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May 14, 2008

VIA FEDERAL EXPRESS:

USDA Forest Service
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Attn: Appeals
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Re: Notice of Appeal Pursuant to 36 C.F.R. Part 217,
Tongass Forest Plan Amendment

Dear Chief Kimbell:

Pursuant to 36 C.F.R. Part 217, the Alaska Forest Association (“AFA”)¹ hereby appeals the USDA Forest Service – Alaska Region’s decision to amend the Tongass National Forest Plan as stated in the Tongass National Forest Land and Resource Management Plan Amendment (“Revised Forest Plan”), Final Environmental Impact Statement (“EIS”), and Record of Decision (“ROD”) (collectively the “Tongass Decision”). The ROD was signed by Dennis E. Bschor, Regional Forester, on January 23, 2008.

APPELLANT’S INTEREST

The AFA is one of the oldest trade associations in the State of Alaska and represents more than 120 members sharing an interest in the timber industry and public lands of Alaska. Its mission is to advance the restoration, promotion and maintenance of a healthy, viable forest products industry that contributes to the economic and ecological health in Alaska’s forests

¹ The AFA’s offices are located at 111 Stedman Street, Suite 200, Ketchikan, Alaska, 99901, telephone number 907.225.6114.

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and communities. The AFA is committed to ensuring a reliable and sustainable supply of forest products from the Tongass National Forest that supports a fully-integrated industry. It has participated at every opportunity throughout the process that led to the challenged Tongass Decision because the fate of the Alaska timber industry literally hangs in the balance, a fact the Forest Service does not dispute. See ROD at 17 (acknowledging that if the Tongass Decision is “inadequate to meet the needs of the timber industry over the next 10-15 years, the industry simply will not be around for corrections to be made during the next Plan revision.”). The management of lands on the Tongass National Forest ultimately will dictate not only the health of Alaska’s natural resources but also the viability of AFA members’ businesses and the economic health of their local communities.

In addition to this appeal, the AFA joins in, and incorporates herein by reference, the appeal filed by the Southeast Conference, the Ketchikan Gateway Borough and a coalition of local Alaskan cities (“Southeast Conference Appeal”). The AFA particularly incorporates the Southeast Conference Appeal’s Attachments 1-3, 8-10, 12-17 and 19, which are identified more specifically on the exhibit list accompanying this filing.

STATEMENT OF REASONS FOR OBJECTING

1. **The Tongass Decision fails to seek to provide a supply of timber that meets market demand in violation of the Tongass Timber Reform Act, the National Forest Management Act and the National Environmental Policy Act.**

The AFA’s fundamental objection to the Tongass Decision is that it falls far short of the Forest Service’s obligation to seek to provide a supply of timber that meets market demand, both on an annual and a planning cycle basis, from the Tongass National Forest. The Tongass Decision is deficient both substantively and procedurally in violation of the Tongass Timber Reform Act (“TTRA”), 16 U.S.C. § 539d, the National Forest Management Act (“NFMA”), 16 U.S.C. § 1600 et seq., and the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 et seq. (“NEPA”). All of these statutes are made actionable under the Administrative Procedures Act (“APA”), 5 U.S.C. § 701 et seq.

A. **The Tongass Decision does not reconcile the need to offer financially feasible timber sales with the TTRA’s mandate to ensure that timber sale offerings reflect market demand.**

Under the TTRA, the Forest Service must seek to provide a supply of timber from the Tongass National Forest that meets market demand. 16 U.S.C. § 539d(a). Under NEPA, the Forest Service must fully inform the public and the decisionmaker of the relevant factors

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considered in seeking to meet that demand. Natural Resources Defense Council v. U.S. Forest Serv., 421 F.3d 797, 811 (9th Cir. 2005) (“NRDC”) (NEPA is a procedural statute that mandates fully-informed decisionmaking). Under NFMA, the Forest Service must properly balance multiple use goals on the Tongass National Forest – including “recreation, environmental protection, and timber harvest” – without elevating any one leg of “this tripod balance” above the others. NRDC, 421 F.3d at 808-09, 809 n.22. At the same time, the Tongass National Forest is prohibited by Congress from offering deficit timber sales.² See Consolidated Appropriation Act, 2008, Pub. L. No. 110-161, § 410, 121 Stat. 1844 (2007) (stating that “[n]o timber sale in Region 10 shall be advertised if the indicated rate is deficit when appraised using a residual value approach that assigns domestic Alaska values for western redcedar”). Given these Congressional mandates, it necessarily follows that the Forest Service must consider and disclose timber sale economics in its analysis of timber demand and the manner in which the agency plans to meet that demand. This is so despite the fact that the TTRA relaxes the requirement for consideration of economics during the suitable lands identification process. 16 U.S.C. § 539d(d).

