



B-238859

October 23, 2017

The Honorable Lisa Murkowski
United States Senate

Subject: *Tongass National Forest Land and Resource Management Plan
Amendment*

This is in response to your letter requesting our opinion on whether the 2016 Amendment to the Tongass Land and Resource Management Plan (2016 Tongass Amendment or Amendment), approved by the Tongass Forest Supervisor on December 9, 2016, is a rule under the Congressional Review Act (CRA). For the reasons discussed in more detail below, we conclude that the 2016 Tongass Amendment is a rule under CRA.¹

BACKGROUND

Tongass National Forest

The Tongass National Forest is the largest of the 154 national forests. It comprises 78 percent of the land base in southeast Alaska.² Of its approximate 16.7 million acres, about 10 million acres are forested. Of the forested acres, the Forest Service classifies approximately 5.5 million acres as being “productive forest.”³ As a national

¹ Our practice when rendering opinions is to contact the relevant agency and obtain its legal views on the subject of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.; Sept. 2006), available at www.gao.gov/legal/red-book/resources. We contacted the General Counsel of the Department of Agriculture (USDA) who provided us with the agency’s views. Letter from USDA to Assistant General Counsel, GAO, May 15, 2017.

² See, USDA, Forest Service, *Tongass Land and Resource Management Plan: Final Environmental Impact Statement*, R10-MB-603a, at 3-454 (Washington, D.C.: January 2008).

³ GAO, *Tongass National Forest: Forest Service’s Actions Related to Its Planned Timber Program Transition*, GAO-16-456, at 6 (Washington, D.C.: April 25, 2016).

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forest, the Tongass is managed by the Forest Service within the Department of Agriculture (USDA).

Since inception, the Tongass timber program has been based on harvesting old-growth trees—in the context of the Tongass, generally meaning trees more than 150 years old—that can be a source of high-quality lumber. The Forest Service began offering timber sales on the Tongass in the early 1900s. Although timber harvest increased substantially in the 1950s through 1970s, harvest has since declined significantly.⁴

A number of laws and regulations have reduced the number of acres where timber harvest is allowed on national forests, both nationwide and on the Tongass.⁵ Specifically, according to statistics provided by Forest Service officials, of the approximately 5.5 million acres of productive forest in the Tongass, approximately 2.4 million acres are not available for harvest because of statutory provisions, such as wilderness designations,⁶ and another 1.8 million acres are not available for harvest because of other factors, such as USDA adopting the roadless rule.⁷

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The Forest Service defines productive forest as forested areas that contain or can produce a minimum volume of timber per acre—specifically, either a volume of 8,000 board feet of standing timber or an annual per-acre production of 20 cubic feet of timber. A board foot is a common measure for timber volume, equivalent to a board 12 inches long, 12 inches wide, and 1 inch thick.

⁴ *Id.* at 8.

⁵ *Id.* at 9.

⁶ *Id.* at 9–10.

⁷ The roadless rule, promulgated by USDA, generally prohibits timber harvesting in inventoried roadless areas within National Forest System lands nationwide, including the Tongass. 66 Fed. Reg. 3244 (Jan. 12, 2001). The State of Alaska challenged the rule in court and USDA settled the suit by agreeing to an amendment which was issued in 2003 that exempted Tongass. In 2011, in response to a challenge brought by the Native Alaskan village of Kake, among others, a federal district court struck down the exemption, holding that USDA had failed to provide a reasoned basis for issuing the exception. *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 776 F. Supp. 2d 960 (D. Alaska 2011). The State of Alaska's effort to have this decision reversed in federal appellate court was unsuccessful. *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956 (9th Cir. 2014). The state sought Supreme Court review, which the Court denied in March 2016. *Alaska v. Organized Vill. of Kake*, 136 S. Ct. 1509 (2016).

