

Data Submitted (UTC 11): 12/16/2019 9:00:00 AM

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Comments: Dear Mr. Tu,

Please find attached a comment letter and nine exhibits regarding the proposed Alaska Roadless Rule, 84 Fed. Reg. 55,522 (Oct. 17, 2019). This letter is submitted on behalf of the Attorneys General of the States of California, Washington, Oregon, Illinois, and New York and the Commonwealth of Massachusetts. We are also submitting this letter by First Class mail and through the Forest Service's online portal.

Regards,

Josh Purtle

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California Department of Justice

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ATTORNEYS GENERAL OF THE STATES OF CALIFORNIA,
WASHINGTON, OREGON, ILLINOIS, AND NEW YORK AND THE
COMMONWEALTH OF MASSACHUSETTS

December 16, 2019

Ken Tu

Interdisciplinary Team Leader

Alaska Roadless Rule

U.S. Forest Service

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Via Email, First Class Mail, and Online Portal

RE: Comments on Alaska Roadless Rule, 84 Fed. Reg. 55,522 (Oct. 17, 2019) Dear Mr. Tu:

The undersigned Attorneys General of the States of California, Washington, Oregon, Illinois, and New York and the Commonwealth of Massachusetts (hereinafter, "the States") respectfully submit these comments on the U.S. Forest Service's October 17, 2019 proposed rule to exempt the Tongass National Forest from the national Roadless Rule. Notice of Proposed Rulemaking, 84 Fed. Reg. 55,522 (Oct. 17, 2019) ("Proposed Rule"). If adopted, the Proposed Rule would open up 9.2 million acres of formerly-protected forest land to potential new roadbuilding and logging. The Proposed Rule thus threatens the undersigned States' interest in the Tongass, which provides habitat for vulnerable wildlife species with a nexus to some of the undersigned States, as well as an important sink for greenhouse gas emissions that is critical to national efforts to mitigate the impacts of climate change. As discussed further below, the Proposed Rule fails to meet governing legal requirements under the Administrative Procedure Act ("APA"), National Environmental Policy Act ("NEPA"), and the Endangered Species Act ("ESA"). The Service must correct these legal defects or withdraw the Proposed Rule.

The Forest Service's proposal is the latest chapter in a long battle to eliminate the Roadless Rule's important protections for clean water, intact wildlife habitat, and wild places. The Roadless Rule, adopted in 2001, protects critical undeveloped forest lands from the roadbuilding and logging that have left permanent scars on vast areas of our nation's public lands. Industry groups and hostile federal administrations have worked tirelessly to gut the Roadless Rule from the day it was adopted, and the efforts of several of the undersigned States and other stakeholders were critical in fending off those attacks and ensuring that the Roadless Rule remains in force nationwide.

The Tongass National Forest has been at the vanguard of the fight to preserve the Roadless Rule since the beginning, as the Rule's opponents have repeatedly attempted to exempt the Tongass from national roadless area protection. The last attempt to adopt a Tongass exemption faltered in the courts. Just four years ago, the Ninth Circuit held that the Forest Service failed to provide a rational explanation for its previous attempt to discard roadless area

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protections that, in 2001, it had deemed critical to preserving the Tongass's unique

environmental values. See *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956 (9th Cir. 2015).

The Forest Service's Proposed Rule suffers from the same flaw. The Service now asserts that a Tongass exemption is justified because roadless area management in Southeast Alaska is controversial, and it is therefore preferable to decide the fate of roadless areas on a case-by-case basis. This reasoning ignores that the Service found the opposite in adopting the 2001 Roadless Rule, concluding that national protection for roadless areas was necessary to avoid the cost and litigation of case-by-case decisionmaking. The Service fails to explain why its previous finding in the Roadless Rule is no longer valid, and thus fails to satisfy the basic APA requirement that an agency rationally explain a change in policy.

The Proposed Rule and supporting Draft Environmental Impact Statement ("Draft EIS") further fail to comply with NEPA's requirement that the Service rationally consider and disclose all of the potential environmental impacts of the proposed Tongass exemption. In this regard, the Forest Service asserts that the Proposed Rule, if adopted, will have no meaningful environmental impact because, according to the Service, the Tongass exemption would not increase the amount of logging in the National Forest. The Service, however, does not provide any analysis, study, or citation to support this prediction, which forms the foundation of the Service's entire Draft EIS. In

addition to this pervasive flaw, the Draft EIS unlawfully discounts the Proposed Rule's climate impacts, including by relying on scientific findings that directly contradict findings the Service made just three years ago when it adopted the 2016 Tongass National Forest Plan; unlawfully ignores potential impacts to migratory birds; and unlawfully defers analysis of certain foreseeable impacts until site-specific projects are proposed. The Service's environmental analysis is therefore incomplete, unsubstantiated, and unlawful.

The Service has further unlawfully failed to reinstate consultation with the National Marine Fisheries Service ("NMFS") and the U.S. Fish & Wildlife Service ("FWS") regarding the Proposed Rule's possible impacts on ESA-listed species, including Pacific humpback whales and short-tailed albatross. The Service must engage in such required consultation before moving forward with the Proposed Rule.

To be clear, the Service cannot avoid these legal defects by choosing one of the less extreme management alternatives proposed in the Draft EIS. On the contrary, the Service has failed to provide a rational justification and adequate environmental analysis for any of the proposed management alternatives, other than the no action alternative that would maintain status quo Roadless Rule protection. The Service must therefore correct the fundamental legal flaws identified in these comments or withdraw the Proposed Rule.

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BACKGROUND

I. The Tongass National Forest and the Roadless Rule

The Tongass National Forest, located in Southeast Alaska's Alexander Archipelago, is a largely untouched remnant of the vast temperate rainforest that once extended along the Pacific Coast from Alaska to northern California. See Final Rule, Roadless Area Conservation, 66 Fed. Reg. 3,244, 3,254 (Jan. 12, 2001). Stretching "roughly 500 miles from Ketchikan to Yakutat," the Tongass features a diverse landscape of boundless forests, sweeping glaciers and towering coastal mountains. Draft EIS at 3-23.

