AND ACCESS REQUIREMENTS FOR RECORDS. ADOF shall retain all records pertinent to this agreement for a period of no less than 3 years from the expiration or termination date. As used in this provision, records includes books, documents, accounting procedures and practice, and other data, regardless of the type or format. ADOF shall provide access and the right to examine all records related to this agreement to the U.S. Forest Service Inspector General, or Comptroller General or their authorized representative. The rights of access in this section must not be limited to the required retention period but must last as long as the records are kept.

If any litigation, claim, negotiation, audit, or other action involving the records has been started before the end of the 3-year period, the records must be kept until all issues are resolved, or until the end of the regular 3-year period, whichever is later.

Records for nonexpendable property acquired in whole or in part, with Federal funds must be retained for 3 years after its final disposition.

- R. FREEDOM OF INFORMATION ACT (FOIA). Public access to agreement records must not be limited, except when such records must be kept confidential and would have been exempted from disclosure pursuant to Freedom of Information regulations (5 U.S.C. 552). ). Requests for research data are subject to 2 CFR 215.36.

Public access to culturally sensitive data and information of Federally-recognized Tribes may also be explicitly limited by P.L. 110-234, Title VIII Subtitle B §8106 (2009 Farm Bill).

- S. TEXT MESSAGING WHILE DRIVING. In accordance with Executive Order (EO) 13513, "Federal Leadership on Reducing Text Messaging While Driving," any and all text messaging by Federal employees is banned: a) while driving a Government owned vehicle (GOV) or driving a privately owned vehicle (POV) while on official Government business; or b) using any electronic equipment supplied by the Government when driving any vehicle at any time. All cooperators, their employees, volunteers, and contractors are encouraged to adopt and enforce policies that ban text messaging when driving company owned, leased or rented vehicles, POVs or GOVs when driving while on official Government business or when performing any work for or on behalf of the Government.



- T. PUBLIC NOTICES. It is the U.S. Forest Service's policy to inform the public as fully as possible of its programs and activities. ADOF is/are encouraged to give public notice of the receipt of this agreement and, from time to time, to announce progress and accomplishments. Press releases or other public notices should include a statement substantially as follows:
- "Alaska Region, Tongass National Forest of the U. S. Forest Service, Department of Agriculture"
- ADOF may call on the U.S. Forest Service's Office of Communication for advice regarding public notices. ADOF is/are requested to provide copies of notices or announcements to the U.S. Forest Service Program Manager and to U.S. Forest Service's Office of Communications as far in advance of release as possible.
- U. FUNDING EQUIPMENT. Federal funding under this agreement is not available for reimbursement of ADOF's purchase of equipment. Equipment is defined as having a fair market value of \$5,000 or more per unit and a useful life of over one year.
- V. PROPERTY IMPROVEMENTS. Improvements placed on National Forest System land at the direction or with the approval of the U.S. Forest Service becomes property of the United States. These improvements are subject to the same regulations and administration of the U.S. Forest Service as would other National Forest improvements of a similar nature. No part of this agreement entitles ADOF to any interest in the improvements, other than the right to use them under applicable U.S. Forest Service regulations.
- W. CONTRACT REQUIREMENTS. Any contract under this agreement must be awarded following ADOF's established procurement procedures, to ensure free and open competition, and avoid any conflict of interest (or appearance of a conflict). ADOF must maintain cost and price analysis documentation for potential U.S. Forest Service review. ADOF is/are encouraged to utilize small businesses, minority-owned firms, and women's business enterprises.
- X. GOVERNMENT-FURNISHED PROPERTY. ADOF may only use U.S. Forest Service property furnished under this agreement for performing tasks assigned in this agreement. ADOF shall not modify, cannibalize, or make alterations to U.S. Forest Service property. A separate document, Form AD-107, must be completed to document the loan of U.S. Forest Service property. The U.S. Forest Service shall retain title to all U.S. Forest Service-furnished property. Title to U.S. Forest Service property must not be affected by its incorporation into or attachment to any property not owned by the U.S. Forest Service, nor must the property become a fixture or lose its identity as personal property by being attached to any real property.

*Cooperator Liability for Government Property.*



1. Unless otherwise provided for in the agreement, ADOF shall not be liable for loss, damage, destruction, or theft to the Government property furnished or acquired under this contract, except when any one of the following applies:
    - a. The risk is covered by insurance or ADOF is/are otherwise reimbursed (to the extent of such insurance or reimbursement).
    - b. The loss, damage, destruction, or theft is the result of willful misconduct or lack of good faith on the part of ADOF's managerial personnel. ADOF's managerial personnel, in this clause, means ADOF's directors, officers, managers, superintendents, or equivalent representatives who have supervision or direction of all or substantially all of ADOF's business; all or substantially all of ADOF's operation at any one plant or separate location; or a separate and complete major industrial operation.
  2. ADOF shall take all reasonable actions necessary to protect the Government property from further loss, damage, destruction, or theft. ADOF shall separate the damaged and undamaged Government property, place all the affected Government property in the best possible order, and take such other action as the Property Administrator directs.
  3. ADOF shall do nothing to prejudice the Government's rights to recover against third parties for any loss, damage, destruction, or theft of Government property.
  4. Upon the request of the Grants Management Specialist, ADOF shall, at the Government's expense, furnish to the Government all reasonable assistance and cooperation, including the prosecution of suit and the execution of agreements of assignment in favor of the Government in obtaining recovery.
- Y. OFFSETS, CLAIMS AND RIGHTS. Any and all activities entered into or approved by this agreement will create and support afforestation/ reforestation efforts within the National Forest System without generating carbon credits. The U.S. Forest Service does not make claims of permanence or any guarantees of carbon sequestration on lands reforested or afforested through partner assistance. The U.S. Forest Service will provide for long-term management of reforested and afforested lands, according to applicable Federal statute regulations and forest plans.
- Z. U.S. FOREST SERVICE ACKNOWLEDGED IN PUBLICATIONS, AUDIOVISUALS AND ELECTRONIC MEDIA. ADOF shall acknowledge U.S. Forest Service support in any publications, audiovisuals, and electronic media developed as a result of this agreement.
- AA. TRAINING, EVALUATION, AND CERTIFICATION OF SAWYERS.

