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November 17, 2006

Honorable Michael Menge, Commissioner
Department of Natural Resources
400 Willoughby Avenue, Suite 500
Juneau, AK 99801

Re: Enforceable State Policies Applicable to Timber Sales in the Tongass
National Forest Pursuant to the Alaska Coastal Management Program,
AG File No. 661-03-0536

Dear Commissioner Menge:

The Alaska Department of Natural Resources (“DNR”) requested an opinion regarding which state enforceable policies are applicable to timber sales in the Tongass National Forest (“Tongass”) pursuant to the Alaska Coastal Management Program (“ACMP”). In our opinion, federal timber sales must comply with the resource protection provisions of the Forest Resources and Practice Act (“FRPA”) and the regulations promulgated under those provisions in order to be consistent with the ACMP.

Background

Under the Coastal Zone Management Act of 1972, “[e]ach Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs.” 16 U.S.C. 1456(c)(1)(A); AS 46.39.010.

The ACMP is the approved program for the State of Alaska. DNR is tasked with enforcing and coordinating the ACMP. AS 40.39. DNR's determination of whether Federal agency activities are consistent, to the maximum extent practicable, with the enforceable policies of the ACMP are called "consistency determinations."

One type of consistency determination is a general consistency determination ("GCD"). Pursuant to 15 C.F.R. 930.36(c), "in cases where Federal agencies will be performing repeated activity other than a development project¹ . . . which cumulatively has an effect upon any coastal use or resource, the Federal agency may develop a general consistency determination, thereby avoiding the necessity of issuing separate consistency determinations for each incremental action controlled by the major activity." The U.S. Forest Service has recently submitted this type of consistency determination to DNR for timber sales in the Tongass.

DNR must approve the GCD before it can become effective. However, the agency must first identify the applicable state enforceable policies under the ACMP before it can approve or object to the Forest Service's GCD. This opinion identifies the enforceable state policies.

Applicable Law

The ACMP implementing regulations provide that "AS 41.17 (Forest Resources and Practices Act) and the regulations adopted under that chapter with respect to the harvest and processing of timber are incorporated into the [coastal management] program and constitute the components of the program with respect to those purposes." 11 AAC 112.250. Therefore, in order to comply with the ACMP, federal timber sales must be consistent with FRPA and the regulations adopted thereunder.

¹ Timber harvest activities are not "development projects." See 15 C.F.R. 930.31(b).

The Forest Resources and Practices Act provides in relevant part:

(b) For federal land,

(1) the degree of resource protection may not be less than that established by this chapter for state land except that AS 41.17.119 establishes the minimum riparian standard;

(2) a timber harvest activity subject to this chapter shall satisfy the requirement to be consistent to the maximum extent practicable with the Alaska coastal zone management program if the federal land management plans, guidelines, and standards applicable to that timber harvest activity provide no less resource protection than the standards that are established in this chapter provide for state land except that

(A) AS 41.17.119 establishes the minimum riparian standards; and

(B) this paragraph does not apply to a timber harvest activity that requires a state or federal authorization under a provision of law other than this chapter.

AS 41.17.900(b).

We interpret this to mean that federal timber harvest activities, excluding those which require state or federal authorization under a provision of law other than FRPA, will be deemed consistent with the ACMP if the degree of resource protection is not less than that established by FRPA for state land, with one exception. That is the minimum riparian standard for federal lands is established by AS 41.17.119 (“Minimum riparian standards for other public land”), not AS 41.17.118 (“Riparian standards for state land”).

Forest Resources and Practices Act

With the exception of the application of AS 41.17.119, the provisions of FRPA that are applicable to federal timber sales are those that provide resource protection to state land. These provisions are found at AS 41.17.060, AS 41.17.082, AS 41.17.115(a), AS 41.17.220, and AS 41.17.119. In particular, AS 41.17.060 sets out the regulatory and administrative standards for state land, and by extension, for federal timber sales. Alaska Statute 41.17.082 addresses the

control of infestations and disease. More specifically, this provision states that forest clearing operations and silvicultural systems must be designed to reduce the likelihood of increased insect infestation and disease infections that threaten forest resources. Resource protection for federal timber sales must meet or exceed this protection in order to be consistent with the ACMP. Alaska Statute 41.17.115(a) establishes that the management intent for riparian areas is the adequate preservation of fish habitat. This is accomplished by maintaining a short- and long-term source of large woody debris, stream bank stability, channel morphology, water temperatures, stream flows, water quality, adequate nutrient cycling, food sources, clean spawning gravels, and sunlight. Resource protection for federal timber sales must meet or exceed this management intent for riparian areas. Alaska Statute 41.17.220 requires that state land (and therefore federal land pursuant to AS 41.17.900(b)) be managed under the sustained yield principle, the provisions of FRPA, and a forest management plan. Finally, AS 41.17.119 establishes the minimum riparian standard for federal land.² This provision dictates the setback of harvest activities depending upon the Region in which the timber harvest activities are taking place.

