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CONGRESSIONAL REVIEW ACT

Application to the Tongass National Forest Land and Resource Management Plan

Statement of Robert P. Murphy, General Counsel

GAO/T-OGC-97-54

Chairman Murkowski, Chairman Young, and Members of the Committees:

I am pleased to appear before you today to discuss the General Accounting Office's views on whether the Tongass National Forest Land and Resource Management Plan, issued by the United States Forest Service on May 23, 1997, is a "rule" under the provisions of the Small Business Regulatory Enforcement Fairness Act (SBREFA). Attached to this statement is a detailed legal opinion we recently issued on the question.

SBREFA was enacted on March 29, 1996, establishing a government-wide congressional review mechanism of new rules, including the availability of expedited procedures to enact joint resolutions of disapproval to overrule federal rulemaking actions. As the joint statement on the new law by Senators Stevens, Nickles, and Reid explained, the purpose of the legislation was to restore balance between the enactment of laws by Congress and their implementation by the Executive branch. The Congress sought to reclaim some of the policymaking authority that had been assumed by regulatory agencies with increased delegation of legislative functions from the Congress to these agencies.

Congressional oversight of rulemaking as contemplated by SBREFA can be an important and useful tool for balancing and accommodating the concerns of American citizens and businesses with federal agency rulemaking. It is important to assure that Executive branch agencies are responsive to citizens and businesses about the reach, cost, and impact of regulations without compromising the statutory mission given to those agencies. SBREFA seeks to accomplish this by giving the Congress an opportunity to review rules before they take effect and to disapprove those found to be too burdensome, excessive, inappropriate, duplicative, or otherwise objectionable. As of July 3, 1997 (about 15 months following enactment), 79 major rules and 4,833 non-major rules have been submitted under SBREFA.

On June 18, 1997, the Chief of the Forest Service forwarded copies of the Tongass Plan to both Houses of Congress and our Office following the procedures outlined in SBREFA, while stating at the same time that land and resource management plans are not subject to the statute. An attachment to the transmittal letter states that the Plan is not a major rule.[1]

[1]A "major rule" is one found by the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), to meet certain criteria, such as whether the rule will have an annual effect on the economy of $100 million or more. 5 U.S.C. § 804(2).

We conclude that the Tongass Plan constitutes a "rule" under SBREFA. Therefore, submittal of a report to each House of Congress and the General Accounting Office was necessary in order for the rule to become effective. If the Office of Information and Regulatory Affairs determines the rule to be major, it is not effective until 60 days after the submission of the report to the Congress or publication in the Federal Register, whichever is later. This would result in an effective date of August 17, 1997, 60 days after submission to the Congress.

SBREFA provides that before a rule becomes effective, the agency promulgating the rule must submit to each House of Congress and to the Comptroller General a report containing: "(i) a copy of the rule; (ii) a concise general statement relating to the rule, including whether it is a major rule; and (iii) the proposed effective date of the rule."

On the date the report is submitted, the agency also must submit to the Comptroller General and make available to each House of Congress certain other documents, including a cost-benefit analysis, if any, and agency actions relevant to the Regulatory Flexibility Act, and the Unfunded Mandates Reform Act of 1995, and any other relevant information or requirements under any other legislation or any relevant executive orders.

Once a rule, whether determined to be a major rule or not, is submitted, special procedures are available for a period of 60 session days in the Senate or 60 legislative days in the House for Congress to pass a joint resolution of disapproval. These time periods can be extended upon a congressional adjournment. SBREFA provides that a major rule may not become effective until 60 days after it is submitted to Congress or published in the Federal Register, whichever is later.

There are two questions concerning whether SBREFA procedures are applicable to the Tongass Plan. The first is whether the Tongass Plan is a "rule" under SBREFA, that is, an "agency statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy." The second is whether any of the statutory exceptions in SBREFA are applicable. If the Tongass Plan is a rule, which we conclude it is, there is a third question—is it a "major" rule, which cannot be effective for 60 days after presentation to the Congress and GAO. This determination is reserved to OMB's Office of Information and Regulatory Affairs.