As the Forest Service recognizes, the Tongass is "an important national and international resource." Draft EIS at 3-23. Its unique ecosystem provides seasonal and permanent habitat to many important species, including some with a nexus to California and Washington, such as vulnerable humpback whales, green sturgeon, short-tailed albatross, Southern Resident killer whales, and salmon. See Proposed Rulemaking to Revise Critical Habitat for the Southern Resident Killer Whale Distinct Population Segment, 84 Fed. Reg. 49,214, 49,217 (Sept. 19, 2019) (Southern Resident killer whales' coastal range "extends from the Monterey Bay area in California, north to Chatham Strait in southeast Alaska."). The Tongass further supports migratory birds that spend part of the year in or migrate through some of the undersigned States. The Tongass, as the largest National Forest, also has an enormous capacity to absorb and store carbon dioxide, and thus is an invaluable carbon sink for purposes of climate change mitigation, providing substantial benefits to every state.

The Tongass is further important to the millions of people—including 1.2 million people in 2016 alone—who have visited the area. These visitors include residents of the undersigned States. For many of these visitors, "a visit to the Tongass is a] once-in-a-lifetime experience." Draft EIS at 3-23. Even people who have not visited value the Tongass and "benefit from knowing that [it] is there" and that it will be "left for future generations to inherit." Draft EIS at 3-23.

The Tongass's unique values have been preserved in large part because of the Roadless Rule. First adopted in 2001, the Roadless Rule generally prohibits roadbuilding and logging in areas of National Forests designated as

"inventoried roadless areas." 66 Fed. Reg. at 3,244, 3,272-73. When the Service adopted the Roadless Rule, it recognized that roadless areas in National Forests provide unique ecological values that warrant special protection. Specifically, "roadless areas provide large, relatively undisturbed blocks of important habitat for a variety of terrestrial and aquatic wildlife and plants, including hundreds of threatened, endangered, and sensitive species." Id. at 3,247. Preventing roadbuilding and logging in these areas is critical to maintaining their environmental values: "Road construction, reconstruction, and timber harvesting activities can result in fragmentation of ecosystems, the introduction of non-native invasive species, and other adverse consequences to the health and integrity of inventoried roadless areas[.]" Id. Habitat fragmentation caused by logging and roadbuilding in particular "results in decreased connectivity of wildlife habitat and wildlife movement, isolating some species and increasing the risk of local extirpations and extinctions." 66 Fed. Reg. at 3,247. Road construction can also impact watersheds, including by contributing to stream sedimentation

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and harmful landslides that can disrupt waterways' beneficial ecological functions and impair public drinking water supplies. Id. at 3,245-47.

The Forest Service chose to promulgate a national Roadless Rule rather than manage roadless areas through case-by-case decisionmaking in large part to avoid the cost and controversy of local land use management. Id. at 3,253. As the Roadless Rule explained, "roadless area management has been a major point of conflict in land management planning ... particularly on most proposals to harvest timber, build roads, or otherwise develop inventoried roadless areas." Id. According to the Roadless Rule, "[t]hese disputes are costly in terms of both fiscal resources and agency relationships with communities of place and communities of interest," and they have produced a "large number of appeals and lawsuits." Id. The Forest Service therefore determined, "[b]ased on these factors ... that the best means to reduce this conflict is through a national level rule." Id.

Some states, industry groups, and prior federal administrations have repeatedly attempted to undo the Roadless Rule since it was adopted. Several of the undersigned States and other stakeholders have resisted these efforts, including through successful litigation opposing attempts to repeal the Roadless Rule. See, e.g., *California ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999 (9th Cir. 2009) (affirming district court order enjoining attempted repeal of the national Roadless Rule and reinstating the Rule). The Tongass in particular has proven to be a bellwether in this larger national fight, as opponents to roadless protection have repeatedly sought to exempt the Tongass from protection under the national Roadless Rule. Thus, in 2003, the George W. Bush administration adopted a rule carving the Tongass out of the Roadless Rule. A coalition of tribal and environmental groups successfully challenged this exemption in the District of Alaska, and an en banc panel of the Ninth Circuit affirmed the district court's decision vacating the exemption rule in 2015. See *Organized Vill. of Kake*, 795 F.3d 956. The undersigned States have a continued interest in blocking attempts to carve out Roadless Rule exemptions, which threaten to erode the Roadless Rule's national reach and undermine efforts by several of the undersigned States to protect National Forest roadless areas within their borders and nationwide.

II. The Proposed Rule

In the Proposed Rule, the Service again proposes to exempt the Tongass from Roadless Rule protection. See 84 Fed. Reg. 55,522. If adopted, the Proposed Rule would allow new road construction and logging on 9.2 million acres of formerly-protected roadless areas. See id. at 55,526. The Service asserts this sweeping policy change is justified because "[t]here is not consensus over how to manage the Forest" and management "through the local planning processes" is therefore preferable to maintaining its protected status under the national Roadless Rule. Id. at 55,524. (The Proposed Rule also discusses and rejects several other management alternatives, each of

which would substantially reduce protections for the Tongass's roadless areas. See *id.* at 55,526.)

Despite the radical management change the Service proposes, it nevertheless claims in the Draft EIS accompanying the Proposed Rule that removing roadless protection from 9.2 million acres of National Forest land will have no meaningful environmental impact because,

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according to the Service, the amount of logging in the Forest will not increase, but will instead remain at the level the Service calculated in its 2016 Tongass National Forest Plan. See, e.g., 84 Fed. Reg. at 55,525; Draft EIS at 1-7, 3-92. The Proposed Rule provides no justification for this prediction. As a result, the Draft EIS does not discuss the potential impacts of new logging and roadbuilding that would be allowed if the Tongass exemption is adopted.

