



THE STATE
of **ALASKA**
GOVERNOR BILL WALKER

Department of Natural Resources

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August 30, 2016

Beth G. Pendleton, Regional Forester/Objection Reviewing Officer
U.S. Forest Service – Alaska Region
Attention: Tongass Objections
P.O. Box 21628
Juneau, AK 99802-1628

RE: Objection to the 2016 Tongass National Forest Land and Resource Management Plan Amendment.
Submitted electronically at: objections-alaska-regional-office@fs.fed.us.

Responsible Official: Earl Stewart, Tongass National Forest Supervisor

Objector:

State of Alaska
Governor Bill Walker
State Capitol
P.O. Box 110001
Juneau, AK 99811-0001

INTRODUCTION

The State of Alaska (State) has been an active participant in the management of the Tongass National Forest (Tongass) for many decades. Working under a variety of memoranda of understanding and cooperative agency agreements, as well as serving together on planning teams and in many other forums, the State and the U.S. Forest Service (USFS) have frequently participated in Tongass management as *de facto* partners.

Although the State declined full cooperating agency status for this national forest plan amendment process, it nevertheless provided formal written comments multiple times and participated in the Tongass Advisory Committee (TAC). The State even developed a separate State Alternative and proposed that the USFS analyze and consider it in the National Environmental Policy Act (NEPA) process along with the other USFS alternatives. As is the normal practice, many state employees engaged with USFS representatives on a broad range of topics including wildlife, timber, and transportation.

Unfortunately, the State Alternative was rejected without analysis. On July 18, 2016, Tongass National Forest Supervisor Earl Stewart published a Draft Record of Decision (ROD), Final Environmental Impact Statement and amended Land and Resource Management Plan, adopting an alternative that fully implements the Roadless Area Conservation Rule (Roadless Rule) as well as U.S. Secretary of Agriculture Tom Vilsack's direction on transitioning from old-growth to young growth timber harvest. This alternative ignores the State's proposed changes which were necessary to avoid devastating impacts to the residents of Southeast Alaska. Therefore, the State appreciates the opportunity to submit this objection and respectfully seeks your thoughtful consideration of the issues that we raise.

SUMMARY OF THE ISSUES ON THE OBJECTION

I. The USFS failed to analyze and properly consider the proposed State Alternative in violation of NEPA.

During the scoping process, the State timely notified the USFS of its intent to provide a new alternative for consideration and analysis. This State Alternative would allow for transition to young-growth harvest at a more realistic rate that would allow the survival of the existing timber industry. However, the USFS declined to analyze or properly consider this reasonable and viable alternative as required under NEPA.

II. The USFS deletion of the Transportation and Utility System Land Use Designation (TUS LUD) in this plan amendment process is a violation of the federal planning regulation applicable to this amendment, a violation of the National Forest Management Act (NFMA), and a violation of NEPA.

Pursuant to 36 CFR 219.7(c) and 219.13(b), the designation or elimination of a management area or a geographic area from an existing forest plan must be done through a plan revision, not an amendment. Failure to comply with the planning regulations results in an amendment in violation of NFMA.

Furthermore, neither the scoping documents nor the DEIS purpose and need statement disclose an intent to consider elimination of the TUS LUD. Failure to provide adequate and timely public notice of this significant federal action is a violation of NEPA.

III. The amended forest plan violates the Tongass Timber Reform Act (TTRA)¹ and the Alaska National Interest Lands Conservation Act (ANILCA).

Due primarily to the decision to implement the Roadless Rule² without modification to national forests in Alaska and due to the decision to rapidly implement the transition from the sale of old-growth to young-growth timber, the USFS has decided that it will not attempt to meet the demand for timber from

¹ The Tongass Timber Reform Act of 1990. 16 U.S.C. § 539d(a).

² 66 Fed. Reg. 3,244 (Jan. 12, 2001) The Roadless Rule was implemented only days before President Clinton left office.

the Tongass in violation of the TTRA. The TTRA mandates that the USFS must “seek to meet” timber demand.