A summary description of the Plan shows clearly that it meets the definition of a "rule." The Plan implements the requirement of the National Forest Management Act that the Secretary of Agriculture develop, maintain, and revise land resource management plans and assure compliance with the Multiple-Use Sustained-Yield Act of 1960 in setting forest management direction and harvesting levels. It prescribes the manner or the policy of the Forest Service for managing the Tongass National Forest for the future (10-15 years). The various management prescriptions and land use designations, when read together, set out what type of activities may occur in various sections of the National Forest. Thus, it meets the elements of a "rule": it is of general applicability (it affects many parties, private and governmental, concerning the National Forest) and future effect (10 to 15 years in duration), and it implements, interprets, and prescribes law and policy.

SBREFA sets forth several exceptions to the definition of rules subject to congressional review. The only one arguably applicable here is "any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties."

In our view, the Plan has a substantial effect on non-agency parties. It allocates areas of the Forest to Land Use Designations and describes the uses to which the land may be put and the activities which may occur there. This "management prescription" gives general direction on what may occur within an area allocated to a particular Designation, the minimum standards for accomplishing each activity, and guidelines on how to go about accomplishing the standards.

Some minimum standards and guidelines provide considerable discretion to forest managers. For example, for the Karst and Caves Resource in areas of the Wilderness Designation, managers are to: "Identify opportunities for interpretation of caves for public education and enjoyment. Interpretation will generally occur outside this Land Use Designation." Other standards and guidelines are more specific. For example, for the Lands Resource in areas of the Wilderness Designation, managers may permit new special use cabins only if, among other things, the permit is nontransferable, limited to a 5-year term, and provides that no motorized equipment may be used unless specifically approved by the Regional Forester.

Among the more specific standards are those applicable to timber harvesting. Timber may not be harvested within the 1,000 foot beach and

estuary fringe or buffer zone. In the Wildlife standards and guidelines, forest stand structural characteristics are listed which must be maintained after harvesting. For example, in the American Marten habitat (1) 10-20 percent of the original stand, (2) four large trees (20-30 inches in diameter) per acre, (3) three large dead or dying trees (20-30 inches in diameter) per acre, and (4) an average of three large pieces of down material per acre must remain.

The specific restrictions and prohibitions are binding unless a land resource plan is amended in accordance with the requirements of the National Forest Management Plan Act, which provides that a plan may be amended after adoption following public notice. If the amendment is a significant change, the revision must be made available to the public in the vicinity of the affected area at least 3 months before amendment and the agency must hold public meetings or comparable processes that foster public participation. We note that the predecessor Tongass Plan was only amended through this process twice in over 15 years and both amendments resulted from congressional action.

In concluding that decisions made in the Plan substantially effect non-agency parties and are, therefore, not "agency procedures," we also recognize that the regulatory scheme includes a second stage of decisionmaking in managing the Forest. That stage occurs when Forest Service officials implement the Plan with respect to a particular area of the Forest. Clearly the Tongass Plan as a whole has itself a substantial effect on non-agency parties—it is not in that sense "procedural"—even though Plan restrictions will ultimately be embodied in site-specific decisions. We note that to conclude otherwise would effectively frustrate the SBREFA congressional review mechanism. The vast majority of site-specific actions concern individual use of particular areas of the Forest. They would in many cases be rules of "particular applicability" and thereby be excluded from congressional review. If only site-specific actions were considered "rules," a regulatory scheme in preparation for 10 years at a cost of over $13 million, with substantial impact during the next 15 years on all those who use the Forest, would be insulated from congressional review.

For the foregoing reasons, it is our opinion that the Tongass Plan constitutes a "rule" under SBREFA; it is subject to review by the Congress in accordance with the procedures set forth therein.

Thank you Mr. Chairmen. This concludes my prepared remarks. I would be happy to answer any questions you may have.

GAO
United States
General Accounting Office
Washington, D.C. 20548

Office of the General Counsel

B-275178

July 3, 1997

The Honorable Ted Stevens
Chairman
Committee on Appropriations
United States Senate

The Honorable Frank H. Murkowski
Chairman
Committee on Energy and Natural Resources
United States Senate

The Honorable Don Young
Chairman
Committee on Resources
House of Representatives

This is in response to your joint letter, dated June 5, 1997, requesting our views on whether the Tongass National Forest Land and Resource Management Plan, issued by the United States Forest Service, Department of Agriculture, and signed on May 23, 1997, is a "rule" under the provisions of the Small Business Regulatory Enforcement Fairness Act (SBREFA). 5 U.S.C. § 801 et seq.

