

STATE OF ALASKA,	)	
	)	
Appellant,	)	
	)	ADMINISTRATIVE APPEAL
v.	)	
	)	OF THE
UNITED STATES FOREST SERVICE;	)	
FORREST COLE, in his official capacity	)	CENTRAL KUPREANOF
as Forest Supervisor, Tongass	)	
National Forest,	)	
	)	TIMBER HARVEST PROJECT
Defendants.	)	
_____	)	

Submitted to:

[Appeals-alaska-regional-office@fs.fed.us](mailto:Appeals-alaska-regional-office@fs.fed.us)  
 Beth Pendleton, Regional Forester  
 Alaska Region  
 US Department of Agriculture  
 709 W. 9<sup>th</sup> Street  
 P.O. Box 21628  
 Juneau, AK 99802-1628

This is an appeal of the Record of Decision (“ROD”) and associated Final Environmental Impact Statement (“FEIS”) for the Central Kupreanof (“CK”) Timber Harvest Project. Tongass National Forest Supervisor Forrest Cole signed the CK Timber Harvest Project ROD on February 4, 2011. This appeal is filed pursuant to 36 C.F.R. § 215. The Ketchikan Daily News published the official notice for this project on March 10, 2011. Therefore, the appeal period for this decision ends April 25, 2011, and this appeal is timely. The State of Alaska is filing this appeal with 13 exhibits attached.

## STATEMENT OF THE CASE

### I. Introduction

The United States Forest Service has a statutory obligation to supply timber from the Tongass to meet the market demand for timber, and to manage those areas designated under the forest plan for timber production, primarily to meet timber objectives. The record of decision for the Central Kupreanof Timber Harvest Project violates those requirements. Despite the USFS having failed to supply adequate timber to meet its own estimates of demand, the CK timber harvest project ROD drastically reduced the timber volume and acreage offered in the harvest project, in part based on its implementation of the Transition Framework, a USFS policy that has not been legally implemented and is inconsistent with the USFS' statutory obligations and the current Tongass Land Management Plan ("TLMP"). The USFS must therefore withdraw the CK timber harvest project ROD and redesign and reissue this sale in compliance with all applicable laws.

### II. Tongass National Forest Management Overview

The Tongass National Forest ("Tongass") is comprised of over 16.8 million acres in Southeast Alaska and is the largest national forest in the United States.<sup>1</sup> Congress created national forests for the purpose of improving and protecting the forest, securing favorable conditions of water flows, and furnishing "a continuous supply of timber for the use and necessities of citizens of the United States."<sup>2</sup> Congress recognized

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<sup>1</sup> TLMP Final Environmental Impact Statement at 2.

<sup>2</sup> 16 U.S.C. § 475.

a special need to assure adequate timber sales from the Tongass. In 1990, Congress passed the Tongass Timber Reform Act (“TTRA”), which explicitly requires that the USFS “seek to provide a supply of timber from the Tongass National Forest which (1) meets the annual market demand for timber from such forest and (2) meets the market demand from such forest for each planning cycle.”<sup>3</sup>

The National Forest Management Act (“NFMA”) requires the USFS to develop a land and resource management plan for every national forest.<sup>4</sup> These forest plans must provide for multiple use and for sustained yields of forest products.<sup>5</sup> All site-specific projects in a forest, including timber projects, must be consistent with the land resource management plan for that forest.<sup>6</sup> Any significant amendments to the plan must be adopted only after the USFS complies with the public involvement process requirements of the NFMA.<sup>7</sup>

All timber projects in the Tongass must therefore be designed and implemented consistent with the 2008 TLMP.<sup>8</sup> As explained in the TLMP, a forest land management plan is analogous to a city zoning plan, identifying where certain activities will be allowed, and where they will be forbidden. TLMP at 1-1, 1-3. In the context of a forest plan, “zoning designations” are called Land Use Designations or “LUD”s. TLMP at 1-2. The TLMP sets forth the goals and objectives for managing the Tongass, along

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<sup>3</sup> 16 U.S.C. § 539(d).

<sup>4</sup> 16 U.S.C. § 1604.

<sup>5</sup> 16 U.S.C. § 1604(e).

<sup>6</sup> 16 U.S.C. § 1604(1).

<sup>7</sup> 16 U.S.C. § 1604(f)(4).

<sup>8</sup> The TLMP was amended in a public process as prescribed in NFMA in 2008 following a court order to correct the methodology for determining timber demand.

with certain requirements regarding how lands will be managed, called management prescriptions. Each LUD has a set of specific management prescriptions for that LUD. TLMP at 1-3.