There is a difference between the TTRA provision that economics need not be considered in identifying lands unsuited for timber production on the one hand, and the TTRA requirement on the other hand that the Secretary shall seek to provide a supply of timber to meet market demand from those lands identified as suitable for timber production. Section 539d(d) of the TTRA cannot be read in such a way that it nullifies the requirements of TTRA section 539d(a). See, e.g., Reiter v. Sonoton Corp., 442 U.S. 330, 339 (1979) (“In construing a statute we are obliged to give effect, if possible, to every word Congress used.”).³ Indeed, the legislative history of the TTRA indicates that section 539d(d) was merely “designed to give the Forest Service some flexibility in harvesting marginal timber stands.” S. REP. NO. 101-261 (1990), as reprinted in 1990 U.S.C.C.A.N. 6232, 6238. In fact, the Conference Report emphasized that the economic exemption was applicable only to the determination of lands not suitable for timber production under NFMA Section 6(k) and that the Conferees “fully expect that the Forest Service will meet all other requirements of NFMA and other applicable law relating to the consideration of economic factors in land management planning for the Tongass.” H.R. REP. NO. 101-931 (Conf. Rep. 1990), as reprinted in 1990 U.S.C.C.A.N. 6267, 6268.

² A deficit sale is a timber sale in which the appraised value of the timber, including a margin for profit and risk, is less than the cost of harvesting the timber.

³ The Revised Forest Plan is not assessing just any supply of timber, but rather a supply of timber that will “meet” market demand. The definition of meet means to achieve, to provide for, or “[t]o satisfy (e.g., a need).” WEBSTER’S II NEW COLLEGE DICTIONARY 681 (1995).

Inexplicably, the Forest Service failed to consider the financial feasibility of timber sales in assessing whether the Tongass Decision's Allowable Sale Quantity ("ASQ") of 2.67 billion board feet per decade, or 267 mmbf on average annually from suitable lands, would supply the volume needed to meet market demand.⁴ According to the Forest Service, even though timber sale economics "is an important consideration in determining whether lands should be harvested," assessing sale economics is "difficult to meaningfully assess" over the 10-15 year life of a forest plan. EIS 3-346. The Forest Service thus ignored this crucial factor, relegating its consideration to future timber sale-specific analysis. As a result, the Tongass Decision's determination of how much timber can be supplied from the suitable land base annually and during this current planning cycle does not reflect the reality of whether enough timber can be supplied to meet demand.

Because the Forest Service failed to consider the financial feasibility of selling and operating timber sales in the analysis on which the Tongass Decision is based, the AFA did so and provided the Forest Service with the resulting information. Specifically, the AFA hired Cascade Appraisal Services, Inc. ("Cascade Appraisal") to assist in the analysis by: (1) reviewing and refining your contractor Tetra Tech's Value Comparison Unit ("VCU") analysis, which Tetra Tech provided after the comment period on the draft EIS had closed;⁵ and (2) appraising the timber in a sampling of VCUs to determine whether they would support financially feasible timber sales. The results are disheartening, do not bode well for the future of the timber industry in Alaska, and demonstrate that the Tongass Decision is not supported by the evidence before the agency.

Enclosed as Exhibits A and B are two versions of the Tetra Tech VCU analysis that differ only in whether they include all suitable lands, as opposed to the Phase 1 subset of

⁴ As discussed herein, see infra, the Forest Service's Timber Sale Program Adaptive Management Strategy effectively reduced the suitable land base and adopted a lower ASQ – an ASQ associated with EIS Alternative 2, ROD at 40 – for the foreseeable future by relegating current timber sales to Phase 1 lands. Regardless, for purposes of this discussion, it is assumed that the ASQ is 267 mmbf on average each year and that the suitable land base is as stated in the Forest Plan, i.e. about 663,000 acres. Revised Forest Plan, Appendix A, A-1.

⁵ The omission from the draft and final EIS of the Tetra Tech analysis regarding the ability of the Forest Service to supply timber from the suitable land base to meet market demand violates NEPA, the TTRA and NFMA because such an analysis is essential to informed public comment and informed decisionmaking and central to the question that must be addressed in the environmental documents as to whether the Revised Forest Plan can meet timber demand.