STATUTORY BACKGROUND

1. National Environmental Policy Act

NEPA "is our basic national charter for protection of the environment." 40 C.F.R. [sect] 1500.1(a). Congress enacted NEPA in 1969 "to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." 42 U.S.C. [sect] 4331(a). NEPA has two fundamental purposes: (1) to guarantee that agencies take a "hard look" at the consequences of their actions before the actions occur by ensuring that "the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts;" and (2) to ensure that "the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-50 (1989).

To achieve these purposes, NEPA requires the preparation of a detailed environmental impact statement for any "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. [sect] 4332(2)(C). NEPA's implementing regulations broadly define such actions to include "new or revised agency rules, regulations, plans, policies, or procedures." 40 C.F.R. [sect] 1508.18(a). In preparing environmental impact statements, federal agencies must consider all of the direct, indirect, and cumulative impacts of their proposed actions. *Dineen v. Citizens Against Ruining Our Env't v. Bernhardt*, 923 F.3d 831, 851 (10th Cir. 2019); 40 C.F.R. [sect][sect] 1508.7, 1508.8(a)-(b).

1. Administrative Procedure Act

Under the Administrative Procedure Act, courts will set aside an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. [sect] 706(2)(A). An agency action is arbitrary and capricious where the agency: (i) "has relied on factors which Congress has not intended it to consider"; (ii) "entirely failed to consider an important aspect of the problem"; (iii) "offered an explanation for its decision that runs counter to the evidence before the agency"; or (iv) offered an explanation "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983). When promulgating a rule, "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.'" *Id.* (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

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These core principles apply to an agency's decision to change existing policy. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513-15 (2009). While an agency need not show that a new rule is "better" than the rule it replaced, it still must demonstrate that the rule "is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates." *Id.* at 515 (emphasis omitted). Further, an agency must "provide a more detailed justification than what would suffice for a new policy created on a blank slate" when "its new policy rests upon factual findings that contradict those which underlay its prior policy." *Id.* An "[u]nexplained inconsistency" between a new rule and its prior version is "a reason for holding an [agency's] interpretation to be an arbitrary and capricious change." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005); see also *Organized Vill. of Kake*, 795 F.3d at 968 (holding Forest Service failed to provide a rational explanation for its decision to exempt the Tongass National Forest from the Roadless Rule, where the exemption was based on "a direct, and entirely unexplained, contradiction" of the 2001 Roadless Rule's findings).

III. The Endangered Species Act

The Endangered Species Act requires that every federal agency "insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species" listed pursuant to the Act. 16 U.S.C. [sect] 1536(a)(2). To that end, agencies must consult with NMFS or FWS[mdash]depending on the species[mdash]to determine whether their actions will harm listed species. See *id.*; *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1020 (9th Cir. 2012). "The purpose of consultation is to obtain the expert opinion of wildlife agencies to determine whether the action is likely to jeopardize a listed species or adversely modify its critical habitat and, if so, to identify

reasonable and prudent alternatives that will avoid the action's unfavorable impacts." *Karuk Tribe of California*, 681 F.3d at 1020.

COMMENTS ON THE PROPOSED RULE The Proposed Rule and Draft EIS violate NEPA and the APA by:

1. failing to provide a rational explanation for changing the Service's roadless policy in the Tongass;
2. failing to justify the Service's claim that the Proposed Rule will not lead to new logging in the Tongass, with accompanying environmental impacts;
3. unlawfully discounting the Proposed Rule's potential climate impacts;
4. failing to rationally analyze potential impacts to migratory birds; and
5. unlawfully postponing the environmental analysis of certain key impacts.

The Service has also unlawfully failed to reinstate ESA consultation with NMFS and FWS regarding the Proposed Rule's potential impacts on ESA-listed species, including Pacific

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humpback whales and short-tailed albatross. The Service therefore cannot lawfully adopt the Proposed Rule without providing additional required justification and environmental analysis and engaging in required ESA

consultation. The Service's other management alternatives, which suffer from the same legal flaws, are also unlawful. The Service must therefore remedy these legal defects or withdraw the Proposed Rule.

I. The Proposed Rule Fails to Provide a Rational Explanation for Changing the Service's Roadless Policy in the Tongass

The Proposed Rule is unlawful because it fails to provide a rational explanation for the Service's decision to exempt the Tongass from the Roadless Rule and thus radically change its policy concerning the Tongass's 9.2 million acres of roadless areas. The Proposed Rule thus falls short of APA requirements.

In this respect, the Proposed Rule repeats the legal error the Forest Service committed the last time it attempted to exempt the Tongass from Roadless Rule protection. As the Ninth Circuit explained in the *Organized Village of Kake* decision, the Forest Service considered and rejected a proposed Tongass exemption in 2001, when the Roadless Rule was first adopted. At that time, the Forest Service determined that "wholly exempting the Tongass from the Roadless Rule ... would risk the loss of important roadless area values, and that roadless values would be lost or diminished even by a limited exemption." *Organized Vill. of Kake*, 795 F.3d at 968 (quotations omitted). Yet in 2003, when the Forest Service reversed course and promulgated a rule exempting the Tongass, it found exactly the opposite, concluding that "the Roadless Rule was unnecessary to maintain the roadless values ... , and that the roadless values in the Tongass are sufficiently protected under the Tongass Forest Plan." *Id.* (quotation omitted). The Ninth Circuit thus held that the 2003 rule's conclusions in this regard, which were "a direct, and entirely unexplained, contradiction" of the 2001 Roadless Rule's findings, were inadequate to support the Service's changed policy concerning management of the Tongass. *Id.* at 968.