On June 18, 1997, the Chief of the Forest Service forwarded copies of the Plan to both Houses of Congress and our Office following the procedures outlined in chapter 8 of title 5 of the United States Code. However, the transmittal letter accompanying the Plan stated that "The Forest Service does not consider land and resource management plans to be subject to the requirements of 5 U.S.C. § 800." In addition, on the "Congressional Notice and Review Report" attached to the transmittal letter, the Forest Service classifies the Plan as "non-major."[1] We have informally requested but have not received the views of the Department of Agriculture and the Office of Management and Budget on the applicability of chapter 8.

[1]A "major rule" is one found by the Office of Information and Regulatory Affairs, Office of Management and Budget, to meet certain criteria, such as whether the rule will have an annual effect on the economy of $100 million or more. 5 U.S.C. § 804(2).

For the reasons which follow, we conclude that the Tongass Plan constitutes a "rule" as defined in 5 U.S.C. § 804(3). Therefore, submittal of a report, as required by 5 U.S.C. § 801(a)(1)(A), to each House of Congress and the General Accounting Office was necessary in order for the rule to become effective. If the Office of Information and Regulatory Affairs determines the rule to be major, the effective date must be delayed for 60 days after the submission of the report.

Rules Subject to Congressional Review

Chapter 8 of title 5, United States Code, entitled "Congressional Review of Agency Rulemaking," is designed to keep Congress informed about the rulemaking activities of federal agencies and to allow for congressional review of rules. The requirements of chapter 8 take precedence over any other provision of law.[2]

Section 801(a)(1) provides that before a rule becomes effective, the agency promulgating the rule must submit to each House of Congress and to the Comptroller General a report containing:

"(i) a copy of the rule;

"(ii) a concise general statement relating to the rule, including whether it is a major rule; and

"(iii) the proposed effective date of the rule."

On the date the report is submitted, the agency also must submit to the Comptroller General and make available to each House of Congress certain other documents, including a cost-benefit analysis, if any, and agency actions relevant to the Regulatory Flexibility Act, 5 U.S.C. § 601 et seq., and the Unfunded Mandates Reform Act of 1995, 5 U.S.C. § 202 et seq., and any other relevant information or requirements under any other legislation or any relevant executive orders. 5 U.S.C. §§ 801(a)(1)(B)(i)-(iv).

Once a rule, whether determined to be a major rule or not, is submitted in accordance with section 801(a)(1), special procedures for congressional consideration of a joint resolution of disapproval are available for a period of 60 session days in the Senate or 60 legislative days in the House. 5 U.S.C. § 802. These time periods can be extended upon a congressional adjournment. 5 U.S.C. § 801(d)(1).

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[2]5 U.S.C. § 806(a) provides that: "This chapter shall apply notwithstanding any other provision of law."

A major rule may not become effective until 60 days after it is submitted to Congress or published in the Federal Register, whichever is later. 5 U.S.C. § 801(a)(3)(A).

Section 804(3) provides that for purposes of chapter 8, with some exclusions, the term "rule" has the same meaning given the term in 5 U.S.C. § 551(4), which defines rules subject to the Administrative Procedure Act (APA). The APA definition of a "rule" is as follows:

> "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing . . . ."

Chapter 8 contains several exclusions from the APA definition of "rule":

> "(A) any rule of particular applicability, including a rule that approves or prescribes for the future rates, wages, prices, services, or allowances therefor, corporate or financial structures, reorganizations, mergers or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing;
>
> (B) any rule relating to agency management or personnel; or
>
> (C) any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties." 5 U.S.C. § 804(3).

Land Management Resource Plans Generally

The National Forest Management Act (16 U.S.C. §§ 1600-1614), which amended the Forest and Rangeland Resources Act, directs the Secretary of Agriculture to develop, maintain, and revise Land Resource Management Plans (LRMPs) for units of the National Forest System. LRMPs guide all natural resource management activities and establish management standards and guidelines for national forests. When approved, among other things, an LRMP:

(1) establishes forest multiple-use goals and objectives;

(2) establishes forest-wide management requirements to fulfill the requirements of 16 U.S.C. § 1604 applying to future activities;

(3) establishes management areas and management area direction applying to future activities in that management area;

(4) designates suitable timber land and establishes allowable timber sale quantity;[3]

(5) establishes nonwilderness allocations and wilderness designation recommendations; and

(6) establishes monitoring and evaluation recommendations.[4]

LRMPs are to be revised when conditions have significantly changed, or at least every 15 years.