Of the 16.8 million acres of the Tongass, only 663,000 acres are designated as suitable timber land in which harvest may be allowed, leaving over 96 percent of the Tongass unavailable for timber harvest. TLMP at A-1. As required by Congress' mandate to produce timber from the Tongass to meet market demand, one explicit management goal set forth in the TLMP is to "provide for the continuation of timber uses and resources by the timber industry and Alaska residents." TLMP 2-7. One of the stated TLMP objectives restates the statutory language of the TTRA, by requiring the USFS to "(s)eeK to provide an economic timber supply sufficient to meet the annual market demand for Tongass National Forest timber, and the market demand for the planning cycle." *Id.*

As stated above, less than four percent of the total land area of the Tongass is available to the USFS for timber harvest projects to satisfy the demand for Tongass timber and meet the USFS' statutory obligation. When a timber harvest project is designed in a Timber Production LUD,<sup>9</sup> the management prescriptions under the Timber Production LUD apply. TLMP at 3-116. The TLMP makes clear that when a timber sale is planned within the small fraction of the Tongass that is available for timber production, the primary goal of the project must be timber production. The management prescription

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<sup>9</sup> Timber harvest is also allowed in Modified Landscape and Scenic Viewshed LUDs.

specific to timber sales states that the USFS shall “locate and design timber harvest activities primarily to meet timber objectives.” *Id.* Under the timber management prescriptions, other objectives, such as “wildlife and vegetative diversity,” are to be integrated, but only “if they do not have a significant adverse impact on the timber resources goal.” TLMP at 3-121.

### **III. The Central Kupreanof Timber Harvest Project**

The USFS first requested scoping comments on the proposed Central Kupreanof timber harvest project in October of 2006.<sup>10</sup> This letter explained that timber sales would occur within a 178,895 acre project, of which 143,848 acres are in LUDs that are suitable for timber harvest. *Id.* Seventy five percent of the project area, 133,984 acres, was in the Timber Production LUD, the LUD with management prescriptions that require the USFS to manage primarily for timber.

On November 21, 2008, the Forest Supervisor released the draft environmental impact statement (“DEIS”) for the Central Kupreanof timber harvest project.<sup>11</sup> The purposes identified for the project were to manage the timber resource for production from those lands made available for harvest, to seek to provide a sufficient timber supply to meet market demand, and to otherwise provide for a diversity of resource uses that would contribute to the local and regional economies in Southeast Alaska.<sup>12</sup> The USFS proposed alternative 3 as the preferred alternative, which would

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<sup>10</sup> Letter from Patricia Grantham, Petersburg District Ranger, dated October 2010, Exhibit 1.

<sup>11</sup> Central Kupreanof DEIS cover letter.

<sup>12</sup> Central Kupreanof DEIS Summary at i-ii.

produce up to 70.2 MMBF of timber, the most of all the alternatives.<sup>13</sup> The USFS explained that the actions analyzed in the DEIS were designed to “implement the direction contained in the 2008 Tongass Land and Resource Management Plan (Forest Plan) and the Tongass Timber Reform Act (TTRA).” *Id.*

The final environmental impact statement (FEIS) for the Central Kupreanof project was completed and initially intended for release in October 2009.<sup>14</sup> In the FEIS, alternative 3 continued to be the preferred alternative, with a volume of up to 70.2 MMBF.<sup>15</sup> As in the DEIS, the USFS explained that this alternative would maximize timber harvest opportunity while meeting Forest Plan Standards and Guidelines; would address timber economics by maximizing the proposed volume available; and would allow the Forest Service flexibility to respond to current and future market demands.<sup>16</sup> The USFS, however, delayed the FEIS’ release until February 2011; at that time, it explained that the delay was in part to address policy changes related to the transition to young-growth and the management of roadless areas.<sup>17</sup>

During the delay, the USFS announced in a three-page letter to the Tongass Futures Roundtable, dated May 10, 2010, and in an associated press release, that it was working on a “Transition Framework” that sought to transition timber harvesting in the

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<sup>13</sup> Central Kupreanof DEIS title page.

<sup>14</sup> Central Kupreanof FEIS, R10-MB-633a.

<sup>15</sup> *Id.* at 2-5.

<sup>16</sup> DEIS Summary at viii; FEIS Summary at viii. Similarly, in addressing the issues of timber supply and sale economics, both the DEIS and FEIS acknowledged that “a greater number of units/larger volume available allows for greater diversity and flexibility in responding to future market demands and to appropriately [packaging] potential sales.” DEIS at Summary iv; FEIS Summary at iv.

<sup>17</sup> ROD cover letter.