The 2019 Proposed Rule once again relies on "findings that contradict those which underlay" the 2001 Roadless Rule. *Organized Vill. of Kake*, 795 F.3d at 967 (quoting *FCC v. Fox*, 556 U.S. at 515). The Service stated in adopting the Roadless Rule that a national rule was preferable to case-by-case decisionmaking at the local level because a national policy would avoid the cost and controversy that local land use decisions produce. 66 Fed. Reg. at 3,253. As the Roadless Rule explained, "roadless area management has been a major point of conflict in land management planning ... particularly on most proposals to harvest timber, build roads, or otherwise develop inventoried roadless areas." *Id.* According to the Forest Service, "[t]hese disputes are costly in terms of both fiscal resources and agency relationships with communities of place and communities of interest," and they have produced a "large number of appeals and lawsuits" *Id.* The Forest Service therefore determined, "[b]ased on these factors ... that the best means to reduce this conflict is through a national level rule." *Id.*

The Proposed Rule, however, reaches the exact opposite conclusion, finding that because "[t]here is not consensus over how to manage the Forest," "the circumstances of the Tongass National Forest appear to be best managed through the local planning processes," rather than through the national Roadless Rule. 84 Fed. Reg. at 55,524. The Forest Service, however, fails

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to explain why its finding in 2001 that such case-by-case decisionmaking will produce lengthy, costly, and undesirable disputes is no longer valid. The Service's explanation for the Proposed Rule thus fails to pass APA muster. See *id.* (an agency must "provide a more detailed justification than what would suffice for a new policy created on a blank slate" when "its new policy rests upon factual findings that contradict those which underlay its prior policy.").

The Service's appeal to the controversy over roadless area management and the need for local decisionmaking

is further inadequate on its face. *State Farm*, 463 U.S. at 43 ("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.") (quotation omitted). The fact that roadless protection is controversial does not justify abandoning it, especially in light of the Tongass's important environmental values, which the Service cited in adopting the Roadless Rule. See *Organized Vill. of Kake*, 795 F.3d at 968. And rather than leave the question of roadless area management to local agency planners, the Proposed Rule decides that question for the foreseeable future by putting a heavy weight on the scales in favor of new development. See 84 Fed. Reg. at 55,526 (Proposed Rule would remove roadless protection from 9.2 million acres).

The Forest Service's other reasons for adopting the Proposed Rule also fail. The Proposed Rule states that its "overarching goal ... is to reach a long-term, durable approach to roadless area management" in the Tongass. *Id.* at 55,524. But that is not what the proposed rule does at all. Rather than settle the controversy around the Tongass's roadless areas, the Proposed Rule reopens an issue that was closed after the Ninth Circuit's *Organized Village of Kake* decision. The Proposed Rule, if adopted, will inevitably generate a raft of litigation and appeals, which may not be resolved for years. See, e.g., *Organized Vill. of Kake*, 795 F.3d 956. Further, as discussed, the Tongass exemption would radically change management direction in the National Forest by allowing new roadbuilding and development projects in the Tongass's roadless areas. Each of these projects would be subject to lengthy disputes by local stakeholders, including litigation. The Roadless Rule, which the Tongass exemption would abandon, was designed to avoid precisely that sort of contentious and piecemeal decisionmaking. See 66 Fed. Reg. at 3,253. The Forest Service cannot rely on a desire to settle the controversy over the Tongass's roadless areas when it itself proposes to poke the bear.

The Proposed Rule also asserts that removing Roadless Rule protection "would allow local managers greater flexibility in the selection and design of future timber sale areas," thus potentially improving the Service's "ability to offer economic timber sales that better meet the needs of the timber industry and contribute to rural economies." 84 Fed. Reg. at 55,524. This statement contradicts the Service's own representation that timber harvest levels in the Tongass would not increase if the Proposed Rule is adopted. See, e.g., Draft EIS at 1-7, 3-92; see *State Farm*, 463 U.S. at 43 (agency action is arbitrary where agency has "offered an explanation ... [that] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise"). It is hard to understand how Tongass timber sales can "better meet the needs of the timber industry and contribute to rural economies" if the Service is not also expecting to sell more timber, and the Service makes no attempt to resolve this apparent contradiction. 84

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Fed. Reg. at 55,524. The Service may not justify the Proposed Rule on the basis of new development that it itself asserts will not occur.

The Proposed Rule further states that the Forest Service "has given substantial weight" to the State of Alaska's preference for using Tongass forest lands "to emphasize rural economic development opportunities." 84 Fed. Reg. at 55,523. While promoting rural development is no doubt important, the Service makes no meaningful attempt to evaluate whether the Tongass exemption would indeed contribute to rural economies. *State Farm*, 463 U.S. at 43 ("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.") (quotation omitted). This lack of analysis starkly contrasts with the Roadless Rule, which examined in detail the economic impacts of curbing new timber development in the Tongass's roadless areas. See 66 Fed. Reg. at 3,266-67.

Indeed, what evidence there is in the record contradicts the Service's purported prioritization of rural economic

development opportunities. As discussed, the Draft EIS states that the Tongass exemption will not increase logging sales in the Tongass. See Draft EIS at 1-7. Thus, the record suggests that any boost to the timber industry due to the Tongass exemption would have a negligible effect on Southeast Alaska's economy as a whole. The Draft EIS further indicates that weakening roadless area protections would not increase opportunities for mineral exploration or development, either. Draft EIS at ES-13. Accordingly, a preference for rural economic development does not provide a rational basis for the Proposed Rule. *State Farm*, 463 U.S. at 43.

To be clear, the Service fails to justify any reduction in Roadless Rule protection, and it cannot avoid this legal deficiency merely by choosing a less extreme management alternative. The Service must therefore provide a rational justification for weakening roadless protection for the Tongass or withdraw the Proposed Rule.