Tongass Land and Resource Management Plan

The Tongass LRMP is a revision of the previous Tongass LRMP which was approved in 1979 and amended in 1986 and 1991. The approved LRMP consists of the Record of Decision (ROD) and the Forest Plan, which is based on alternative 11 in the accompanying Final Environmental Impact Statement.

In order to ensure that the Plan was legally defensible, scientifically credible, and able to sustain the Forest's resources, the revision process was extraordinarily long and expensive. The revision process began in July 1987. In late 1987, over 4,000 copies of preliminary environmental impact issues were provided to interested parties, and 22,000 southeast Alaska homes and businesses received copies through newspaper inserts. This was followed by community workshops, radio and television news releases, community postings, and local newspaper stories. The Forest Service received and considered public comments on a draft plan released in June 1990, a supplemental plan dated September 1991, and an April 1996 revision to the supplement. Each of these documents was accompanied by a draft Environmental Impact Statement (EIS) or a supplemental EIS. During this time, the Forest Service received over 30,000 comments and was advised by various panels composed of experts and scientists. The cost of developing the revised plan and the accompanying EIS is over $13 million.

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[3]The allowable sale quantity is the maximum quantity of timber that may be sold from the area of suitable land covered by a forest plan over a decade. The quantity is usually expressed on an annual basis as the "average annual allowable sale quantity."

[4]Citizens for Environmental Quality v. United States, 731 F. Supp. 970, 977-978 (D. Colo. 1989).

The LRMP sets forth the management direction for the Tongass Forest and the desired condition of the Forest to be attained through Forest-wide multiple-use goals and objectives. These goals and objectives are subject to management standards and guidelines for each of 19 individual Land Use Designations (LUDs). Areas of land in the Forest are allocated to LUDs. Locations of the boundaries of the LUDs and management areas are set out in the Forest Plan map. Examples of the LUDs are "Wilderness," "Old-Growth Habitat," "Timber Production," and "Scenic River." The Plan describes 22 Resources which are addressed in each of the LUDs as to the manner in which they should be managed. Examples of the Resources are "Air," "Fish," "Karst and Caves," "Minerals and Geology," "Timber," and "Wetlands."

One often controversial subject of LRMPs is timber management. The Tongass LRMP establishes 2.67 billion board feet per decade or 267 million board feet per year as the allowable sale quantity for timber in the Forest. While the yearly amount may vary during the decade, the 2.67 billion board feet is a decadal ceiling of the amount of timber that will be offered for sale from suitable timberland in the Forest. The LRMP also establishes which areas of the forest are subject to logging.

Analysis

There are two questions presented. The first is whether the LRMP is a "rule," that is, an "agency statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4). The second is whether any of the statutory exceptions in chapter 8 are applicable.

A summary description of the LRMP shows clearly that it meets the APA definition of a "rule" quoted above. The LRMP implements the requirement of the National Forest Management Act that the Secretary of Agriculture develop, maintain, and revise LRMPs and assure compliance with the Multiple-Use Sustained-Yield Act of 1960 (16 U.S.C. §§ 528-531) in setting forest management direction and harvesting levels. It prescribes the manner or the policy of the Forest Service for managing the Tongass National Forest for the future (10-15 years). The various management prescriptions and land use designations, when read together, set out what type of activities may occur in various sections of the National Forest. Thus, it meets the elements of an APA "rule": it is of general applicability (it affects many parties, private and governmental, concerning the National Forest) and future effect (10 to 15 years in duration), and it implements, interprets, and prescribes law and policy. See Lujan v. National Wildlife Federation, 497 U.S. 871, 892 (1990). (Land withdrawal review program of the Bureau of Land Management can be regarded as a rule of general applicability.)

As quoted above, 5 U.S.C. § 804(3) sets forth several exceptions to the definition of rules subject to congressional review. The only one arguably applicable here is section 804(3)(c): "any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties." This

language is taken from an APA provision exempting some rules from requirements for public notice and comment. The APA exception is itself much broader, including "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice."[5] 5 U.S.C. § 553(b)(A).