Tongass from old-growth to young-growth areas.<sup>18</sup> The press release expressed a goal to transition “quickly away from timber harvesting in roadless areas and old-growth forests.” *Id.* at 1. In May 2010, the USFS also released an Economic Analysis of Southeast Alaska, which analyzed, among other things, the ability of the Tongass timber industry to survive the transition to young-growth.<sup>19</sup> This study concluded that economically sustainable young-growth management could be available beginning in the 2030s, but that transition scenarios that quickly end old-growth harvest will most likely permanently eliminate the Tongass timber industry. *Id.* The study explained that none of the scenarios considered would be adopted as policy without first meeting all applicable procedural requirements, such as those required by the NEPA, the NFMA, and the TTRA.<sup>20</sup>

On February 4, 2011, the USFS released the Record of Decision for the Central Kupreanof Timber Harvest. The Forest Supervisor explained that, among other considerations, he incorporated the “new USDA objectives associated with the Transition Framework” into this decision.<sup>21</sup> As a result of the USFS’ change in management direction between the October 2009 preparation of the FEIS and its release together with

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<sup>18</sup> Letter from Beth Pendleton dated May 24, 2010 and associated USDA press release, Exhibit 2.

<sup>19</sup> Economic Analysis of Southeast Alaska, R10-MB-725, May 2010, Exhibit 3.

<sup>20</sup> *Id.* at 3, Exhibit 3.

<sup>21</sup> ROD at 1.

the ROD in February 2011, the selected alternative was modified to reduce the maximum timber available from 70.2 MMBF to 26.3 MMBF.<sup>22</sup>

The Forest Supervisor reduced the timber volume offered by nearly two-thirds despite the fact that the USFS has fallen far short of meeting demand with the sales offered under the TLMP. Based on the USFS' own reports and calculations, the USFS is failing to meet demand by over 100 MMBF annually.<sup>23</sup> Despite this, the Forest Supervisor concluded that the Central Kupreanof timber harvest project is consistent with the TTRA and 2008 TLMP.<sup>24</sup>

This appeal challenges the Forest Supervisor's assertion of consistency with either the TTRA or TLMP and challenges his implementation of the Transition Framework in this project, due to its lack of formal adoption in any public process. It also challenges implementation of the framework in this project based on the framework's substantive inconsistency with the TTRA and TLMP, given the USFS' failure to identify a transition scenario capable of meeting the demands of the timber industry.

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<sup>22</sup> ROD at 2.

<sup>23</sup> See 2009 Annual Monitoring & Evaluation Report (with timber resource reports attached), R10-MB-715, Aug 17, 2010, Exhibit 4; Briefing Paper Estimating the Range of Expected Tongass Timber Purchase and Sale Offer, USFS, June 2010, Exhibit 5; Periodic Timber Sale Accomplishment Report FY2010, PTSR202R, Exhibit 6; Predicting Likely Timber Purchases and Offer Levels on the Tongass National Forest. Fiscal Year 2011, USFS, March 3, 2011, Exhibit 7.

<sup>24</sup> ROD at 20-21.

## STATEMENT OF REASONS

### **I. The Central Kupreanof Timber Harvest Project Record of Decision and its Implementation of the Tongass Transition Framework Demonstrates That the Forest Service is Not Seeking to Meet Timber Demand in Violation of the Tongass Timber Reform Act, the Tongass Land Management Plan, and the National Forest Management Act.**

#### **A. The USFS has been failing by a large measure to meet its own estimates of timber demand.**

The Tongass Timber Reform Act (TTRA) specifically mandates that the USFS “[s]eek to provide a supply of timber from the Tongass National Forest which (1) meets the annual market demand for timber from such forest and (2) meets the market demand from such forest for each planning cycle.”<sup>25</sup> This statutory duty is restated as an objective in the Tongass Land Management Plan. TLMP 2-7.

The TLMP further requires the USFS to provide an annual assessment of whether it is satisfying its statutory obligation to meet the demand for timber from the Tongass.<sup>26</sup> Even prior to releasing the ROD on the CK timber harvest project, the USFS—by its own estimates—has been falling far short of providing timber supply that meets demand as Congress directed.

In Fiscal Year 2009, the Annual Demand Calculation for Tongass timber, as prepared by the USFS, “ranged from a low of 146 MMBF to a high of 261 MMBF.”<sup>27</sup>

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<sup>25</sup> 16 U.S.C. § 539(d).

<sup>26</sup> TLMP at 6-13.

<sup>27</sup> USFS 2009 Annual Monitoring and Evaluation Report Exhibit 4. The cited numbers are the offerings required to meet the USFS estimate for timber needed to meet volume under contract objectives. The expected timber purchase for FY 2009 was 112 MMBF, also well above the 36 MMBF that was offered.

But in 2009 the USFS only offered 36 MMBF for sale in the Tongass.<sup>28</sup> Even at the low end of the demand calculation, the USFS was 110 MMBF short of meeting demand for 2009.