Any of the cooperator's employees, and any participants and volunteers engaged on behalf of the cooperator and Forest Service, who will use chain saws or crosscut saws



on National Forest System lands to conduct the program of work contained in this agreement must be trained, evaluated, and certified in accordance with Forest Service Manual 2358 and Forest Service Handbook 6709.11, section 22.48b. The cooperator is responsible for providing this training, evaluation, and certification, unless the Forest Service and the cooperator determine it is not in the best interest of the partnership. In these circumstances, the Forest Service, upon request and based on availability of Agency funding and personnel, may assist with developing and conducting training, evaluation, and certification of the cooperator's employees, and any volunteers and participants engaged on behalf of the cooperator and the Forest Service, who will use chain saws or cross cut saws on National Forest System lands.

- BB. NONDISCRIMINATION STATEMENT – PRINTED, ELECTRONIC, OR AUDIOVISUAL MATERIAL. ADOF shall include the following statement, in full, in any printed, audiovisual material, or electronic media for public distribution developed or printed with any Federal funding.

*"In accordance with Federal law and U.S. Department of Agriculture policy, this institution is prohibited from discriminating on the basis of race, color, national origin, sex, age, or disability. (Not all prohibited bases apply to all programs.)"*

To file a complaint alleging discrimination, write USDA, Director, Office of Civil Rights, 1400 Independence Avenue, SW, Washington DC 20250-9410 or call toll free voice (866) 632-9992, TDD (800)877-8339, or voice relay (866) 377-8642. USDA is an equal opportunity provider and employer."

If the material is too small to permit the full statement to be included, the material must, at minimum, include the following statement, in print size no smaller than the text:

*"This institution is an equal opportunity provider."*

- CC. REMEDIES FOR COMPLIANCE RELATED ISSUES. If ADOF materially fail(s) to comply with any term of the agreement, whether stated in a Federal statute or regulation, an assurance, or the agreement, the U.S. Forest Service may take one or more of the following actions:

1. Temporarily withhold cash payments pending correction of the deficiency by ADOF or more severe enforcement action by the U.S. Forest Service;
2. Disallow (that is, deny both use of funds and matching credit for) all or part of the cost of the activity or action not in compliance;
3. Wholly or partly suspend or terminate the current agreement for ADOF's program;
4. Withhold further awards for the program, or



5. Take other remedies that may be legally available, including debarment procedures under 2 CFR Part 417.

DD. TERMINATION BY MUTUAL AGREEMENT. This agreement may be terminated, in whole or part, as follows:

1. When the U.S. Forest Service and ADOF agree upon the termination conditions, including the effective date and, in the case of partial termination, the portion to be terminated.
2. By 30 days written notification by ADOF to the U.S. Forest Service setting forth the reasons for termination, effective date, and in the case of partial termination, the portion to be terminated. If the U.S. Forest Service decides that the remaining portion of the agreement does not accomplish the purpose for which the award/agreement was made, the Forest Service may terminate the award upon 30 days written notice in its entirety.

Upon termination of an agreement, ADOF shall not incur any new obligations for the terminated portion of the agreement after the effective date, and shall cancel as many outstanding obligations as possible. The U.S. Forest Service shall allow full credit to ADOF for the United States Federal share of the non-cancelable obligations properly incurred by ADOF up to the effective date of the termination. Excess funds must be refunded within 60 days after the effective date of termination.

EE. ALTERNATE DISPUTE RESOLUTION – PARTNERSHIP AGREEMENT. In the event of any issue of controversy under this agreement, the parties may pursue Alternate Dispute Resolution procedures to voluntarily resolve those issues. These procedures may include, but are not limited to conciliation, facilitation, mediation, and fact finding.

FF. DEBARMENT AND SUSPENSION. ADOF shall immediately inform the U.S. Forest Service if they or any of their principals are presently excluded, debarred, or suspended from entering into covered transactions with the Federal Government according to the terms of 2 CFR Part 180. Additionally, should ADOF or any of their principals receive a transmittal letter or other official Federal notice of debarment or suspension, then they shall notify the U.S. Forest Service without undue delay. This applies whether the exclusion, debarment, or suspension is voluntary or involuntary.

GG. PROHIBITION AGAINST INTERNAL CONFIDENTIAL AGREEMENTS: All non federal government entities working on this agreement will adhere to the below provisions found in the Consolidated Appropriations Act, 2016, Pub. L. 114-113, relating to reporting fraud, waste and abuse to authorities:

- (a) The recipient may not require its employees, contractors, or sub recipients seeking to report fraud, waste, or abuse to sign or comply with internal confidentiality agreements or statements prohibiting or





otherwise restricting them from lawfully reporting that waste, fraud, or abuse to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information.

(b) The recipient must notify its employees, contractors, or sub recipients that the prohibitions and restrictions of any internal confidentiality agreements inconsistent with paragraph (a) of this award provision are no longer in effect.

(c) The prohibition in paragraph (a) of this award provision does not contravene requirements applicable to any other form issued by a Federal department or agency governing the nondisclosure of classified information.

(d) If the Government determines that the recipient is not in compliance with this award provision, it:

(1) Will prohibit the recipient's use of funds under this award, in accordance with sections 743, 744 of Division E of the Consolidated Appropriations Act, 2016, (Pub. L. 114-113) or any successor provision of law; and

(2) May pursue other remedies available for the recipient's material failure to comply with award terms and conditions.

HH. MODIFICATIONS. Modifications within the scope of this agreement must be made by mutual consent of the parties, by the issuance of a written modification signed and dated by all properly authorized, signatory officials, prior to any changes being performed. Requests for modification should be made, in writing, at least 30 days prior to implementation of the requested change. The U.S. Forest Service is not obligated to fund any changes not properly approved in advance.

