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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

GREATER SOUTHEAST ALASKA
CONSERVATION COMMUNITY, CASCADIA
WILDLANDS, GREENPEACE, CENTER FOR
BIOLOGICAL DIVERSITY, and ALASKA
WILDLIFE ALLIANCE,

Plaintiffs,

v.

JASON ANDERSON, in his official capacity as
District Ranger of the Petersburg Ranger District;
EARL STEWART¹, in his official capacity as
Tongass National Forest Supervisor; and the
UNITED STATES FOREST SERVICE, an agency
of the United States Department of Agriculture,

Defendants.

Civ. Case No. 3:15-cv-00073-SLG

**FIRST AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF**

**(Violation of National Environmental
Policy Act, National Forest
Management Act, and Administrative
Procedure Act)**

¹ Substituted pursuant to FED. R. CIV. P. 25(d) for the former Forest Supervisor, Forrest Cole.

INTRODUCTION

1. Plaintiffs Greater Southeast Alaska Conservation Community, Cascadia Wildlands, Greenpeace, Center for Biological Diversity, and Alaska Wildlife Alliance bring this Administrative Procedure Act (“APA”) case to challenge the final agency action of Defendants Jason Anderson, Forrest Cole, and the United States Forest Service (collectively, the “Forest Service”) in approving the Mitkof Island Project (the “Project”) on Mitkof Island in the Tongass National Forest.

2. The Mitkof Island Project Decision Notice (“DN”) and Finding of No Significant Impact (“FONSI”) authorizes the logging of 28.5 million board feet (“MMBF”) from 4,117 acres of National Forest System (“NFS”) land. The DN also authorizes 1.3 miles of new road construction, 4.7 miles of temporary road construction and approximately 4.5 miles of road reconditioning.

3. The Mitkof Project is a large timber sale in an area that has already been heavily impacted by 60 years of commercial old-growth logging and road building. The Mitkof Project will further degrade conditions by harvesting more old-growth trees and building more roads in an already fragmented landscape. The additive impacts of the Mitkof Project would have cascading impacts on a host of old-growth dependent species, including the Queen Charlotte goshawk (“goshawk”), the Alexander Archipelago wolf (“wolf”), and the Sitka black-tailed deer (“deer”).

4. The Mitkof Project was approved based on a 100-page Environmental Assessment (“EA”) that was never made available for public comment.

5. In at least the last 20 years, the Forest Service has never approved such a large Tongass timber sale without first preparing a more thorough and searching Environmental Impact Statement (“EIS”). Under NEPA, an EIS, in contrast to an EA, more fully evaluates direct, indirect, and cumulative impacts, and is subject to public notice and comment.

6. The Forest Service prepared and analyzed the Mitkof Project under the 2008 Tongass Land and Resource Management Plan (“TLMP”). The TLMP requires that the Forest Service ensure viable and sustainable populations of the goshawk, the wolf, the deer, and other old-growth dependent species. These species rely upon a healthy old-growth forest ecosystem for

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their survival.

7. Hunters in the Project area rely on deer for subsistence needs, but have been subjected to some of the most stringent hunting restrictions in all of southeast Alaska due to low deer numbers. While other hunting opportunities exist in the surrounding areas, these require traveling greater distances, often by large vessels that can navigate dangerous open-water crossings, and so are not available for lower-income residents of the community.

8. The Mitkof Project EA, DN, and FONSI do not provide a comprehensive evaluation of the Project's impacts on top of degraded baseline conditions; do not quantify the additive impacts to deer, wolves, and subsistence hunters; and do not even mention potentially significant impacts to the goshawk.

9. Opportunities for public comment on the Mitkof Project EA, DN, and FONSI were limited and the Forest Service did not provide sufficient information to foster informed public comment for the development of the EA; did not provide the public an opportunity to comment on a draft EA; and did not respond to the public's concerns in the final DN/FONSI.

10. Plaintiffs seek a preliminary and permanent injunction, declaratory relief, and an order vacating the EA/DN/FONSI, because Defendants have failed to comply with the National Environmental Policy Act ("NEPA"), 16 U.S.C. §§ 4321 *et seq.*, the National Forest Management Act ("NFMA"), 16 U.S.C. §§ 1600 *et seq.*, and the APA, 5 U.S.C. §§ 701 *et seq.*, in issuing the EA, DN, and FONSI for the Mitkof Project.

11. Should Plaintiffs prevail, they will seek attorney's fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

JURISDICTION AND VENUE

12. Jurisdiction is proper in this Court pursuant to 28 U.S.C. §§ 1331 (federal question), 2201 (injunctive relief), 2202 (declaratory relief), and 1346 (United States as a defendant). This cause of action arises under the laws of the United States, including the APA, NEPA, and NFMA.

13. An actual, justiciable controversy exists between Plaintiffs and Defendants. Plaintiffs have exhausted their administrative remedies, and the Forest Service's Objection Response under 36 C.F.R. § 218 constitutes the final administrative decision of the Forest Service

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regarding the Mitkof Project.

14. The relief requested by Plaintiffs is proper under 28 U.S.C. §§ 2201 and 2202, and 5 U.S.C. §§ 705 and 706.

15. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(e). The Mitkof Project that is the subject of this dispute is located on the Tongass National Forest in this judicial district, and the Forest Service employees that approved the project are also located in the district. Plaintiffs all have offices in this judicial district. Venue is proper in Anchorage pursuant to Local Rule 3.3.

PARTIES

16. GREATER SOUTHEAST ALASKA CONSERVATION COMMUNITY (“GSACC”) is a regional conservation non-profit corporation in Southeast Alaska. GSACC seeks to foster protection of southeast Alaska’s fish and wildlife and their habitat. GSACC’s membership uses public lands throughout southeast Alaska and the Project area for commercial and subsistence fishing and hunting, professional scientific work, and a wide range of recreational activities. GSACC’s members have been intimately involved throughout the administrative process for the Mitkof Project, submitting scoping comments and objections on the draft EA/DN/FONSI. The interests of GSACC’s members will be irreparably impaired if the Mitkof Project is allowed to proceed without compliance with federal environmental laws.

17. CASCADIA WILDLANDS is a non-profit corporation, headquartered in Eugene, Oregon, with a field office in Cordova, Alaska, that focuses on the temperate coastal rainforest of the Cascadia bioregion. Cascadia has approximately 5,000 members and supporters throughout the United States. Cascadia has staff and/or board members working continuously in Alaska since 1998. Cascadia educates, agitates, and inspires a movement to protect and restore Cascadia’s wild ecosystems. Cascadia envisions vast old-growth forests, rivers full of salmon, wolves howling in the backcountry, and vibrant communities sustained by the unique landscapes of the Cascadia Bioregion. Cascadia’s members use the Mitkoff Project area for hunting, hiking, fishing, bird watching, and other recreational and professional pursuits. Cascadia’s members and staff have been intimately involved throughout the administrative process for the Mitkof Project, submitting scoping comments and objections on the draft

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EA/DN/FONSI. The interests of Cascadia’s members will be irreparably impaired if the Mitkof Project is allowed to proceed without compliance with federal environmental laws. Cascadia Wildlands brings this action on its own institutional behalf and on behalf of its members.

18. GREENPEACE, INC. (“Greenpeace”) is a non-profit environmental organization incorporated in California and headquartered in Washington, D.C., with offices in Sitka and San Francisco. Greenpeace’s mission is to raise public awareness about environmental problems and promote changes that are essential to a green and peaceful future. There are approximately 349,000 current Greenpeace members in the United States, and Greenpeace brings this action on its own institutional behalf and on behalf of its members. Since the early 1990s, Greenpeace has worked to curtail the negative effects of logging and associated road building on ecosystems and the fish, wildlife, and subsistence users that depend upon them, as well as to protect the last remnants of old-growth forest in the United States and especially in the Tongass National Forest.

19. CENTER FOR BIOLOGICAL DIVERSITY (the “Center”) is a non-profit corporation incorporated in the State of California with a field office in Alaska. The Center works through science and environmental law to advocate for the protection of endangered, threatened, and rare species and their habitats throughout the United States and abroad. The Center has 775,000 members and online activists. Center members reside throughout the United States, including southeast Alaska, as well as in other countries. The Center works to ensure the long-term health and viability of animal and plant communities across the United States and elsewhere, and to protect the habitat these species need to survive. The Center believes that the health and vigor of human societies and the integrity and wildness of the natural environment are closely linked. The Center has been actively involved in protecting Alaska’s wildlife since the early 1990s. With regard to the Tongass National Forest, the Center has filed petitions to protect the Queen Charlotte goshawk and the Alexander Archipelago wolf under the Endangered Species Act. The Center closely follows the fate of these and many other species that depend upon Tongass wildlands.

20. ALASKA WILDLIFE ALLIANCE (“AWA”) is a non-profit organization committed to the conservation and protection of Alaska’s wildlife. Founded in 1978, AWA

promotes the integrity, beauty, and stability of Alaska's ecosystems, supports true subsistence hunting, and recognizes the intrinsic value of wildlife. AWA works to achieve and maintain balanced ecosystems in Alaska managed with use of sound science to preserve wildlife for present and future generations. AWA's Southeast Alaska chapter is specifically dedicated to wildlife preservation in Southeast.

21. Members of the Plaintiff organizations use and enjoy the old-growth forests and lands managed by the Forest Service on the Tongass National Forest on Mitkof Island for subsistence and recreational hunting, hiking, camping, photographing scenery and wildlife, and engaging in other vocational, scientific, and recreational activities. Plaintiffs' members derive recreational, inspirational, spiritual, scientific, educational, and aesthetic benefits from their activities in old-growth forests on Mitkof Island. Plaintiffs' members use and enjoy, and intend to continue to do so on an ongoing basis in the future, areas of the Tongass National Forest, including places throughout or adjacent to the Mitkof Project area.

22. The subsistence, aesthetic, recreational, scientific, educational, and spiritual interests of Plaintiffs' organizations, staff, and members will be adversely affected and irreparably injured if Defendants implement the Mitkof Project and authorize logging of irreplaceable old-growth forests. These are actual, concrete interests caused by the Defendants' failure to comply with mandatory duties under NEPA, NFMA and the APA. The injuries would be redressed by the relief sought.

23. Defendant JASON ANDERSON is the District Ranger of the Petersburg Ranger District. Mr. Anderson signed the DN authorizing the Mitkof Project. As District Ranger, Mr. Anderson has the responsibility to ensure that the Petersburg Ranger District—where the Mitkof Island Project is located—is managed in accordance with applicable laws and regulations.