suitable lands, respectively. Looking first at Exhibit A, Tetra Tech's analysis shows in the first column of cells (titled Total VCU Acres and highlighted in purple) that of 2,733,050 acres on the Tongass National Forest where timber management could occur, 667,631 acres are mapped as suitable lands. Exhibit A at 3. That number includes both young-growth ("YG") and old-growth ("OG") habitat. Tetra Tech's analysis then applies the correction factor for falldown – the Model Implementation Reduction Factor, or MIRF, see Revised Forest Plan, Appendix A, A-9 – with the result being shown in the second column of cells (titled Total VCU and highlighted in green). Specifically, after applying MIRF to correct for overestimates of suitable acreage, Tetra Tech concludes there are 542,951 suitable acres to support the Forest Service's ASQ. Exhibit A at 3. Next, Tetra Tech's analysis breaks out the subset of non-interchangeable component 1 ("NIC 1") lands, which is the bulk of the suitable land base and is where most lands "are expected to be economic under most market conditions." EIS 3-346. The result shown in the third column of cells (titled NIC 1 Areas Only and highlighted in orange) indicates that the NIC 1 suitable lands include 515,851 acres, Exhibit A at 3, which is the acreage that would be counted on to support timber harvest during the first few decades of the Revised Forest Plan's implementation. EIS 3-347. In the fourth column of cells (titled Positive Value Analysis Areas Only and highlighted in yellow), Tetra Tech determined which of the VCUs were capable of supporting non-deficit timber sales. The result is a sobering 289,951 acres in the suitable land base, Exhibit A at 3 – made even more sobering when one realizes the acreage includes both young-growth and old-growth habitat, when in reality young growth has insufficient diameter to be a source of timber harvest for the first few decades of Plan implementation. EIS 3-347.

To get a more realistic view of the suitable lands capable of supporting financially feasible timber sales in the near term, as opposed to decades in the future when second-growth habitat will be sufficiently mature to move into the harvest rotation, AFA's contractor Cascade Appraisal assessed the VCUs having old-growth habitat capable of supporting non-deficit timber sales. The results are shown in the fifth column of cells on Exhibit A (titled Positive Value Analysis Areas Only – OG Only and highlighted in blue) and total only 121,898 acres of suitable land. Exhibit A at 3. Finally, because only a subset of suitable lands are included in Phase 1 of the Forest Service's newly-announced Timber Sale Program Adaptive Management Strategy, Exhibit B shows the same information as was displayed in Exhibit A but this time only for the subset of suitable lands included in Phase 1. The result is 102,493 acres of suitable old-growth acreage capable of supporting non-deficit timber sales. Exhibit B at 2. This is insufficient acreage to support the Revised Forest Plan's stated ASQ and less than 16% of the total amount of scheduled suitable land according to the ROD. ROD at 6.

Based on the above, the Tongass Decision is not supported by the record before the Forest Service. But it gets worse. In addition to the above information, Cascade Appraisal selected nine VCUs for a closer look at the economics of likely timber sale offerings. Using

Forest Service appraisal data and a technique that emulated the agency's Spectrum Analysis tool, Cascade Appraisal assessed whether the sampled VCUs would support financially feasible sales. Because the Forest Service has not determined which particular timberlands within any given VCU will be harvested, having instead performed a black-box analysis (Spectrum) to calculate the acreage of timber that may be harvested in each VCU, Cascade Appraisal coupled its analysis with the Forest Service's Logging System Transportation Analysis to more precisely map where harvesting likely would occur, with agency personnel reviewing the analysis to ensure it was performed correctly.⁶ The results of the analysis, which are included as Exhibit C, show that the timber in six of the nine VCUs analyzed would not support financially feasible timber sales. Only three VCUs – identified as VCUs 5770, 5730 and 5440 – would support financially feasible timber harvest, and none would support a full, normal profit and risk allowance. See Exhibit C at 1 (summarizing the analysis). Thus, not only is there an insufficient land base of suitable old-growth acres capable of generating non-deficit timber sales to supply timber to meet market demand, much of that land base appears to suffer from significant falldown not previously accounted for by the Forest Service's MIRF analysis. In fact, extrapolating from the results of this analysis (only one-third of the sampled VCUs would support economically-viable timber harvest) to the Phase 1 suitable old-growth acreage capable of supporting non-deficit timber sales (102,493 acres as shown on Exhibit B at 2), only about 34,160 acres of Phase 1 acreage may be available for financially-feasible harvest (102,493 acres x .3333). The Forest Service cannot claim to have sought to provide a supply of timber to meet market demand as required by the TTRA when the effort is doomed from the start by missing information and/or erroneous and misleading assumptions about how much timber is financially feasible to sell and harvest.