II. COMMENCEMENT/EXPIRATION DATE. This agreement is executed as of the date of the last signature and is effective through September 30, 2023 at which time it will expire. The expiration date is the final date for completion of all work activities under this agreement.



- JJ. AUTHORIZED REPRESENTATIVES. By signature below, each party certifies that the individuals listed in this document as representatives of the individual parties are authorized to act in their respective areas for matters related to this agreement. In witness whereof, the parties hereto have executed this agreement as of the last date written below.

JOHN 'CHRIS' MAISCH, State Forester & Director  
Alaska Division of Forestry

7/12/19  
Date

For

DAVID SCHMID, Regional Forester  
U.S. Forest Service, Juneau, AK

7/12/19  
Date

The authority and format of this agreement [19-CS-11100100-077] have been reviewed and approved for signature.

PAMELA W. WARD  
U.S. Forest Service Grants Management Specialist

7/12/19  
Date

#### Burden Statement

According to the Paperwork Reduction Act of 1995, an agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 0596-0217. The time required to complete this information collection is estimated to average 4 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

The U.S. Department of Agriculture (USDA) prohibits discrimination in all its programs and activities on the basis of race, color, national origin, age, disability, and where applicable, sex, marital status, familial status, parental status, religion, sexual orientation, genetic information, political beliefs, reprisal, or because all or part of an individual's income is derived from any public assistance. (Not all prohibited bases apply to all programs.) Persons with disabilities who require alternative means for communication of program information (Braille, large print, audiotape, etc.) should contact USDA's TARGET Center at 202-720-2600 (voice and TDD).

To file a complaint of discrimination, write USDA, Director, Office of Civil Rights, 1400 Independence Avenue, SW, Washington, DC 20250-9410 or call toll free (866) 632-9992 (voice). TDD users can contact USDA through local relay or the Federal relay at (800) 877-8339 (TDD) or (866) 377-8642 (relay voice). USDA is an equal opportunity provider and employer.

**Attachment A**  
**Five year overview of Statement of Work**

Expected accomplishments and products (in no particular order) over the life of this agreement:

1. Partners to select cadre members.
2. Cadre members formulate realistic expectations with yearly time schedules, yearly program of work with deliverables, and yearly financial plan.
3. Partners together with participating consultants develop a cadre “training syllabus” for each year to keep focused on agency expectations and direction.
4. Train by end of year two and each following year 3-5 field crew member to a skill level where they can work independently, with minimal oversight. During the field season training will also be directed toward seasonal crews that typically are onboard each upcoming year.
5. Develop a strategy to help both agency’s workforce secure knowledge in economical helicopter unit lay-out, as well as cable logging designs and road location techniques. In this process complete ground layout on current proposed projects.
6. Produce GIS map of potential un-even aged old growth stands suitable for helicopter harvest opportunities.
  - Estimated due date late summer of 2019
7. Utilizing data gathered from the previous Challenged Cost Share agreement, provide a GIS map of isolated young growth stands which show the potential for helicopter harvesting.
8. Cadre to Coordinate with State, Tongass NF District and SO timber management staff to produce a draft 10-15 year helicopter sale program on Federal Lands with complimenting private land offerings with the following suggested caveat;
  - Harvesting eight to ten mmbf per year;
  - Utilizing two or three 10 year length stewardship contracts.
9. Identify from POW LLA and CT LLA realistic restoration projects across land ownerships that could entail helicopter support.
10. Develop assessment of needs for helicopter use across all lands for SE Alaska
11. Work with Silviculture and timber sale administration individuals in developing economic and ecologically sound silvicultural prescriptions.
12. Train and utilize agencies crews to better prepare them to train the next generation of agency forestry crews.
13. Yearly ‘after action review’ of previous year’s program of work.

**Attachment B**  
**2019 Statement of Work**

Expected accomplishments and products (in no particular order) for FY 2019:

1. Partners meet for initial meeting to formalize 2019 statement of work and develop a time line for remainder of the FY. The outcome from this meeting will also confirm the anticipated deliverables (e.g. number of field crew members to receive initial 'hands on' training, estimated number of unit boundaries located and layed out).
2. Select first year cadre members and field personnel that will be working with them.
3. Together, partners will develop expectations for the remaining field season, project needs for fall work, time line to accomplish anticipated work and expected outcomes for FY20 field season.
4. USFS to produce GIS map of potential un-even aged old growth stands so cadre can begin developing program and work and an action plan for the next 6 and 12 months.
5. Utilizing district knowledge identify "problem" harvest opportunities that need refinement and begin field layout on these 'units'.

Attachment: C

USFS Agreement No.: 19-CS-11100100-077  
Cooperator Agreement No.:

Mod. No.: 0

**Note: This Financial Plan may be used when:**

- (1) No program income is expected and
- (2) The Cooperator is not giving cash to the FS and
- (3) There is no other Federal funding

**Agreements Financial Plan (Short Form)****Financial Plan Matrix:** Note: All columns may not be used. Use depends on source and type of contribution(s).