II. The Forest Service Fails to Provide any Support for its Claim that the Proposed Rule Will Not Increase Logging in the Tongass

The Proposed Rule and the Draft EIS further fail to justify the Forest Service's claim that logging levels will not increase if the Tongass exemption—or any of the other management alternatives discussed in the Draft EIS—is adopted. See *Native Vill. of Point Hope v. Jewell*, 740 F.3d 489, 499 (9th Cir. 2014) (agency violated NEPA where its claim that a leasing program would produce only one billion barrels of oil was not supported by the record). This claim is the key finding supporting the majority of the Draft EIS's environmental analysis, including its conclusions that the rule, or any of the other proposed management alternatives, will not cause meaningful impacts to (1) humpback whales and other marine mammals, Draft EIS at 3-92; (2) terrestrial mammals, including American marten, wolves, and brown bears, Draft EIS at 3-97 through 3-99; (3) migratory birds, Draft EIS at 3-101; (4) fish, including several endangered species of salmon and endangered green sturgeon, Draft EIS at 3-116 through 3-117; and (5) climate change and greenhouse gas emissions, Draft EIS at 3-126. See *Native Vill. of Point Hope*, 740 F.3d at 504 (agency's estimate of amount of oil likely to be produced by leasing program "informed an assessment of seismic effects, habitat effects, oil production, and ...

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global warming"). The Draft EIS's finding that increased roadbuilding in roadless areas will be minimal relies on the same claim, "because roads on the Tongass are largely developed in support of timber harvesting." Draft EIS at 3-144.

The Forest Service, however, provides no analysis to support its claim that logging will not increase if the Tongass loses Roadless Rule protection. In this regard, the Draft EIS cites the Projected Timber Sale Quantity ("PTSQ") established by the 2016 Tongass National Forest Plan, under which the Forest Service predicted that the Tongass would sell an average of 46 million board feet of timber per year. Draft EIS at 1-10. The PTSQ calculated in the 2016 Forest Plan assumed, of course, that logging would not occur on the 9.2 million acres of the Tongass that were protected by the Roadless Rule. See *Tongass Land and Resource Management Plan*, Final Environmental Impact Statement ES-7 (June 2016) ("Forest Plan EIS"). The Proposed Rule asserts, without elaboration, that it "does not change the projected timber sale quantity or timber demand projections set out in the Tongass Forest Plan." 84 Fed. Reg. at 55,525. In the Draft EIS, the Service likewise represents that it "considered the current market situation and determined that no change to the PTSQ are [sic] needed at this time for purposes of this rulemaking." Draft EIS at 1-10. Neither the Proposed Rule nor the Draft EIS provides any economic data or further analysis to support this conclusion. 84 Fed. Reg. at 55,525; Draft EIS at 1-10.

To the contrary, the record—including the Forest Service's own statements—suggests that removing roadless protection from some or all of the Tongass will create new sources of timber and will therefore increase

demand for logging the Tongass's trees. For example, in the Proposed Rule, the Forest Service asserts that "improved flexibility" in offering timber sales without roadless restrictions could "improve the Forest Service's ability to offer economic timber sales that better meet the needs of the timber industry and contribute to rural economies." 84 Fed. Reg. at 55,524; accord Draft EIS at 1-11. It is highly unlikely that the Forest Service will not sell more timber if it is able to offer more economic timber sales. See *State Farm*, 463 U.S. at 43 (agency action is arbitrary where agency has "offered an explanation ... [that] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise"). Indeed, a recent Forest Service analysis of logging in the Tongass found that, under status quo management, "there has been a lack of economic timber volume available for the Forest Service to offer across the Tongass National Forest." Draft EIS at 3-32. The Proposed Rule will likely address that issue by opening more timber to logging. Draft EIS at 1-11. The Service's finding that it will not sell more timber is therefore "counter to the evidence before the agency" and unlawful. *Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. Zinke*, 889 F.3d 584, 602 (9th Cir. 2018) (agency cannot offer "an explanation for its decision that runs counter to the evidence before the agency") (quotation omitted).

Importantly, the PTSQ set by the 2016 Forest Plan does not put a ceiling on timber sales—it is only an estimate of how much timber the Tongass expects to sell. Tongass Land and Resource Management Plan, Record of Decision 31 (Dec. 2016) (PTSQ "is also not a ceiling—it is an estimate. It is the annualized average amount of timber expected to be sold over a ten-year period"). The so-called "Sustained Yield Limit," also set by the 2016 Forest Plan, does cap total logging, Forest Plan EIS at 2-9, but that limit is set at 248 million board feet, *id.* at 3-348,

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many times the amount the Forest Service predicted would be sold before the Service proposed to remove roadless protection from the Tongass. The Sustained Yield Limit therefore does not place a meaningful limit on new logging in the Tongass, either.

The 2016 Forest Plan's suitable timber designations also do not meaningfully restrain additional logging. Although "timber harvest for the purposes of timber production" is apparently not allowed on lands the Service has designated "not suited for timber production," 36 C.F.R. [sect] 219.11(d)(1), the Draft EIS itself acknowledges that the Proposed Rule will increase the total area of such suitable timber lands by 185,000 acres, Draft EIS at 3-48 through 3-49—an area over four times the size of the District of Columbia. The other action alternatives likewise substantially increase the available timber base. See Draft EIS at 3-46. The Service is further required to revisit its suitable timber designations "at least once every 10 years." 36 C.F.R. [sect] 219.11(a)(2). As a result, the Forest Plan's designations will be up for revision by 2026 at the latest, at which time the Service may deem that logging should be allowed on more of the 9.2 million acres that would be opened for new development under the Proposed Rule. See also Forest Plan EIS at 3-328 (noting that 5.5 million acres of the Tongass "is classified as productive forest land; these lands are considered biologically capable of producing industrial wood products").

The Forest Service must therefore substantiate its claim that logging will not increase on the Tongass if the Proposed Rule or any of the Service's other management alternatives is adopted, including by divulging the analysis on which it is basing that conclusion. See *Native Vill. of Point Hope*, 740 F.3d at 499-505; *Nat. Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 812 (9th Cir. 2005) (holding EIS violated NEPA where its calculations of the employment effects of an agency proposal were based on a "mistaken interpretation" of an economic study); see *Ecology Ctr. v. Castaneda*, 574 F.3d 652, 667 (9th Cir. 2009) ("NEPA requires that the Forest Service disclose the hard data supporting its expert opinions to facilitate the public's ability to challenge agency action."). If the Service cannot rationally justify this claim, it must analyze and disclose the expected impacts of logging,

including on fish, wildlife, water resources, and climate, as required by NEPA. See 42 U.S.C. [sect] 4332(2)(C).

