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Andrew Mack, Commissioner
Department of Natural Resources
550 W. 7th Ave.
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Anchorage, Alaska 99501

Submitted via e-mail to: <mailto:dnr.appeals@alaska.gov>

Re: Baby Brown Timber Sale Forest Land Use Plan, DNR Project File Number NSE-1549

Dear Commissioner Mack:

I submit the following appeal of the Baby Brown Timber Sale Forest Land Use Plan (FLUP), Project File Number NSE-1549, pursuant to 11 AAC 02 on behalf of my client, Lynn Canal Conservation (hereinafter "LCC"). LCC has been active in the Haines area for over four decades and has closely followed and submitted comments on Haines State Forest issues since its inception. LCC filed comments on the Draft FLUP on January 5, 2017, and is eligible to file an appeal pursuant to 11 AAC 02.010. The State of Alaska issued its online public notice of the decision on February 6, 2017. LCC files this timely appeal on February 27, 2017 pursuant to 11 AAC 02.040(a) and (d).

Pursuant to 11 AAC 02.030, please consider my law office as the single point of contact for any notice or decision concerning this appeal at the above address.

I. Introduction: Basis of Challenge and Requested Remedy

LCC appeals the decision of Area Forester Greg Staunton to adopt the FLUP and challenges the decision for two reasons. First, the Division of Forestry bypassed its own commercial timber sale planning procedures by offering the Baby Brown timber sale for bid prior to completing a final FLUP. Because those procedures are regulations that implement the Alaska Land Act, which in turn implements procedural safeguards established by the Alaska Constitution for the management of public lands, the Division of Forestry's adoption the draft FLUP is unlawful. Second, the Division of Forestry offered the entire timber sale volume authorized under the Final Best Interest Finding (FBIF) as one large sale. But the FLUP encompasses only a portion of the affected area – 2 of 9 harvest units comprising 137 acres of the total 855 acres slated for timber extraction activities. The FLUP is thus incomplete and

also violates the Alaska Land Act and its provisions meant to implement procedural safeguards under the Alaska Constitution.

In order to remedy these problems, LCC requests that you direct the Division of Forestry to back up and reinitiate the public process in a manner that is consistent with the agency's regulations, the FBIF, the Haines State Forest Management Plan, and the laws implemented by those instruments. Specifically, the Division of Forestry must rescind its timber sale offering and bid award, and restart the public process with a Draft FLUP that encompasses all harvest units under the FBIF prior to any further agency action on this timber sale.

II. The Division of Forestry unlawfully offered the sale for bid prior to completing the FLUP stage of the administrative review process

LCC submits that the Division of Forestry violated its own regulations providing for the completion of the public review process prior to offering the timber sale for bid. These regulations implement procedural safeguards under the Alaska Constitution and Alaska Statutes. Article VIII, section 10 of the Alaska Constitution provides that "no disposals or leases of state lands, or interests therein, shall be made without prior public notice and other safeguards of the public interest as may be prescribed by law." The state legislature enacted the Alaska Land Act, AS § 38.05 *et seq.*, to establish these procedural safeguards for the management of state lands.¹ An agency action that fails to comply with these procedures is invalid.²

The Alaska Land Act provides for several procedures that must occur prior to a sale or disposal of public forest resources: (1) a written best interest finding; (2) public notice in the five year sale schedule; and (3) a final FLUP.³ AS 38.05.112 explicitly requires the development of a FLUP prior to authorizing timber harvest: "[t]he department may not authorize the harvest of timber, except for harvests of 10 acres or less or timber salvaged from land cleared for a nonforest use, until a site-specific forest land use plan has been adopted."⁴ Thus, the statutory scheme provides for all of these administrative review procedures to occur prior to offering a timber sale for bid.

Given this statutory mandate, the Division of Forestry's own commercial timber sale planning process explicitly anticipates administrative review at multiple stages prior to the issuance of timber sale notice. The process occurs in four phases that provide for public review at all stages, including the FLUP, prior to offering the timber for bid:

¹ See *Alaska Survival v. State*, 723 P.2d 1281,1289 (Alaska 1986).