	<b>FOREST SERVICE CONTRIBUTIONS</b>		<b>COOPERATOR CONTRIBUTIONS</b>		
	(a)	(b)	(c)	(d)	(e)
<b>COST ELEMENTS</b>	Noncash	Cash to Cooperator	Noncash	In-Kind	Total
Direct Costs					
Salaries/Labor	\$25,784.00	\$19,635.00	\$30,086.00	\$0.00	\$75,505.00
Travel	\$0.00	\$9,574.00	\$0.00	\$0.00	\$9,574.00
Equipment	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Supplies/Materials	\$0.00	\$3,377.00	\$0.00	\$0.00	\$3,377.00
Printing	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Other	\$0.00	\$93,697.89	\$54,500.00	\$0.00	\$148,197.89
Other					\$0.00
Subtotal	\$25,784.00	\$126,283.89	\$84,586.00	\$0.00	\$236,653.89
Coop Indirect Costs		\$23,716.11	\$15,885.25		\$39,601.36
FS Overhead Costs	\$2,578.40				\$2,578.40
Total	\$28,362.40	\$150,000.00	\$100,471.25	\$0.00	\$278,833.65
<b>Total Project Value:</b>					\$278,833.65

**Matching Costs Determination**

Total Forest Service Share = (a+b) ÷ (e) = (f)	(f) 63.97%
Total Cooperator Share (c+d) ÷ (e) = (g)	(g) 36.03%
Total (f+g) = (h)	(h) 100.00%

## WORKSHEET FOR

### FS Non-Cash Contribution Cost Analysis, Column (a)

#### Salaries/Labor

##### Standard Calculation

Key Personnel	Cost/Day	# of Days	Total
Deputy Ranger Tyler Gunn	\$549.00	8	\$4,392.00
Acting Forest Timber Staff	\$582.00	8	\$4,656.00
Logging Stan McCoy	\$540.00	16	\$8,640.00
POW TMA Nick Reynolds	\$372.00	16	\$5,952.00
Dave Zimmerman	\$536.00	4	\$2,144.00
			\$0.00
			\$0.00

##### Non-Standard Calculation

**Total Salaries/Labor**

**\$25,784.00**

**Subtotal Direct Costs**

**\$25,784.00**

#### Forest Service Overhead Costs

Current Overhead Rate	Subtotal Direct Costs	Total
10.00%	\$25,784.00	\$2,578.40
<b>Total FS Overhead Costs</b>		<b>\$2,578.40</b>

**TOTAL COST**

**\$28,362.40**

**WORKSHEET FOR**

**FS Cash to the Cooperator Cost Analysis, Column (b)**

**Salaries/Labor**

Standard Calculation				
Job Description		Cost/Day	# of Days	Total
LTNP Project Mgr., Jim Ele:	0.5	\$35.00	65	\$2,275.00
LTNP Forester III, Mike Coc	8	\$560.00	31	\$17,360.00
Non-Standard Calculation				

<b>Total Salaries/Labor</b>	<b>\$19,635.00</b>
-----------------------------	--------------------

**Travel**

Standard Calculation				
Travel Expense		Cost/Trip/day	# of Trips	# days Total
Forester III per diem, meals		\$60.00		31 \$1,860.00
Forester III lodging		\$94.00		31 \$2,914.00
Forester III travel		\$1,600.00	3	\$4,800.00
Non-Standard Calculation				

<b>Total Travel</b>	<b>\$9,574.00</b>
---------------------	-------------------

**Supplies/Materials**

Standard Calculation			
Supplies/Materials	# of Items	Cost/Item	Total
Field supplies	1.00	\$615.00	\$615.00
Office tech	1.00	\$1,400.00	\$1,400.00
Field tech	1.00	\$1,362.00	\$1,362.00
			\$0.00
Non-Standard Calculation			

<b>Total Supplies/Materials</b>	<b>\$3,377.00</b>
---------------------------------	-------------------

**Printing**

Standard Calculation			
Paper Material	# of Units	Cost/Unit	Total
			\$0.00
Non-Standard Calculation			
			\$0.00
<b>Total Printing</b>			<b>\$0.00</b>

**Other Expenses**

Standard Calculation				
Item		cost / day	# of days	# trips Total
contract forester I		\$1,250.00	20	\$25,000.00
contract forester II		\$1,250.00	20	\$25,000.00
contract forester III		\$1,250.00	20	\$25,000.00
lodging		\$94.00	60	\$5,640.00
per diem meals		\$55.00	60	\$3,300.00
travel		\$1,600.00	6	\$9,757.89
Non-Standard Calculation				
Cooperative agreements for training includes \$125 per hr, plus expenses and 12.5% admin indirect costs.				
<b>Total Other</b>				<b>\$93,697.89</b>

**Subtotal Direct Costs**

**\$126,283.89**

**Cooperator Indirect Costs**

Current Overhead Rate	Subtotal Direct Costs		Total
18.78%	\$126,283.89		\$23,716.11
<b>Total Coop. Indirect Costs</b>			<b>\$23,716.11</b>

**TOTAL COST**

**\$150,000.00**

## WORKSHEET FOR

### Cooperator Non-Cash Contribution Cost Analysis, Column (c)

#### Salaries/Labor

##### Standard Calculation

Job Description		Cost/Day	# of Days		Total
					\$0.00

##### Non-Standard Calculation

Job Description	Annual Cost	% of Annual	Total
DOF Director	\$208,706.00	0.05	\$10,435.00
DOF Deputy Director	\$226,186.00	0.05	\$11,309.00
DOF Admin Chief	\$166,831.00	0.05	\$8,342.00

<b>Total Salaries/Labor</b>				<b>\$30,086.00</b>
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#### Other Expenses

##### Standard Calculation

Item		# of Units	Cost/Unit		Total
					\$0.00

##### Non-Standard Calculation

State Forest Parcel at Hollis road upgrade					\$54,500.00
--	--	--	--	--	-------------

<b>Total Other</b>					<b>\$54,500.00</b>
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**Subtotal Direct Costs**

**\$84,586.00**

#### Cooperator Indirect Costs

Current Overhead Rate	Subtotal Direct Costs			Total
18.78%	\$84,586.00			\$15,885.25

<b>Total Coop. Indirect Costs</b>				<b>\$15,885.25</b>
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**TOTAL COST**

**\$100,471.25**



## **COOPERATIVE AGREEMENT**

**Between**

**Division of Forestry, DNR, State of Alaska Department of Natural Resources**

**And**

**Alaska Forest Association**

**To: Support and Facilitate Collaboration between the U.S. Forest Service, the Alaska Division of Forestry and the Alaska Forest Industry in southeast Alaska**

### **Section I Parties and Project Title:**

This Agreement is made and entered into between the State of Alaska, Department of Natural Resources, Division of Forestry, hereinafter referred to as "DOF", and Alaska Forest Association, hereinafter referred to as "AFA", to support and facilitate collaboration between the U.S. Forest Service (USFS), the Alaska Division of Forestry (DOF) and the Alaska Forest Industry.