The Supreme Court has never addressed the meaning of the APA exemption for rules of "agency procedure." There are federal district court and court of appeals decisions distinguishing between "substantive" and "procedural" rules, but these cases have not resulted in a bright line distinction, largely because "procedure impacts on outcomes and thus can virtually always be described as affecting substance."[6] JEM Broadcasting Co., Inc. v. FCC, 22 F.3d 320, 326 (D.C. Cir. 1994). The resulting effort is characterized by Professors Davis and Pierce as "analytically intractable," resulting in an "untidy," "murky" area of law. Kenneth Culp Davis & Richard J. Pierce, Jr., 1 Administrative Law Treatise § 6.4 (3d ed. 1994).

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[5]In his floor statement during final consideration of the Contract with America Advancement Act of 1996, of which SBREFA was title III, Representative McIntosh, a principal sponsor of the legislation, emphasized that rules subject to congressional review are not the same as those subject to APA notice and comment requirements:

> "All too often, agencies have attempted to circumvent the notice and comment requirements of the Administrative Procedure Act by trying to give legal effect to general policy statements, guidelines, and agency policy and procedure manuals. Although agency interpretative rules, general statements of policy, guideline documents, and agency and procedure manuals may not be subject to the notice and comment provisions of section 553(c) of title 5, United States Code, these types of documents are covered under the congressional review provisions of the new chapter 8 of title 5."
>
> "Under section 801(a), covered rules, with very few exceptions, may not go into effect until the relevant agency submits a copy of the rule and an accompanying report to both Houses of Congress. Interpretive rules, general statements of policy, and analogous agency policy guidelines are covered without qualification because they meet the definition of a 'rule' borrowed from section 551 of Title 5, and are not excluded from the definition of rule." 142 Cong. Rec. H3005 (daily ed. March 28, 1996).

[6]We are not aware of litigation concerning whether LRMPs are exempt from APA public notice and comment requirements (as, for example, agency statements of policy or procedural rules). This undoubtedly results from the fact that the National Forest Management Act and implementing regulations impose more extensive public notice and comment requirements than those in the APA. See 16 U.S.C. § 1604(d); 5 U.S.C. § 553(b); and 36 C.F.R. § 219.6.

In most cases, the key distinguishing feature the courts find in a "procedural" rule "is that it covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency." Id. (quoting from Batterton v. Marshall, 648 F.2d 694, 707 (D.C. Cir. 1980)). This feature was expressly included in 5 U.S.C. § 804(3), which excludes procedural rules that do not "substantially affect the rights or obligations of non-agency parties."[7]

In applying the APA exception, courts often consider the purpose and implication of characterizing a rule as substantive or procedural–whether the substantive effects of the rule are "sufficiently grave so that notice and comment are needed to safeguard the policies underlying the APA." Lamoille Valley R.R.C. v. ICC, 711 F.2d 295, 328 (D.C. Cir. 1983). In this case, the analogous consideration would be whether the impact of the rule on the rights and interests of non-agency parties is sufficiently significant that the Congress should review the Forest Service's exercise of delegated legislative authority to determine if the rule is "too burdensome, excessive, inappropriate, or duplicative." 142 Cong. Rec. S3683 (daily ed. April 18, 1996) (statement of Sen. Nickles); 142 Cong. Rec. E575 (daily ed. April 19, 1996) (remarks of Rep. Hyde).

In our view, the Plan has a substantial effect on non-agency parties. It allocates areas of the Forest to Land Use Designations and describes the uses to which the land may be put and the activities which may occur there. This "management prescription" gives general direction on what may occur within an area allocated to a particular LUD, the minimum standards for accomplishing each activity, and guidelines on how to go about accomplishing the standards.

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[7]Representative McIntosh addressed this aspect of the statute during final consideration of the Contract with America Advancement Act of 1996 as follows:

> "Pursuant to section [804(3)(C)], a rule of agency organization, procedure, or practice, is only excluded if it 'does not substantially affect the rights or obligations of nonagency parties.' The focus of the test is not on the type of rule but on its effect on the rights or obligations of nonagency parties. A statement of agency procedures or practice with a truly minor, incidental effect on nonagency parties is excluded from the definition of the rule. Any other effect, whether direct or indirect, on the rights and obligations of nonagency parties is a substantial effect within the meaning of the exception. Thus, the exception should be read narrowly and resolved in favor of nonagency parties who can demonstrate that the rule will have a nontrivial effect on their rights and obligations." 142 Cong. Rec. H3005 (daily ed. March 28, 1996).