24. Defendant EARL STEWART is the Forest Supervisor of the Tongass National Forest. Mr. Stewart's predecessor, Forrest Cole, signed the Objection Response constituting the final administrative determination of the Department of Agriculture. As Forest Supervisor, Mr. Stewart has the responsibility to ensure that the Tongass National Forest is managed in accordance with applicable laws and regulations.

25. Defendant the UNITED STATES FOREST SERVICE is an agency within the

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United States Department of Agriculture entrusted with the management of our national forests.

FACTS

The Tongass National Forest

26. The Tongass National Forest in southeast Alaska is comprised of the mainland and most islands within the Alexander Archipelago. Created in 1907 by President Theodore Roosevelt, the Tongass is the nation's largest national forest, and along with other land ownerships in the region is the largest intact temperate rainforest in the world. The Tongass contains almost seventeen million acres (much of which is not forested) and occupies about seven percent of Alaska's area.

27. Since 1954 the Forest Service has allowed industrial-scale logging of old-growth timber stands, resulting in the harvest of about 455,000 acres (nearly 700 square miles). Nearly that same acreage of old growth has been harvested on other land ownerships in the region. This has resulted in a substantial loss of high-quality deer habitat because of the general targeting of high-quality forest stands which have the most valuable timber available (i.e., the practice of “high-grading”) are often the same stands that provide key deer winter habitat.

28. Harvest of old growth renders forage generally inaccessible to deer much of the time in winter, due to the accumulation of deep snow. Moreover, as clearcuts grow back, the conifer second growth becomes dense, shading out understory forage plants leaving very poor habitat for deer. Timber harvest and dense second-growth have resulted in a significant decline in deer habitat throughout the Tongass.

29. Harvest of old growth also negatively impacts habitat for the goshawk, a species that selects almost exclusively for high to moderately high volume productive old-growth stands.

30. Traditionally, abundant wildlife populations have provided essential subsistence hunting and fishing opportunities for the many local and indigenous communities on the Tongass. Subsistence is an important, non-cash element of the regional community, economy, and culture at all times, but especially in times of a downturn in the cash-economy, given the remoteness and isolation of the region. The most important terrestrial subsistence species for these communities is the deer.

31. The Tongass’ dramatic scenic beauty and rich biodiversity have also made the

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Tongass a major destination for sport hunting, fishing, outdoor recreation, and scientific research, and this is a driving feature of the economy.

The Tongass Land and Resource Management Plan

32. The 2008 TLMP is the land use plan governing management of public lands on the Tongass National Forest.

33. The 2008 TLMP sets detailed goals for a series of public issues and ecosystem service related opportunities. These goals are to be achieved through specific management objectives.

34. The 2008 TLMP sets goals for wildlife: (1) Maintain the abundance and distribution of habitats, especially old-growth forests, to sustain viable populations in the planning area; and (2) Maintain habitat capability sufficient to produce wildlife populations that support the use of wildlife resources for sport, subsistence, and recreational activities.

35. The 2008 TLMP also sets a goal for biodiversity: Maintain ecosystems capable of supporting the full range of native and desired non-native species and ecological processes. Maintain a mix of habitats at different spatial and temporal scales. The management objectives for this goal include: Provide sufficient habitat to preclude the need for listing species under the Endangered Species Act, or from becoming listed as Sensitive due to National Forest habitat conditions.

36. The 2008 TLMP also contains standards and guidelines for site-specific projects, to protect Sensitive Species and Management Indicator Species.

37. “Sensitive Species” are those species identified by the Regional Forester for which population viability is a concern on National Forest System (“NFS”) lands within the region. Concerns over the population viability of a species are indicated by either: (1) a significant current or predicted downward trend in population numbers or density, or (2) a significant current or predicted downward trend in habitat capability that would reduce a species’ existing distribution. The goal of the Forest Service Sensitive Species Program is to ensure that no listing will be required under the Endangered Species Act and no extirpation will occur on NFS lands.

38. The Queen Charlotte goshawk is designated as a Sensitive Species on the Tongass National Forest. Goshawks rely almost entirely on old-growth forests for nesting and foraging

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habitat.

39. “Management Indicator Species” (“MIS”) are selected and monitored by the agency because they indicate the health of the habitat type that they depend upon, and can therefore serve as a bellwether for other species that rely upon similar habitat types.

40. The Tongass National Forest has designated both the Alexander Archipelago wolf and the Sitka black-tailed deer as MIS because they depend upon low elevation old-growth forest. In fact, the wolf and the deer are inextricably linked because the deer is the primary prey of the wolf. The deer, in turn, rely on old-growth forest habitat for their survival—particularly low-elevation old growth. Deer require old growth on the Tongass because these forest types contain important forage plants and lichens for deer, while the high, broken canopy intercepts snow during the winter, allowing deer to find forage and shelter during periods of heavy snow.

41. The 2008 TLMP incorporates a two-tiered approach to ensuring the viability of old-growth dependent species like the goshawk, deer, and wolf: (1) provide a forest-wide network of reserve areas where logging is generally prohibited; and (2) manage the lands outside of reserves, the “matrix,” pursuant to standards and guidelines that protect old-growth characteristics.

42. Standard and Guideline WILD1.II.B. of the 2008 TLMP requires the Forest Service to:

Provide the abundance and distribution of habitat necessary to maintain viable populations of existing native . . . species well-distributed in the planning area (i.e. the Tongass National Forest). (Consult 36 C.F.R. 219.19 and 36 C.F.R. 219.27).

43. The 2008 TLMP also includes standards and guidelines specific to the relationship between wolves, deer, and humans. The Forest Service determined that these standards and guidelines, which promote deer habitat capability and limit road densities, would have a high likelihood of maintaining viable and well-distributed populations of wolves.

44. Standard and Guideline WILD1.XIV.A.2. of the 2008 TLMP requires the Forest Service to:

Provide, where possible, sufficient deer habitat capability to first maintain sustainable wolf populations, and then to consider meeting estimated human deer harvest demands. This is generally considered to equate to the habitat capability to support 18 deer per square mile (using habitat capability model outputs) in the

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biogeographic provinces where deer are the primary prey of wolves. Use the most recent version of the interagency deer habitat capability model and field validation of local deer habitat conditions to assess deer habitat, unless alternative analysis tools are developed. Local knowledge of habitat conditions, spatial location of habitat, and other factors need to be considered by the biologist rather than solely relying on model outputs.

45. Standard and Guideline WILD1.XIV.A.1.c. provides that where road access and associated human-caused mortality have been determined, through interagency analysis, to be a significant contributing factor to locally unsustainable wolf mortality, then both open and closed total road densities of 0.7 to 1.0 mile per square mile or less may be necessary.

46. Standard and Guideline WILD1.XIV.A. requires the Forest Service to implement a forest-wide program to assist in maintaining long-term, sustainable populations of wolves. To date, the agency has not prepared a Wolf Habitat Management Program pursuant to WILD1.XIV.A.1.

The interagency deer habitat capability model

47. Standard and Guideline WILD1.XIV.A.2. instructs the Forest Service to use the most recent version of the interagency deer habitat capability model (the “deer model”) as part of its efforts to determine impacts to deer, wolves, and hunters. The deer model estimates the relative ability of small areas of the forest (map “polygons”) to provide winter habitat for deer. These polygons are a few acres to a few tens of acres in size, and collectively, they cover the entire land area of the Tongass National Forest.

48. Each polygon is scored on the basis of several habitat features: forest type, snow level zone, elevation zone, and solar aspect. Forest type is classified into seven categories: (1) high-volume, productive old growth; (2) mid-volume, productive old growth; (3) low-volume, productive old growth; (4) unproductive forest; (5) second-growth forest less than 25 years post-logging; (6) second-growth forest >25 years post-logging (i.e., closed canopy); and (7) group selection logging. Snow level zone is low, intermediate, or high. Elevation zone is <800 feet, <1,500 feet, or >1,500 feet. Aspect is south, west, east, or north.

49. “Productive old growth” is defined as a stand of trees capable of producing 20 cubic feet of wood-fiber acre per acre per year or having at least 8,000 board feet per acre.

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50. The deer model assigns each polygon a score, called a Habitat Suitability Index (“HSI”) score, based on the specific combination of forest type, snow level zone, elevation zone, and aspect. HSI scores (based on a look-up table) range from 0 (no habitat value) to 1.0 (100% habitat value). The deer model assigns the highest value (1.0, or 100% habitat value) to south-facing, low-elevation (<800 feet), low snow level, high-volume productive old-growth stands. In these stands, the interspersed canopy intercepts snow while providing thermal cover and more exposed forage during winter snows. In contrast, closed-canopy, second-growth stands, where trees are even-aged and grow densely together, are assigned poor scores. Understory forage production in these stands is essentially non-existent, and therefore, they provide little to no winter habitat for deer.

51. The deer model then aggregates all of the polygon-level HSI scores into an overall (averaged) HSI score for the total land area that is being analyzed, for instance, a project area. The overall HSI score is a unitless number that simply reflects the relative ability of an area to provide winter habitat for deer (again, on a scale of 0 to 1.0).

52. The Forest Service next uses a “deer multiplier” to quantify the overall HSI score in terms of habitat capability (i.e., carrying capacity)—which is expressed in terms of the maximum number of deer per square mile an area could theoretically support. The Forest Service uses 100 deer/mi² as the deer multiplier, which corresponds to an HSI of 1.0. In other words, the areas of the Tongass with a 1.0 HSI for winter habitat equates to a maximum carrying capacity of 100 deer/mi².

53. For the final output, the aggregate HSI score is multiplied by the deer multiplier. The result is an estimate of the average long-term habitat capability of a given area in terms of deer per square mile. The figure represents theoretical habitat capability, not actual deer density. The final equation is thus: aggregate HSI score * deer multiplier (100 deer/mi²) = deer habitat capability in terms of deer/mi².

54. A final value of at least 18 deer/mi² represents the habitat capability generally considered necessary to support actual numbers of deer necessary to meet both the needs of wolves and subsistence hunters. *See* WILD1.XIV.A.2. The 18 deer/mi² figure represents the peer reviewed, best available science on modeling the impacts of timber harvest to the deer-wolf-

human predator-prey community. It is the scientifically supported deer habitat capability threshold below which there is a greatly increased risk of instability in the predator-prey system, inability to meet the demands of deer hunters, and increased human threats to wolves. According to the best available science, once habitat capability drops below 18 deer/mi², further reductions in habitat capability can result in disproportionately large changes in actual deer numbers.