### **Section II Authority and General Intent:**

**AUTHORITIES:** Pursuant to AS 41.17.055(e) the State Forester can enter into cooperative agreements as specified under that chapter to complete tasks identified in this document.

AFA is a 501(c)6 non-profit Alaska forest industry trade association that represents the common business interests of the timber industry of Alaska. AFA is committed to advancing the restoration, promotion and maintenance of a healthy, viable forest products industry, contributing to economic and ecological health in Alaska's forests and communities. AFA enters into this agreement under the authority vested in its Board President.

**PURPOSE:** The USFS and the DOF require industry perspective on operability and economic viability of future timber sales in the Tongass National Forest. Due to expensive operational costs and limited infrastructure, not all available land or harvest prescriptions provide for economically viable operations. The Alaska Forest Association can provide this industry perspective as a third-party trade association and has entered a Memorandum of Understanding (MOU) with the USFS to do so (See Appendix D, March 2017 USFS - AFA MOU and March 2019 USFS – AFA MOU Modification 1). This Cooperative Agreement provides the needed funding through the Challenge Cost Share Agreement executed July 12, 2019 between the DOF and the USFS for AFA's collaborative efforts. This Agreement formalizes that funding mechanism, utilizing direct payment from DOF to AFA for expenses associated with collaboration under the AFA-USFS MOU and Modification 1 to the MOU.

### Section III Project Scope and Responsibilities:

THE ALASKA DEPARTMENT OF NATURAL RESOURCES, DIVISION OF FORSTRY WILL:

1. Provide funding to AFA for expenses associated with work under the work plan developed by the USFS for work under the AFA - USFS MOU and AFA – USFS MOU Modification 1 attached as Appendix D from ~~its~~ <sup>the</sup> effective date of ~~March 2017~~. This funding will provide reimbursement for AFA's hourly rates for AFA's professional employees (Forester(s) and Executive Director), plus expenses including travel, lodging and per diem for AFA representatives and all contractor fees and expenses. The total reimbursement under this agreement is not to exceed \$260,000.00 annually except that any unspent funds from any previous year(s) may be rolled forward adding to the \$260,000.00 of the current year.

THE ALASKA FOREST ASSOCIATION WILL:

1. Perform the work as outlined within the USFS developed work plan, submitted to DOF and AFA, under the AFA-USFS MOU and Modification 1 to the MOU.
2. Request reimbursement from the DOF program manager for any expenses associated with the work plans on a monthly basis. AFA shall provide receipts and proof of charges incurred with their request for reimbursement.
3. Not be held responsible to perform any work on an annual basis, listed within the USFS developed work plan under the AFA-USFS MOU and Modification 1 to the MOU, if the cost of performing such work would exceed the current year expenses and all funds rolled forward from previous years.

### Section IV Project Specific Term and Conditions:

#### IV. A- Federal Funds

Funding for this agreement will be from the Challenge Cost Share Agreement (CCSA).

This is an award of Federal Financial Assistance and as such is subject to the Office of Management and Budget (OMB) Circular A-102 (Grants and Cooperative Agreements with State and Local Governments) and 2 CFR 215 (Uniform Requirements with Institutions of Higher Education, Hospitals and Other Non Profit Organizations (OMB Circular 110) and OMB Circular A-133 (Audits of States, Local Governments and Non –Profit Organizations) and 2 CFR 230 (Cost Principles for Non-Profit Organizations, formerly Circular A-122). The OMB Circulars are available on the internet at [www.whitehouse.gov/omb/grants](http://www.whitehouse.gov/omb/grants). Electronic copies of the CFR's can be obtained at the following internet site: [www.gpoaccess.gov/cfr/](http://www.gpoaccess.gov/cfr/). If you are unable to retrieve these regulations electronically, please contact Arlene Weber-Sword at (907) 269-8471.

Funding under this agreement is not generally available for reimbursement for a single item purchase or a piece of equipment over \$5000.00.

#### IV. B- Financial Terms

The DOF will reimburse the AFA for Section III-Task 2 on the following terms and not to exceed amounts.

1. Expenses shall be invoiced monthly with backup documentation attached for expenses incurred from the effective date of this agreement.
2. The total reimbursement under this agreement is not to exceed \$260,000.00 annually except that any unspent funds from any previous year(s) may be rolled forward adding to the \$260,000.00 of the current year.
3. Under the terms of this agreement, there is no AFA match requirement.
4. AFA will bill DOF at a rate of \$125.00 per hour plus expenses for work performed by AFA's professional employees (Forester(s) and Executive Director).
5. AFA will bill DOF at the contract rate including expenses that AFA is billed by any and all contractors used on the project.
6. When working away from home AFA field personnel daily food and incidentals per diem rate is established at \$100.00 per day.
7. AFA administrative indirect costs will be charged at the rate of 12.5%.
8. Any single item purchase or piece of equipment over \$5000.00 must be approved in advance in writing by the DOF project manager.

#### IV. C- Billing Process and Payment Schedule:

Requests for payment may be submitted monthly on AFA letter head. Billing shall be submitted promptly and before the end of the following month, with final bill submission not later than 45 days after the expiration of this agreement. Any unexpended funding is subject to cancellation after that 45-day period. DOF agrees to reimburse AFA within 30 days of receipt of invoice for AFA work authorized for reimbursement under the terms of this agreement.

Requests for reimbursement: Send electronically to jim.eleazer@alaska.gov.

#### IV. D- Performance Period and Cancellation/Termination:

This Agreement is executed as of the date of the last signature and expires September 30, 2023 when the CCSA ends. The Agreement can be terminated upon 30 days written notice by either party. Parties will only be liable for payment in accordance with the payment provision of this agreement for services rendered before the effective date of termination.