The USFS low end estimate of demand for FY 2010 was 173 MMBF.<sup>29</sup> In the updated appendix 3 to the CK Timber Harvest Project ROD, however, the USFS actually selected the “Expanded Lumber” scenario for the 2010 demand scenario, which estimates demand at 211 MMBF.<sup>30</sup> Actual timber offered for sale was far short of either demand estimate, at just 45.2 MMBF.<sup>31</sup> That level is 127.8 MMBF below the USFS’ low-end estimate of calculated demand for 2010, and 165.8 MMBF below its adopted expanded estimate.

For Fiscal Year 2011, the USFS projects timber demand to range from 110 MMBF to 259 MMBF.<sup>32</sup> Given the USFS’ legal obligation under the TTRA to seek to meet timber demand from the Tongass, the USFS is required, at a minimum, to seek to offer a volume of timber that meets the low end of USFS demand calculations.<sup>33</sup>

The ROD issued for the CK timber harvest project demonstrates that the USFS is once again on track to fail to offer timber for sale that meets even the low end

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

<sup>29</sup> USFS Briefing Paper, June 2010 Exhibit 5. This calculation is to meet the demand for volume under contract.

<sup>30</sup> ROD appendix 3 at 3-37.

<sup>31</sup> FY 2010 Periodic Timber Sale Accomplishment Report, PTSR202R, Exhibit 6.

<sup>32</sup> Predicting Likely Timber Purchases and Offer Levels on the Tongass National Forest, Exhibit 7.

<sup>33</sup> The State does not concede that the lowest number in the demand calculation is the best estimate of actual current demand, as the actual demand may be higher.

estimate of demand. This violates the laws governing timber management for the Tongass.

**B. The CK timber harvest project ROD, which drastically reduces the volume of timber included, violates the Tongass Timber Reform Act's direction to seek to supply timber from the Tongass to meet demand.**

Despite the legal obligation to seek to meet timber demand and the pronounced failure to meet demand in 2009 and 2010, the USFS modified alternative 3 in this ROD to reduce the timber available for sale from over 70 MMBF to only 26.3 MMBF.<sup>34</sup> According to the USFS, this sale still complies with TTRA because it provides “part of the timber supply to the Tongass National Forest’s timber program.” ROD at 21. Under that logic, the USFS could have offered one tree and found itself in compliance with its obligations under the TTRA. Given the USFS’ consistent shortfall in meeting demand, and its failure to identify where the remainder of the supply needed for the program may come from, the claim to be in compliance with the TTRA rings hollow. While no one sale is likely to provide all the necessary timber supply for the Tongass program, it is difficult to understand how the ROD’s slashing of the sale by close to two-thirds reflects a USFS that is, in fact, seeking to meet timber demand.

By contrast, alternative 3, as it appeared in the DEIS and FEIS, demonstrated more of an attempt to seek to provide a timber supply from the Tongass to meet demand. Rather than strip two-thirds of the volume, the originally-conceived alternative 3 maximized the timber harvest opportunity and provided the USFS with the

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<sup>34</sup> ROD at 2. The ROD states that alternative 3 had been at 75.8 MMBF, but the DEIS and FEIS list alternative 3 as providing 70.2 MMBF. DEIS at viii; FEIS Summary at ix.

most flexibility to address market conditions.<sup>35</sup> The modified alternative selected in the ROD abandons that potential. With only a fraction of the Tongass designated to provide for timber production, the decision to take a substantial portion of the available acres in a project area offline, and effectively out of even potential production, marks an abdication of the obligation to seek to supply market demand.

That the ROD demonstrates intent to ignore or evade the obligation to seek to supply timber to meet demand is reinforced by its “implementation” and “incorporation” of the “USDA goals and objectives associated with the Transition Framework.” ROD at 1, 5. The ROD does not specifically identify what Transition Framework goals and objectives it is incorporating. Indeed, those goals and objectives were presented as a work in progress.<sup>36</sup> But to the extent the USDA has given an indication as to the contours of the Transition Framework, it is not consistent with the USDA’s mandate to seek to meet market demand. None of the scenarios the USDA has explored provide adequate timber to meet projected demand for Tongass timber.

According to its May 2010 letter to the Tongass Future Roundtable, the USFS is considering a Transition Framework under which the USFS would cease offering roadless sales (although the Tongass was exempted from the Roadless Rule), but would offer a “limited number of old-growth sales in the near-term in roaded forest areas

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<sup>35</sup> See DEIS Summary at iv, viii; FEIS Summary at iv, viii; and related discussion *supra* p. 6. While the economics of the CK timber harvest project under any of the alternatives assessed presented challenges, not including the maximum volume and acreage in the project is needlessly limiting should market conditions change.