National Forest Planning Process

The National Forest Management Act of 1976 (NFMA), as amended, requires the Forest Service to “develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest systems.”⁸ Plans are to provide for “the multiple use and sustained yield of the products and services obtained from [the national forests] ... and, in particular, include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness.”⁹ Thus, the Forest Service must “balance competing demands on national forests, including timber harvesting, recreational use, and environmental preservation.”¹⁰

Forest plans identify the uses that may occur in each area of the forest.¹¹ The Forest Service is required to update forest plans at least every 15 years and may amend a plan more frequently to adapt to new information or changing conditions.¹² Resource plans and permits, contracts, and other instruments for the use of national forests must be consistent with the applicable plans.¹³ When a plan is revised, these instruments are to be revised as soon as practicable to be made consistent with the revised plan, but only subject to valid existing legal rights.¹⁴ The Forest Service is required to promulgate and follow certain procedures set forth in regulation for the development, amendment, and revision of forest plans.¹⁵ The decision to adopt a

⁸ 16 U.S.C. § 1604(a).

⁹ 16 U.S.C. § 1604(e)(1).

¹⁰ *Lands Council v. Powell*, 379 F.3d 738, 741 n.2 (9th Cir. 2005); see also 16 U.S.C. § 528 (national forests are to be “administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes”). The Forest Service compares its national forest land use planning to community land use zoning. 2016 Tongass Amendment at 1-2.

¹¹ The use of motor vehicles in national forests is governed by separate regulations that were promulgated through notice-and-comment rulemaking. 36 C.F.R §§ 212.1–212.81. See also, 70 Fed. Reg. 68,264 (Nov. 9, 2005); 80 Fed. Reg. 4500 (Jan. 28, 2015).

¹² 16 U.S.C. § 1604(f)(5).

¹³ 16 U.S.C. § 1604(i).

¹⁴ 16 U.S.C. § 1604(i).

¹⁵ 16 U.S.C. § 1604(g). USDA published these regulations as part 219 of title 36, Code of Federal Regulations. The regulations clarify that the forest planning process
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forest plan and the rationale for making that decision are made public in a Record of Decision (ROD) issued pursuant to the National Environmental Policy Act (NEPA).¹⁶ For timber harvest activities, forest plans typically identify areas where timber harvest is permitted to occur and set a limit on the amount of timber that may be harvested from the forest.¹⁷

The Tongass forest plan allocates defined areas of the forest to various Land Use Designations (LUDs).¹⁸ In general, the plan allocates all areas of the forest to LUDs as part of the forest planning process.¹⁹ Some LUDs implement statutory land designations, such as wilderness, and areas allocated to those LUDs must be managed in accordance with the statutory requirements applicable to those land designations.²⁰ Other LUD allocations are for development of resources, such as timber production, and the Forest Service manages these areas in accordance with LUD direction, such as by allowing roads to be built and commercial timber to be harvested.²¹

The descriptions of the uses allowed by the plan within a LUD and the corresponding permissible activities are management prescriptions.²² Each management prescription gives general direction on what may occur within areas allocated to the corresponding LUD, the standards for accomplishing each activity, and the guidelines on how to go about accomplishing the standards.²³ While a

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does not affect treaty rights or rights established by statute or legal instrument. 36 C.F.R. § 219.1(d).

¹⁶ NEPA regulations provide that a ROD must state what the decision was, identify all alternatives considered by the agency in reaching its decision, and state whether all practical means to avoid or minimize environmental harms from the alternative selected have been adopted. 40 C.F.R. § 1505.2.

¹⁷ See 16 U.S.C. § 1611.

¹⁸ 2016 Tongass Amendment at 1-2.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

forest plan may allocate certain areas to a timber LUD, that allocation does not itself authorize third parties to harvest timber. If the applicable management prescription allows timber harvesting within a given LUD, additional steps are required before the contractual right to harvest timber is created. The Forest Service will identify a sale area, conduct the required environmental analyses, appraise the timber, and solicit bids from buyers interested in purchasing the timber.²⁴ The Forest Service then prepares the timber sale contract and marks the sale boundary and the trees to be cut or left.²⁵ The purchaser is responsible for cutting and removing the timber, with the Forest Service monitoring the harvest operations.²⁶ These sales or projects are to be conducted consistent with the applicable forest plan, but plans generally do not require any specific sale or project to be undertaken.