III. The Draft EIS Inadequately Analyzes and Unlawfully Discounts the Proposed Rule's Potential Climate Impacts

The Draft EIS further unlawfully discounts the Proposed Rule's potential climate impacts, including by discarding sub silentio the Service's earlier conclusions that logging in the Tongass can cause significant greenhouse gas emissions. As discussed, the Tongass National Forest is a critical sink for greenhouse gas emissions. The Draft EIS explains:

The Tongass stores more forest carbon than any other national forest in the United States ... , due to its very large size and high density carbon. As such, an important ecosystem service sustained by this forest is carbon uptake and storage (i.e., the removal of carbon dioxide from the atmosphere and storage of it in live or dead biomass as well as organic soil matter). This makes the Tongass, along with forests worldwide, an important component in the global carbon cycle.

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Draft EIS at 3-123.

Despite the Tongass's importance for the global climate, the Draft EIS concludes that the Proposed Rule, as well as any other management alternative discussed in the Draft EIS, would cause a "negligible" increase in greenhouse gas emissions because, according to the Service, the amount of logging will not change. Draft EIS at 3-126. As discussed above, however, the Draft EIS provides no justification for the Service's conclusion that logging levels will not increase if the Tongass exemption is adopted. The Service's analysis of the potential greenhouse gas emissions of reducing Tongass roadless area protection is therefore unsupported and legally deficient.

The Draft EIS further attempts to discount the climate impacts of logging in the Tongass by claiming that logging causes little or no net greenhouse gas emissions. In this regard, the Draft EIS asserts that "[i]n some cases, removing carbon from forests for human use can result in lower net contributions of [greenhouse gases] to the atmosphere than if the forest was not managed, when accounting for carbon stored in wood products, substitution effects, and forest regrowth." Draft EIS at 3-125. For example, "management activities" can "result in long-term maintenance or increases in forest carbon uptake and storage by improving forest health and resilience to various types of stressors." Draft EIS at 3-123. According to the Draft EIS, "[c]arbon can also be transferred and stored outside of the forest system in the form of wood products, further influencing the amount of carbon entering the atmosphere." Draft EIS at 3-123.

These findings are inconsistent with findings the Service made just three years ago when it adopted the 2016 Tongass National Forest Plan. As the Service explained in the Final EIS for that Plan, a scientific study found that "even when timber is used for permanent construction purposes, 35 to 45 percent of the wood's biomass is lost to sawdust or scraps created during processing." Forest Plan EIS at 3-16; accord id. at 3-20. As a result, "the final amount of carbon ultimately stored in permanent construction is much less than what was originally harvested." Forest Plan EIS at 3-16 (citing Harmon 1990, attached as Exhibit 1); accord id. at 3-20. Further, the carbon in wood products produced from logging "will transition back into the atmosphere over time as they degrade or are disposed of." Forest Plan EIS at 3-20. Thus, "because harvest levels" in Alaska "peaked in the 1970s, and much of the resulting wood products may now be in landfills, wood products from the Alaska Region are now believed to be a net emitter of carbon." Forest Plan EIS at 3-20 (citing Barrett 2014, attached as Exhibit 2). In addition, some wood products resulting from logging in the Tongass "could be burned as part of biomass

energy production, which would rapidly release the stored carbon into the atmosphere." Forest Plan EIS at 3-20 (citing Holtzmark 2012, attached as Exhibit 3; DellaSala and Koopman 2015, attached as Exhibit 4).

The Final EIS for the 2016 Forest Plan also states that "timber harvesting and active forest management can affect"negatively" a forest's ability to store and ultimately sequester carbon." Forest Plan EIS at 3-16. Scientific research, for example, "suggested that a logged forest would emit substantial amounts of carbon for at least the first 15 years following harvest, and that a young regenerating forest would remain a net carbon emitter for up to 50 years." Forest Plan EIS at 3-20 (citing DellaSala 2016, attached as Exhibit 5). Another study "suggested

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that it can take more than 200 years following a timber harvest for forests to reach ... the point where carbon released from the initial harvest as well as ongoing decay of organic materials equals the amount of carbon that is absorbed into the system." Forest Plan EIS at 3-16 (citing Janisch and Harmon 2002, attached as Exhibit 6); accord id. at 3-20. Other studies of forestry in Southeast Alaskan ecosystems "indicate that the Tongass National Forest would generate a net release of carbon to the atmosphere if active harvest of old growth is pursued" Forest Plan EIS at 3-16 (citing Harmon et al. 1990; Leighty et al. 2006, attached as Exhibit 7); accord Law et al., Land use strategies to mitigate climate change in carbon dense temperate forests, Proceedings of the National Academy of Sciences (Jan. 2018) (attached as Exhibit 8) (finding that forest management in Oregon, including logging, emitted the equivalent of over 34 million tons of carbon dioxide between 2011 and 2015); Buotte et al. (attached as Exhibit 9) (concluding that preserving certain temperate forests in the western United States could sequester the equivalent of about six years of fossil fuel emissions from the same region).

Based on these and other studies, the Forest Service concluded when it adopted the 2016 Tongass Forest Plan "that the past harvests and management of the Forest has likely resulted in a net release of carbon to the atmosphere due in part to the practice of harvesting of old-growth timber on the Forest." Forest Plan EIS at 3-16. Likewise, future logging contemplated under the 2016 Forest Plan "would result in a net release of carbon to the atmosphere." Forest Plan EIS at 3-21.