The Mitkof Project

55. The Mitkof Project is proposed for lands within the Petersburg Ranger District on Mitkof Island. The Mitkof Project area encompasses 134,156 acres.

56. Mitkof Island lies about 160 miles south of Juneau, and is situated between the mainland to the east and Kupreanof Island to the west. The community of Petersburg, population 3,200, is located at the on the northern end of the island. The City of Kupreanof sits across the Wrangell Narrows from Petersburg on the southeastern shores of Kupreanof Island.

57. The distinctive ecosystems of Mitkof Island provide habitat for a host of terrestrial and aquatic species. Mitkof Island supports the Queen Charlotte goshawk, Alexander Archipelago wolf, Sitka black-tailed deer, and numerous other wildlife populations including the American marten. The streams and lakes of Mitkof Island provide habitat for both anadromous and resident fish species. Mitkof Island also supports local communities that depend upon wildlife and fish for subsistence.

58. Mitkof Island is located within Biogeographic Province 10, Kupreanof/Mitkof. The Forest Service designates biogeographic provinces based on distinct ecological features. The Tongass National Forest is divided into 21 biogeographic provinces.

59. On February 21, 2013, the Forest Service issued a Public Scoping Letter for the “Mitkof Island Small Sales Project.” This “pre-scoping” letter provided a general proposal of harvesting salvage timber, commercial young growth opportunities, and sawtimber accessible by helicopter. The pre-scoping letter did not identify old-growth logging. The pre-scoping letter requested input and ideas on the general concepts of this “small sales” project, but noted that a “proposed action and alternatives, including a ‘No Action’ alternative, will be developed and presented to the public at a later date.”

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60. On April 1, 2013, Plaintiff organizations timely submitted pre-scoping comments, expressing confusion over the intent and purpose behind a “pre-scoping” phase. Plaintiffs commented on the discrepancy between what the agency was telling the public and what the agency was planning internally. On the one hand, the agency had employed the “pre-scoping” phase purportedly designed to allow the public an opportunity to help develop the project. According to the agency during a March 13, 2013 pre-scoping meeting, it was still undecided whether the proposed project would be analyzed under an EA or EIS. Yet at the same time, the Forest Service’s Schedule of Proposed Actions, available on the agency’s website, indicated that the decision had already been made to prepare an EA, with a decision on the Project expected in July, 2013.

61. In their pre-scoping comments, Plaintiffs identified the need for an EIS, with a range of alternatives and a robust cumulative impacts assessment, but explained that they could not provide specific comments based on the lack of project details in the three-page pre-scoping letter.

62. On September 5, 2013, the Forest Service issued a legal notice of a 30-day comment period on the Mitkof Island Project. The agency requested feedback on an 11-page “Scoping Report.” At that point, the Forest Service disclosed its intent to only prepare an EA for the Project.

63. The Scoping Report identified a purpose and need, the location and volume of harvest units for proposed action, and one alternative to the proposed action. In terms of environmental impacts, the Scoping Report contained one paragraph on subsistence use concerns, but otherwise did not contain any description or analysis of the Project’s impacts. The Scoping Report did not indicate the amount of old growth proposed for harvest, or the cumulative reduction in old growth from 60 years of commercial logging, and the attendant impacts on old-growth dependent species.

64. On October 7, 2013, Plaintiffs submitted scoping comments based on the Scoping Report. Plaintiffs provided feedback on the Mitkof Project, expressing their opposition to a large-volume timber sale on Mitkof Island, and explaining that if the Project did move forward, a full EIS was necessary to disclose and consider cumulative impacts.

65. The Forest Service did not issue a draft EA. No other public comment period occurred prior to the issuance of the final EA.

66. On August 7, 2014, the Forest Service issued a legal notice announcing the availability of the Mitkof Island EA, draft Decision Notice and Finding of No Significant Impact, triggering a 45-day objection period.

67. The EA, draft DN and FONSI, and unit and road cards were made available to the public. No other documents were made available to the general public. Upon request by Plaintiffs, the Forest Service provided hundreds of pages of specialists' reports and other documents relied upon by the agency in preparing the EA. None of these documents had been made accessible to the general public during the public comment periods.

68. The EA presents three alternatives. The "Preferred Alternative" proposes 28.5 MMBF of timber from approximately 4,117 acres of NFS lands. Under the Preferred Alternative, 13.4 MMBF of timber would be harvested using helicopter logging. Full implementation would include an estimated 1.3 miles of new NFS road construction, 4.7 miles of temporary road construction, and approximately 4.5 mile of road reconditioning.

69. The EA does not mention the Project's impacts on the Queen Charlotte goshawk.

70. Deer habitat capability on Mitkof Island is already below the 2008 TLMP's 18 deer/mi² threshold. The EA acknowledges that under the Preferred Alternative, deer habitat capability will drop to 11.6 deer/mi² after Project completion.

71. Under the Preferred Alternative, at Project completion, deer habitat capability would be lower than the WILD1.XIV.A.2. threshold of 18 deer/mi² in 8 of 11 WAAs in the biogeographic province. The EA does not disclose the deer habitat capability of the biogeographic province as a whole.

72. According to the EA, there may be a significant possibility of a significant restriction of the subsistence use of deer.

73. The Mitkof Project is the largest timber sale on the Tongass National Forest that the Forest Service has evaluated under an EA—not an EIS—in at least the last 20 years. From 1998 to 2006 the Forest Service evaluated 10 timber projects on the Tongass National Forest by EA. The timber volumes ranged between 2.6 and 8.7 MMBF, or an average of 5.5 MMBF.

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74. Conversely, since 1998, the Forest Service evaluated 19 timber sales by EIS that had timber volumes less than the Mitkof project. These include sales of 24, 13, 13, 12, 12.9, 19, 16.3, 21.4, 17, 27, 19.5, 23, 16.4, 8.3, 18.3, 21, 17.1, 4.3, 26.3 MMBF. The timber volumes for these project analyzed by EIS averaged 17.3 MMBF—or 11 MMBF less than the Mitkof Project.

75. The Woodpecker timber sale is an active project within the Project area. The Woodpecker timber sale authorizes the harvest of 5.4 MMBF and 2.5 miles of road construction. For the Woodpecker timber sale, 800 of the 900 acres of harvest units were designed for 50 to 75 percent retention. The Forest Service evaluated the cumulative impacts of the Woodpecker timber sale in an EIS.

76. Defendant District Ranger Anderson selected the Preferred Alternative in its entirety in the Mitkof Project draft DN.

77. On September 22, 2013, Plaintiffs timely submitted a formal objection on the EA and draft DN/FONSI, pursuant to 36 C.F.R. § 218.

78. On November 16, 2014, the Tongass Forest Supervisor, at that time, Defendant Earl Stewart’s predecessor, Forrest Cole, responded to the objection. The objection response found the Project to be in compliance with all “environmental laws, regulations, policies, and the Forest Plan.” However, Forest Supervisor Cole agreed with Plaintiffs’ objection that various elements of the Petersburg Ranger District’s analysis were unclear or unsupported. Forest Supervisor Cole found lacking (1) the explanation on why no disproportional adverse effects are expected to occur for low-income subsistence users; (2) the conclusions drawn with respect to the direct, indirect, and cumulative effects to deer, wolves, and subsistence hunting; and (3) disclosure of the direct, indirect, and cumulative effects to American marten. He also agreed that no detailed sale layout and marking instructions had been provided. The objection response therefore explained that the District Ranger could not sign a final DN until all the instructions were addressed. The objection response constituted the Forest Service’s final administrative decision.

79. On November 13, 2014, Supervisor Cole provided instructions to District Ranger Anderson, directing the Petersburg Ranger District to:

- (1) “Clarify and further explain the conclusions and rationale based on the cumulative effects to deer, wolves, and subsistence deer hunting and

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clearly distinguish direct, indirect, and cumulative effects in relation to the FONSI.”

- (2) “Ensure that two NFS (Woodpecker and Overlook) and two University of Alaska Timber sales referenced in the Wildlife Resource Report (p.46) were analyzed as part of the wildlife cumulative effects analysis. Additionally, clearly distinguish direct, indirect, and cumulative effects to marten in relation to the FONSI.”
- (3) “Explain why effects to low-income subsistence users would not be disproportional. The required Environmental Justice finding per Executive Order 12898 is included in the DN (p.21); however, no explanation was found in the record describing the reason for this finding.”
- (4) “Complete the detailed prescriptions for the units selected in the draft Decision Notice.”

80. Forest Supervisor Cole also ordered that the concerns and instructions must be sufficiently addressed before the final decision could be signed.

81. On March 9, 2014, District Ranger Anderson signed the final DN and FONSI. The DN authorized 28.5 MMBF of timber harvest distributed over approximately 4,117 acres.

82. On April 10, Jorge Enriquez of the Petersburg Ranger District sent a letter to Acting District Ranger Sandra Stevens. The letter informed Acting District Ranger Stevens that the Petersburg Ranger District was preparing to offer the “Mitkof Heli Stewardship Project,” the helicopter logging portion of the Mitkof Project. The Mitkof DN had authorized a one-time 13.4 MMBF helicopter offering.

83. As an attachment to the letter, Mr. Enriquez included a “Change Analysis,” which described the differences between the helicopter logging as authorized by the DN, and as proposed for implementation.

84. The Change Analysis disclosed an increase of 6.4 MMBF of planned timber volume. This change represents a 48% increase in timber volume from the volume authorized in the DN, and analyzed in the EA. This change brings the Mitkof Project’s total volume to 34.9 MMBF.

85. In his letter, Mr. Enriquez said that the difference in volume was the result of on-

the-ground reconnaissance, layout, and interdisciplinary review. Mr. Enriquez recommended that the Acting District Ranger determine that the Change Analysis does not represent a substantial change relevant to environmental concerns.

86. On April 15, 2015, Acting District Ranger Stevens responded to Mr. Enriquez, and concurred that the Project as proposed for implementation does not require correction or supplementation of environmental review documents. Ms. Stevens determined that implementation of the Mitkof Heli Stewardship Project, with its additional 6.4 MMBF of volume, would not result in substantial change to the selected alternative as evaluated in the EA and authorized in the DN. She also determined that the Mitkof Heli Stewardship Project, with its additional 6.4 MMBF of volume does not reveal significant new circumstances or information relevant to environmental concerns or impacts. Accordingly, Acting District Ranger Stevens determined that no further analysis was required under NEPA.