Tongass National Forest Planning

In 1979, the Tongass National Forest was the first to complete a forest plan under NFMA. The plan was amended in 1986 and 1991. In 1997 USDA approved a Revised Forest Plan, which was then amended in 2008.²⁷

In 2010, USDA announced its intent to transition the Tongass timber program to one based predominantly on the harvest of young growth—generally consisting of trees that have regrown after the harvest of old growth—in part to help conserve the remaining old-growth forest.²⁸ A 2013 memorandum from the Secretary of Agriculture stated that within 10 to 15 years, the “vast majority” of timber harvested in the Tongass would be young growth.²⁹ The memorandum also stated that the transition must be done in a manner that “preserves a viable timber industry” in southeast Alaska.³⁰ The Forest Service announced in May 2014 that it would

²⁴ GAO-16-456 at 7.

²⁵ *Id.*

²⁶ *Id.*

²⁷ These revisions and amendments were subject to various administrative and judicial challenges with a variety of outcomes. See, e.g., *Natural Resources Defense Council v. U.S. Forest Service*, 421 F.3d 797 (9th Cir. 2005).

²⁸ See, GAO-16-456 at 10.

²⁹ USDA, *Secretary’s Memorandum 1044-009: Addressing Sustainable Forestry in Southeast Alaska* (Washington, D.C.: July 2013).

³⁰ *Id.*

amend the forest plan for the Tongass to accomplish the transition.³¹ As part of the decision-making process for the amendment, in November 2015 the Forest Service released for public comment its proposed forest plan amendment and accompanying environmental analyses.³²

The substantive changes in the 2016 Tongass Amendment are set out in Chapter 5 of the Amendment. As compared to the 2008 plan, the 2016 Tongass Amendment generally reduced the areas potentially open to old-growth harvest while allowing young growth harvest in some areas previously unavailable for any type of harvest. Specifically, the 2016 Tongass Amendment makes the following changes to the 2008 Tongass Land Resource Management Plan (LRMP):³³

- allows old-growth harvest only within the portion of the Tongass National Forest included in the first phase of a timber sale program adaptive management strategy set forth in a 2008 Tongass LRMP Amendment Record of Decision;
- allows young-growth harvest in all phases of the 2008 timber sale program adaptive management strategy, but only outside of roadless areas identified in the 2001 Roadless Rule;
- allows young-growth management in development LUDs and in the Old-Growth Habitat LUD, beach and estuary fringe, and riparian management areas outside of stream buffers, subject to certain conditions and for a specified period of time;
- establishes direction to protect priority watersheds;³⁴
- modifies the network of old-growth reserves to maintain their effectiveness; and

³¹ Notice of intent to prepare an environmental impact statement, 79 Fed. Reg. 30,074 (May 27, 2014).

³² USDA, Forest Service, *Tongass Land and Resource Plan, Draft Environmental Impact Statement*, R10-MB-769b (Washington, D.C.: November 2015).

³³ USDA, Forest Service, *Tongass Land and Resource Management Plan, Record of Decision*, R10-MB-769I (Washington, D.C.: December 2016) at 2.

³⁴ The priority watershed direction is not a LUD, but provides additional direction regarding timber harvests. Priority watersheds are areas within which old growth harvest will be prohibited, and young-growth harvest will be allowed, subject to further scientific review after 5 years. 2016 Tongass Amendment at 5-4.