² *Id.*

³ AS §§ 38.05.35(3); 38.05.112; 38.05.113.

⁴ AS § 38.05.112(a).

- (1) Phase One – pre-field work: the agency prepares a Five-Year Schedule of Timber Sales (FYSTS), provides for public and agency review and adopts the FYSTS;
- (2) Phase Two - field work: the Division of Forestry performs a timber cruise and road and harvest unit layout;
- (3) Phase Three – post-field work: the Division of Forestry prepares a draft FLUP and preliminary decision for its best interest finding for public review, followed by the preparation of a Final FLUP and Final Best Interest Finding;
- (4) Phase Four – contract: the Division of Forestry prepares a contract, prospectus, and notice of timber sale, and *then* conducts the sale.⁵

The administrative process set forth in the governing forest management plan and Final Best Interest Finding (FBIF) both direct the Division of Forestry to adhere to the above procedures. The Haines State Forest Management Plan requires that “[b]efore timber harvest *decisions* are made for specific locations ... a Forest Land Use Plan must be prepared.”⁶ The Baby Brown Timber Sale Final Best Interest Finding sets forth a six step process for the project. It identifies the preparation of FLUP as “Step 4”, and for “Step 5,” states that “[f]ollowing adoption of the final BIF, and completion of the FLUPs, DOF will offer the timber for sale.”⁷ Similarly, the Haines State Forest’s Five Year Forest Management Schedule explains that: “[b]efore any commercial timber sale is offered for bid, the Division of Forestry *must* issue a finding concluding that the sale is in the State’s best interest *and prepare a detailed Forest Land Use Plan (FLUP).*”⁸

But the Division of Forestry instead offered timber for bid prior to completing the FLUP process. In accordance with the regulations, the agency provided its Five Year Forest Management Schedule for projects encompassed within the Baby Brown FBIF in April 2014.⁹ Coastal Regional Forester Michael Curran signed the FBIF on March 12, 2015.¹⁰ But then, on November 9, 2016, the Division of Forestry offered the sale of 19.7 million board feet of timber for

⁵ Alaska Department of Natural Resources, Division of Forestry. 2005. Commercial Timber Sales Planning Process. Available at forestry.alaska.gov/timber/index?.

⁶ Alaska Department of Natural Resources, Division of Mining, Land and Water, Resource Assessment and Development Section and Division of Forestry. 2002. Haines State Forest Management Plan at 2-15 (emphasis added)(hereinafter Haines State Forest Management Plan).

⁷ Alaska Department of Natural Resources, Division of Forestry. 2015. Final Best Interest Finding and Decision for Baby Brown Timber Sale, NSE -1549 at pdf 2 – 4 (hereinafter Baby Brown FBIF).

⁸ Alaska Department of Natural Resources, Division of Forestry. Five Year Forest Management Schedule at 2 (emphasis added).

⁹ *Id.*

¹⁰ Baby Brown FBIF at pdf 5.

competitive sealed bid.¹¹ Nearly two weeks after the Division of Forestry offered the timber for sale, the agency released the Draft FLUP for public review.¹²

The Division of Forestry's failure to produce a FLUP prior to offering timber for sale violated a regulation that the agency must follow in order to comply with the Alaska Land Act and consequently the Land Act's Constitutionally required procedural safeguards. Alaska's Administrative Procedure Act explains that:

“[R]egulation means every rule, regulation, order, or standard of general application or the amendment, supplement, or revisions of a rule, regulation, order, or standard adopted by a state agency to implement, interpret, or make specific the law enforced or administered by, or to govern its procedure, except one that relates only to the internal management of a state agency; “regulation does not include a form prescribed by a state agency or instructions relating to the use of the form, but this provision is not a limitation upon a requirement that a regulation be adopted under the chapter when one is needed to implement the law under which the form is issued; “regulation” includes “manuals,” “policies,” “instructions,” “guides to enforcement,” “interpretative bulletins,” “interpretations,” and the like, that have the effect of rules, orders, regulations or standards of general application, and this and similar phraseology may not be used to avoid or circumvent this chapter; whether a regulation, regardless of name, is covered by this chapter depends in part on whether it affects the public or issued by the agency dealing with the public.¹³