The above discussion demonstrates that contrary to the Forest Service's representations in the EIS, it is both possible and necessary for the agency to carefully assess the financial feasibility of timber sales in determining how it will seek to provide a supply of timber from the Tongass National Forest that meets market demand. The agency's failure to adequately consider this aspect of the problem renders the Tongass Decision arbitrary and capricious in violation of NEPA, the TTRA and NFMA, all of which are actionable through the APA. Under the APA, an agency's decision is unlawful if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In assessing agency action

⁶ The Forest Service's proprietary Spectrum Analysis tool cannot spatially define the location of timber within any given VCU and thus cannot generate a timber type map. Cascade Appraisal therefore used geographic information provided by the Forest Service in Geographic Information System format and coupled it with the agency's Logging System Transportation Analysis to map likely harvest locations, after which it appraised the timber using Forest Service appraisal data.

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under this standard, a reviewer should determine “whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). Unless the agency considered the relevant factors and articulated a “rational connection between the facts found and the choice made,” its determination should be set aside. Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)). See also id. (an agency’s action is arbitrary and capricious if “the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise”). Here, the agency did not consider the relevant factors such that there is not a rational connection between the Tongass Decision and the evidence before the agency.

Ironically, although the Forest Service’s Tongass Decision purportedly sought to respond to the Ninth Circuit’s decision in NRDC, the holding in NRDC actually supports the conclusion that the Tongass Decision is arbitrary and capricious in violation of the TTRA and NEPA for failure to properly consider and disclose timber sale economics. In NRDC, the Ninth Circuit held that where the Forest Service had mistakenly overestimated the demand for timber in its analysis and tied the Tongass Forest Plan’s selected ASQ to that demand, the error fatally undermined the agency’s analysis in violation of the APA. 421 F.3d at 807 (concluding that because of the mistake, the Forest Service’s explanation in the ROD ran “counter to the evidence before the agency”). The court pointed to precedent stating that a proper determination of ASQ is crucial, in part because to properly balance multiple uses on a forest, “trees are not to be cut nor forest leveled for no purpose.” Id. at 808. In reaching that holding, the court explicitly acknowledged that depending on demand, “the need for timber harvest may outweigh the competing goals for environmental preservation and recreational use.” Id.

Here, the Forest Service has made just as blatant an error in its timber analysis through errors in assessing the supply of timber available from land suitable for timber production and in assessing market demand. Similar to NRDC, trees and forestland are not to be preserved for the benefit of wildlife viability and other environmental goals when the demand for timber is not being met and existing environmental protections are more than sufficient. Based on our analysis of the Tongass Decision, the Forest Service appears to believe it can satisfy its statutory obligations by adopting a Revised Forest Plan with a stated ASQ despite the fact that in reality the Plan imposes timber harvest restrictions that will make it next to impossible to offer non-deficit timber sales, and which as a result will not accommodate timber harvest at a level anywhere near demand. The AFA disagrees that such an approach would satisfy the TTRA’s “seek to meet market demand” requirement, and it also disagrees that such an analysis would

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satisfy NEPA's requirement for full and informed disclosures. Instead, the AFA believes that as in NRDC, the Forest Service acted arbitrarily in adopting the Tongass Decision because the agency "fundamentally misunderstood" and/or misrepresented the balance between the multiple use goals of "recreation, environmental protection, and timber harvest" Id. at 809 n.22.

B. The Tongass Decision rests on flawed demand assumptions.

The Tongass Decision does not satisfy the TTRA's mandate that the Forest Service seek to provide a timber supply that meets market demand both annually and over the current 10 to 15 year planning cycle basis. The Forest Service employed the so-called Morse methodology to estimate market demand for Tongass timber on an annual basis, something it has done since about 2000. ROD at 29-30. See Kathleen S. Morse, Responding to the Market Demand for Tongass Timber, USDA Forest Service, Region 10, April 2000. See also EIS Appendix G (discussing timber demand calculations). As the ROD states, the Morse methodology incorporates and reacts to such metrics as timber harvest levels and is "adaptive," meaning that "if harvest levels drop below expectations and other factors remain constant, future timber sale offerings would also be reduced to levels needed to maintain the target level of volume under contract." ROD at 30. See also EIS Appendix G, G-2 (stating that the Morse methodology is designed to "monitor industry behavior and adjust timber program levels" to mirror that harvest activity). The AFA repeatedly has pointed out the error in relying on past harvest levels as an indicator of current demand and does so here once again. See Exhibit D (October 23, 2007 memo from AFA Executive Director Owen Graham to Agriculture Undersecretary Mark Rey critiquing the Morse methodology).