87. On Saturday April 19, the Forest Service provided legal notice of the Mitkof Heli Stewardship Integrated Resource Timber Contract. The agency notified the public that the Forest Service would receive technical and price proposals by May 19, 2015 for approximately 10.7 MMBF of Western Hemlock, 6.7 MMBF Sitka Spruce, and 2.2 MBF of Alaska Yellow Cedar of sawtimber.

The Queen Charlotte Goshawk

88. The Queen Charlotte goshawk (*Accipiter gentilis laingi*) is a subspecies of the northern goshawk, and is endemic to the coastal rainforests of Vancouver Island and northern southeast Alaska. The Forest Service added the Queen Charlotte goshawk to the Alaska Region Sensitive Species list in 1994, as a result of a viability concern over the declining trend in goshawk habitat.

89. Goshawks occur in low densities across the Tongass, are difficult to detect, and the Forest Service does not have a scientifically validated population estimate of the species. While population trends are unknown, they are believed to be downward. Very coarse estimates suggest that southeast Alaska supports only a few to several hundred breeding pairs.

90. Within southeast Alaska, the goshawk is a year-round resident, and may occupy different, or overlapping winter and breeding territories. Breeding pairs in managed landscapes

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of southeast Alaska rely almost entirely on productive old-growth forests. Breeding pairs are highly territorial.

91. Goshawks have large home ranges; adult home ranges on the Tongass average about 10,000 acres during the nesting season and nearly 30,000 acres outside of the nesting season (i.e., winter). Home ranges are represented as a hierarchical sequence of three areas: (1) nest area, (2) post-fledging (family) area, and (3) foraging area.

92. Nest areas are the portions of breeding pairs' home ranges that contains all active and inactive nests. Post-fledgling areas surround active nest trees and represent the core-use area of an adult female and young goshawks after fledging but before become independent adults and dispersing. Foraging areas comprise the majority of goshawk home ranges.

93. A high percentage of pairs (up to 75%) change nest locations yearly and these nests can be as far as 1.5 miles from a previously used nest site.

94. Old-growth timber harvest within goshawk home ranges reduces the availability of nest sites and decreases foraging habitat quality through reductions in prey abundance and availability.

95. The 2008 TLMP does not incorporate the core scientific concepts for goshawk habitat management: nest area, post-fledgling area, and foraging area. These concepts underpin the current paradigm of conservation planning to sustain viable populations of northern goshawks across a significant portion of its range. Instead, WILD4.II.A.1. instructs the Forest Service to "provide nesting habitat around all goshawk nest sites." WILD4.II.A.1.c. requires the Forest Service to "maintain an area of not less than 100 acres of productive old-growth forest (if it exists) generally centered over the nest tree or probable nest site to provide for prey handling area, perches, roosts, alternative nests, hiding cover, and foraging opportunities for young goshawks."

96. When it provided comments on the 2008 TLMP, the USFWS expressly recommended that goshawk nest buffers be increased to 500 acres of productive old growth.

97. Uncertainty remains with respect to the ability of the 2008 TLMP's conservation measures to contribute sufficient habitat to sustain well-distributed, viable populations of goshawks throughout southeast Alaska. In particular, recent studies have raised uncertainty with

regard to whether goshawk breeding-season habitat objectives are being met in managed landscapes of southeast Alaska.

98. A leading goshawk scientist recently reported that it is unclear whether a system of old-growth reserves designed explicitly for other wildlife species and protection of goshawk nest trees in landscapes intensively managed for timber would provide sufficient habitat to sustain breeding populations of the northern goshawk across the planning area. Likewise, the standards and guidelines prescribed for protection of goshawk nest areas (100 acres) in Southeast Alaska are unlikely to meet breeding-season habitat objectives established for goshawk populations elsewhere.

99. The Mitkof Project EA does not mention the Queen Charlotte goshawk. There have been six known, historic goshawk nests on Mitkof Island. Currently, there are three known, active goshawk nests. Old-growth timber harvest units for the Project are located within the home ranges of the known, active nests.

100. A biological evaluation (“BE”) prepared for the Mitkof Project—which was not made available to the public until after the final EA had issued—briefly discusses the goshawk in relation to the Project. The BE generally discloses the amount of productive old growth harvested on Mitkof Island. The BE notes that goshawks would be affected by a reduction in productive old growth. The BE includes tables showing that, including the Project, over 15,000 acres of productive old growth on Mitkof Island will have been harvested since 1954.

101. The BE does not contain spatially explicit information about the impacts of the Project on essential goshawk habitat, including nest areas, post-fledgling areas, and foraging areas.

102. The BE asserts, without explanation, that “5 units were dropped in association with goshawk buffers and/or foraging area.” The Forest Service did not explain why dropping these five units would be sufficient to mitigate the impacts of the Project that will harvest additional productive old growth forest within goshawk home ranges.

103. The Forest Service in the BE concludes that the Project “may adversely impact individuals, but [is] not likely to cause a trend to federal listing or a loss of viability in the Planning Area, nor cause a trend toward federal listing [sic] . . . due to reduction in nesting and

foraging habitat, and potential human disturbance at undocumented sites.” The BE does not explain how the agency arrived at this determination.

104. The Forest Service did not disclose or explain this determination in the EA/DN/FONSI.

The Sitka black-tailed deer

105. Sitka black-tailed deer are a critical part of the Mitkof Island ecosystem. Deer serve as the primary prey of the wolf.

106. Deer are a critically important subsistence resource to local communities. Deer in the Project area are particularly valuable to subsistence users due to their road-accessible (and skiff travel) proximity to Petersburg.

107. Despite an historic 17-year closure of deer hunting, deer hunting opportunities on Mitkof Island have been severely restricted, due in part to habitat loss from ongoing logging.

108. Other deer hunting opportunities are available at locations remote from the community to members with financial means and large enough vessels to accommodate open-water crossings and other marine perils present during hunting season.

109. Hunting restrictions on Mitkof Island have disproportionate impact on lower-income residents of the community, who lack the economic means to travel greater distances for their subsistence hunting. Should hunters decide push further afield in small boats, they are subject to increased safety risks from seasonally higher frequencies of storms and diminished daylight.

110. The deer was chosen as a Management Indicator Species because it is the wildlife species that receives the highest hunting and subsistence use of all terrestrial species in southeast Alaska, and it represents those species that use lower elevation productive old-growth habitat during the winter. Winter habitat quantity, quality, distribution, and arrangement are considered the most important limiting factors for deer in southeast Alaska. Heavy winter snowpack can lead to substantial deer mortality, which can be mitigated by the availability of old-growth forest with sufficient canopy to intercept snow and provide forage during extreme weather events. Optimum habitat during a deep-snow winter is low-elevation, old-growth forest on south facing slopes.

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111. Following timber harvest, deer populations are impacted by the combination of increased snow accumulation that reduces forage availability, and the conversion of winter habitat to young-growth stands. 20-30 years after cutting, a stage of forest succession called “stem exclusion” is attained that provides little or no forage, a situation that can last for more than a hundred years.

112. Following a series of severe winters culminating with the winter of 1972, deer populations crashed in Game Management Unit (“GMU”) 3, a State of Alaska wildlife management unit that includes Mitkof Island. Since then, deer populations have not recovered. Today, Mitkof Island is managed with one of the most restrictive season lengths and bag limits for deer of any area in Southeast Alaska.

113. Currently, only 53% of the deep-snow winter habitat that existed in 1954 (the beginning of commercial timber harvest) remains on Mitkof Island. Only 80% of the average-snow winter habitat that existed in 1954 remains on Mitkof Island.

114. Where fewer acres of average- and deep-snow winter habitat exist, deer will concentrate use within those remnant patches and will be more prone to increased predation pressure, and forced to compete for fewer acres of forage.

115. The best available science indicates that as the capacity of logged landscapes to support deer diminishes, nonlinear predator-prey dynamics will dramatically alter conditions such that populations of deer and wolves likely will decline substantially. In other words, incremental reductions in habitat are attended by larger incremental impacts to the species—that is, once a critical level of habitat is reached, even minor reductions in habitat can have major impacts on the system. The best available science recognizes 18 deer/mi² as the critical habitat threshold.

116. To quantify the impacts of the Mitkof Project on deer, the Forest Service calculated the reduction in productive old growth.

117. The Mitkof Project EA discloses that the Project would harvest old-growth timber from another 837 acres of average-snow winter habitat (i.e., productive old growth, below 1,500 feet in elevation), and 70 acres of deep-snow winter habitat (i.e., high volume productive old growth, below 800 feet in elevation, on non-north-facing slopes).

118. However, the Project record reveals that the Forest Service did not count or model toward the total reduction in productive old growth/deer winter habitat the majority of units containing high-volume or mid-volume, productive old-growth that will be harvested with 66% retention rates. Some 1,473 acres and 13.4 MMBF of old-growth would be cut using a 66% retention rate. The Mitkof Project would allow clear-cut openings up to 2 acres in size for units with 66% retention rate.

119. The Project record also reveals that the Forest Service did not count or model units with 95% and 98% retention rates toward the reduction in productive old growth/deer winter habitat. Some 1,351 acres and approximately 1.3 MMBF of old-growth would be cut using 95% 98% retention rates. The Mitkof Project would allow clear-cut openings up to 1.5 acres in size for units with 95% and 98 % retention rates.

120. In doing so, the agency disclosed that the harvest using 66%, 95%, and 98% retention rates would reduce only 114 acres of average snow winter habitat and 44 acres of deep-snow winter habitat. The 66%, 95%, and 98% retention rates would be applied to 2,824 acres, the majority of which is in average- and deep-snow winter habitat.

121. In issuing its decision, the Forest Service found that the Project's impact to subsistence users of deer would be "minor," while acknowledging significant cumulative effects.

122. Under Executive Order 12898, each federal agency must document every federal action's disproportionate impacts on minority populations and low-income populations.

123. In making its decision, the Forest Service found, pursuant to Executive Order 12898, that the project would not cause further restrictions to subsistence deer users, because the project's direct effects on habitat, access and competition would be minor.

124. The EA and DN/FONSI do not directly address or discuss the direct, indirect, or cumulative impacts to subsistence use patterns, or disproportionate impacts to low-income or minority subsistence users.

125. The DN/FONSI states that "no disproportionate adverse effects are expected to occur solely to" the low-income and minority residents of Petersburg.

126. The DN/FONSI fails to provide a reason for the Forest Service finding that impacts to low-income and minority users would not be disproportionate.

The Alexander Archipelago wolf

127. The Alexander Archipelago wolf is a subspecies of grey wolf found only in southeast Alaska on the mainland and on certain islands including Mitkof.