The Alaska Supreme Court has observed that this definition provides “an expansive view of the term regulation.”¹⁴ There are two particular indicia of a regulation: (1) whether it “implements, interprets, or makes specific the law enforced or administered by the state agency” and (2) whether it affects the public or is used by the agency in dealing with the public.”¹⁵ The Division of Forestry's commercial timber sale planning procedures implement specific provisions of the Land Act administered by the agency – the best interest finding requirements set forth in AS 38.05.035(e) and the Timber Sale statutes set forth in AS 38.05.110-120.

¹¹ Alaska Department of Natural Resources, Division of Forestry. 2016. Notice of Timber Sale. *Available at* <http://aws.state.ak.us/OnlinePublicNotices/Notices/View.aspx?id=183543>

¹² Alaska Department of Natural Resources, Division of Forestry. 2016. Draft Forest Land Use Plan, Baby Brown Timber Sale NSE-1549 at 7.

¹³ AS 44.62.640(3).

¹⁴ *Messerli v. State*, 768 P.2d 1112, 1117 (Alaska 1989).

¹⁵ *Kenai Peninsula Fisherman's Co-op Ass'n v. State*, 628 P.2d 897, 904 (Alaska 1981).

The regulation also affects public participation in the commercial timber sale planning process, and is used by the agency in dealing with the public.

The Final FLUP insists that the chosen procedure was lawful, citing AS 38.05.112(a) which provides that: [t]he department may not authorize the harvest of timber ... until a site-specific forest land use plan has been adopted.”¹⁶ The Alaska Land Act does not define what it means to “authorize timber harvest.”¹⁷ The FLUP asserts that “harvest” describes the actual removal of the timber from state land and does not occur until after the Division of Forestry has adopted a FLUP.¹⁸

This position is untenable and confuses what the timber operator will do – “actual removal of the timber” - with the agency’s *decision* to offer a specified amount of timber from a specific location for sale. The agency’s timber sale procedures, applicable forest plan, and historical practice all demonstrate that it interprets the statute to require a FLUP before offering timber for sale. The Division of Forestry authorizes the harvest of timber when the agency makes its final decision to harvest the timber by offering it for sale in the final FLUP.

The Division of Forestry’s website explains that:

FLUPs are subject to public and agency review. FLUPs may be reviewed either simultaneous to or following the review and adoption of a Best Interest Finding. After FLUP review and revision, the Division decides whether to adopt the FLUP and go on with the sale, or to drop the sale.¹⁹

This recognition that AS 38.05.112 requires a FLUP prior to offering timber is also clear in the Haines State Forest Management Plan: “[b]efore timber harvest *decisions* are made for specific locations ... a Forest Land Use Plan *must* be prepared.”²⁰ In other words, it is the timber harvest decision in the FLUP that is the critical point in the process – not the subsequent actual removal of timber by the sale purchaser. The Final Best Interest Finding similarly reflects the same understanding: “*following* completion of the FLUPs, DOF will offer the timber for sale by auctioning competitive sales and/or negotiating some sales with purchasers.”²¹ The Haines State Forest’s Five Year Forest Management Schedule

¹⁶ Alaska Department of Resources, Division of Forestry. 2017. Forest Land Use Plan, Baby Brown Timber Sale at Appx. D. p. 32.

¹⁷ AS § 38.05.990.

¹⁸ Alaska Department of Resources, Division of Forestry. 2017. Forest Land Use Plan, Baby Brown Timber Sale at Appx. D. p. 32.

¹⁹ See <http://forestry.alaska.gov/timber/fup> (citing AS 38.05.112, 38.04.65(b); 38.05.035(e))(emphasis added). The end of the hyperlink link – fup instead of flup – is the correct website.

²⁰ Haines State Forest Management Plan at 2-15 (emphasis added).