The Draft EIS for the Proposed Rule does not analyze or address these findings in the 2016 Forest Plan EIS, which contradict the Forest Service's present conclusion that logging in the Tongass can reduce, rather than increase, carbon emissions. The Draft EIS thus fails to explain the Service's change in position regarding the carbon impacts of logging, as required by governing law. California by & through Becerra v. U.S. Dep't of the Interior, 381 F. Supp. 3d 1153, 1166 n.8 (N.D. Cal. 2019) ("[T]he Supreme Court requires a detailed or reasoned explanation when the current findings in support of a policy change contradict earlier

findings").

The Draft EIS further attempts to discount carbon emissions from logging in the Tongass by asserting that any such emissions will be small on a global scale. Draft EIS at 3-126. This assertion also contradicts the 2016 Forest Plan EIS, in which the Service found that the Tongass National Forest by itself is "a critical component in the global carbon cycle." Forest Plan EIS at 3-13; see also Forest Plan EIS at 3-19 ("The Tongass National Forest plays an important role in [the] amount of carbon that is stored globally as well as the global climatic condition"). The Forest Service thus concluded in the Forest Plan EIS that "land management and other actions taken on the Tongass National Forest can affect climate change at a local, regional, and global scale." Forest Plan EIS at 3-19. The Draft EIS does not explain why it departed from these previous findings, either. California by & through Becerra, 381 F. Supp. 3d at 1166 n.8.

The Draft EIS's assertion that logging under the Proposed Rule "would have a small contribution to [greenhouse gas] emissions and therefore would have a negligible effect on ... climate change," Draft EIS at 3-126, is further inconsistent with the Council on Environmental Quality's ("CEQ") 2016 guidance on how agencies should evaluate greenhouse gas emissions

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under NEPA. As CEQ explained in that guidance document, "a statement that emissions from a proposed Federal action represent only a small fraction of global emissions is essentially a statement about the nature of the climate change challenge" and is therefore not "an appropriate method for characterizing the potential impacts associated with a proposed action and its alternatives." CEQ, Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews 11 (Aug. 1, 2016).¹ Although the Trump Administration withdrew this CEQ guidance in 2017, see CEQ, Withdrawal of Final Guidance, 82 Fed. Reg. 16,576 (Apr. 5, 2017), CEQ's 2016 findings still hold true today, and demonstrate why the Draft EIS's dismissive climate analysis is inadequate under NEPA.

In sum, the Service must explain why it believes its 2016 conclusions regarding the climate impacts of logging in the Tongass are no longer valid. *California by & through Becerra*, 381 F. Supp. 3d at 1166 n.8. The Service must also revise its climate analysis to provide "a reasonable, good faith, and objective presentation" of the Proposed Rule's climate impacts, including by accounting for the Service's 2016 findings cited above, which contradict the Draft EIS's findings. *Nat. Res. Def. Council*, 421 F.3d at 811 (such revision may be necessary "[w]here the information in the initial EIS was so incomplete or misleading that the decisionmaker and the public could not make an informed comparison of the alternatives"); *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1225 (9th Cir. 2008) (holding environmental assessment was unlawful where agency's conclusion that rule's climate impacts would not be significant lacked adequate record support).

IV. The Draft EIS Fails to Rationally Assess Impacts to Migratory Birds

The Draft EIS also ignores or unlawfully discounts potential impacts to migratory birds. As discussed, the Draft EIS arbitrarily dismisses impacts to migratory birds as negligible or, at worst, minor, on the ground that logging will not increase in the Tongass if roadless area protections are weakened or eliminated. Draft EIS at 3-101. The Service must either provide a rational justification for this finding or analyze and disclose the potential impacts new logging will have on migratory birds.

The Draft EIS in particular largely ignores potential impacts to shorebirds and waterfowl. The Draft EIS focuses on impacts to birds that occupy old growth forests in the Tongass, Draft EIS at 3-86, but the Draft EIS also acknowledges that new roadbuilding in the Tongass, including new roadbuilding associated with logging, could increase the amount of sediment delivered to streams. Draft EIS 3-112 ("Roads have been found to contribute more sediment to streams than any other land management activity"). Such sediment can impact wetlands associated with streams and nearshore marine habitats, including habitat used by many

¹ Available at https://ceq.doe.gov/docs/ceq-regulations-and-guidance/nepa_final_ghg_guidance.pdf.

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shorebirds and waterfowl. Draft EIS at 3-117 ("Sediment runoff to streams from land-based activities could have some effects to nearshore marine habitat"). Logging may also affect wetlands directly, as the Draft EIS acknowledges. Draft EIS at 3-113. However, the Draft EIS fails to analyze or disclose potential impacts to waterfowl and shorebirds that use wetlands and other nearshore or riparian areas that may be impacted by logging and roadbuilding. The Forest Service must correct this error and fully disclose these impacts in the Final EIS.

V. The Draft EIS Unlawfully Postpones Analysis of Key Impacts

The Draft EIS further unlawfully defers analysis of certain environmental impacts until the Service receives specific development proposals. "NEPA is not designed to postpone analysis of an environmental consequence to the last possible moment." *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1072 (9th Cir. 2002). Instead, the agency must analyze the environmental consequences of a broadly applicable rule or policy when such impacts are "readily apparent at the time the EIS was prepared." *Id.* at 1073.

The Draft EIS improperly defers analysis of environmental impacts that are foreseeable now, before any specific projects have been proposed pursuant to the Proposed Rule's lax management framework. For example, the Draft EIS declines to consider impacts to nearshore marine habitats due to roadbuilding, logging, and associated activities, on the ground that "[s]ite-specific nearshore marine habitat-disturbing actions, or any other ground-disturbing action, are not ... directly authorized under the" Proposed Rule. Draft EIS at 3-117. The Draft EIS likewise dismisses potential impacts to water quantity and quality because "[i]mpacts to water quantity or quality would be based on site-specific proposals, which are currently unknown, and would be addressed in subsequent project environmental analyses." Draft EIS at 1-8; see also *id.* at 1-8 through 1-9 (dismissing on the same ground impacts to soil characteristics, "general wildlife habitat," "general aquatic species," "essential fish habitat," and wetlands).