128. The viability of the wolf has long been a significant concern of federal agencies and the public. In 1995 and again in 1997, the subspecies was considered for listing under the Endangered Species Act (“ESA”) by the U.S. Fish and Wildlife Service (“USFWS”). 60 Fed. Reg. 10056 (Feb. 15, 1995); 62 Fed. Reg. 46709 (Aug. 28, 1997). In order to avoid the listing of the species under the ESA, in 1997, the Forest Service included various requirements in the TLMP designed to provide protections for the wolf.

129. Based on the 1997 TLMP’s conservation strategy and the species’ ability to reproduce and disperse, the USFWS concluded that listing of the subspecies was not warranted at that time.

130. In August 2011, the USFWS received another petition to list the subspecies under the ESA. On March 21, 2014, the USFWS determined that “the petition presents substantial scientific or commercial information indicating that listing the Alexander Archipelago wolf may be warranted. Therefore, with publication of this notice, we are notifying the public that when resources become available, we will be conducting a review of the status of the species to determine if listing the Alexander Archipelago wolf is warranted.” 79 Fed. Reg. 17993, 17993 (Mar. 31, 2014). By and through a Stipulated Settlement Agreement with Plaintiffs the Center and Greenpeace, as well as The Boat Company, the USFWS agreed to review the status of the wolf and submit to the Federal Register a 12-month finding as to whether the listing of the wolf as a threatened or endangered species is (a) not warranted; (b) warranted; or (c) warranted but precluded by other pending proposals pursuant to 16 U.S.C. § 1533(b)(3)(B) by no later than December 31, 2015. *See Center for Biological Diversity, et al. v. Jewell*, No. 1:14-cv-00991-EGS (D.D.C. Sept. 22, 2014) (Stipulated Settlement Agreement).

131. Currently, the Forest Service does not have a scientifically credible wolf population estimate on the Tongass, or on Mitkof Island or its adjacent areas.

132. The Forest Service uses deer habitat capability as a measure of habitat quality for wolves in southeast Alaska. Sitka black-tailed deer are the primary prey of the wolf. The greatest

threats to the wolf are loss of habitat for the deer primarily due to logging, and continued high levels of human harvest of wolves (both legal and illegal).

133. The Forest Service acknowledges the Mitkof Project will reduce deer habitat capability to 11.6 deer/mi² at stem exclusion.

134. When deer populations decline due to logging of winter habitat, human hunters and trappers are motivated to target wolves both legally and illegally, because they perceive wolves as a competitor for the limited number of deer available on the landscape. High levels of human harvest of wolves (including illegal take) are facilitated by the access afforded by open and closed logging roads. Studies have shown that wolf harvest increased twofold when total road density below 1,200 feet in elevation exceeded 0.7 mi/mi².

135. The Mitkof Project will increase road density below 1,200 feet to 1.36 mi/mi² across all lands.

136. Under current State of Alaska GMU 3 hunting restrictions, five wolves/hunter may be harvested and there is no limit on trapping.

137. Under current State of Alaska predator control efforts, in an effort to boost deer hunting opportunities, the wolf population in an area encompassing the project area is targeted for an 80% reduction.

LEGAL FRAMEWORK

Administrative Procedure Act

138. The APA confers a right of judicial review on any person adversely affected by agency action. 5 U.S.C. § 702. Neither NEPA nor NFMA contain a standard of review; claims brought pursuant to these statutes are reviewed under the APA.

139. “Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.” 5 U.S.C. § 704.

140. Upon review, a court shall hold unlawful and set aside agency actions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with and/or without observance of procedure required by law. 5 U.S.C. § 706(2). A court shall compel agency action unlawfully withheld or unreasonably delayed in light of an agency’s failure to act. *Id.* § 706(1).

National Forest Management Act

141. NFMA and its implementing regulations provide for forest planning and management on two levels: (1) forest level and (2) site-specific project level. *See* 16 U.S.C. § 1604.

142. On the forest level, the Forest Service develops a Land and Resource Management Plan (“forest plan”). A forest plan guides natural resource management activities forest-wide, setting standards, management area goals and objectives, and monitoring and evaluation requirements.

143. After a forest plan is adopted, the Forest Service implements the forest plan through site-specific projects. NFMA requires that site-specific actions be consistent with the governing forest plan. 16 U.S.C. § 1604(i). The Forest Service’s failure to comply with the provisions of a Forest Plan is a violation of NFMA.

144. Pursuant to NFMA, the Forest Service must “provide for diversity of plant and animal communities.” 16 U.S.C. § 1604(g)(3)(B). In 1982 the Forest Service promulgated implementing regulations that apply to the development and implementation of forest plans. The Tongass National Forest developed the applicable forest plan pursuant to the 1982 planning regulations, and those regulations therefore apply to the Mitkof Project.

145. According to the regulations, the Forest Service must manage wildlife habitat “to maintain viable populations of existing native *** vertebrate species in the planning area.” 36 C.F.R. § 219.19 (1983). A “viable population” is “one which has the estimated numbers and distribution of reproductive individuals to insure its continued existence is well distributed in the planning area.” *Id.*

National Environmental Policy Act

146. NEPA is our nation’s “basic charter for protection of the environment.” 40 C.F.R. § 1500.1(a). It requires federal agencies to take a “hard look” at the environmental consequences of their projects before taking action.

147. The “twin aims” of NEPA are to place upon federal agencies the obligation to consider every significant aspect of the environmental impacts of a proposed action, and to ensure the public that it has indeed considered environmental concerns in its decisionmaking process.

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148. Under NEPA, federal agencies must prepare an Environmental Impact Statement (“EIS”) for “major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). Prior to preparing an EIS, the agency may prepare an Environmental Assessment (“EA”), a public document that provides sufficient evidence and analysis for determining whether to prepare an EIS. 40 C.F.R. § 1508.9.

149. The Council on Environmental Quality (“CEQ”) has issued regulations prescribing the procedures agencies must take and the considerations agencies must take into account when carrying out their NEPA duties.

150. CEQ regulations direct agencies to consider both “context” and “intensity” when determining whether a proposed action may be “significant” under NEPA. 40 C.F.R. §1508.27. “Context” means “the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality.” 40 C.F.R. §1508.27(a). “Intensity” refers to “the severity of the impact,” and the agency must consider ten factors in evaluating intensity. 40 C.F.R. §1508.27(b).

151. “Intensity” factors include: (a) impacts that may be both beneficial and adverse; (b) unique characteristics of the geographic area such as proximity to wetlands or ecologically critical areas; (c) the degree to which the effects on the quality of the human environment are likely to be highly controversial; (d) the degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks; (e) whether the action is related to other actions with individually insignificant but cumulatively significant impacts; (f) whether the action threatens a violation of Federal, State, or local law requirements imposed for the protection of the environment. 40 C.F.R. §§ 1508.27(1), (3)–(5), (7), (10).

152. An EIS must be prepared if substantial questions are raised as to whether a project may cause significant degradation of some human environmental factor.

Environmental Assessment

153. An EA serves to provide sufficient evidence and analysis for determining whether to prepare an EIS or finding of no significant impact. 40 C.F.R. § 1508.9(a)(1). It aids an agency’s compliance with NEPA, and facilitates preparation of an EIS when one is necessary. 40 C.F.R. § 1508.9(a)(2)–(3).

154. The EA must discuss the need for the project, alternatives, and environmental impacts. 40 C.F.R. § 1508.9. Environmental impacts, or “effects”, include: (a) direct effects, which are caused by the action and occur at the same time and place; (b) indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable; and (c) cumulative effects, which are the impacts on the environment which results from the incremental impact of the action when added to past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such actions. 40 C.F.R. §§ 1508.7, 1508.8(a), (b). Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. *Id.* § 1508.7.

155. In some cases, an agency’s decision to forego issuing an EIS may be justified by the adoption of mitigation measures. Mitigation measures must constitute an adequate buffer so as to ensure that impacts are so minor so as no to warrant an EIS.

Public Involvement

156. One of NEPA’s declared purposes is to “promote efforts which will prevent or eliminate damage to the environment.” 42 U.S.C. § 4321. Because NEPA pursues its goals through the imposition of specific procedural requirements, not through the imposition of particular substantive results, the procedural safeguards created by NEPA must be carefully adhered to.

157. NEPA requires that “[high quality] environmental information is available to public officials and citizens before decisions are made and actions are taken.” 40 C.F.R. § 1500.1(b). “Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.” *Id.*

158. Pursuant to NEPA, agencies must “[e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment.” 40 C.F.R. § 1500.2(d).

159. NEPA seeks informed decisionmaking through informed public participation, and NEPA’s public comment procedures are at the heart of the NEPA review process. Accordingly, agencies must make diligent efforts to involve the public in preparing and implementing their NEPA procedures. 40 C.F.R. § 1506.6(a).

160. Agencies must “provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested.” 40 C.F.R. § 1506.6(b). “The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing [and EA].” 40 C.F.R. § 1501.4(b).

161. NEPA requires not merely public notice, but public participation in the evaluation of the consequences of a proposed project. An agency, when preparing an EA, must provide the public with sufficient environmental information, considered in the totality of circumstances, to permit members of the public to weigh in with their views and thus inform the agency decisionmaking process.

162. Under NEPA, agencies also have a continuing duty to supplement their analyses on the basis of changes to a project or significant new information gleaned after the close of environmental review. An agency cannot simply rest on the original EA. It must be alert to new information that may alter the results of its original environmental analysis and continue to take a hard look at the environmental effects of its planned action.

163. Pursuant to NEPA, the Forest Service must supplement its original analysis if (1) the agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (2) there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. 40 C.F.R. § 1502.9(c)(i), (ii).

The Alaska National Interest Lands Conservation Act

164. In passing the Alaska National Interest Lands Conservation Act (“ANILCA”), Congress declared a policy that the “utilization of public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence uses of the resources of such lands.” 16 U.S.C. § 3112(1). Section 804 of ANILCA provides that the taking of fish and wildlife “for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes.” 16 U.S.C. § 3114.