²¹ Baby Brown FBIF at pdf 4 (emphasis added).

explicitly interprets the Division of Forestry’s regulations and governing statutes to trigger the FLUP requirement prior to offering timber for sale: “[b]efore any commercial timber sale is offered for bid, the Division of Forestry *must* issue a finding concluding that the sale is in the State’s best interest and prepare a detailed Forest Land Use Plan (FLUP).”²²

LCC has reviewed a number of timber sales from different Division of Forestry management areas – all of which utilize the same six-step process described in the Baby Brown FBIF.²³ For example, the recent Coffman Cove Timber Sale FBIF explained that: “[f]ollowing the adoption of the final BIF, and completion of the FLUPs, DOF offers the timber sale by either auctioning competitive sales and/or negotiating some sales with purchasers.”²⁴ Thus, on August 31, 2016, you signed the Final Best Interest Finding for the sale.²⁵ Then, on January 18, 2017, Area Forester Greg Staunton approved the Forest Land Use Plan. Then, on January 30, 2017, after completion of the FLUP, the Division issued its prospectus.²⁶

Further, LCC’s concerns find support in the administrative function of a FLUP – to refine the timber sale volume and prescriptions prior to the sale offering. The FBIF for the Baby Brown Timber Sale explains that the purpose of a FLUP is to specify the site, size, timing and harvest methods for timber unit, address site-specific requirements for construction and consider multiple use management.²⁷ The FLUP describes the specific harvest location, estimated volume of timber, harvest methods, reforestation plan, access, and multiple use considerations for a sale area.²⁸ The decision to offer the timber sale for bid prior to conducting a site-specific evaluation is thus not only unlawful – it is impractical.

²² Alaska Department of Natural Resources. 2014. 2014-2018 Five Year Forest Management Schedule. *See* p.2.

²³ *See, e.g.* Exh. 1, Alaska Department of Natural Resources, Division of Forestry. 2016. Preliminary Best Interest Finding and Decision for the North Hollis Timber Sale, SSE-1346-K (November 2016); Exh. 2, Alaska Department of Natural Resources, Division of Forestry. 2015. Final Best Interest Finding and Decision for the Vallenar Bay Timber Sale, Number SSE-1345K (May 2015); DNR. 2016; Exh. 4, Alaska Department of Natural Resources, Division of Forestry. 2016. Forest Land Use Plan, Healy Lake Fire Salvage Sale #NC1652-D; *see also* forestry.alaska.gov/timber/delta (showing that the Division (1) prepared a FLUP on October 21, 2016; (2) issued the FBIF on January 30, 2017 and (3) issued its Notice of Timber Sale on February 2, 2017).

²⁴ *See, e.g.* Exh. 3, Alaska Department of Natural Resources, Division of Forestry. 2016. Final Best Interest Finding and Decision for the Coffman Cove Timber Sale.

²⁵ *Id.*

²⁶ Exh. 7. Alaska Department of Natural Resources, Division of Forestry. 2017. Request for Proposals.

²⁷ Baby Brown FBIF at pdf 4.

²⁸ Alaska Department of Natural Resources, Division of Forestry. 2014. 2014-2018 Five Year Forest Management Schedule at 2.

Equally important, as explained on the Division of Forestry’s website, the FLUP review process informs the decision to proceed with, modify, or amend the timber sale.²⁹ Similarly, the Haines State Forest Management Plan explains that a FLUP assesses alternative approaches to a proposed timber harvest, identifies a preferred alternative for implementation, and any required stipulations.³⁰ In other words, the FLUP is the final step in the process that provides the public and other state agencies with the opportunity to request changes to harvest units, review alternative approaches to the timber sale, or even to request that the agency drop the sale. Other Division of Forest FLUPs directly provide for alternative actions.³¹ The Baby Brown FLUP did not provide the public with this opportunity – in direct conflict with the procedures required by the Haines State Forest Management Plan. By offering the entire sale volume for bid, the Division of Forestry has rendered the FLUP process a nullity.

The Division of Forestry’s procedures implanting the Alaska Land Act make clear the FLUP is critical to the broader timber sale planning process in that it provides the final opportunity for the public or other resource agencies to provide final input and suggest mitigating measures for site-specific actions. This input must occur prior to finalizing the sale volume and location through the bidding process. Otherwise, the Division of Forestry will – as it has done here – bypass public participation and review by other resource agencies.