<sup>36</sup> The procedural shortcomings of the Transition Framework are addressed further *infra* in section III.

in order to ensure that a bridge exists for the remaining forest industry infrastructure to make the transition.”<sup>37</sup> In the associated news release, Regional Forester Beth Pendleton added that the intent was to transition “quickly away from timber harvesting in roadless areas and old-growth forests.”<sup>38</sup>

In the Economic Analysis of Southeast Alaska report, also released in May of 2010, the USFS explored alternatives for ending old-growth logging that ranged from an immediate end to old-growth harvest to allowing limited old-growth harvest of up to 50 MMBF/year for an indefinite period until sufficient second-growth is available to sustain the timber industry at a 50 MMBF/year harvest rate.<sup>39</sup> The study found that any scenario for transition to young-growth that ends old-growth harvest immediately or in 10 years or less will not maintain a timber industry in Southeast Alaska.<sup>40</sup> The study also concluded that the current rate of harvest in the Tongass of 30-40 MMBF/year<sup>41</sup> “will not maintain the traditional timber industry in Southeast Alaska.”<sup>42</sup>

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<sup>37</sup> Letter from Beth Pendleton dated May 24, 2010, and associated USDA press release, Exhibit 2.

<sup>38</sup> *Id.* at 1.

<sup>39</sup> Economic Analysis of Southeast Alaska at 23-42, Exhibit 3.

<sup>40</sup> *Id.* at 41.

<sup>41</sup> The USFS statement that the current rate of harvest in the Tongass is 30-40 MMBF/year does not account for additional wood from other sources such as State lands that have been partially sustaining the timber industry on a temporary basis. As a result, the actual timber consumed by the industry in recent years and the supply needed to maintain even this level of production and jobs is understated. *See* TLMP FEIS 3-319, 3-335, 3-500, 3-501; see also State of Alaska Brief, *Organized Village of Kake v. USFS*, Case No. 1:09-CV-00023, Nov. 1, 2010 at 13-19, Exhibit 8.

<sup>42</sup> Economic Analysis of Southeast Alaska at 1, Exhibit 3.

A harvest of 50 MMBF/year was the highest transition harvest level the USFS considered.<sup>43</sup> At that level, the USFS estimates that the timber supply could potentially support 150-250 direct timber jobs.<sup>44</sup> But at 50 MMBF/year, which appears to be the best case scenario for the timber industry under the Transition Framework, the USFS falls far short of its statutory duty to seek to meet timber demand. As noted above, *supra* p. 9, 50 MMBF/year is well below the recent USFS estimates of timber demand, and more than 50% below the estimate for FY2011. That gap will only increase as the USFS study predicts that in the future, “markets and prices are expected to improve.”<sup>45</sup>

The USFS’ decision not to offer adequate timber from traditional sources is reflected also in its comment that “[u]nder any scenario, the traditional reliance on old-growth timber is problematic. Politically, it engenders controversy and conflict.”<sup>46</sup> But politics and controversy aside, so-called traditional timber production is what is predominately available on a commercial level at this point in time. The second growth timber has not yet matured enough to sustain a viable timber market.<sup>47</sup> There is general agreement and interest in transitioning timber harvest to focus on the harvest of second growth timber (from areas previously harvested); the TLMP recognized as much.<sup>48</sup> But

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<sup>43</sup> The statement of the Regional Forester that the USFS intended to “quickly” transition away from old-growth suggests the USFS may be planning a harvest well below 50 MMBF/year. News Release 0288.10, Exhibit 2.

<sup>44</sup> Economic Analysis of Southeast Alaska at 40, Exhibit 3.

<sup>45</sup> *Id.* at 45.

<sup>46</sup> *Id.* at 1.

<sup>47</sup> *See Id.* at 23, Exhibit 3. *See also* Inventory of Young Growth Timber Tongass National Forest in Southeast Alaska, Cascade Appraisal Service, Inc. for the Southeast Conference, January 2011, Exhibit 9.

<sup>48</sup> TLMP ROD at 49-50.

the TLMP also recognized that a transition is decades away and depends on many factors—including keeping the current timber industry strong and viable.<sup>49</sup>

The USFS may not as a policy choice or strategy of conflict avoidance abandon its obligation under the TTRA to supply timber from the Tongass to meet the timber demand. The USFS has flexibility in how it is to achieve that end, but try it must.<sup>50</sup>

The ROD for the CK timber harvest project, which slashed the available timber volume by close to two-thirds in the face of the USFS' consistent and stark failure to offer adequate timber to meet demand, shows the USFS is not trying to satisfy its obligations under the TTRA. Its precipitous implementation of the Transition Framework reinforces the conclusion that the USFS has no intention of seeking to supply timber to meet market demand. Accordingly, the ROD should be withdrawn and the project redesigned in compliance with the TTRA.

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<sup>49</sup> TLMP ROD at 50, 35-37.