#### IV. E- Modification and Amendments:

Changes to this agreement must be mutually acceptable to both parties and will be agreed to in writing and approved by the appropriate authorizing officials.

#### IV. F- Project Managers/Contacts

##### Principal contacts:

##### ADNR Division of Forestry

Jim Eleazer, Program Manager  
550 W. 7<sup>th</sup> Ave., Ste. 1450  
Anchorage, AK  
99501

##### Alaska Forest Association

Bert S. Burkhart, President-Board of Directors  
111 Stedman St., Suite 200  
Ketchikan, AK  
99901

#### IV. G- Reporting Requirements:

Quarterly accomplishment reporting is required. The quarterly reports submitted by AFA will support the requirements of the Challenge Cost Share Agreement (CCS), part V. P., Program Performance Reports, with the goal of ensuring performance goals are achieved. Appendix E may be used for this purpose.

#### **Section V Standard Terms and Conditions:**

1. Appendix A - State of Alaska required.
2. Appendices B & C - USFS Challenge Cost Share Agreement required.
3. Appendix D - March 2017 USFS - AFA MOU and March 2019 USFS – AFA MOU Modification 1.
4. Appendix E - Reporting Form OMB 0596-0217.

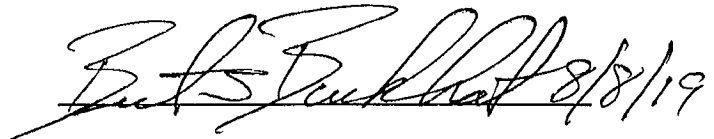
**Section VI Authorization Representative Signatures:**

By signature below, the Alaska Forest Association and Division of Forestry certify that the individuals listed in this document as representatives of the cooperators are authorized to act in their respective areas for matters related to this agreement.

Signatories:

John C Maisch  
Digitally signed by John C Maisch  
Date: 2019.08.08 08:57:07 -08'00'

John "Chris" Maisch, date  
Director  
Division of Forestry

 8/8/19

Bert S. Burkhardt, date  
Board President  
Alaska Forest Association

 8/29/19

Marlys Hagen, date  
Chief of Procurement  
Department of Natural Resources

## **APPENDIX A GENERAL CONDITIONS**

### **Inspections and Reports:**

The department may inspect, in the manner and at reasonable times it considers appropriate, all the contractor's facilities and activities under this contract. The contractor shall make progress and other reports in the manner and at the times the department reasonably requires.

### **Suitable Materials, Etc.:**

Unless otherwise specified, all materials, supplies or equipment offered by the contractor shall be new, unused, and of the latest edition, version, model or crop and of recent manufacture.

### **Disputes:**

If the contractor has a claim arising in connection with the contract that it cannot resolve with the State by mutual agreement, it shall pursue the claim, if at all, in accordance with the provisions of AS 36.30.620-AS 36.30.632

### **Default:**

In case of default by the contractor, for any reason whatsoever, the State of Alaska may procure the goods or services from another source and hold the contractor responsible for any resulting excess cost and may seek other remedies under law or equity.

### **No Assignment or Delegation:**

The contractor may not assign or delegate this contract, or any part of it, or any right to any of the money to be paid under it, except with the written consent of the Procurement Officer.

### **No Additional Work or Material:**

No claim for additional supplies or services, not specifically provided in this contract, performed or furnished by the contractor, will be allowed, nor may the contractor do any work or furnish any material not covered by the contract unless the work or material is ordered in writing by the Procurement Officer.

### **Independent Contractor:**

The contractor and any agents and employees of the contractor act in an independent capacity and are not officers or employees or agents of the State in the performance of this contract.

### **Payment of Taxes:**

As a condition of performance of this contract, the contractor shall pay all federal, State, and local taxes incurred by the contractor and shall require their payment by any subcontractor or any other persons in the performance of this contract. Satisfactory performance of this paragraph is a condition precedent to payment by the State under this contract.

**Compliance:**

In the performance of this contract, the contractor must comply with all applicable federal, state, and borough regulations, codes, and laws, and be liable for all required insurance, licenses, permits and bonds.

**Conflicting Provisions:**

Unless specifically amended and approved by the Department of Law, the terms of this contract supersede any provisions the contractor may seek to add. The contractor may not add additional or different terms to this contract; AS 45.02.207(b)(1). The contractor specifically acknowledges and agrees that, among other things, provisions in any documents it sees to append hereto that purport to (1) waive the State of Alaska's sovereign immunity, (2) impose indemnification obligations on the State of Alaska, or (3) seek to limit liability of the contractor for acts of contractor negligence, are expressly superseded by this contract and are void.

**Officials Not to Benefit:**

Contractor must comply with all applicable federal or State laws regulating ethical conduct of public officers and employees.

**Contract Prices:**

Contract prices for commodities must be in U.S. funds and include applicable federal duty, brokerage fees, packaging, and transportation cost to the FOB point so that upon transfer of title the commodity can be utilized without further cost. Prices for services must be in U.S. funds and include applicable federal duty, brokerage fee, packaging, and transportation cost so that the services can be provided without further cost.

**Contract Funding:**

Contractors are advised that funds are available for the initial purchase and/or the first term of the contract. Payment and performance obligations for succeeding purchases and/or additional terms of the contract are subject to the availability and appropriation of funds.

**Force Majeure:**

The parties to this contract are not liable for the consequences of any failure to perform, or default in performing, any of their obligations under this Agreement, if that failure or default is caused by any unforeseeable Force Majeure, beyond the control of, and without the fault

or negligence of, the respective party. For the purposes of this Agreement, Force Majeure will mean war (whether declared or not); revolution; invasion; insurrection; riot; civil commotion; sabotage; military or usurped power; lightning; explosion; fire; storm; drought; flood; earthquake; epidemic; quarantine; strikes; acts or restraints of governmental authorities affecting the project or directly or indirectly prohibiting or restricting the furnishing or use of materials or labor required; inability to secure materials, machinery, equipment or labor because of priority, allocation or other regulations of any governmental authorities.

