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Title:

Comments: Thank you for this opportunity to comment. Please see my comments, attached in the separate PDF file. Thank you.

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Erin Noakes

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December 13, 2019

USDA Forest Service

P.O. Box 21628

Juneau, Alaska 99802-1628

RE: RIN 0596-AD37 Alaska Roadless Rule

To Whom It May Concern:

Thank you for the opportunity to comment on project 54511, the Alaska Roadless Rule. I have two main concerns with the proposed rulemaking.

First, the USDA Forest Service stated<sup>1</sup> in its NPRM that the proposed Tongass National Forest Exemption is a deregulatory action under Executive Order ("E.O.") 13771. The Forest Service stated that the proposed rule would create an incremental reduction in the cost of conducting compliance reviews of permissible projects proposed in designated inventoried roadless areas on the Tongass National Forest, thus reducing expenditure of taxpayer dollars. I have reviewed E.O. 13771, and have considered the Office of Management and Budget's guidance<sup>2</sup> on deregulatory actions, in particular Q4.A. I do not believe that the Forest Service has adequately evaluated the costs of this proposed rule. If it had, I believe that it would conclude that the proposed rule has a total cost greater than zero, making it a "new regulatory action," not a "deregulatory action" under E.O. 13771.

Currently, the Forest Service applies the 2001 Roadless Rule to the Tongass National Forest. An outright prohibition means that project review in the 185,000 acres covered under the 2001 Roadless Rule is pretty straightforward. The proposed rule would replace a straightforward review process with a "case-by-case" review process managed by local planning processes. The proposed rule does not establish caps or parameters for what that case-by-case review process will entail. Consequently, a case-by-case review process may involve a multitude of unique and novel factors presented to the Forest Service to take under consideration, along with lengthy fact-finding hearings. The proposed rule does not adequately explain why expenditure of taxpayer dollars would be reduced by shifting from a straightforward, well-known review process (is it in the roadless rule area? if

yes, then the project is denied) to an amorphous, detail-laden case-by-case review process. I believe that this shift would in fact increase expenditure of taxpayer dollars used during the permit review process. Consequently, I believe that this proposed rule should be re-proposed as a "new regulatory action" under E.O. 13771, and it should contain information on the additional costs of the more complicated and fact-intensive permitting review processes that this proposal would necessitate. Under E.O. 13771, such re-proposal would also need to identify the necessary cost decreases and deregulatory actions required to offset those additional costs.

Secondly, the Forest Service states that the proposed rule would "return decision-making authority to the Forest Service, allowing decisions concerning timber harvest, road construction, and roadless area management on the Tongass National Forest to be made by local officials on a case-by-case basis."<sup>3</sup> I disagree with this characterization - the Forest Service never lost its decision-making authority. Instead, the 2001 Forest Service established "lasting protection" of roadless areas, essentially binding itself in the future from approving project permits in certain areas. In doing so, the Forest Service created substantial reliance interests among the public. If the agency nonetheless wants to act contrary to what the public has come to rely on it to do or not do, the Supreme Court has held that the Administrative Procedure Act requires that an agency must establish a reason for the change that is not arbitrary and capricious.<sup>4</sup>

The 2019 proposed rule does not provide a rationale other than what could be viewed as an arbitrary and capricious shift in perspective. Under the heading, "Rationale for the Proposed Rule," the Forest Service admits that the 2019 proposed rule was actually contemplated - and rejected - by the agency when promulgating the 2001 Roadless Rule (i.e. the "Tongass exempt alternative"). As a result, the agency must explain why the rationale for rejecting the Tongass exempt alternative in 2001 rests on some fact patterns or conditions that have changed now in 2019. However, the Forest Service fails to do this, and even explicitly denies that there were any changed conditions that brought about the 2003 Tongass exemption rulemaking. Instead, the Forest Service provides as a rationale that it has a "different policy perspective on the roadless policy question" in 2019. It lists general policy priorities (rural prosperity, competing economic interests, environmental tradeoffs) that all existed at the time the 2001 Roadless Rule was established, and does not provide a concrete rationale for the change in conditions that would allow an agency to pivot away from what it had promised to the public that it would do. The receipt of a petition from the State of Alaska does not in and of itself equate to a change in conditions, any more than the various court rulings discussed. The Forest Service must provide its own explanation and rationale as to what change in conditions from 2001 to 2019 merit a change in its decision on whether to reject or accept the Tongass exempt alternative. This rationale must be more than an arbitrary or

capricious rationale, in consideration of the substantial reliance interests of the American public that were created by previous Forest Service actions and declarations.

Thank you for your consideration, time, and effort on this important matter.

Sincerely,

Erin Noakes

<sup>1</sup> See 84 Fed. Reg. 55524.

<sup>2</sup> Available at: <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21-OMB.pdf>.

<sup>3</sup> See 84 Fed. Reg. 55523.

4 For an example of the Supreme Court's view on this requirement, see [https://www.supremecourt.gov/opinions/15pdf/15-415\\_mlho.pdf](https://www.supremecourt.gov/opinions/15pdf/15-415_mlho.pdf).

[Position]