<sup>50</sup> The obligation to seek to meet timber demand is not altered by the recent decision in *Organized Village of Kake v. USFS*, which invalidated the Tongass Exemption Rule. If timber from inventoried roadless areas is necessary to meet timber demand, the USFS needs to take steps to ensure that such areas are not administratively closed to timber harvest. The USFS could accomplish this through several paths: the USFS can appeal the *Organized Village of Kake* decision, commence a rulemaking to correct the purported deficiencies in the Tongass Exemption rule, or commence a rulemaking that addresses the Roadless Rule directly. An agency that is required to take an action by statute cannot relieve itself of that legal obligation by prohibiting the action through an administrative regulation, directive, or bulletin. To attempt to do so is an *ultra vires* act that would usurp the authority of Congress and violate the fundamental principle of supremacy of law that public officials obey the lawful enactments of the Congress. *C.B.S. Imports Corp. v. United States*, 450 F.Supp 724, 728 (United States Customs Court, 1978). *See also Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-214 (1976) holding that an administrative agency lacks the power to make law, but rather has the delegated authority to carry out the will of Congress as expressed by statute.

**C. Because the Tongass Land Management Plan incorporates Tongass Timber Reform Act standards, the ROD is also inconsistent with the Tongass Land Management Plan, and thus violates the National Forest Management Act.**

As established above, the CK timber harvest ROD violates the TTRA. Because the timber demand requirements of the TTRA are incorporated in the Tongass Land Management Plan, TLMP 2-7, that violation also constitutes a violation of the National Forest Management Act. The NFMA requires that all projects be consistent with the forest plan.<sup>51</sup> This project is not, as the USFS is plainly not seeking to meet timber demand with this ROD for the CK timber harvest project as TLMP requires. The ROD for the project must be withdrawn and redesigned consistent with the forest plan to satisfy the NFMA.

As discussed below, the ROD is otherwise inconsistent with the Tongass forest plan, because the failure to supply timber not only violates the TTRA-specific plan components, it violates related timber production prescriptions set forth in the plan.

**II. The Central Kupreanof Timber Harvest Project Record of Decision is Inconsistent With the Tongass Land Management Plan in Violation of the National Forest Management Act Due to its Failure to Put Timber Objectives First on Lands Designated for Timber Production.**

The overwhelming majority—over 96%—of lands in the Tongass are not available for timber production. TLMP at A-1. As the USFS explained in the CK Project FEIS, the land use designations applied to various lands in the forest under the TLMP are designed to accommodate the multiple-use mandate for forest lands, as the same land

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<sup>51</sup> 16 U.S.C. § 1604(i). *See, e.g., The Wilderness Society v. USFS*, 118 F.Supp.2d 1082, 1089-1090 (D. Montana, 2000).

cannot necessarily support all uses.<sup>52</sup> Among those uses are productive uses that support the timber industry and assure the nation a continuous supply of timber.<sup>53</sup> The majority of the land considered for the Central Kupreanof project is drawn from that small fraction of the forest that is in the land use designation for Timber Production.<sup>54</sup> The current TLMP management prescriptions for Timber Production LUDs require the USFS to“(l)ocate and design timber harvest activities primarily to meet timber objectives.”<sup>55</sup> The Timber Production LUD prescriptions provide further that “other resources objectives, particularly wildlife and vegetative diversity,” may be integrated, but only “if they do not have a significant adverse impact on the timber resource goals.”<sup>56</sup>

The ROD’s drastic reduction in timber volume from the original preferred alternative is in direct violation of the TLMP management prescriptions as to the portions of this project located in Timber Production LUDs.<sup>57</sup> Rather than construct a project that allows the USFS maximum flexibility to meet timber objectives as the primary goal, the USFS put other objectives first and reduced the sale volume by close to two-thirds. By any fair assessment, that constitutes a “significant adverse impact” on achieving the timber production goals in the TLMP.<sup>58</sup>

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<sup>52</sup> Central Kupreanof FEIS, Ch. 1 at 8.

<sup>53</sup> See, e.g., TLMP 2-7, 3-116 to 3-121; 16 U.S.C. § 475.

<sup>54</sup> October 2006 Central Kupreanof Scoping Letter, Exhibit 1.

<sup>55</sup> TLMP at 3-121.

<sup>56</sup> *Id.*

<sup>57</sup> Management prescriptions take precedence over standards and guidelines and are mandatory unless inconsistent with law. TLMP at 1-3.

<sup>58</sup> See TLMP 2-7 (providing for the continuation of the use of timber by the timber industry and Alaska residents and incorporating the TTRA’s statutory language).