At the risk of repeating information detailed in the AFA memo, the Morse methodology uses erroneous assumptions about things like current installed capacity (about 370 mmbf, not 290 mmbf), the industry rate of capacity utilization (100%, not somewhere between 33-70%), the share of industry raw material provided by the Tongass National Forest (relegating an unrealistic 35% share to the State of Alaska), and the best-case percentage of usable wood in an average Tongass National Forest timber sale (about 80%, not 91%).⁷ The analysis in the EIS actually supports much of this criticism. For example, in EIS Appendix G, the agency appears to acknowledge that State of Alaska lands cannot indefinitely supply about one-third of the timber industry's raw material needs, something the State has done in recent years on an emergency basis to keep the industry alive because the Forest Service has failed to live up to its statutory timber obligations. EIS Appendix G, G-2 to G-3 ("State lands cannot indefinitely supply such a

⁷ This is not a dispute over Forest Service methodology but rather a dispute over the assumptions flowing into the Morse Methodology. See Exhibit D at 1.

high proportion of the needs of remaining Southeast Alaska sawmills.”); EIS 3-319 (“The State increased the sales volume from its forest lands in Southeast Alaska in most recent years to help bridge the gap between national forest harvest and local industry needs.”). But see id. at G-6 (erroneously stating that there is a perpetual inverse relationship between timber production on State of Alaska lands and that on the Tongass National Forest, such that State lands can make up for falldown on the Forest indefinitely). The EIS also plainly acknowledges that factors outside the control of the timber industry and unrelated to market demand have depressed timber harvest. See, e.g., EIS 3-508 (stating that litigation and the Congressional prohibition against deficit timber sales makes it “unclear what the actual harvest levels would have been if these constrictions on supply were not present”); EIS 3-506 (current status of the industry “is believed to be largely the result of supply limitations and not necessarily related to market demand”). Given the admitted flaws with a methodology that links timber supply levels with unnaturally-constrained past harvest levels, the Forest Service is not fulfilling its statutory obligations to seek to provide a timber supply from the Tongass that meets annual market demand. This is particularly egregious given the Forest Service’s explicit acknowledgment of the serious consequences associated with missing the mark by under-supplying timber volume to the industry. EIS Appendix G, G-12 (“In terms of short-term economic consequences, over-supplying the market is less damaging than under-supplying it. If more timber is offered than purchased in a given year, the unsold volume is still available for purchasing off-the-shelf or re-offered at a minimal investment. However, a significant shortfall in the supply of timber available for harvest in a given year can be financially devastating to the industry.”).

To illustrate the unworkable nature of the Forest Service’s annual demand process, the AFA recently provided the agency with a timber supply ramp-up worksheet included herein as Exhibit E. The worksheet demonstrates that because of the Forest Service’s failure to offer sufficient timber volumes in the recent past, coupled with the approximately three-year duration of the average timber sale, see, e.g., EIS 3-334 (“Timber sales can take from 3 to 5 years to complete.”); EIS 3-510 (acknowledging that timber sales cannot be harvested instantaneously), it will be 2021 under the Revised Forest Plan before the timber industry has sufficient timber under contract to support a 100 mmbf annual harvest level (assuming the industry survives that long). This is far less than the 360 mmbf annual harvest level needed to support a fully-integrated timber industry in Southeast Alaska. See Exhibit D at 3-5. See also ROD at 33 (setting forth annual harvest levels that purportedly would restore a fully integrated manufacturing industry at a volume of 360-370 mmbf but not until 2024-25). This unworkable “ramp-up” process also demonstrates that the Forest Service’s last minute decision to adopt a Timber Sale Program Adaptive Management Strategy will relegate timber harvest to Phase 1 lands for the duration of the current planning cycle. ROD at 40 (“Phase 2 of the Strategy . . . would be implemented only if the level of timber harvest reached 100 MMBF annually for two consecutive years . . .”). See also id. (stating that entry into Phase 3 lands is even less attainable

because it will require that timber harvest levels reach “150 MMBF for two consecutive years”). It thus is a gross misrepresentation for the Forest Service to offer the Revised Forest Plan as a mechanism to seek to provide a timber supply that meets market demand on the Tongass according to any time frame.

Although the Forest Service has concluded that an integrated industry could be restored at a lesser annual harvest level than the AFA’s figure of 360 mmbf, see ROD at 37 (concluding that an “annual supply of at least 200 MMBF of economic timber would be needed from the Tongass to meet the objective of providing an opportunity for the reestablishment of an integrated industry”), the Forest Service does not dispute the need for restoring an integrated timber industry in Southeast Alaska. ROD at 35-37. And the ROD makes clear that providing for annual harvest at a rate that will not reach 100 mmbf until 2021 is unworkable. Compare ROD at 37 (stating that none of the draft EIS alternatives having an ASQ lower than 267 would provide “an opportunity for the reestablishment of an integrated industry”) with id. at 40 (stating that “Phase 1 of the Strategy is similar to Alternative 2,” an alternative having an associated ASQ of only 151 mmbf (see EIS 2-22)). The Tongass Decision thus runs contrary to the evidence before the agency and is unlawful.