- includes new management direction to facilitate renewable energy production.³⁵

USDA describes the other changes resulting from the 2016 Tongass Amendment as simply clarifications, corrections of typographical errors, and updates of references to law, regulation, and other mandatory policy direction to reflect the current version of the provisions that have changed since 2008.³⁶

Congressional Review Act

CRA, enacted in 1996 to strengthen congressional oversight of agency rulemaking, requires all federal agencies, including independent regulatory agencies, to submit a report on each new rule to both Houses of Congress and to the Comptroller General before it can take effect. The report must contain a copy of the rule, “a concise general statement relating to the rule,” and the rule’s proposed effective date. In addition, the agency must submit to the Comptroller General a complete copy of the cost-benefit analysis of the rule, if any, and information concerning the agency’s actions relevant to specific procedural rulemaking requirements set forth in various statutes and executive orders governing the regulatory process. CRA also established special expedited procedures under which Congress may pass a joint resolution of disapproval that, if enacted into law, overturns the rule.

USDA has not sent a report on the 2016 Tongass Amendment. In its response to us, USDA stated that “it is the position of the Department of Agriculture that the 2016 Tongass Amendment is not subject to CRA. Accordingly, the amendment will not be submitted pursuant to CRA.”³⁷

³⁵ The new management direction on renewable energy production applies to all of the Tongass National Forest. Under this direction, all Tongass land may be suitable for renewable energy sites on a case-by-case determination in consideration of the LUD, ecological and social values, and benefit to Southeast Alaska communities. 2016 Tongass Amendment at 5-9.

³⁶ USDA, Forest Service, *Tongass Land and Resource Management Plan, Record of Decision*, R10-MB-769I (Washington, D.C.: December 2016) at 2.

³⁷ Letter from USDA to Assistant General Counsel, GAO, May 15, 2017, at 2.

ANALYSIS

In 1997, we decided whether the Tongass National Forest Land and Resource Management Plan issued May 23, 1997, was a rule under CRA.³⁸ In that decision, we reviewed CRA's definition of a rule, found that the Plan fit within that definition, and concluded that it was a rule for CRA purposes. As explained below, we reach the same conclusion with regard to the 2016 Tongass Amendment.

CRA incorporates by reference³⁹ the definition of "rule" found in section 551 of the Administrative Procedure Act (APA) which provides, in relevant part:

"rule" means the whole or a 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"⁴⁰

However, under CRA, the term "rule" does not include:

"(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."⁴¹

³⁸ B-275178, July 3, 1997, *available at* www.gao.gov/decisions/cra/tongass.pdf.

³⁹ 5 U.S.C. § 804(3).

⁴⁰ 5 U.S.C. § 551(4).

⁴¹ 5 U.S.C. § 804(3). There are additional exceptions for rules promulgated under the Telecommunications Act of 1996, as amended, rules concerning monetary policy promulgated by the Board of Governors of the Federal Reserve System or the Federal Open Market Committee, and rules that establish, modify, open, close, or conduct regulatory programs for a commercial, recreational, or subsistence activity related to hunting, fishing, or camping. 5 U.S.C. §§ 804, 807, 808. These exceptions are not relevant in this instance.

Consequently, the first step in analyzing whether the 2016 Tongass Amendment is a rule under CRA is to determine whether it meets the definition in section 551 of APA.

The definition has three key components. A rule must (1) be an agency statement, (2) have future effect, and (3) be designed to either implement, interpret, or prescribe law or policy or describe the agency's organization, procedure, or practice requirements. First, in order to be a rule, the statement must be made by an agency.⁴² USDA, the issuer of the 2016 Tongass Amendment, is an agency. The 2016 Tongass Amendment therefore meets the first component of the definition.

Second, the agency statement must have future effect.⁴³ The 2016 Tongass Amendment is a guide for future forest management activities and establishes a prospective management direction. The text of the Amendment specifically notes that all future plans and activities will be based on this Forest Plan.⁴⁴ We therefore conclude that the 2016 Tongass Amendment also meets the second component of the definition.

Third, the statement must be designed to implement, interpret, or prescribe law or policy or describe the agency's organization, procedure, or practice requirements. The purpose of the 2016 Tongass Amendment, like all forest plans, is to implement the provisions of NFMA and other applicable statutory and regulatory provisions. The Amendment also implements USDA's policy to transition the Tongass timber program to one based predominantly on the harvest of young growth. It thus meets the third component of the definition and falls within the definition of the term "rule" in section 551 of APA.