165. Section 810 of ANILCA places an affirmative obligation on the Forest Service to evaluate proposed uses of public lands to determine whether those uses “would significantly restrict subsistence uses.” 16 U.S.C. § 3120(a). If the responsible federal agency determines that

a proposed use will “significantly restrict subsistence uses,” the agency must demonstrate that the restriction on subsistence uses: 1) “is necessary, consistent with sound management principles for the utilization of the public lands”; 2) “will involve the minimal amount of public lands necessary to accomplish the purposes of such use”; and 3) that “reasonable steps will be taken to minimize adverse impacts upon subsistence uses.” *Id.*

166. The Secretaries of the Interior and Agriculture have established a Federal Subsistence Board assigned with the responsibility for “administering the subsistence taking and uses of fish and wildlife on public lands.” 50 C.F.R. § 100.10(a). The Federal Subsistence Board is also authorized to establish Regional Councils. 50 C.F.R. § 100.11. When necessary, the Board, in consultation with the Regional Councils, may limit the hunting of deer and other wildlife for both subsistence and non-subsistence needs in order to ensure the viability and conservation of wildlife populations. 50 C.F.R. § 100.17(a).

167. In recent years, the ADF&G and the Federal Subsistence Board have had to issue emergency closures of both the subsistence hunt and sport hunt of deer on federal lands as a result of heavy winter snowfall. At its January, 2013 meeting, the Alaska Department of Fish and Game approved a reduction in the hunting seasons and bag limits for deer in Unit 3, which includes the Mitkoff Project area. The reasons for the limitations on subsistence uses included habitat loss from logging of old growth forests, three consecutive deep snow winters, and predation by wolves.

168. Moreover, because of concerns over low numbers of deer, the Alaska Department of Fish and Game recently approved a wolf harvest program in GMU 3 including Mitkof Island. ADF&G concluded that severe winters with abnormally high levels of snowpack, clear-cut logging of productive old growth stands, and wolf predation contribute to low deer numbers and reduced deer harvest by local subsistence hunters. ADF&G therefore proposes to increase the harvest of wolves from a portion of GMU 3 over the course of five years in an effort to determine whether predator control can contribute to the recovery of deer populations.

Executive Order 12898 (Environmental Justice)

169. Executive Order 12898 of February 11, 1994 is titled “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.”

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170. Under EO 12898, the Forest Service is ordered by the President to identify and, where appropriate, address disproportionately high and adverse effects of its activities on minority and low-income populations.

CLAIM ONE

NEPA and NFMA Compliance – Failure to disclose and consider the direct, indirect, and cumulative effects of the Mitkof Project on the Queen Charlotte goshawk

171. Plaintiffs incorporate by reference all preceding paragraphs.

172. The Forest Service failed to discharge its procedural and substantive duties under NEPA and NFMA by failing to adequately disclose and consider the impacts of the Mitkof Project on the Queen Charlotte goshawk, and to ensure the species' continued viability.

NEPA

173. NEPA requires that federal agencies take a “hard look” at the potential environmental impacts of their proposed actions. 42 U.S.C. § 4332(2)(C). The “hard look” is required by NEPA to ensure the agency has detailed information about significant environmental impacts before it makes a decision, and to ensure that the information is available to the public.

174. An EA must contain a brief discussion of the environmental impacts of the proposed action, 40 C.F.R. § 1508.9(b), which include direct, indirect, and cumulative impacts. *Id.* §§ 1508.8, 1508.7. An EA must provide sufficient evidence and analysis for determining whether to prepare an EIS. *Id.* § 1508.9(a).

175. An EA that does not reference any material in support of or in opposition to its conclusions, nor provide a defense of its position, violates NEPA.

NFMA

176. Pursuant to NFMA, the Forest Service must “provide for the diversity of plant and animal communities.” 16 U.S.C. § 1604(g)(3)(B). To meet this requirement, the Forest Service must ensure that viable populations of native species are maintained. *See* 36 C.F.R. § 219.19.

177. The Forest Service’s duty to maintain viable populations applies with special force to sensitive species. Pursuant to the forest plan, the Forest Service must give special

consideration to the possible adverse effects on habitat of sensitive species. WILD1.I.B.

178. Pursuant to the Forest Service Manual (“FSM”), viable populations and habitats of sensitive species will be maintained and distributed throughout their geographic range. *See* FSM 2670.22. Moreover, sensitive species must receive special management emphasis to ensure their viability and to preclude trends toward endangerment that would result in the need for Federal listing. FSM 2672.1. Finally, there must be no impacts to sensitive species without an analysis of the significance of adverse effects on the population, its habitat, and on the viability of the species as a whole. It is essential to establish population viability objectives when making decisions that would significantly reduce sensitive species numbers. FSM 2672.1.

179. The FSM instructs the Forest Service to review programs and activities as part the NEPA process through a biological evaluation (“BE”), to determine their potential effect on sensitive species. FSM 2670.32; *see also* FSM 2672.4.

180. The BE is the means of conducting the review of impacts and documenting the findings. FSM 2672.4. The Forest Service is instructed to document the findings of the biological evaluation in the decision notice. *Id.*

Violation of NEPA and NFMA

181. With respect to Sensitive Species, the Forest Service must, in its NEPA analysis, disclose and consider the project impacts, while meeting its substantive duties under NFMA to provide special management protections and ensure species viability.

182. A NEPA analysis must be informed by the laws driving the action being reviewed.

183. Here, the Forest Service had a duty under NFMA to ensure species viability, a duty under the 2008 TLMP to provide special management protections for Sensitive Species, and a duty under NEPA address every significant aspect of the environmental impact of a proposed action.

184. Yet neither the EA, nor the DN/FONSI, disclose or analyze the effects of the Mitkof Project on the Queen Charlotte goshawk, a Sensitive Species—despite planned timber harvest and road building nearby active goshawk nesting areas. Instead, all goshawk analysis was contained in the Forest Service’s BE, which was never released to the public until after the final EA and draft DN were released.

185. The failure to disclose and consider impacts to a Sensitive Species in the EA/DN/FONSI violated NEPA and NFMA.

186. To the extent that the Forest Service's disclosure of the Project's impacts on the goshawk satisfied NEPA and NFMA (which it did not), the Forest Service failed to take the requisite hard look.

187. In the BE, the Forest Service did not provide a reliable goshawk population estimate. The BE states that "[p]opulations are believed to have declined, primarily due to timber harvest since the 1950s, but actual goshawk populations and population trends are not available." BE at 32. The BE notes that there were six historic goshawk nests on Mitkof Island; now, there are three.

188. In the BE, the Forest Service provided no indication of the species' viability threshold. By definition, viability is already a concern for Sensitive Species. The agency never explained how authorizing additional impacts to goshawk home ranges on Mitkof Island, where nearly half of the high-volume productive old growth has already been logged, is consistent with the duty to provide for a viable population of the species.

189. The BE only disclosed reductions in productive old growth at the WAA scale. The BE does not address the impacts of the Project relative to goshawk home ranges. The BE never disclosed or considered impacts to essential goshawk habitat features: alternative nest sites, post-fledging areas, and foraging habitat.

190. The Forest Service summarily concluded that the Project "may adversely impact individuals, but [is] not likely to cause a trend to federal listing or a loss of viability in the Planning Area." The agency never explained how permitting a project that further reduces productive old growth from an already fragmented landscape is consistent with WILD1.II.B. of the 2008 TLMP, which requires the agency to maintain a viable and well-distributed goshawk population on the Tongass.

191. The Forest Service violated NEPA and NFMA where it failed to take a hard look at the impacts of the Mitkof Project on the Queen Charlotte goshawk, and to ensure the viability of the species.

192. In violating NEPA and NFMA's requirements, Defendants have acted arbitrarily

and capriciously, abused their discretion, and acted contrary to law, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2).

CLAIM TWO

NEPA and NFMA Compliance – Failure to ensure consistency with the 2008 TLMP, and to disclose and consider the direct, indirect, and cumulative effects of the Project on the Alexander Archipelago wolf and Sitka black-tailed deer

193. Plaintiffs incorporate by reference all preceding paragraphs.

194. The Forest Service failed to discharge its procedural and substantive duties under NEPA and NFMA to adequately disclose and consider the impacts of the Mitkof Project on the deer-wolf-human predator-prey community, and to ensure the continued viability and sustainability of the wolf. Specifically, the Forest Service failed to ensure that the Project was consistent with 2008 TLMP standards and guidelines requiring the maintenance of deer habitat to support a sustainable wolf population, and to take a hard look at the Mitkof Project's impacts on deer, wolves, and humans.

Violation of NFMA

195. The Forest Service failed to provide a rational explanation for how the Mitkof Project is consistent with the 2008 TLMP's provisions on wolf viability and sustainability, in violation of NFMA.

196. After a forest plan has been developed and implemented, NFMA prohibits site-specific activities that are inconsistent with the governing forest plan.

197. The Forest Service has no scientifically credible estimate of the wolf population on the Tongass, or on Mitkof Island or adjacent areas. Instead, the Forest Service uses deer habitat capability as a proxy for monitoring the wolf population.

198. It is assumed that a decline in the deer population would likely result in a decline in the wolf population. Resonating effects included increased pressure from humans on the wolf population to support higher deer numbers.

199. The 2008 TLMP provides that habitat capability sufficient to support 18 deer/mi² is generally considered sufficient to support wolves and human hunters.

200. The Forest Service admits that all Mitkof Project action alternatives would result

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in an insufficient number of deer to sustain wolves and hunting.

201. The EA acknowledges that deer habitat capability will drop to 11.6 deer/mi² after Project completion. This value is 36% below the scientifically validated TLMP threshold of 18 deer/mi². At Project completion, deer habitat capability is expected to be lower than 18 deer/mi² in 8 of 11 WAAs in the biogeographic province.

202. Moreover, at Project completion, road density in the Project area will increase to 1.36 mi/mi². This value is well above the TLMP threshold of 0.7 to 1.0 mi/mi².

203. NFMA requires that each site-specific project must be consistent with the governing forest plan. Here, the Forest Service never explained how the Project is consistent with WILD1.XIV.A.2. or WILD1.XIC.A.1.c.

204. Instead, the agency concluded that the reduction in deer habitat capability, and increase in road density, will not significantly impact wolves. The Forest Service also labeled the Project-area population as “stable.”

205. The Forest Service never considered local knowledge of habitat conditions, spatial location of the habitat and other factors, rather than relying solely on the habitat conditions as portrayed by the deer model output. Instead, the Forest Service vaguely referenced the fact that 3 of 11 WAAs in the biogeographic province—on a different island—would continue to support 18 deer/mi² and that a wilderness area—also on a different island—would support wolves in the vicinity of the Project.

206. In doing so, the Forest Service failed to articulate a rational connection between the facts found and the choice made, and entirely failed to consider important aspects of the problem. In particular, the EA/DN/FONSI never disclosed and considered the USFWS’s March 21, 2014 decision that listing the wolf under the ESA may be warranted. Moreover, the Forest Service has no population data by which to label the wolf population as “stable.” Furthermore, the Forest Service did not take a hard look at the implications of State predator control efforts, which target wolves for an 80% population reduction in the area, including on adjacent wilderness and reserve areas. Finally, the Forest Service never evaluated the habitat conditions or status of the wolf population in the areas that could allegedly service as a population “source.”