Implementing the Roadless Rule by inclusion in the forest plan also constitutes a withdrawal of federal land in violation of ANILCA.³ Issues regarding the validity of the Roadless Rule, including violations of TTRA and ANILCA, remain in active litigation in federal District Court for the District of Columbia where the case is currently ripe for a decision.⁴

IV. In violation of NEPA, the USFS has failed to appropriately consider and respond to a broad range of substantive comments provided to the USFS by the State.

During the plan amendment process, the State has provided substantive comments on the scoping process⁵, the Draft Environmental Impact Statement (DEIS),⁶ and the Final Environmental Impact Statement (FEIS),⁷ all of which are hereby incorporated into this Objection to the Draft ROD and which are attached as Exhibits A, B and C. In addition, informal comments were provided to the USFS frequently during the process as the USFS and the State have a long history of cooperating on Tongass management. But in this plan amendment process, many of the State’s comments were either rejected or not considered and did not receive an adequate response from the USFS.

Failure to appropriately consider and respond to comments from a commenter, especially when the commenter is a state with decades of cooperation with the USFS on the management of the national forest, is a violation of NEPA. The state comments on the FEIS emphasized many of the state comments on the scoping process and the DEIS upon which the USFS failed to either take action or provide an adequate response (Exhibit C).

V. The State meets all requirements for filing an objection.

The State has filed substantive formal comments on the plan amendment scoping, DEIS and the FEIS (Exhibits A, B, and C). In addition, the State submitted the proposed State Alternative, requesting that the USFS analyze and consider it in the DEIS process (Exhibit D). State Objection issues I, II, and III are all addressed in these comments and the requirement for a link between comments and objection therefore exists as required by 36 CFR 219.54.

³ 16 U.S.C. § 3213(a) prohibits federal executive action land withdraws over 5,000 acres in Alaska without approval of Congress.

⁴ Case No. 1:11-cv-01122 (RJL)

⁵ Scoping Comments, Letter of June 26, 2014 from Kyle Moselle, State Large Project Coordinator, to Forrest Cole, Tongass Forest Supervisor. Exhibit A.

⁶ DEIS Comments, Letter of February 22, 2016 from Bill Walker, Governor of Alaska, to Earl Stewart, Tongass Forest Supervisor. Exhibit B.

⁷ FEIS Comments, Letter of August 1, 2016 from Elizabeth Bluemink, State Project Assistant to the Commissioner, to Earl Stewart, Tongass Forest Supervisor. Exhibit C

The State's Issue IV is the failure of the USFS to appropriately consider and respond to many of the comments submitted on scoping and on the DEIS (Exhibits A and B). Although the USFS does not provide a formal comment period on the FEIS, the State nevertheless provided timely formal written comments on the FEIS regarding the issues set forth in Issue IV (Exhibit C). Therefore, Issue IV also links to substantive comments. Alternatively, the failure to address scoping and DEIS comments in the FEIS is an issue that cannot be raised prior to the objection period. Either way, the matters raised as Issue IV also met the criteria for objection under 36.CFR 219.54.

DISCUSSION OF ISSUES

I. The USFS failed to analyze and properly consider the proposed State Alternative in violation of NEPA.

In comments on scoping, the State notified the USFS of its intent to provide a new alternative for consideration and analysis. This State Alternative would, among other things, allow for transition to young-growth harvest, but at a more realistic rate that would allow the survival of the timber industry. The State Alternative submitted to the USFS on November 12, 2014, is attached as Exhibit D and is incorporated herein. The USFS declined to analyze or properly consider this viable alternative, stating instead that it failed to meet the purpose and need of transitioning to young-growth in 15 years.⁸

However, none of the alternatives considered by the USFS provide transition to young-growth in 10-15 years while also providing sufficient timber to maintain the existing timber industry. Therefore, all of the rapid transition alternatives considered by the USFS violate the TTRA congressional directive to seek to meet Tongass timber demand. Thus, none of the alternatives considered – including the selected alternative – meet the purpose and need of transition in 15 years and comply with federal law. These rapid transition alternatives also fail to meet the purpose and need of the plan amendment as established by Secretary Vilsack, which conditioned the transition upon maintaining a viable timber industry.