Without amending (or re-writing) the TLMP and its management prescriptions, the USFS cannot simply decide to prefer policies such as those embodied in its Transition Framework, which would result in the USFS avoiding roadless areas and old-growth forests. In the process of adopting the TLMP, the USFS considered what the impact would be of prohibiting harvest in inventoried roadless areas.<sup>59</sup> It concluded that such a prohibition would limit the maximum sustainable harvest to less than 50 MMBF/year.<sup>60</sup> The final 2008 TLMP rejected that option as too restrictive, finding the USFS would need greater flexibility in order to meet its obligations under the TTRA to seek to supply timber to meet demand.<sup>61</sup> That obligation has not gone away.<sup>62</sup>

In response to concerns that the harvest levels permitted under the TLMP would allow for road construction in areas perceived to be environmentally sensitive, the USFS adopted as part of the plan, the Timber Sale Program Adaptive Management Strategy.<sup>63</sup> Under that strategy, any potential harvest would be limited to lower quality roadless areas until actual timber harvest levels indicated a need to engage in

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<sup>59</sup> TLMP FEIS at 2.15- 2.18.

<sup>60</sup> TLMP ROD at 37, 47. If old growth areas were avoided as well, the sustainable harvest would presumably plummet even further. The USFS has confirmed that there is insufficient young growth timber to sustain the timber industry. *See* Economic Analysis of Southeast Alaska at 23-42, Exhibit 3.

<sup>61</sup> TLMP ROD at 35, 37, 47. Similarly, the USFS in its rulemaking exempting the Tongass from the Roadless Rule specifically considered the congressional direction provided in ANILCA and the TTRA, and concluded that providing an exemption best implemented that direction. *See* 68 Fed. Reg. 75136, 75142 (Dec. 30, 2003).

<sup>62</sup> As noted above, *supra* n. 50, the USFS' obligation to meet demand is not altered by the Alaska District Court's recent decision in *Organized Village of Kake*.

<sup>63</sup> TLMP ROD at 3, 34-35.

development in higher quality areas.<sup>64</sup> The Central Kupreanof Project area was comprised only of roaded areas and lower valued inventoried roadless areas identified as suitable for “Phase 1” under the Adaptive Management Strategy.<sup>65</sup>

For the ROD to implement the Transition Framework and prioritize its goals and internal policy shifts over the management prescriptions for Timber Production LUDs, and to ignore the careful balance struck by the TLMP’s Adaptive Management Strategy, is inconsistent with the TLMP, and violates the NFMA.<sup>66</sup>

**III. The Forest Supervisor Impermissibly Relied on the Transition Framework Because it has Never Been Properly Promulgated or Adopted; in Substance, it Violates the Tongass Timber Reform Act, and it is Inconsistent With the Tongass Land Management Plan and So Violates the National Forest Management Act.**

**A. The Transition Framework has not been properly promulgated in a public process.**

In the CK timber harvest project ROD, the Forest Supervisor announced that he was implementing and had incorporated the “USDA goals and objectives associated with the Transition Framework.” ROD at 1, 5. The statement is made as though the Transition Framework were an established policy, program, or rule, or had otherwise been adopted as an amendment to the TLMP.

Instead, the Transition Framework, at least as far as the public or State knows, is a work in progress, sketched out in a three-page letter to the Tongass Futures Roundtable and an associated press release. Exhibit 2. Having apparently decided to

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<sup>64</sup> TLMP ROD at 35.

<sup>65</sup> Central Kupreanof FEIS Ch. 1 at 11-12.

<sup>66</sup> 16 U.S.C. § 1604(i); *The Wilderness Society*, 118 F.Supp.2d at 1089-1090.

“quickly transition away from timber harvesting in roadless areas and old-growth forests[,]” *id.*, the USFS also issued an economic report that explored alternatives for such transition ranging from an immediate end to all old-growth harvest to allowing limited old-growth harvest in roaded areas of up to 50 MMBF/year until such time as there was sufficient second growth timber to permit harvest at the 50 MMBF/year level. Exhibit 3.

The USFS noted the report’s limited purposes. It stated that it “does not include a proposed action to change the Tongass Forest Plan or authorize or restrict project-level activities. Nor does it include an analysis of the demand for forest products from the Tongass National Forest.”<sup>67</sup> The USFS also stated that should any of the transition scenarios discussed in the report “be selected as policy, all applicable procedural requirements, such as those in the National Environmental Policy Act, the National Forest Management Act, and the Tongass Timber Reform Act would have to be met.”<sup>68</sup>

None of that occurred before the Forest Supervisor announced that he was implementing the Transition Framework’s goals and objectives (whatever those may be) at the project level. Even though the State is a cooperating agency with the USFS in the

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<sup>67</sup> Economic Analysis of Southeast Alaska at 6, Exhibit 3.