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207. By failing to provide a rational explanation for how the Mitkof Project is consistent with the requirements of the 2008 TLMP, the Forest Service violated NFMA.

Violation of NEPA

208. NEPA requires a federal agency—whether in an EA or EIS—to disclose and consider the direct, indirect, and cumulative impacts of a project. To comply with NEPA, an agency must consider every significant aspect of the environmental impact of a proposed action.

209. The Forest Service here failed to take a hard look at the Project because it failed to address significant aspects of the Project’s impacts on deer winter habitat, and attendant impacts deer, wolves, and subsistence hunters.

210. The Forest Service claimed there would only be small reductions in the acreage of deer winter habitat lost, and therefore claimed the Project would have only minimal impacts on deer, wolves, and subsistence hunters. The Forest Service disclosed that only 114 acres of average deer winter habitat (POG below 1,500 feet in elevation) and 44 acres of high-value deer winter habitat (high-volume POG on non-north-facing slopes below 800 feet in elevation) would be logged using 66%, 95%, and 98% retention rates; however the Mitkof Project involves 2,842 acres of units with these retention rates, the majority of which are average- and deep-snow deer winter habitat.

211. Specifically, the agency only included acres of low volume productive old growth with 66% harvest retention in its calculation of productive old growth/deer winter habitat lost, because that acreage would no longer fall under the productive old growth class. The agency did not disclose or consider the acres of deer winter habitat where the volume class would be downgraded (e.g., from high volume to low volume) by using 66%, 95%, and 98% retention harvest.

212. Moreover, when the agency ran the deer model, it assigned an old-growth habitat capability score to the retained portions of each stand. In other words, the agency assumed that the value of a stand as deer winter habitat would be reduced only in exact proportion to the basal area reduced, instead of analyzing where the logging would occur and the impacts to the volume class of a stand.

213. At the same time, the Forest Service acknowledged that units with 66% retention

rates could have clear-cut openings of up to two acres, and units with 95 and 98% retention rates could have clear-cut openings of up to 1.5 acres.

214. Yet the Forest Service never disclosed the size, number, and density of clear-cut openings, or disclosed their relationship to previously harvested areas, or areas slated for harvest under four reasonably foreseeable timber sales. Accordingly, the agency failed to quantify and assess the Project's impacts on deer winter habitat, and the cascading impacts to the deer population, wolf population, and subsistence hunters.

215. In particular, by neglecting to measure impacts on deer winter habitat, the Forest Service failed to take a hard look at:

- (1) Cumulative impacts—including non-linear responses—to deer populations based on reductions in winter habitat;
- (2) Subsistence use patterns, and disproportionate impacts on minority and low-income people, because locating timber harvest closer to communities impedes accessible deer harvest, requiring more capital investment and greater personal risk to reach deer harvest opportunities;
- (3) Impacts to wolves from a reduced prey base and increased vulnerability to higher human harvest rates (legal and illegal).

216. By failing to take a hard look at the Project's impacts on deer, wolves, and subsistence hunters, the Forest Service violated NEPA.

217. In violating NEPA and NFMA's requirements, Defendants have acted arbitrarily and capriciously, abused their discretion, and acted contrary to law, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2).

CLAIM THREE

NEPA Compliance – Failure to Prepare an Environmental Impact Statement

218. Plaintiffs incorporate by reference all preceding paragraphs.

219. The Forest Service violated NEPA by failing to prepare an EIS because the impacts of the Mitkof Project may be significant. If an EA reveals that a project may have a significant effect on the environment, then the agency must prepare an EIS.

Cumulative Impacts

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220. The Mitkof Project, when added to other past, present, and reasonably foreseeable future actions occurring in the Project area, including but not limited to timber harvests, may have a significant, cumulative effect on the goshawk, the deer population, and by extension, the wolf population and human subsistence deer harvest.

221. The term “significantly” is defined in part as those actions “with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment.” 50 C.F.R. § 1508.27(b)(7).

222. “Cumulative impacts” are those impacts on the environment “which result from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.” 40 C.F.R. § 1508.7.

223. A cumulative impacts analysis requires some quantified or detailed information, and conclusory statements about “possible effects” or “some risk” do not satisfy NEPA’s hard look requirement.

224. According to the CEQ, “the most devastating environmental effects may result not from the direct effects of a particular action, but from the combination of individually minor effects of multiple actions over time.” CEQ, *Considering Cumulative Effects Under the National Environmental Policy Act*, at 1 (Jan. 1997).

225. A limited cumulative impacts analysis impermissibly subjects the decisionmaking process contemplated by NEPA to the tyranny of small decisions.

226. The Kupreanof/Mitkof Island Biogeographic province has the third lowest percent of intact watersheds out of the 21 biogeographic provinces on the Tongass National Forest. Within the Project area, approximately 12,207 acres have been harvested on NFS lands and another 2,926 acres on Non-NFS lands. There are approximately 107 miles of open and 20 miles of closed National Forest System (“NFS”) roads within the Project area. There are an additional 47 miles of roads on non-NFS lands on Mitkof Island.

227. Due to the impacts of decades of industrial scale logging and road building, winter deer habitat in the Mitkof Project area has already been seriously impacted.

228. Currently, the Project area has a restricted deer hunting season, due to habitat loss and low deer numbers.

229. In conjunction with past harvest activities, deer habitat capability after Project completion will be 36% below the scientifically validated threshold for maintaining a sustainable deer-wolf-human predator-prey community.

230. The Forest Service in the Mitkof Project EA/DN/FONSI analyzed the incremental reduction in deer habitat capability, and concluded that a 1 to 2 percent reduction from the existing deer winter habitats (deep- and average-snow) is not significant.

231. The Forest Service did not analyze the Project's reduction in deer habitat capability in the context of the situation where there have already been significant reductions in deer habitat capability to the point where baseline conditions are already well below the scientifically validated threshold of 18 deer/mi².

232. Any additional impacts on deer habitat will exacerbate an already bad situation for deer, wolves, and subsistence hunters, and old-growth dependent species like goshawks and American marten, and therefore will have a significant effect on the quality of the human environment.

233. The DN/FONSI fail to provide any defensible reason for the conclusion that the Project will not have disproportionate impact on low-income and minority residents.

234. The Forest Service violated NEPA by failing to prepare an EIS to fully and fairly disclose and consider the significant impacts of the Mitkof project, when added to degraded baseline conditions.

Uncertainty and Controversy

235. To the extent that the Forest Service relied on mitigation measures to lower the impacts of the Mitkof Project below the level of significance, that strategy failed because the mitigation measures are controversial and uncertain.

236. "Significance" is also defined as the "degree to which the effects on the quality of the human environment are highly controversial" and the "degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks." 40 C.F.R. § 1508.27(b)(4), (5).

237. A project is considered controversial if substantial questions are raised as to whether the project may cause significant degradation of some human environmental factor,

thereby requiring the preparation of an EIS.

238. Moreover, preparation of an EIS is mandated where uncertainty may be resolved by further collection of data, or where the collection of such data may prevent speculation on potential effects.

239. The Forest Service here purportedly relied on partial harvest prescriptions (i.e., retention of a certain percentage of trees in an old-growth stand) and pre-commercial thinning (i.e., removal of a certain percentage of trees in a second-growth stand) to “mitigate” the impacts of logging 4,117 acres of land below the level of significance.

240. The Forest Service removed from its calculation of reduction in acres of productive old growth the majority of acres assigned 66%, 95%, and 98% retention rates.

241. Moreover, for the purposes of the deer model, the Forest Service assumed, without providing support, that the retained portion of a stand will continue to function as old-growth forest. Specifically, the Forest Service assumed that partial harvest prescriptions have no impact on deer winter habitat beyond the percentage of basal area removed. For instance, the DN states that harvest units with 66% retention will “maintain” old-growth characteristics.

242. The agency, however, never explained how allowing openings of up to 2 acres in size would allow a stand to retain its old-growth characteristics, or how removal of 33% of the basal area of a stand allows the stand to function biologically as deer winter habitat.

243. The agency stated, without providing support, that “the management of a publically owned forest is seldom controversial from a scientific perspective.”

244. Harvesting 2,824 acres and 14.4 MMBF of productive old growth forest using 66%, 95%, and 98% retention rates is an untested and risky mitigation measure to ostensibly “retain” the old-growth characteristics of the forest. The Forest Service did not provide a rational explanation for how experimental harvest prescriptions prevent further loss of deer winter habitat.

245. The agency ignored available scientific information that directly undercut its assumptions.

246. To the extent the Forest Service has relied upon scientifically controversial, unsupported, and uncertain mitigation measures to lower the Project’s impacts below the level of

significance, these measures must be addressed in an EIS.

Threatened Violations of NFMA

247. A project's "significance" may also be measured according to whether it threatens a violation of federal law imposed for the protection of the environment. *See* 40 C.F.R. § 1508.27(b)(10).

248. As described in detail in Claims 1 and 2, the Mitkof Project violates NMFA's provisions for managing the Queen Charlotte goshawk, a Sensitive Species, and the Alexander Archipelago wolf, a Management Indicator Species. Because there are at least substantial questions about whether the Mitkof Project violates NFMA, the Forest Service violated NEPA where it failed to address NFMA's substantive requirements for the goshawk and wolf in an EIS.

249. In violating NEPA's requirements, Defendants have acted arbitrarily and capriciously, abused their discretion, and acted contrary to law, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2).

CLAIM FOUR

NEPA Compliance: Failure to involve the public in the NEPA process

250. Plaintiffs incorporate by reference all preceding paragraphs.

251. The Forest Service violated NEPA by failing to adequately involve the public in the preparation of the Mitkof Project Environmental Assessment and decisionmaking process, and respond to Plaintiffs' comments and objections as required by law.

Environmental Assessment

252. CEQ regulations require that the Forest Service give environmental information to the public and provide an opportunity for informed comments to the agency. 40 C.F.R. §§ 1501.4, 1506.6. Disclosure of information and public involvement must occur before the agency reaches its decision on whether to go forward with a project. *Id.* § 1500.1(b).

253. The public must be given as much environmental information as is practicable, prior to completion of the EA, so that the public has a sufficient basis to address those subject areas that the agency must consider in preparing the EA.