USDA argues that the Amendment is not a rule because it does not provide final authorization for any activity and does not substantially affect the rights or obligations of non-agency parties. It points out that implementing the Amendment necessarily requires additional actions by the Forest Service, and that the

⁴² In November 1997, we concluded Executive Order 13,061 was not a rule under CRA because the President is not an agency under APA. B-278224, Nov. 10, 1997, *available at* www.gao.gov/products/D16395.

⁴³ "[T]he phrase 'future effect' was added by Congress to 5 U.S.C. § 551(4) in attempt to distinguish between rule-making and adjudication." *Colyer v. Harris*, 519 F. Supp. 692, 699 (S.D. Ohio 1981).

⁴⁴ Similarly, in evaluating a pre-NFMA forest management document called a Timber Management Plan, a U.S. District Court found that the plan "is clearly prospective." *Intermountain Forest Industry Assoc. v. Lyng*, 683 F. Supp. 1330, 1341(D. Wyo. 1988).

Amendment itself neither creates nor takes away any party's rights or obligations.⁴⁵ However, APA does not require that an agency statement provide final authorization for any activity, or that it substantially affect the rights or obligations of non-agency parties, to qualify as a rule.⁴⁶ Indeed, "the impact of an agency statement upon private parties is relevant only to whether it is the sort of rule that is a rule of procedure ... not to whether it is a rule at all."⁴⁷ The APA sets forth only the three requirements described above, each of which is met in this instance.

Our analysis now turns to whether the Amendment falls under any of the CRA exceptions. In its response to us, USDA presents alternative arguments that the 2016 Tongass Amendment is a rule of particular applicability or, alternatively, a rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.

Rules of particular applicability

USDA argues that the 2016 Tongass Amendment is a rule of particular applicability because it applies to a single national forest and, thus, is not a rule for purposes of CRA pursuant to the exception in section 804(3)(a). According to the legislative history of CRA:

"Most rules or other agency actions that grant an approval, license, registration, or similar authority to a particular person or particular entities, or grant or recognize an exemption or relieve a restriction for a particular person or particular entities, or permit new or improved applications of technology for a particular person or particular entities, or allow the manufacture, distribution, sale, or use of a substance or product are exempted under subsection 804(3)(A) from the definition of a rule."⁴⁸

The legislative history also provides examples of rules of particular applicability such as import and export licenses, individual rate and tariff approvals, wetlands permits, grazing permits, plant licenses or permits, drug and medical device approvals, new source review permits, hunting and fishing take limits, incidental take permits, broadcast licenses, and product approvals.⁴⁹ The legislative history of CRA also

⁴⁵ Letter from USDA to Assistant General Counsel, GAO, May 15, 2017, at 3–5.

⁴⁶ *Thomas v. New York*, 802 F.2d 1443, 1446 (D.C. Cir. 1986).

⁴⁷ *Id.* at 1446 n.

⁴⁸ 142 Cong. Rec. S3683-01, S3687.

⁴⁹ 142 Cong. Rec. S3683-01, S3687.

offers IRS private letter rulings as an example of a rule of particular applicability. In addition to being addressed to a specific person or entity, private letter rulings differ from other IRS guidance and Treasury rules in that the agency is not bound to follow them in its dealings with others even on facts that are analogous. Other IRS guidance and Treasury regulations have legal force in all instances and are binding on the agency in all cases; private letter rules have legal force only with regard to a particular person or entity.⁵⁰

The 2016 Tongass Amendment is not an approval, license, or registration to a particular person or entity. Nor does it grant or recognize an exemption or relieve a restriction for a particular person or entity. While the plan does only apply to the Tongass National Forest and not to other national forests, it applies to “all natural resource management activities;”⁵¹ to all projects approved to take place in the forest; and to all persons or entities that engage in uses permitted by those projects. For instance, every person or entity bidding on or engaged in permitted timber harvesting will be doing so in accordance with the plan. The Amendment applies to all persons or entities using the forest—not just a particular person or entity. It is binding on agency action in all cases, not with respect to one person or entity.