In contrast, the State Alternative allows for transition to young growth over a longer and more reasonable period while maintaining a viable timber industry consistent with federal law and the Secretary's direction to the USFS. Because it is a viable alternative for transition that unlike the selected alternative is consistent with federal law, the USFS is required under NEPA to analyze and fully consider the State Alternative.

II. The USFS deletion of the TUS LUD in this forest plan amendment process is a violation of the federal planning regulation applicable to this amendment, a violation of NFMA, and a violation of NEPA.

Eliminating the TUS LUD violates USFS planning regulations implementing the NFMA and

⁸ Draft ROD at Page 10.

violates NEPA. The State's comments on the DEIS (Exhibit B at 16-17) provided a methodical and detailed explanation of the flexibility in USFS regulations to allow by amendment the modification or removal of plan components from a specific management or geographic area (36 CFR § 219.13); however, the same regulations are quite inflexible in that they require that the designation or elimination of a specific management or geographic area must be done through a plan revision (36 CFR § 219.7(c) and (d)). The USFS response contains a single sentence conclusion to the state comment on this point: "An amendment may remove all the plan components within a LUD *and may remove the LUD itself*" (FEIS, p. 1-108 emphasis added). This conclusory statement contains a significant leap in logic and is directly contrary to the USFS 2012 planning rule and regulations.

The locations of the transportation and utility corridors in the TUS LUD are based almost exclusively on the locations of the transportation and utility easements established by Congress in SAFETEA-LU Section 4407. Under the USFS 2012 planning rule, all areas designated by Congress must appear in the plan (36 CFR 219.7(c)(2)(vii)), and the TUS LUD fulfills this requirement. Additionally, each of those congressionally-designated areas must have plan components for USFS management within the geographic areas (36 CFR § 219.10(b)(1)(vi)). Removal of all plan components would violate this regulatory requirement. Furthermore, the responsible official is only authorized to modify the existing area by plan amendment, which would necessarily include modification of the TUS LUD by completely removing the LUD itself, if the responsible official was given the delegated authority for the modification (36 CFR 219.7(c)(2)(vii)). Congress did not provide such delegated authority to modify or eliminate the Section 4407 transportation and utility easements; therefore, the USFS does not have the authority to eliminate all TUS LUD components or the authority to eliminate the LUD itself.

Furthermore, elimination of the TUS LUD requires adequate public notice and compliance with NEPA. The State's comments on the DEIS stated the clear and unarguable fact that the public notice, the notice of intent, and the entire scoping process for this forest plan amendment did not indicate a need, desire, or intent to remove the TUS LUD. The USFS responses to comments explain that the elimination of the TUS LUD was first considered in the Five-Year Review for the 2008 Forest Plan (FEIS, pp. 1-107-1-108). This statement and excuse does not address the fact that the USFS chose to take the major and significant action of eliminating the TUS LUD without notifying the public or conducting scoping as required by NEPA.

The concept of removing the TUS LUD appears nowhere in any of the Five-Year Review news releases, community meeting agendas, community meeting summaries or public comments. The idea of removing the TUS LUD appears to have been immaculately conceived within the agency rather than as the response to public comments in the various venues leading up to this proposed forest plan amendment as stated by the Agency.

The State also presented other transportation and utility concerns in comments on the DEIS and FEIS to which the USFS gave inadequate responses. These issues are discussed below in Section IV.

III. The Amended Forest Plan violates the TTRA and ANILCA.

In 2001, the U.S. Department of Agriculture (USDA) promulgated the Roadless Rule and thereby prohibited virtually all road construction and timber harvest in Inventoried Roadless Areas within all national forests. As a separate decision within that rulemaking, USDA applied these prohibitions to the Tongass despite an EIS that clearly indicated that timber demand in the Tongass could not be met with the Roadless Rule in effect. The State's opening and reply briefs in the pending legal challenge to the Roadless Rule in the Federal District Court for the District of Columbia present the full argument as to why the Roadless Rule is itself invalid as it violates TTRA and ANILCA. The briefs are attached as Exhibits E and F and are incorporated herein.