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

implementation of the Tongass Land Management Plan,<sup>69</sup> the State is not aware of any written analysis or discussion from the USDA or USFS regarding the basis for implementing this Transition Framework in the CK ROD.

This is impermissible, particularly in light of the USFS' previous presentation of the Transition Framework as a work in progress and the obvious and major impacts any such transition will have on the forest, the timber industry, and the people of Southeast Alaska. Such a profound proposal for change to the environment and forest management is exactly the sort of action that is meant to be addressed under NEPA and the NFMA mandated forest-planning process prior to its implementation.<sup>70</sup> Any such assessment must also include a formal analysis of the timber supply to determine if implementation of the Transition Framework would violate the USFS's legal obligation to seek to meet timber demand under the Tongass Timber Reform Act.<sup>71</sup>

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<sup>69</sup> The State has a long history of working cooperatively with Forest Supervisor Forrest Cole and the USFS. With regard to the Tongass, the State and USFS's working relationship and shared vision is captured in the Shared Vision Statement signed by the Governor of Alaska and the Chief of the USFS published in the January 2008 Record of Decision for the Tongass Land Management Plan ("TLMP"). Exhibit 10. The State is also a cooperating agency for the implementation of the TLMP as defined in 40 C.F.R. § 1508. The State and USFS roles and responsibilities for TLMP implementation are more fully set forth in a series of memoranda of understanding ("MOU"): Agreement No. FS 06MU-11100500-068 addresses the development of economically and technically viable timber sales in the Tongass; FS Agreement No. 08MU-11100500-109 addresses managing the land and resources of the Tongass; FS Agreement No. 08MU-11100500-110 addresses environmental analyses work and managing Tongass resources, Exhibits 11-13.

<sup>70</sup> See 42 U.S.C. 4332(C); 16 U.S.C. § 1604(f)(4).

<sup>71</sup> As discussed in section I, even under the best case scenario the USFS has offered for timber harvest under the Transition Framework, the timber supply would fall far short of meeting the USFS' own estimates of demand for Tongass timber.

The Forest Supervisor's precipitous implementation of the Transition Framework in the CK ROD violates NEPA and the NFMA. In addition, the USFS has not completed any process or provided any analysis of the implementation of the Transition Framework under the Administrative Procedure Act<sup>72</sup>, the Endangered Species Act<sup>73</sup> or the Regulatory Flexibility Act.<sup>74</sup> The Transition Framework remains such a vague conceptual framework that it is impossible for the State to determine which provisions of the above listed statutes or other laws may have also been violated by the implementation of the Transition Framework. The State therefore claims that the implementation of the Transition Framework violates all of the above statutes and reserves the right to clarify this claim if and when the actual legal character of the Transition Framework becomes known.

**B. Implementation of the Transition Framework violates the USFS obligations under the Tongass Timber Reform Act, and violates the National Forest Management Act due to its inconsistency with the Tongass Land Management Plan.**

Apart from the serious procedural concerns regarding its legitimacy as a governing standard, implementation of the Transition Framework violates the USFS' obligations under the TTRA. As has already been discussed at length above, the unduly restrictive harvest opportunities that would be available under the Transition Framework (as currently framed) essentially guarantee that the USFS will fail to meet the demand for timber from the Tongass. *See supra* section I. B. The USFS may not choose to adopt a

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<sup>72</sup> 5 U.S.C. § 500 *et seq.*

<sup>73</sup> 16 U.S.C. § 1531 *et seq.*

<sup>74</sup> 5 U.S.C. § 601 *et seq.*

self-imposed policy that prevents it from meeting its statutory obligations. As noted above, the USFS has flexibility in determining how to meet its obligations to supply timber under the TTRA, *see* discussion *supra* n. 50, but it may not ignore those obligations or erect insurmountable hurdles to their achievement.

Accordingly, even if the USFS were to amend or re-write the TLMP to accommodate the Transition Framework's apparent objective of transitioning quickly away from harvesting in old-growth or roadless areas<sup>75</sup> — which is not consistent with the current TLMP, *see* sections I.C, II — any such amendment or re-write would need to be consistent with the USFS' obligations under the TTRA. Unless the Transition Framework were reconsidered or re-framed, such consistency is not possible. It may not be implemented as it is.

#### **IV. Remedy Sought**

For the reasons stated, the USFS must withdraw the CK Timber Harvest Project ROD and redesign and reissue this sale in compliance with all applicable laws.

Respectfully submitted this 25<sup>th</sup> day of April 2011.

JOHN J. BURNS  
ATTORNEY GENERAL

By:

Thomas E. Lenhart  
Assistant Attorney General  
Alaska Bar No. 0703006  
Attorney General, State of Alaska  
Dimond Courthouse  
PO Box 110300  
Juneau, AK 99811  
Phone: (907) 465-3600

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Exhibit 2.