While there is no case law on the question of general versus particular applicability for purposes of CRA, there is analogous case law interpreting these terms under APA in which courts have held rate setting “addressed to and served upon named persons in accordance with law” to be a type of rule of particular applicability.⁵² However, the 2016 Tongass Amendment does not solely set rates and it does not apply to a single entity. It states: “All future plans and activities will be based on this Forest Plan.”⁵³ Additionally, in our prior decision on the Tongass National Forest

⁵⁰ “The different types of rules issued pursuant to the internal revenue laws of the United States are good examples of the distinction between rules of general and particular applicability.” 142 Cong. Rec. S3683-01, S3687.

⁵¹ 2016 Tongass Amendment, at 1-1. See *also* 1-2 (“All future plans and activities will be based on this Forest Plan”); 1-3 (“Together, these elements [of the plan] establish a framework that identifies the location, design, and scheduling of all Forest management uses and activities”).

⁵² *Am. Broad. Cos. v. FCC*, 682 F.2d 25, 32 (2d Cir. 1982). The quoted language is from a predecessor to the current provision, but one the court concluded was relevant to interpreting the current provision since the legislative history, in the eyes of the court, demonstrated Congress’s intention to clarify rather than change the exception.

⁵³ 2016 Tongass Amendment at 1-2.

Land and Resource Management Plan issued in 1997, we concluded that the Plan was of general applicability since it affected many parties.⁵⁴ We therefore conclude that this rule does not fall within the exception for rules of particular applicability.

Rules of organization, practice, or procedure that do not substantially affect the rights or obligations of non-agency parties

USDA maintains that the 2016 Tongass Amendment is exempt from the requirements of CRA as a rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties. The Amendment governs where old-growth and young-growth timber harvests are allowed in Tongass. USDA states that the Amendment is narrowly focused on accelerating the transition from a primarily old-growth timber program to a primarily young-growth program and, in doing so, “provides limited modifications to the Tongass LRMP to guide the Tongass National Forest’s procedures and practices going forward.”⁵⁵ These changes, it asserts, involve agency procedure and practice relating to the Forest Service’s management of the Tongass National Forest.

The CRA legislative history discussion of this exception is limited,⁵⁶ but states that it was modeled on APA, which excludes “rules of agency organization, procedure, or practice” from the requirement that a notice of proposed rulemaking be published in the *Federal Register*.⁵⁷ Courts have applied the APA exception by distinguishing between procedural and substantive rules.⁵⁸ A rule is substantive when it “encodes a substantive value judgment or puts a stamp of approval or disapproval on a given type of behavior.”⁵⁹ In these cases, courts have focused on whether the agency action has substantive impacts on the regulated community.

⁵⁴ B-275178, July 3, 1997, at 5, *available at* www.gao.gov/decisions/cra/tongass.pdf.

⁵⁵ Letter from USDA to Assistant General Counsel, GAO, May 15, 2017, at 3–4.

⁵⁶ 142 Cong. Rec. S3683-01, S3687.

⁵⁷ 5 U.S.C. § 553(b)(A). The CRA exception includes the additional modifying clause “... that does not substantially affect the rights or obligations of non-agency parties.”

⁵⁸ See, e.g., *Pickus v. U.S. Board of Parole*, 507 F.2d 1107, 1112–13 (1967). See generally, Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking* 59 (5th ed. 2012).

⁵⁹ *Am. Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987).