The USFS now compounds this violation of federal law by selecting an alternative that not only fully implements the Roadless Rule in the management plan governing the Tongass, but also implements a transition plan to young-growth timber with a rapid phase out of the old-growth timber on which the timber industry is dependent. The result is a forest plan that violates TTRA and ANILCA – under this plan, the USFS leaves itself with no possibility of meeting timber demand.⁹

The State has acknowledged in other forums that the “seek to meet timber demand” provision is not an inflexible requirement to actually meet all demand every year. The directive is subject to meeting certain other management requirements, such as some environmental concerns. In addition, there has been a history of the USFS offering timber sales in good faith only to have those sales enjoined in federal court by anti-timber interests, which is of course in part beyond the control of the USFS.

However, the congressional requirement for the USFS to “seek to meet timber demand” obviously requires at a minimum a good faith attempt to actually meet demand. As the governing plan for all forest management on the Tongass, the forest plan is clearly a document where this congressional mandate must be manifested. If the USFS adopts a forest plan that totally restricts its ability to offer timber at levels that could meet timber demand, it is impossible for the USFS to comply with the clear directive to “seek to meet timber demand.” This plan amendment is a decision by the USFS that it will no longer even consider meeting timber demand in its future management actions, which is a clear violation of TTRA.

In comments on the DEIS and on the FEIS (Exhibits B and C), the State has already provided the USFS with its analysis of why the newly commissioned timber demand study that reduced the most recent estimate of demand from 142 MMBF to 46 MMBF of timber is fatally flawed. Similarly, the State has repeatedly commented on why a rapid transition from old-growth to young-growth timber will not meet

⁹ The Forest Service attempt to establish a new artificially low current demand for timber with commissioning of the Daniels Report fails in that as discussed below this report is highly suspect. In addition, even if this report is accurate, this forest plan amendment leaves the Forest Service no opportunity to meet future increases in market demand for timber.

the timber demand needed to preserve a viable timber industry in Southeast Alaska as required by TTRA (Exhibits A, B and C).

In addition to our previous concerns on the suitability of the demand study, the current methodology is focused on the demand for old-growth logs and makes no differentiation between the demand for old growth and the demand for young growth. The log characteristics between these two types of supply are so different that the Forest Service should not comingle the demand number and instead present a demand number for each. As the transition progresses, this relationship between the two types of log supply will change and so will the demand for each type of log. If insufficient volume of either occurs during the transition, it will cause great harm to the current and future forest products industry.

Remarkably, the USFS admits in its decision that there is no demonstrated market for the young-growth timber on which the new plan will force the timber industry to survive. On page 10 of the Draft ROD, the Forest Supervisor states, "The market for large volumes of young-growth logs has not yet been demonstrated and this is especially true for small logs from 55-year old stands." Given that the TTRA mandates that the USFS seek to meet timber demand, and that the purpose and need for this plan amendment includes maintaining a viable timber industry, the USFS nevertheless is adopting a plan that will in a few years force the industry to attempt survival solely on a product for which it admits there is no demonstrated market.

The plan includes no contingency for the industry in the event that such a speculative market does not appear. Furthermore, the industry cannot possibly be expected to risk financing a massive investment in new equipment and in market development, especially when lenders recognize that even the USFS admits there is a lack of a demonstrated market. Therefore, the selected plan alternative does not meet the purpose and need of transition while maintaining a viable industry and violates the seek to meet demand provision of TTRA.

IV. In violation of NEPA, the USFS has failed to appropriately consider and respond to a broad range of substantive comments provided to the USFS by the State.

In a letter dated February 22, 2016, the State timely provided substantial comments to the USFS on the DEIS setting forth a wide range of issues and concerns (Exhibit B). In a letter dated August 1, 2016, the State commented on the FEIS, providing some examples where the USFS failed to adequately address or respond to the State's substantive comments in the comment response section of the FEIS (Exhibit C).

In many cases, the substance of the state comments on the DEIS identified a deficiency that is a violation of law, generally under NEPA or NFMA. However, the failure to adequately respond to state comments constitutes a separate violation of NEPA.

The attached comments dated August 1, 2016, explain that some state comments were accepted and resulted in revisions in the FEIS. Given the long history of cooperation between the State and the USFS on the Tongass forest plan, the State appreciates the USFS's willingness to address those concerns.