Turning to the Forest Service’s analysis of market demand on a planning cycle basis, the agency concludes that the demand for timber from the Tongass National Forest is “on a trajectory more similar to the scenario 2 (expanded lumber production)” from the Brackley and Haynes model. ROD at 31-34. See Allen M. Brackley, Thomas D. Rojas, and Richard W. Haynes, Timber Products Output and Timber Harvest in Alaska: Projections for 2005-25, USDA Forest Service, Pacific Northwest Research Station, General Technical Report PNW-GTR-677, July 2006. See also Allen M. Brackley and Richard W. Haynes, Timber Products Output and Timber Harvest in Alaska: An Addendum, Manuscript in preparation for USDA Forest Service, Pacific Northwest Research Station, Research Note, December 2007 (“Brackley Addendum”). Although the AFA believes the demand for timber actually is much higher than that projected under scenario 2, even if the Forest Service were correct that scenario 2 represents demand over the next 10 to 15 years, the Tongass Decision will not enable the Forest Service to seek to meet that demand under the Revised Forest Plan.

Table 3 in the ROD presents a schedule for ramping up timber harvest over the planning cycle under each of the four Brackley and Haynes scenarios. See ROD at 33. According to Table 3, the industry harvested between 49.8 and 67 mmbf of timber in 2007 and will increase harvest levels thereafter. Actually, the industry was able to harvest only 19 mmbf in 2007 because the volume of timber under contract was only 110 mmbf, 20 mmbf of that volume was unavailable as it was sold in the last month of the year, and another 30 mmbf was unavailable because of incomplete Forest Service road construction projects. See Exhibit F

(displaying Alaska Region timber volume history from 1994-2007). Given that the industry can physically harvest only about one-third of the volume under contract in any one year, ramping up the harvest level to 66.4 mmbf in 2008 (and higher in successive years) under scenario 2 would mean that the Forest Service was planning and budgeting for a large increase in timber sale preparation and planning (to offer about 200 mmbf in 2008, 217 mmbf in 2009 and so on). Further, even if the agency were to immediately begin planning, budgeting and preparing timber sales at sufficiently higher levels, any additional timber sale volume would not be available for at least three years, the least amount of time the Forest Service says it needs to complete a NEPA document and prepare a timber sale.⁸ The schedule proposed in Table 3 thus not only is unworkable under the scenario deemed most likely by the Forest Service, but it also demonstrates an unwillingness by the agency to plan for and allow restoration of an integrated, competitive and sustainable timber manufacturing industry. Indeed, it may very well not provide for a Southeast Alaska timber industry at all. See EIS 3-507 (acknowledging that “a mill may not be able to operate indefinitely at a utilization rate far below the economically efficient rate without risking bankruptcy”).

Finally, the AFA’s conclusions regarding the inadequacy of the Tongass Decision’s analysis and treatment of timber demand is buttressed by recent events discussed in the Brackley Addendum and acknowledged in the ROD. See ROD at 33 (discussing the Region 10 limited log shipment policy and the restart of the Ketchikan Veneer Mill). As you know, the Region 10 shipment policy, which allows for the shipment of certain lower-value logs from Alaska to the lower 48 states, represents a shift from current demand conditions “toward scenarios 2 and 3.” Brackley Addendum at 32 (document available on the Tongass National Forest website). As the Brackley Addendum further points out, “in the summer of 2007, the Ketchikan veneer mill was restarted using timber imported from British Columbia.” *Id.* at 33. See also *id.* (pointing out that after start-up, the mill also used logs from the Tongass National Forest). The Ketchikan veneer mill has an estimated annual log processing capacity of 30 mmbf,

⁸ Forest Service Region 10 has been funded by an additional \$5 million by Congress every year since 1999 to prepare additional timber sales to restore a more viable three-year pipeline of volume under contract. Historically, the agency appears to have refused to allocate that earmarked funding to Region 10 resulting in a loss to the Tongass National Forest of \$45 million through 2007. See, e.g., Exhibit G (letter in 2001 from Alaska Senators to the Forest Service inquiring about the use of the \$5 million appropriation). At the agency’s current cost of \$67 per thousand board feet for timber sale NEPA work, the earmarked funds could have supported additional NEPA work on 671 mmbf of timber sales. This likely is a conservative estimate given that the agency only spent about \$41 per thousand board feet to conduct NEPA work back in 1998.

see Exhibit H at 6 (identifying the mill as the “Gateway Forest Products” veneer mill), and therefore “is an expression of increased demand for Tongass timber.” Brackley Addendum at 33. Confusingly, the Brackley Addendum puts the cart before the horse by stating that if the “mill start-up is successful, the next version of the model will need to add conversion assumptions for veneer production.” *Id.* However, the mill start-up – which actually is an expression of existing demand, not increased demand – needs a predictable supply of timber in order to be successful, not the other way around. Ironically, the mill currently is shut down due to the increased cost of Canadian logs.