The applicability of AS 41.17.119 to federal timber sales warrants further analysis since part of a December 13, 1993 memorandum from the Department of Law to Resource Commissioners entitled “Central Prince of Wales U.S. Forest Service timber sale and Alaska coastal management review” is at odds with this opinion on that point. During that time, there was debate regarding the applicability of the more protective standards in AS 41.17.118

² Alaska Statute 41.17.119 is entitled “Minimum Riparian Standards For Other Public Land.” Although the definition of “other public land” does not include federal land (*see* AS 41.17.950(16)), AS 41.17.119 applies to federal lands. AS 41.17.900(b).

(“Riparian standards for state land”) to federal lands. There was little legislative guidance relating to this issue, so the Department of Law interpreted the applicable statutes conservatively, concluding that the most stringent provision, *i.e.*, AS 41.17.118, also applied to federal lands. The legislature has since amended these statutes such that the conservative 1993 interpretation is no longer appropriate. Therefore, we conclude here that AS 41.17.119 (not AS 41.17.118) controls the standards that apply to federal timber sales.

In 1993, this office concluded that “AS 41.17.900(b)(1) and (2) require federal lands to receive no less protection than state land, [so] the minimum standard [established in 41.17.119] does not supersede the standard outlined in AS 41.17.118, which sets the riparian standard for state land.” At that time, AS 41.17.119 provided minimum setbacks in terms of feet from water bodies:

- On other public land, harvest of timber may not occur
- (1) within 100 feet from the shore or bank of an anadromous or high value resident fish water body that is located south of the Alaska Range;
 - (2) within 100 feet immediately adjacent to an anadromous or high value resident fish water body north of the Alaska Range unless the commissioner determines that adequate protection remains for the fish habitat.

AS 41.17.119 (1993). In 1993, section 118 set more stringent standards for state land:

- (a) The riparian standards for state land are as follows:
 - (1) on state forest land managed by the department that is located north of the Alaska range, harvest of timber may not be undertaken within 100 feet immediately adjacent to an anadromous or high value resident fish water body unless the division determines that adequate protection remains for the fish habitat;
 - (2) on state forest land managed by the department that is located south of the Alaska Range,
 - (A) harvest of timber may not be undertaken within 100 feet immediately adjacent to an anadromous or high value resident fish water body;

(B) between 100 and 300 feet from the water body, timber harvest may occur but shall be consistent with the maintenance of important fish and wildlife habitat.

AS 41.17.118(a) (1993). Since the state riparian standard outlined in the 1993 version of AS 41.17.119 was the **minimum** standard (*see* AS 41.17.900(b) (1993)), the state interpreted 41.17.118(a)(2)(B) (a more stringent standard than AS 41.17.119(1)) to be applicable to federal lands south of the Alaska Range by virtue of section 900's demand that federal land have no less resource protection than state land.

Amendments to AS 41.17.119 since 1993, however, require that we now reach a different conclusion. Alaska Statute 41.17.119 has been amended and currently reads:

The riparian standards for other public land are as follows:

- (1) in Region I, harvest of timber may not be undertaken within 100 feet of an anadromous or high value resident fish water body;
- (2) in Region II, the standards are the same as for state land under AS 41.17.118(a)(2)(A)-(F) and regulations adopted under this chapter;
- (3) in Region III, the standards are the same as for state land under AS 41.17.118(a)(3) and regulations adopted under this chapter.

Sec. 4, ch. 65, SLA 2006.

This conclusion makes little difference in Regions II and III because the legislature simply incorporated by reference the applicable state standards in section 118 when it amended section 119.³ The standard for Region I, however, expresses the setback as an absolute minimum measurement rather than incorporating section 118 by reference. Had the legislature intended for AS 41.17.118 to apply to federal lands in Region I, it would have expressly said so, as it has done for Regions II and III. The Tongass National Forest is located in Region I, which encompasses coastal forests from Southeast Alaska through Prince William Sound and the

³ Regions I, II, and III are defined at AS 41.17.950(18) – (20).

Alaska Peninsula. As such, timber harvest activity in the Tongass needs only to comply with AS 41.17.119(1), not AS 41.17.118.