However, Exhibit C also explains many areas of substantial disagreement where the State's comments and concerns have not been addressed. Some of those areas are separately addressed above in Sections I, II and III of this Objection. The remaining concerns that were not addressed by USFS are fully incorporated herein from Exhibit C and are only summarized and highlighted below.

A. Transportation and Utilities

1.) The Proposed Plan and FEIS grossly underestimates development in the TUS LUD.

The State's comments provided the actual mileage totals for the hundreds of miles of public highway projects through the Tongass, which are either fully funded for construction or were recently completed. Rather than acknowledge and fully consider the real and current impacts of these development projects, the USFS responded by quoting a draft Alaska Department of Transportation & Public Facilities (DOT&PF) planning document (that has been in a draft form for over a decade) that says DOT&PF "must plan for the possibility of reduced financial resources" (FEIS, p. I-112). The USFS then goes on to forecast that only 35 miles of projects are achievable and realistic given "time constraints as well as anticipated litigation" (FEIS, p. I-112). It is not clear from the USFS responses whether the delays and litigation are due to anticipated actions by the USFS or if the USFS anticipates third parties to cause these delays.

2.) The Proposed Plan could benefit by adding new components in addition to the TUS LUD.

The State provided detailed comments explaining how the USFS's proposed Transportation System Corridor Direction component, and the Renewable Energy Direction component, would be quite beneficial for the development of new power generation facilities and utility feeder lines located outside the TUS LUD. The creation of these new components to address the current void in transportation and utility management directives outside the TUS LUD for this small segment of developments is a proper use of the amendment process. This modification to address a new condition can and should be accomplished without modifying and complicating the process for the much more common transportation and utility infrastructure development to link the communities of Southeast Alaska. The USFS provided an explanation of how the new components are applicable forest-wide (FEIS, p. I-113), which is obvious from reading the DEIS. The USFS response does not explain how the solution to the small-scale problem of power generation and feeder line development outside the TUS LUD cannot be implemented in parallel with the fixed, predictable and clearly manageable transportation and utility corridors in the TUS LUD.

B. Forestry

The State commented that the projected timber sale quantity (PTSQ) in the DEIS, 46 MMBF, does not meet the requirements of TTRA Sec. 101 to seek to meet the annual timber demand. The previous timber demand published by USFS in 2014 was 142 MMBF (three times greater). The explanation for this drop provided in the DEIS Comments and Responses (Appendix I of the FEIS) that the “PNW Research Station’s [new] timber demand projections are based on solid economic theory, peer-reviewed methodology, and rigorous and objective analysis” is unconvincing.

On page 29 of the Draft ROD, the PTSQ of 46 MMBF is described as neither a goal nor a target. Neither is it a ceiling – “it is an estimate” and serves as the average annual figure over the next ten years. Since providing a larger timber supply is less risky than undersupplying market demand, setting a range for the PTSQ would more flexibly meet TTRA’s requirement to ‘seek to meet’ timber demand than using the proposed fixed number.

The proposed plan also does not meet the statutory requirements of TTRA because none of the alternatives provide sufficient quantities of old growth to meet the demands of the existing timber industry, which is recognized as old growth dependent. Providing sufficient old growth timber in compliance with TTRA will require modifying the application of the Roadless Rule as proposed in two alternatives, modifying the Transition Plan, or both. The selected alternative in the FEIS rejects both approaches.

Table 3.22-5, Timber Harvest in Southeast Alaska by Ownership, 2002-2014 does not provide a realistic average harvest figure due to the significant reductions in harvests on State lands taking place after 2007-2008. We pointed out that harvests on state Mental Health Trust and University timber lands are not managed on a sustained yield basis, further lowering future harvest levels when considered along with other State of Alaska lands. This overestimate of timber production from State lands results in lower estimates of the amount of timber that the Tongass is required to provide in order to meet demand.

The USFS failed to analyze the proposed State Alternative submitted by the State, concluding that it does not meet the purpose and need of the plan amendment of transition to young growth in 15 years. However, as noted above, a transition within 15 years fails to seek to meet timber demand. Therefore, the selected alternative violates TTRA. The State Alternative, while proposing a longer transition, is a viable alternative that is compliant with federal law and therefore must be analyzed under NEPA.