C. The Tongass Decision improperly elevates one multiple use, i.e. species viability, over the multiple use of timber production in violation of NFMA.

NFMA is a multiple-use management statute governing land use planning on Forest Service lands. As a multiple-use statute, NFMA’s congressional policies range from natural resource protection to the production of timber from public lands. *See, e.g.*, 16 U.S.C. § 1604(e)(1) (providing that national forests are to managed for “outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness” purposes). Although the Forest Service is required under NFMA to “provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives,” *id.* § 1604(g)(3)(B), the statute does not elevate any particular forest use above others. The Ninth Circuit acknowledged this in *Seattle Audubon Society v. Moseley*, 80 F.3d 1401 (9th Cir. 1996), when it rejected a claim that federal land management agencies should have adopted a forest management alternative that would have provided greater assurance of maintaining the viability of various species because such an interpretation would have precluded “any multiple use compromises contrary to the overall mandate of NFMA.” *Id.* at 1404.

The Tongass Decision unlawfully elevates the purported needs of wildlife above timber production in violation of NFMA. The ROD plainly subsumes the multiple use of timber production below that of maintaining species viability. *Compare* ROD at 17 (stating that if the Tongass Decision is “inadequate to meet the needs of the timber industry over the next 10-15 years, the industry simply will not be around for corrections to be made during the next Plan revision”) *with* ROD at 19-20 (explaining that the Tongass Decision provides for highly conservative viability likelihoods predicting that at worst, the odds of maintaining species viability over the next century will be very high for most species of concern). Indeed, as a result of the Forest Service’s last-minute Timber Sale Program Adaptive Management Strategy, which is discussed further below and which reduces the suitable land base for the foreseeable future by about 31%, ROD at 9, the viability estimates have become even more conservative in that harvest is precluded on additional lands above and beyond what was assessed in the EIS. *See also* ROD at 40, 47 (stating that Phase 1 of the Timber Sale Program Adaptive Management Strategy is akin

to Alternative 2, an alternative which “would not allow sufficient timber volume to meet the projected market demand under the scenario considered most likely to occur over the next 15 years”); EIS Appendix G, G-12 (stating that over-supplying the market has far less serious consequences than under-supplying it, because whereas unsold timber volume can always be shelved for the future, “a significant shortfall in the supply of timber available for harvest in a given year can be financially devastating to the industry”). As a result, the reported environmental consequences of implementing the Revised Forest Plan, which already overemphasize environmental protection to the detriment of timber production, further overstate the risk of harm to the environment by assuming a level of timber harvest that will never come to pass.

Put simply, the Forest Service has placed an inequitable share of risk on the shoulders of the multiple use of timber production. ROD at 15 (stating that the “logical order” of balancing multiple uses is to “deal with fish and wildlife issues first” and only later address timber needs). This is contrary to the holding in Moseley, where the Ninth Circuit rejected a challenge to a federal land management strategy that provided an 80% or more likelihood of viability for the northern spotted owl and other species where providing too high a likelihood of viability would have precluded balancing the statutory multiple uses on federal lands. 80 F.3d at 1404. In essence, the Forest Service has gone of its own volition where the environmental plaintiffs sought to take the federal agencies in Moseley by elevating species viability above other multiple uses of the Tongass, including the multiple use of timber production, despite the acknowledged risk that an improper balancing will lead to the demise of the Alaska timber industry.

2. The Forest Service’s decision in the ROD to adopt a Timber Sale Program Adaptive Management Strategy violates NEPA and NFMA.

A. The Timber Sale Program Adaptive Management Strategy violates NEPA.

The Forest Service’s decision to adopt a Timber Sale Program Adaptive Management Strategy (“Timber Strategy”) that effectively reduces the suitable land base on the Tongass National Forest is a major federal action requiring comprehensive environmental review under NEPA. Despite this requirement, no environmental review of the Timber Strategy took place during development of the Revised Forest Plan. Rather, the Timber Strategy was revealed to the public after the public comment period on the Revised Forest Plan’s draft EIS had closed, with the issuance of the ROD. Because the Forest Service did not take the requisite hard look at the effects of the Timber Strategy, incorporation of the Timber Strategy into the Revised Forest Plan violates NEPA.