**Contract Extension:**

Unless otherwise provided, the State and the contractor agree: (1) that any holding over of the contract excluding any exercised renewal options, will be considered as a month-to-month extension, and all other terms and conditions shall remain in full force and effect, and (2) to provide written notice to the other party of the intent to cancel such month-to-month extension at least thirty (30) days before the desired date of cancellation.

**Severability:**

If any provision of the contract is declared by a court to be illegal or in conflict with any law, the validity of the remaining terms and provisions will not be affected; and, the rights and obligations of the parties will be construed and enforced as if the contract did not contain the particular provision held to be invalid.

**Continuing Obligation of Contractor:**

Notwithstanding the expiration date of this contract, the contractor is obligated to fulfill its responsibilities until warranty, guarantee, maintenance and parts availability requirements have completely expired.

**Governing Law; Forum Selection**

This contract is governed by the laws of the State of Alaska. To the extent not otherwise governed by Article 3 of this Appendix, any claim concerning this contract shall be brought only in the Superior Court of the State of Alaska and not elsewhere.



**Appendix B**  
**U.S. DEPARTMENT OF AGRICULTURE**

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**Certification Regarding Debarment, Suspension, Ineligibility  
and Voluntary Exclusion - Lower Tier Covered Transactions**

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This certification is required by the regulations implementing Executive Order 12549, Debarment and Suspension, 7 CFR Part 3017, Section 3017.510, Participants' responsibilities. The regulations were published as Part IV of the January 30, 1989, Federal Register (pages 4722-4733). Copies of the regulations may be obtained by contacting the Department of Agriculture agency with which this transaction originated.

(BEFORE COMPLETING CERTIFICATION, READ INSTRUCTIONS ON REVERSE)

- (1) The prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or agency.
- (2) Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

**Alaska Forest Association**

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Organization Name

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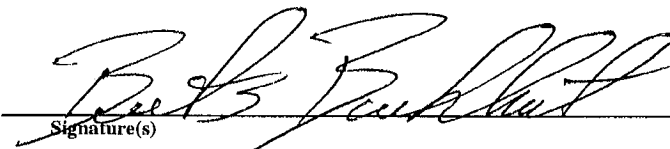
PR/Award Number or Project Name

**Bert S. Burkhart, President**

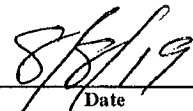
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Name(s) and Title(s) of Authorized Representative(s)

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Signature(s)

---

  
Date

Form AD-1048 (1/92)

### **Instructions for Certification**

1. By signing and submitting this form, the prospective lower tier participant is providing the certification set out on the reverse side in accordance with these instructions.
2. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.
3. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.
4. The terms "covered transaction," "debarred," "suspended," "ineligible," "lower tier covered transaction," "participant," "person," "primary covered transaction," "principal," "proposal," and "voluntarily excluded," as used in this clause, have the meanings set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the person to which this proposal is submitted for assistance in obtaining a copy of those regulations.
5. The prospective lower tier participant agrees by submitting this form that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.
6. The prospective lower tier participant further agrees by submitting this form that it will include this clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion - Lower Tier Covered Transactions," without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.
- 7\* A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the Nonprocurement List.
8. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.
9. Except for transactions authorized under paragraph 5 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

**Appendix C**  
**U.S. DEPARTMENT OF AGRICULTURE**

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**CERTIFICATION REGARDING  
DRUG-FREE WORKPLACE REQUIREMENTS (GRANTS)  
ALTERNATIVE I - FOR GRANTEEES OTHER THAN INDIVIDUALS**

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This certification is required by the regulations implementing Sections 5151-5160 of the Drug-Free Workplace Act of 1988 (Pub. L. 100-690, Title V, Subtitle D; 41 U.S.C. 701 et seq.), 7 CFR Part 3017, Subpart F, Section 3017.600, Purpose. The January 31, 1989, regulations were amended and published as Part II of the May 25, 1990 Federal Register (pages 21681-21691). Copies of the regulations may be obtained by contacting the Department of Agriculture agency offering the grant.

(BEFORE COMPLETING CERTIFICATION, READ INSTRUCTIONS)

Alternative I

- A. The grantee certifies that it will or will continue to provide a drug-free workplace by:
- a. Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violation of such prohibition;
  - b. (b) Establishing an ongoing drug-free awareness program to inform employees about --
    - 1. The dangers of drug abuse in the workplace;
    - 2. The grantee's policy of maintaining a drug-free workplace;
    - 3. Any available drug counseling, rehabilitation, and employee assistance programs; and
    - 4. The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;
  - c. Making it a requirement that each employee to be engaged in the performance of the grant be given a copy of the statement required by paragraph (a);
  - d. Notifying the employee in the statement required by paragraph (a) that, as a condition of employment under the grant, the employee will --
    - 1. Abide by the terms of the statement; and
    - 2. Notify the employer in writing of his or her conviction for a violation of a criminal drug statute occurring in the workplace no later than five calendar days after such conviction;
  - e. Notifying the agency in writing, within ten calendar days after receiving notice under subparagraph (d)(2) from an employee or otherwise receiving actual notice of such conviction. Employers of convicted employees must provide notice, including position title, to every grant officer on whose grant activity the convicted employee was working, unless the Federal agency has designated a central point for the receipt of such notices. Notice shall include the identification number(s) of each affected grant;
  - f. Taking one of the following actions, within 30 calendar days of receiving notice under subparagraph (d)(2), with respect to any employee who is so convicted --
    - 1. Taking appropriate personnel action against such an employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973, as amended; or
    - 2. Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency;
  - g. Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs (a), (b), (c), (d), (e) and (f).
- B. The grantee may insert in the space provided below the site(s) for the performance of work done in connection with the specific grant:

Place of Performance (Street address, city, county, State, zip code)

Check ☐ if there are workplaces on file that are not identified here.

Alaska Forest Association.