Although it is true that the Forest Service cannot, at this stage, describe site-specific impacts of logging and roadbuilding with particularity, it can examine the general extent of such impacts caused by removing or weakening Roadless Rule protection. Thus, for example, the Service may not be able to determine at this time whether logging will impact a specific nearshore wetland, but it nevertheless has adequate information to determine how many additional wetlands are likely to be degraded if the Proposed Rule is adopted. Similarly, although the Service cannot predict at this time which rivers or streams will be affected by sedimentation associated with new roadbuilding, the Service can estimate the extent to which stream water quality throughout the Forest will be affected, based on the well-established fact that roadbuilding causes significant sediment pollution. Draft EIS at 3-112 ("Roads have been found to contribute more sediment to streams than any other land management activity"). The Service therefore may not lawfully defer analyzing these impacts, which are a "readily apparent" consequence of the Proposed Rule. *Kern*, 284 F.3d at 1072-73; *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 422 F. Supp. 2d 1115, 1165 (N.D. Cal. 2006) (agency unlawfully "deferred any consideration of the environmental impact" of a management plan on endemic invertebrates).

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VI. The Forest Service Must Reinitiate Endangered Species Act Consultation Before Adopting the Proposed Rule

The Forest Service must also reinitiate ESA consultation with NMFS and FWS before finalizing the Proposed Rule. As discussed, consultation is required before a federal agency may take any action that may affect ESA-listed species. See *California ex rel. Lockyer*, 575 F.3d at 1019 (Forest Service was required to engage in ESA

consultation before promulgating new rule replacing Roadless Rule).

The Draft EIS acknowledges that logging and associated industrial activity could impact federally-listed species, including humpback whales and short-tailed albatross. Draft EIS at 3-91 through 3-92. As to humpback whales, the Draft EIS explains that the whales "could be exposed to disturbance and noise associated with [log transfer facility] activity, young-growth timber harvest in the beach fringe, ... potential collisions with vessels, and fuel or oil spills associated with vessel traffic." Draft EIS at 3-92. Short-tailed albatross, in turn, "could be affected by reduced marine water quality due to activities in the nearshore environment, including [log transfer facility] use, log raft towing, vessel traffic, and timber harvest within the beach fringe." Draft EIS at 3-92.

However, the Draft EIS finds that impacts to these species associated with the Proposed Rule and other management alternatives "would be essentially unchanged" from the status quo "because predicted harvest volumes would be the same under each alternative and the potential for other developments would be similar." Draft EIS at 3-92 (discussing humpback whale impacts); see id. (impacts to short-tailed albatross "are expected to remain comparable to that anticipated under the current Forest Plan"). Thus, the Forest Service concludes that it can continue to rely on a biological assessment prepared for the 2016 Forest Plan and that additional ESA consultation regarding listed species is not required. See Draft EIS at 3-92.

The Service is wrong that it may forgo additional consultation. As discussed, the Service's prediction that logging will not increase if roadless areas are opened to new development is unsubstantiated. Thus, impacts to humpback whales and short-tailed albatross could increase, contrary to the Forest Service's dubious prediction. Under these uncertain circumstances, consultation with the expert wildlife agencies will be critical in reaching an informed conclusion about whether the Proposed Rule could impact these listed species in a manner that violates the ESA. *Karuk Tribe of California*, 681 F.3d at 1020 ("The purpose of consultation is to obtain the expert opinion of wildlife agencies to determine whether the action is likely to jeopardize a listed species or adversely modify its critical habitat and, if so, to identify reasonable and prudent alternatives that will avoid the action's unfavorable impacts."). ESA consultation for these species is therefore required before the Service may proceed with adopting the Proposed Rule or any other management alternative discussed in the Draft EIS. *California ex rel. Lockyer*, 575 F.3d at 1019 (Forest Service was required to engage in ESA consultation before promulgating new rule replacing Roadless Rule); see also 50 C.F.R. [sect] 402.16 ("Reinitiation of consultation is required ... [i]f new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered[.]").

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CONCLUSION

For the reasons stated, the Proposed Rule fails to comply with NEPA, APA, and ESA requirements, and cannot be adopted in its current form. The other management alternatives discussed in the Draft EIS are likewise unlawful for the same reasons. The undersigned States therefore urge the Forest Service to correct these fundamental legal defects or withdraw the Proposed Rule.

[Exhibit 1 Attachment contains journal article titled "Effects on Carbon Storage of Conversion of Old-Growth Forests to Young Forests]

[Exhibit 2 Attachment contains USDA report titled "Storage and Flux of Carbon in Live Trees, Snags, and Logs in

the Chugach and Tongass National Forests"]

[Exhibit 3 Attachment contains journal article titled "The outcome is in the assumptions: analyzing the effects on atmospheric CO2 levels of increased use of bioenergy from forest biomass"]

[Exhibit 4 Attachment contains report titled "Thinning Combined With Biomass Energy Production May Increase, Rather Than Reduce, Greenhouse Gas Emission"]

[Exhibit 5 Attachment contains report titled "The Tongass Rainforest As Alaska's First Line of Climate Change Defense and Importance to the Paris Climate Change Agreements"]

[Exhibit 6 Attachment contains journal article titled "Successional changes in live and dead wood carbon stores: implications for net ecosystem productivity"]

[Exhibit 7 Attachment contains journal titled "Effects of Management on Carbon Sequestration in Forest Biomass in Southeast Alaska"]

[Exhibit 8 Attachment contains journal titled "Land use strategies to mitigate climate change in carbon dense temperate forests"]

[Exhibit 9 Attachment contains journal titled "Title: Carbon sequestration and biodiversity co-benefits of preserving forests in the western USA"]

[Position]