C. Wildlife, Fish and Subsistence

The Alaska Department of Fish and Game (ADF&G) agrees Alternative 5 is the alternative that will most benefit fish and wildlife resources and habitats. That said, ADF&G’s wildlife and subsistence comments were not addressed in the FEIS or final amended plan. While the USFS states in Appendix I

of the FEIS the comments were outside the scope of the amendment, comments that would have strengthened document integrity – like updated citations and terms – were ignored.

For example, on comments on the DEIS, the State identified where the USFS could improve its application of science as well as its explanation of the scientific basis regarding decisions on wolves, the conservation strategy, the effects of young-growth management, the FRESH deer model, and the definition of “appropriate research” for the future. However, the USFS generally chose not to respond to the State’s concern about using the best science available.

While ADF&G may be able to address some issues as it continues to work with the USFS on the Tongass National Forest Monitoring Program, ADF&G staff see no venue to discuss the omissions in the FEIS and final amended plan. ADF&G’s wildlife staff have sought to bring their applied wildlife research expertise to assist the USFS with difficult wildlife and forest management problems. The lack of a cooperative dialog is a change from the collaborative relationship the USFS and ADF&G have enjoyed.

Most of ADF&G’s fish comments were addressed in the FEIS, though no suggested changes to the Chapter 5 standards and guidelines were adopted in the final plan or addressed in comment responses.

RESOLUTIONS REQUESTED

1. Resolution Requested for Objection Issue I:

The State respectfully requests that the USFS withdraw the FEIS and revise the DEIS to fully analyze and consider the State Alternative submitted to the USFS on November 12, 2014 attached as Exhibit D.

2. Resolution Requested for Objection Issue II:

The State respectfully requests that the USFS withdraw the FEIS and revise the DEIS to retain the TUS LUD. Alternatively, as required by the USFS Planning Rule, the USFS should rescind the entire plan amendment process and commence a Plan Revision Process. Note that additional issues with transportation and utilities are addressed under Objection Issue IV.

3. Resolution Requested for Objection Issue III:

The State respectfully requests that the USFS withdraw the FEIS and revise the DEIS to include the State Alternative, include a revised and realistic estimate of timber demand, and remove restrictions in the Amendment that will prevent the USFS from meeting timber demand as required by the TTRA. To

achieve compliance with the TTRA, it may be necessary to revise the Transition Plan to young-growth timber and to undertake a rulemaking to address the Roadless Rule in Alaska¹⁰.

The State also requests that the USFS revise the restrictions on land rights that constitute a prohibited withdrawal of federal land under ANILCA. An example is the prohibition of road access to leasable minerals such as geothermal power.

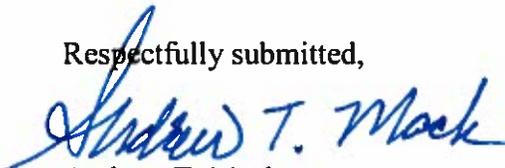
4. Resolution Requested for Objection Issue IV:

The State requests that the USFS withdraw the FEIS and revise the DEIS after full consideration, response and appropriate modifications based on the many previously unaddressed State concerns and comments.

CONCLUSION

On behalf of the State of Alaska and Governor Bill Walker, I respectfully submit this objection to the 2016 Tongass Land and Resource Management Plan Amendment. The State appreciates the very long cooperative relationship between our State and the USFS and looks forward to a resolution of the issues raised in this objection.

Respectfully submitted,



Andrew T. Mack
Commissioner

cc: The Honorable Bill Walker, Governor, State of Alaska
The Honorable Lisa Murkowski, United States Senator
The Honorable Dan Sullivan, United States Senator
The Honorable Don Young, United States Representative
The Honorable Sam Cotten, Commissioner, Alaska Department of Fish and Game
The Honorable Larry Hartig, Commissioner, Alaska Department of Environmental Conservation
The Honorable Marc Luiken, Commissioner, Alaska Department of Transportation & Public Facilities

¹⁰ The State's federal court challenge of the validity of the Roadless Rule is ripe for decision in the District Court for the District of Columbia and invalidation of the Roadless Rule would provide the Forest Service with greater flexibility to comply with the TTRA requirement to seek to meet timber demand.