Regulations Adopted Pursuant to FRPA

In 1990, significant amendments were made to FRPA, including AS 41.17.900. Prior to these amendments, there was considerable controversy about how the statutory and regulatory standards in existence would apply to federal lands. The legislature amended AS 41.17.900(b)(2) to its current version with the intent that the issue would later be resolved through amendments to the ACMP. *See* Section 27 of the Bill Analysis attached to letter from Lennie Gorsuch to Bettye Fahrenkamp (May 5, 1989) (Attachment 1). Subsequently, the ACMP regulations were amended to read “AS 41.17 **and the regulations** adopted under that chapter with respect to the harvest and processing of timber are incorporated into the [coastal management] program and constitute the components of the program with respect to those purposes.” 11 AAC 112.250 (emphasis added). The ACMP put the debate to rest by expressly requiring that both FRPA and the regulations adopted under FRPA are applicable to the harvest and processing of timber, with no distinction made between provisions applicable to federal versus state lands. Therefore, in order to comply with the ACMP, federal timber sales must be consistent with both FRPA and the regulations adopted under FRPA.

Further, the FRPA regulations are integral in interpreting the resource protection standards established in the Act. For example, AS 41.17.060 states that “[a]ll regulations . . . under this chapter shall be in full accordance with the standards set out in this section.” AS 41.17.060(a). The standards in the statute contain broad instructions, such as “to the fullest extent practicable, harvested forest land shall be reforested, naturally or artificially, so as to

result in a sustained yield of merchantable timber from that land.” AS 41.17.060(b)(4). The FRPA regulations expand on this language and define what is “the fullest extent practicable” under the statute. Article 5 (“Reforestation”) of the FRPA regulations, for instance, states “[r]eforestation must be achieved within five years after harvest in Region I,” and in that Region, “the number of vigorous, undamaged, and well distributed seedlings of commercial tree species must average at least 200 trees per acre and must have survived on site for a minimum of two years.” 11 AAC 95.375(d).

For these reasons the regulations implementing the applicable provisions of FRPA are state policies that are enforceable for timber sales on federal land under the ACMP. Consequently, except for the riparian standard, timber harvest activity on federal land that does not require a state or federal authorization under a provision of law other than FRPA must provide **no less resource protection** than the standards for state land. AS 41.17.900(b). This does not mean that resource protection on federal land must meet the specific language of the state standards. Rather, collectively, resource protection provided on federal land must be at least as stringent as the resource protection for state land. The state standards that provide resource protection are found in the attached list of FRPA regulations. *See* Attachment 2. These are the regulations by which federal resource protection must be compared, and in order to be consistent with the ACMP, federal resource protection must be at least as protective as the attached standards.

Conclusion

In order to be consistent with the AMCP, federal timber sales must be at least as stringent as the applicable state enforceable policies pursuant to the ACMP. These provisions are found at

AS 41.17.060, AS 41.17.082, AS 41.17.115(a), AS 41.17.220, AS 41.17.119, and in the list of attached regulations (Attachment 2) implementing the standards of these statutes.

Sincerely,

DAVID W. MÁRQUEZ
ATTORNEY GENERAL

By:

Lindsay A. Wolter
Assistant Attorney General

Attachments

cc: Randy Bates, Acting Director, Office of Project Management and Permitting
Janet Burlison-Baxter, Large Project Coordinator, Office of Project Management and Permitting

FRPA Regulations Applicable to Federal Land

- 11 AAC 95.185 Purpose and relationship to other laws
- 11 AAC 95.195 Clearing of spruce trees
- 11 AAC 95.200 Land use conversion
- 11 AAC 95.260(c) Riparian standards
- 11 AAC 95.265(a)(4)-(5), (b), (c) (excluding the second part relating to private land), (d), (e), (f) Classification of surface water bodies
- 11 AAC 95.270 Designation and marking of a riparian retention area (excluding last provision in subpart (a) relating to private land)
- 11 AAC 95.275 Uses within a riparian area
- 11 AAC 95.280(b)-(d) Slope stability standards
- 11 AAC 95.285 Road location
- 11 AAC 95.290 Road construction
- 11 AAC 95.295 Road drainage
- 11 AAC 95.305 Culverts and other water crossing provisions
- 11 AAC 95.315 Road maintenance
- 11 AAC 95.320 Road closure
- 11 AAC 95.325 Material extraction and disposal sites
- 11 AAC 95.330 Rehabilitation after mass wasting
- 11 AAC 95.335 Blasting standards
- 11 AAC 95.340 Harvest unit planning and design
- 11 AAC 95.345 Landing location, construction, and operation
- 11 AAC 95.350 Bank integrity
- 11 AAC 95.355 Felling and bucking
- 11 AAC 95.360 Cable yarding
- 11 AAC 95.365 Tracked and wheeled harvest systems
- 11 AAC 95.370 Slash
- 11 AAC 95.375(b)-(f) Reforestation requirement
- 11 AAC 95.380 Natural regeneration
- 11 AAC 95.385 Regeneration survey and report
- 11 AAC 95.390 Site preparation
- 11 AAC 95.810 Measurement of distances
- 11 AAC 95.815 Disposal of waste material
- 11 AAC 95.820 Aesthetics
- 11 AAC 95.825 Water quality monitoring
- 11 AAC 95.900 Definitions