B. The Timber Sale Program Adaptive Management Strategy violates NFMA.

Adoption of the Timber Strategy without the opportunity for public comment violates NFMA's requirement that the public be allowed to participate in the forest plan amendment and revision process. 16 U.S.C. § 1604(d). The reclassification of lands previously deemed suitable for timber production into lands not included in the timber production base amounts to a *de facto* amendment of the Forest Plan in violation of NFMA and its implementing regulations. See 16 U.S.C. § 1604 (f)(4) (providing for forest plan amendment procedures); 36 C.F.R. § 219.10 (describing necessary process for amending and revising forest plans). The fact that the Forest Service adopted the Timber Strategy as part of the Tongass Decision does not cloak the amendment in legitimacy. Rather, the Forest Service's decision in the ROD to exclude the Phase 2 and Phase 3 lands from the suitable land base without public involvement is unlawful and should be set aside.

NFMA requires the Forest Service to follow mandatory procedures when amending or revising a Forest Plan. These procedures include such things as examination of alternatives and public participation in the amendment's formulation. See, e.g., 16 U.S.C. § 1604(d) (agency must provide for public participation); *id.* § 1604(f)(4) (stating requirements for significant forest plan amendments). The Timber Strategy amends the Tongass Forest Plan without following these or any other mandatory procedures, much like the lynx strategy held unlawful in Oregon Natural Resources Council Fund v. Forsgren, 252 F. Supp.2d 1088, 1100-01 (D. Or. 2003). There, the Forest Service's implementation of a Lynx Conservation Assessment and Strategy and mapping direction without involving the public in the process constituted a *de facto* and unlawful amendment of the governing forest plan. *Id.* Like the changes at issue in Forsgren, the Forest Service's Timber Strategy decision dramatically changes the suitability classification of the Tongass' forest lands, thereby impliedly amending the Forest Plan without the requisite process. The ROD thus is unlawful under NFMA and should be set aside.

RELIEF SOUGHT

1. Withdraw the Decision to Implement the Timber Sale Program Adaptive Management Strategy.

The Timber Strategy adopted in the ROD is both illegal and unworkable in the context of the Revised Forest Plan. The proper remedy is for the Forest Service to withdraw its decision to implement the Timber Strategy which, as the ROD plainly states, is an additional step above and beyond what the agency believes is a wholly lawful analysis in the EIS. ROD at 29 (statement of Regional Forester Bschor that the "EIS fully remedies the problems identified by the Ninth Circuit regarding the treatment of market demand in the 1997 Tongass Forest plan

EIS”). The Forest Service is the agency to which Congress delegated authority to manage the national forests, including the Tongass. There will always be differences of opinion over the best to manage public lands, and the Forest Service needs to carry out its Congressionally-delegated land management task by meeting its statutory obligations instead of seeking to avoid political conflict. See ROD at 29 (the Timber Strategy was adopted – without public review and comment – to placate environmental “differences of opinion” over how best to manage the Tongass National Forest).

2. Withdraw the Tongass Decision and Approve a Forest Plan Based on an Alternative Similar To, Though Less Aggressive Than, Alternative 7.

The Tongass Decision does not truly seek to meet market demand and grossly elevates environmental concerns over the multiple use of timber production. The Forest Service must provide a timber sale program which truly seeks to meet market demand both in the near term and over the life of the planning cycle. The proper remedy is for the Forest Service to modify the Tongass Decision and adopt a Forest Plan based on an alternative that falls between EIS Alternatives 6 and 7 and that would support an annual harvest level of 360 mmbf, which if fully implemented would at least create the potential for restoring a fully-integrated timber industry in Southeast Alaska.

3. Commit To and Implement an Immediate and Aggressive Ramp Up Schedule for Restoring an Adequate Supply of Timber Under Contract.

The Tongass Decision traps the Tongass National Forest’s timber supply – and the Southeast Alaska timber industry – in a logical impossibility or “Catch-22” situation by establishing timber sale goals based on unnaturally-constrained past harvest levels. The proper remedy for curing this unlawful failure to seek to meet demand is for the Forest Service to commit to and actually implement an immediate ramp up schedule that will put approximately three times the annual desired harvest level under contract. Under the timber industry’s desired goal of a 360 mmbf annual harvest level, this would translate to an annual volume under contract of 1,080 mmbf. Under an annual harvest level of 267, similar to the Revised Forest Plan’s stated ASQ, this would translate to an annual volume under contract of 801 mmbf.

4. Commit to Finding Ways to Increase the Forest’s Budget and Assign an Experienced Timber Management Workforce.

An overarching goal of the above three requests for relief is higher annual timber outputs from the Tongass National Forest. To achieve these necessary higher timber outputs, the Forest Service’s budget for the Tongass will need to increase proportionately. Although detailed