Some minimum standards and guidelines provide considerable discretion to forest managers. For example, for the Karst and Caves Resource in areas of the Wilderness LUD, managers are to: "Identify opportunities for interpretation of caves for public education and enjoyment. Interpretation will generally occur outside this Land Use Designation."[8] Other standards and guidelines are more specific. For example, for the Lands Resource in areas of the Wilderness LUD, managers may permit new special use cabins only if, among other things, the permit is nontransferable, limited to a 5-year term, and provides that no motorized equipment may be used unless specifically approved by the Regional Forester.[9]

Among the more specific standards are those applicable to timber harvesting. Timber may not be harvested within the 1,000 foot beach and estuary fringe or buffer zone.[10] In the Wildlife standards and guidelines, forest stand structural characteristics are listed which must be maintained after harvesting. For example, in the American Marten habitat (1) 10-20 percent of the original stand, (2) four large trees (20-30 inches in diameter) per acre, (3) three large dead or dying trees (20-30 inches in diameter) per acre, and (4) an average of three large pieces of down material per acre must remain.[11]

The specific restrictions and prohibitions are binding unless the LRMP is amended in accordance with the requirements of 16 U.S.C. § 1604(f)(4). Section 1604(f)(4) provides that the LRMP may be amended after adoption following public notice. If the amendment is a significant change, public involvement comparable to that required by section 1604(d) is required. Section 1604(d) requires making the revision available to the public in the vicinity of the affected area at least 3 months before amendment and holding public meetings or comparable processes that foster public participation. We note that the predecessor Tongass LRMP was only amended through this process twice in over 15 years and both amendments resulted from congressional action.[12]

In concluding that decisions made in the Plan substantially effect non-agency parties and are, therefore, not "agency procedures," we recognize that the regulatory scheme includes a second stage of decisionmaking in managing the Forest. That

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[8]Tongass National Forest Land and Resource Management Plan, Forest Plan, at 3-11.

[9]Id.

[10]Id. at 4-4 and 4-5.

[11]Id. at 4-119.

[12]The Alaska National Interests Lands Conservation Act and the Tongass Timber Reform Act of 1990.

stage occurs when Forest Service officials implement the Plan with respect to a particular area of the Forest.[13] Clearly the Tongass LRMP as a whole has itself a substantial effect on non-agency parties–it is not in that sense "procedural"–even though LRMP restrictions will ultimately be embodied in site-specific decisions. We note that to conclude otherwise would effectively frustrate the SBREFA congressional review mechanism. The vast majority of site-specific actions concern individual use of particular areas of the Forest. They would in many cases be rules of "particular applicability" and thereby be excluded from congressional review. 5 U.S.C. § 804(3). If only site-specific actions were considered "rules," a regulatory scheme in preparation for 10 years at a cost of over $13 million, with a substantial impact during the next 15 years on all those who use the Forest, would be insulated from congressional review.

For the foregoing reasons, it is our opinion that the Tongass LRMP constitutes a "rule" under SBREFA; it is subject to review by the Congress in accordance with the procedures set forth in 5 U.S.C. § 802.

We trust that this is responsive to your request. If you have any further questions on the subject, please call me (512-5400), or Assistant General Counsel James Vickers (512-8210) of my staff.

Robert P. Murphy
General Counsel

[13]Because decisions made in LRMPs are couched in language that makes mandatory this second stage of site-specific action, justiciability issues have arisen in cases challenging LRMPs under the judicial review provisions of the APA. These issues concern whether the case is "ripe" for judicial review until site-specific action has been taken, or whether, until site-specific action has been taken, the plaintiff's injury is sufficient to confer "standing." E.g., Sierra Club v. Thomas, 105 F.3d 248 (6th Cir. 1997); Wilderness Society v. Alcock, 83 F.3d 386 (11th Cir. 1996); Sierra Club v. Marita, 46 F.3d 606 (7th Cir. 1995); Idaho Conservation League v. Mumma, 956 F.2d 1508 (9th Cir. 1992). These cases do consider the impact of LRMPs on plaintiffs before the court, but because they concern very different legal considerations and examine the effect of only a particular aspect of an LRMP on a particular party, we do not find them helpful in this inquiry.

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