254. The agency must offer significant pre-decisional opportunities for informed

public involvement in the environmental review process—by releasing sufficient environmental information about the various topics the agency must address in the EA, such as cumulative impacts—before the EA is finalized.

255. Here, the Forest Service provided insufficient information to the public to foster informed public participation in the preparation of the EA.

256. Before reaching its decision on the Project, the Forest Service only released a 5-page Pre-Scoping Letter and a 13-page Scoping Report. Neither of these documents contained sufficient detail on the nature and particulars of the Project and its likely environmental impacts.

257. The Pre-Scoping Letter labeled the Project as a “Small Sale.” It did not provide any information on proposed timber volumes and did not disclose that old-growth timber would be harvested.

258. The Scoping Report did not disclose the amount of old growth proposed for harvest. It contained four sentences on concerns expressed by local residents about deer subsistence use, but otherwise did not disclose or analyze potential impacts. The Scoping Report did not mention wolves, goshawk, or any other old-growth dependent species. It did not disclose or analyze the direct, indirect, and cumulative impacts of the Project.

259. Together, the scoping notices provided no environmental data concerning impacts to wildlife, subsistence uses, watersheds, soils, fisheries, or aquatics.

260. The Forest Service never released a draft EA. The Forest Service released the Final EA at the same time it issued the FONSI and draft DN.

261. The Forest Service then provided for an “Objection” period, but the agency had already released the final EA, and made its decision pursuant to the draft DN.

262. The Forest Service failed to adequately involve and inform the public in the preparation and consideration of the EA for each the Mitkof Project, in violation of NEPA’s public participation requirements.

Decision Notice

263. The Forest Service failed to comply with regulations requiring the agency to address instructions from the Forest Supervisor before a decision is finalized.

264. Pursuant to the new process set forth at 36 C.F.R. § 218, the Forest Service

provided for an “objection” period. The objection period replaced the previous “administrative appeal” period.

265. Plaintiffs submitted extensive objections on the Mitkof Project EA and draft DN/FONSI. Forest Supervisor Cole reviewed the objections. *See* 36 C.F.R. § 218.3(a). Supervisor Cole responded to Plaintiffs’ objections and agreed that the EA and draft DN/FONSI were deficient in several respects.

266. Forest Supervisor Cole found that (1) no explanation was provided in the record that describe why no disproportional adverse effects are expected to occur to low-income subsistence users; (2) prescriptions for the selected harvest units, including detailed sale layout and marking instructions, have not yet been completed; (3) the conclusions drawn from the direct, indirect, and cumulative effects to deer, wolves, and subsistence deer hunting are not clearly distinguished in relation to the FONSI; and (4) it was not clear that the two NFS (Woodpecker and Overlook) timber sales and two by the University of Alaska were included in the cumulative effects analysis, and that the distinctions between the direct, indirect, and cumulative effects to marten in relation to the FONSI could be clearer.

267. Accordingly, Forest Supervisor Cole directed the Petersburg Ranger District to: (1) clearly distinguish direct, indirect, and cumulative effects in relation to the FONSI; (2) ensure that the other timber sales were analyzed as part of the wildlife cumulative effects analysis, and clearly distinguish direct, indirect, and cumulative effects to marten in relation to the FONSI; (3) explain why effects to low-income subsistence users would not be disproportional; and (4) complete the detailed prescriptions for units selected in the draft DN.

268. Pursuant to 36 C.F.R. § 218.12(b), District Ranger Anderson was prohibited from signing the final DN “until all concerns and instructions identified by the reviewing officer in the objection response have been addressed.”

269. The final DN signed by District Ranger Anderson failed to address Forest Supervisor Cole’s instructions, and thereby the concerns raised by Plaintiffs in their objections. Specifically, the final DN:

- (1) Does not distinguish cumulative effects in the analysis of impacts to deer, wolves, and subsistence hunters because it only addresses the incremental impacts of the Mitkof Project;

- (2) Does not contain any assurances that cumulative impacts to wildlife including marten were addressed in the context of the four overlapping timber sales;
- (3) Does not explain why impacts to low-income subsistence users would not be disproportional; and
- (4) Does not provide the required unit prescriptions—the Forest Service has only released draft Activity Cards—and so the Forest Service never assessed the number and size of clear-cut openings within units selected for 66%, 95%, and 98% retention, and the resultant impacts to deer winter habitat.

270. Accordingly, District Ranger Anderson signed the final DN/FONSI in violation of 36 C.F.R. § 218.12(b). In doing so, the Forest Service again deprived the public of a chance for meaningful participation in the decision-making process because the agency failed to respond to Plaintiffs' concerns that the Forest Supervisor himself had validated.

271. By (1) failing to provide sufficient information to foster informed public comment for the development of the EA; (2) failing to provide the public an opportunity to comment on a draft EA; (3) failing to respond to the public and Forest Supervisor's concerns in the final DN/FONSI, the Forest Service violated NEPA's public participation requirements.

272. In violating NEPA's requirements, Defendants have acted arbitrarily and capriciously, abused their discretion, and acted contrary to law, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2).

CLAIM FIVE

NEPA Compliance – Failure to Supplement NEPA Analysis

273. Plaintiffs incorporate by reference all preceding paragraphs.

274. The Forest Service violated NEPA by failing to supplement its NEPA analysis to respond to a substantial change in the Mitkof Project and new circumstances or information bearing on the original environmental analysis. The Forest Service failed to provide a reasoned explanation for its decision not to supplement its NEPA analysis.

275. The Mitkof EA analyzed, and the DN authorized, approximately 13 MMBF of

timber harvest from helicopter logging. For proposed implementation, an additional 6.4 MMBF of timber volume was added to the Project, for a total of 19.7 MMBF. The Mitkof Project has now grown from a 28.5 MMBF timber sale to a 34.9 MMBF timber sale—a 22% increase.

276. The additional timber volume constitutes a substantial change in the Mitkof Project. Agencies are only exempt from supplementation where (1) the new alternative is only a “minor variation” of one of the alternatives considered in the original NEPA analysis and (2) the new alternative is qualitatively within the spectrum of alternatives that were discussed in the EA.

277. Here, the Mitkof EA analyzed three alternatives: (1) a no action alternative; (2) a 15.1 MMBF alternative with no helicopter logging; and (3) the selected alternative with a total of 28.5 MMBF, with 13.4 MMBF of helicopter logging. The Mitkof Project as proposed for implementation now calls for 34.9 MMBF of total harvest, with 19.7 MMBF helicopter logging. The Mitkof Project as proposed for implementation calls for 22% more total harvest, and 48% more helicopter logging, than any of the alternatives considered in the Mitkof EA. Therefore, the new alternative is neither a “minor variation” nor “within the spectrum of” alternatives discussed in the EA.

278. The additional timber volume also constitutes significant new circumstances or information relevant to environmental concerns and bearing on the proposal or impacts.

279. In the Change Analysis, the Forest Service stated that there would only be 3 additional acres scheduled for helicopter harvest. The agency stated that the effects analysis for deer and subsistence summarized in the EA would not change with these additional acres. The agency never explained why the additional volume was insignificant for purposes of NEPA. The agency stated that

The increase in volume from the environmental analysis estimate to the implemented cruise estimate is an effect of several factors. It was assumed for planning purposes that one third basal area equaled one third estimated volume whereas the implemented cruise volume estimate is from a cruise design that incorporated the prescription and one third of the sampled basal area.

280. The agency did not disclose or analyze the implications of the additional volume in terms of the reduction in quality and quantity of deer habitat. The agency never explained how its new data reflected on baseline, and post-implementation habitat conditions or spatial

location of habitat. The agency did not re-run the deer model to incorporate the change in volume. The agency did not calculate reductions in volume class or disclose any additions in the size, number, and density of clear-cut openings.

281. To satisfy its supplemental NEPA duties under NEPA, an agency must sufficiently consider and evaluate the need for supplemental analysis. Here, the Forest Service in the Change Analysis never stated why the additional 6.4 MMBF of timber volume would not affect the environment to a degree not previously considered.

282. Since 1998, the Forest Service has prepared EAs for projects involving timber harvests of 2.2, 3, 3, 3, 3.9, 4.1, 4.6, 4.9, 5, 6, and 7 MMBF.

283. The record does not contain a reasoned explanation for the agency's decision not to supplement its NEPA analysis to address an increase in volume of 6.4 MMBF. The issue is compounded because the Forest Service originally prepared only an EA for the Mitkof Project, rather than a more searching and thorough EIS. One of the primary issues in this case is the Forest Service's failure to disclose and analyze the direct, indirect, and cumulative impacts of logging old-growth habitat for goshawks, deer, wolves, and subsistence hunters. Now, the agency has authorized 22% more logging.

284. The agency violated NEPA because it provided no explanation as to why nearly 20 MMBF of timber harvest would result in a similar magnitude of impacts as approximately 13 MMBF of timber harvest.

285. In violating NEPA's requirements, Defendants have acted arbitrarily and capriciously, abused their discretion, and acted contrary to law, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2).

PLAINTIFFS' PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter a judgment in favor of Plaintiffs and issue the following relief:

(1) Declare that Defendants violated the National Environmental Policy Act and National Forest Management Act by failing to disclose and consider the impacts of the Mitkof Project on the Queen Charlotte goshawk, a Sensitive Species, and to ensure a viable population of the species;

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(2) Declare that the Forest Service violated the National Forest Management Act and National Environmental Policy Act by failing to ensure that the Mitkof Project complies with the standards and guidelines of the 2008 TLMP relating to the Alexander Archipelago wolf, and by failing to take a hard look at the Mitkof Project's impacts to deer, wolves, and humans;

(3) Declare that Defendants violated the National Environmental Policy Act by failing to prepare an Environmental Impact Statement because Plaintiffs have raised substantial questions as to whether the Mitkof Project may have a significant impact on the quality of the human environment;

(4) Declare that Defendants violated the National Environmental Policy Act by failing to release a draft EA, involve the public in the NEPA process, comply with the requirements of 36 C.F.R. § 218.12(b), and prepare a supplemental analysis.

(5) Hold unlawful and set aside the Mitkof Project Environmental Assessment, Finding of No Significant Impact and Decision Notice;

(6) Issue preliminary and permanent injunctive relief prohibiting the Forest Service from authorizing implementation of the Mitkof Project until such time as the Forest Service can demonstrate compliance with the requirements of NEPA and NFMA;

(7) Issue any other relief that the Court deems appropriate; and

(8) Award Plaintiffs their costs and expenses (including reasonable attorney, expert witness, and consultant fees).

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Respectfully submitted this 22nd day of May, 2015,

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