In sum, LCC submits that the procedure followed here by the Division of Forestry – awarding a bid prior to the completion of the administrative and public review process for the FLUP – unlawfully authorized timber harvest prior to completion of the planning process. This is a serious procedural violation because the failure to allow for public comment on a FLUP for the entire sale precludes “meaningful participation” by other agencies, local governments and the general public.³² The Alaska Land Act’s policy statement makes clear that “[t]he involvement of a proximately located municipality and local residents is essential ... in making state land available for private use.”³³ The Division of Forestry unlawfully bypassed its own commercial timber sale planning processes, the Haines State Forest Management Plan, the Alaska Land Act, and Constitutional requirements to provide for meaningful public participation in disposals of public resources.

²⁹ See forestry.alaska.gov/timber/fup;

³⁰ Haines State Forest Management Plan, Appx. A at 3.

³¹ See, e.g. Exh. 5 at 13 (showing that the Kenai/Kodiak region uses the FLUP process to inform the decision to proceed with, modify, or even drop the sale); see also Exh. 6, Alaska Department of Natural Resources, Division of Forestry. 2011. Forest Land Use Plan, Mae West Timber Salvage Sales, ADL#231211 at 6.

³² See *Alaska Survival*, 723 P.2d at 1291 (Alaska 1986).

³³ AS § 38.04.005(e).

LCC requests that you direct the Area Forester to rescind the adopted FLUP and November 9, 2016 timber sale notice and subsequent bid award, and prepare a draft FLUP for public review prior to any further agency action on the Baby Brown Timber Sale.

III. The Division of Forestry unlawfully adopted an incomplete FLUP that unlawfully precludes public and agency review of all harvest units within a large, single sale

LCC's comment letter on the draft FLUP questioned the Division of Forestry's decision to produce an incomplete FLUP that only allowed for public comment on a portion of the sale area. The Division of Forestry's draft contract and bid award for the Baby Brown Timber Sale make clear that this will be a single sale of 19.7 million board feet from 9 separate harvest areas comprising 855 acres. But then, this FLUP then covers only "the first operational period" of the sale – it describes two harvest on 137 acres adjacent to Glacier Creek and defers the preparation of additional FLUP documents for subsequent administrative and public review.³⁴ The Division of Forestry intends to prepare additional FLUPs for the timber sale at a later time.³⁵ Thus, in addition to the procedural problem described above in Section II of this appeal, the Division of Forestry unlawfully has proceeded with a single large timber sale without preparing a FLUP that encompasses the other 7 harvest units comprising 618 acres included in the sale.

Alaska law clearly requires that the Division of Forestry analyze the risks to scenic, fish and wildlife resources prior to issuing development rights.³⁶ The Alaska Land Act also requires that, "[i]n adopting a forest land use plan, the commissioner shall consider the best available data, including information provided by other agencies."³⁷ It is impossible for the Division of Forestry to meet this requirement through the preparation of a FLUP that encompasses only a portion of the harvest units offered for sale.

LCC is aware that the Division of Forestry does at times prepare multiple FLUPs after preparing an FBIF for a project – but these are for individual sales out of a larger area covered by a single FBIF. As the Division of Forestry's Kenai/Kodiak Area explains with regard to multi-sale project, "a [FLUP] will be written for *each individual sale*."³⁸ The Haines State Forest's Five Year Forest Management Schedule

³⁴ Alaska Department of Natural Resources. 2016. Draft Forest Land Use Plan, Baby Brown Timber Sale. See p.4.

³⁵ *Id.*

³⁶ See, e.g. *Trustees ex rel Alaska v. State*, 795 P.2d 805 (Alaska 1990); *Trustees ex rel Alaska v. State*, 865 P.2d 745 (Alaska 1993).

³⁷ AS 38.05.112(b).