Organization Name

PR/Award Number or Project  
Name

Bert S. Burkhardt  
President

Name(s) and Title(s) of Authorized Representative(s)



Signature

8/8/19  
Date

Form AD-1049 (REV 5/90)

**APPENDIX D**  
**MARCH 2017 USFS - AFA MOU**

**FS Agreement No. 17-MU-11100500-024**  
**Incorporated by Reference**  
**and**  
**FS Agreement No. 17-MU-11100500-024**  
**Modification 1**  
**Incorporated by Reference**

**APPENDIX E**  
**QUARTERLY ACCOMPLISHMENTS REPORTING FORM**

	USDA Forest Service	OMB 0596-0217
		FS-1500-23

**Optional Project Performance Report\***

**1. Recipient/Cooperator Name:** \_\_\_\_\_

**2. Agreement Number:** \_\_\_\_\_

**3. Project Title:** \_\_\_\_\_

**4. Reporting Period End Date:** \_\_\_\_\_

**5. Report Type:** ☐ Interim ☐ Final

For each program/project in the agreement narrative, please provide brief information on the following:

6. Status Summary:

7. What has been accomplished to date? Please provide a comparison of actual accomplishments to the objectives established in the agreement narrative (quantify where possible):

8. Any problems encountered? Explain delays or changed costs or conditions that significantly impair the ability to meet agreement objectives and timelines. If necessary, please work with the F.S. program manager for an extension of the agreement period.

9. Any changes that you plan to propose? Please work with F.S. program manager to determine if a modification is needed (e.g., a change is needed to the objectives or financial plan).

10. Briefly describe work to be performed during the next reporting period.

11. Any other comments considered of importance but not discussed above?

12. Signatures of Authorized Representative: by signature below, the signing parties certify that they are the official representatives of their respective parties and authorized to act in their respective areas for matters related to the above-referenced grant/agreement.

<b>Submitted: Cooperator Program Mgr</b>	<b>Signature:</b> _____	<b>Date:</b> _____
	<b>Name/Title:</b> _____ _____	<b>Phone:</b> _____ _____

\*Note to Cooperator Project Lead: This optional form helps respond to the performance reporting required by the agreement.

<b>Reviewed: FS Program Mgr</b>	<b>Signature:</b> _____	<b>Date:</b> _____
	<b>Name/Title:</b> _____ _____	<b>Phone:</b> _____ _____

\*Note to F. S. Program Manager: Please document this and any other monitoring activity in NRM or send to G&A Personnel.

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United States Department of Agriculture

# Land and Resource Management Plan



Forest Service  
Alaska Region

Tongass National Forest

R10-MB-769j

December 2016

## 4 Standards and Guidelines

efficiency or less resource impacts. Additional exceptions are provided by Public Law 113-291 (See Chapter 5, S-YG-01).

- M. Even-aged stands may be regenerated without having reached Culmination of Mean Annual Increment where salvage is prescribed after windthrow, where stands are in imminent danger from insect or disease attack or cutting for experimental and research purposes.

### **Timber: TIM3**

#### *I. Information Gathering and Maintenance*

- A. Provide timber resource information necessary to prepare timber harvest projects. This includes maintenance of inventories, analysis of data, and input for environmental analysis.
- B. Determine operability based on site-specific project conditions; classify the suitable lands according to the NIC definitions.
- C. Consider the management prescription of the LUDs within the project area in project design and environmental analysis for timber activities. Timber harvest unit cards will document resource concerns and protection measures. The unit cards, including a map with relevant resource features, will be provided electronically when Draft or Final NEPA documents and decisions are published. (Consult Tongass National Forest Supplement 1909.15-2015-1.)
- D. Develop the Sale Area Improvement Plan, including any projects that could be funded by Knutson-Vandenburg funds during the interdisciplinary NEPA process to identify resource improvement opportunities consistent with the Forest Service Renewable Resources Handbook. Schedule essential reforestation prioritized by mitigation or enhancement.

### **Timber Sale Preparation: TIM4**

#### *I. Regeneration Methods*

- A. Regeneration methods refer to the manner in which a new stand is created. There are three categories of regeneration systems: even-aged, two-aged, and uneven-aged silvicultural systems. Even-aged systems include clearcutting, seed tree, and shelterwood. Two-aged systems include clearcutting with reserves, seed tree with reserves, and shelterwood with reserves. Uneven-aged systems include single-tree selection, group selection, and group selection with reserves.
  - 1. Consider silvicultural systems other than clearcutting to meet other resource objectives at the project level. As part of the project NEPA process, analyze current scientific information related to the applicability of alternative timber harvest methods.

#### *II. Even-Aged Systems*

- A. Apply even-aged silvicultural methods in such a way that isolated stands of timber will not be created. Avoid locating harvest units where future harvest activities will destroy regeneration under earlier regeneration harvest activities.
- B. Clearcutting is an even-aged regeneration method. There are a number of supportive reasons for the use of this method in Alaska's western hemlock-Sitka spruce forests. These include excellent regeneration of desired species, effective dwarf mistletoe control, viable harvest economics, and compatibility with the use of standard logging systems.
  - 1. Use clearcutting only where it is determined to be the best system to meet the objectives and requirements of LUDs.
  - 2. Apply clearcutting where trees are cut to achieve timber production objectives, where there is risk of dwarf-mistletoe infection and disease control is desired, or where there is a high risk of windthrow.
  - 3. Forest Service Manual (FSM) 2470 Supplement No.: R-10 2400-2005-1 clarifies limitations on "clearcutting." It is limited to areas where it is essential to meet Forest Plan objectives and may involve one or more of the following circumstances:
    - a) To establish, enhance, or maintain habitat for Endangered, Threatened and Sensitive species.
    - b) To enhance wildlife habitat or water yields, or to provide for recreation, scenic vistas, utility lines, road corridors, facility sites, reservoirs or similar development.
    - c) To rehabilitate lands adversely impacted by events, such as fires, windstorms, or insect or disease infestations.