³⁸ See Exh. 5 at 5 (emphasis added).

similarly states that “[a]ll Forest Land Use Plans ... will be completed separately on a sale by sale basis.”³⁹

The FBIF anticipated that this sale “could be sold as one large or a series of 3 – 7 MMBF sales Again, these will all be done as a FLUP.”⁴⁰ The reference to “a” FLUP demonstrates that the Division of Forestry recognized that if it proceeded with one large sale, it would need to produce one FLUP. If it proceeded with multiple sales, the agency planned to prepare multiple FLUPs.

For example, the Vallenar Timber Sale, which anticipates multiple FLUPs, states that “DOF will sign a contract with the winning bidder for *each* sale.”⁴¹ These contracts will “include stipulations to ensure compliance with the BIF, FLUP, and statutory requirements.”⁴² Here, how can the Division contract with an operator to remove timber from 9 units encompassing 855 acres without first identifying the necessary stipulations through the required public and agency process? Thus, when the agency does offer timber volume authorized under a BIF as a single sale, such as the Coffman Cove timber sale, it completes a final FLUP for all harvest units before issuing its request for proposals for the entire sale.

The reason that the Division of Forestry must issue a FLUP addressing all harvest units prior to offering a sale is obvious. Through the Coffman Cove Timber Sale FLUP process, the Division reduced the overall sale acreage from the 492 acres authorized for removal to 427 acres. These reductions are common in timber sales and known as “falldown.” As the Tongass National Forest explains:

The difference between the number of acres planned for timber harvest and those actually harvested [is] usually experienced as a reduction in acres. Falldown results from many factors, including unmapped, unsuitable timber land, newly available information and project-level consideration of site-specific issues and non-timber resource needs.⁴³

The design of the FLUP process clearly aims at addressing falldown to a significant extent. The Baby Brown FBIF was a five page document that defers much of the environmental analysis to the FLUP process. It described the project area,

³⁹ Alaska Department of Natural Resources, Division of Forestry. 2014. Five Year Forest Management Schedule at 2.

⁴⁰ FBIF, Appx. 3 at 10.

⁴¹ Exh. 2 at 4.

⁴² *Id.*

⁴³ U.S. Department of Agriculture, Forest Service, Alaska Region, Tongass National Forest. 2016. Land and Resource Management Plan at 7-21. Available at: <https://www.fs.usda.gov/detail/tongass/landmanagement/?cid=stelprd3801708>

timber volume and process for timber sale planning. It then explained that a FLUP will “specify the site, size, timing and harvest methods for harvest units, and “address site-specific requirements for access construction and maintenance, reforestation, and multiple use management” based on additional field work and public and agency review.”⁴⁴ In response to public concerns about scenic impacts and adverse impacts to fish and wildlife resources, the FBIF stated that the FLUP process would address these issues.⁴⁵

Similarly, the Five Year Forest Management Schedule explains that “other resources that may ... be impacted by road development are considered and described in the FLUP associated with [road developments].”⁴⁶ In other words, through the process explained in the Final Best Interest Finding for this project and Five Year Schedule, the Division of Forestry’s final decisions detailing the timber harvest prescriptions and road management occur during the FLUP process.

But here, the agency has already put the entire sale up for bid and has issued a bid award and draft contract for all of the harvest units – prior to providing the public and other agencies with a FLUP for the other harvest units.⁴⁷ LCC requests that you direct the Area Forester to rescind or withdraw the adopted FLUP, and prepare a revised draft that considers the entirety of the sale.

IV. Conclusion

For the above reasons, LCC requests that you direct the Area Forester to rescind the adopted FLUP and bid award because the Division of Forestry failed to follow legally required procedures by offering the timber for sale prior to completing the FLUP. Further, even if the Division had followed its procedures, the FLUP is incomplete and cannot support the offering or award of the entire sale volume under the FBIF.

Paul C. Olson
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⁴⁴ Alaska Department of Natural Resources. 2015. Final Best Interest Finding and Decision for the Baby Brown Timber Sale.

⁴⁵ Baby Brown FBIF, Appx. 3 at 1, 3, 11.

⁴⁶ Alaska Department of Natural Resources. 2014. 2014-2018 Five Year Forest Management Schedule. See p. 9.

⁴⁷ Alaska Department of Natural Resources, Division of Forestry. 2016. Notice of Timber Sale.