For example, the Fifth Circuit in *Phillips Petroleum Co. v. Johnson*, held that the proper test of whether a rule is procedural or substantive is whether a “regulation of general applicability has a substantial impact on the regulated industry, or an important class of the members or the products of that industry.”⁶⁰ *Phillips Petroleum* concerned oil and gas royalties owed under leases for federal lands administered by the Minerals Management Service (MMS). The court held that an agency Procedure Paper changing the criteria for valuing natural gas liquid products, used to calculate royalties, was a substantive rule subject to APA notice-and-comment rulemaking requirements. The agency argued that the Procedure Paper was a rule of agency organization, procedure, or practice. However, the court rejected this argument, stating: “Although the Procedure Paper would appear to fall squarely within this exemption, for the change effected by the Procedure Paper plainly relates to the internal practices of MMA procedure, the mere fact that it may guide MMS procedures does not mean that the Procedure Paper is a ‘procedural’ rule for purpose of APA.”⁶¹

The 2016 Tongass Amendment implements an agency policy to transition from old-growth to new-growth timber harvesting. In doing so, it encodes the agency’s substantive value judgement in favor of this transition and has a substantial impact on the local timber industry.⁶² Even accepting USDA’s characterization of the Amendment as involving agency procedure and practice relating to the Forest Service,⁶³ under the reasoning of *Phillips Petroleum*, the Amendment is not a procedural rule since it has a substantial effect on the regulated industry. Therefore, we conclude that it is not a rule of agency procedure.⁶⁴ This is consistent with our prior decision on the Tongass National Forest Land and Resource Management

⁶⁰ 22 F.3d 616, 620 (5th Cir. 1994), citing *Brown Express Inc. v. United States*, 607 F.2d 695, 702 (5th Cir. 1979).

⁶¹ *Id.* at 620.

⁶² Some timber industry and conservation organization representatives have raised questions about the Forest Service’s management of its timber program, including its planned transition to young-growth harvest. GAO, *Tongass National Forest: Forest Service’s Actions Related to Its Planned Timber Program Transition*, GAO-16-456, at 2 (Washington, D.C.: April 25, 2016).

⁶³ Letter from USDA to Assistant General Counsel, GAO, May 15, 2017, at 4.

⁶⁴ This is consistent with B-287557, concerning the Trinity River Record of Decision, in which we concluded that because the rule at issue was not procedural, it was unnecessary to evaluate whether it affected contractual rights of non-agency parties. B-287557, May 14, 2001, at 8, available at www.gao.gov/products/A01025.

Plan issued in 1997, in which we concluded that the Plan was not a rule of agency procedure due to its substantial effects on non-agency parties.⁶⁵

Relying primarily on the Supreme Court's decision in *Ohio Forestry Ass'n v. Sierra Club*,⁶⁶ USDA specifically argues that the procedural rule exception applies because the 2016 Tongass Amendment does not substantially affect the rights or obligations of non-agency parties.⁶⁷ At issue in *Ohio Forestry Ass'n* was a Sierra Club challenge to a Land Resource Management Plan for Ohio's Wayne National Forest on the ground that the plan permitted too much logging and clearcutting. The question decided was whether the rights asserted by the Sierra Club in challenging the plan were ripe for judicial review. The Court explained that the purpose of the ripeness doctrine is:

"to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."⁶⁸

The court held that the rights asserted by the Sierra Club were not yet ripe for review, and that there would be later stages in the forest management process when plaintiffs could assert those rights to challenge the Forest Service's decisions.

The issue we decide here, however, is not whether rights asserted by a party to challenge the Amendment are ripe for judicial review. The question here is whether the 2016 Tongass Amendment has a substantial impact on the regulated community such that it is a substantive rather than a procedural rule for purposes of CRA. We have concluded that it has such an impact and thus is a substantive rule. The Supreme Court's decision is inapposite for CRA purposes, since it is Congress' exercise of the review procedures in CRA that is in issue, not the ripeness of a party's right to bring suit challenging administrative action.

⁶⁵ B-275178, July 3, 1997, at 7, available at www.gao.gov/decisions/cra/tongass.pdf.

⁶⁶ 523 U.S. 726 (1998). USDA also cites *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004) and *Forest Guardians v. Forsgren*, 478 F.3d 1149 (10th Cir. 2007).

⁶⁷ Letter from USDA to Assistant General Counsel, GAO, May 15, 2017, at 3–5.

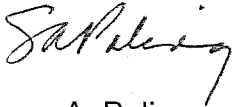
⁶⁸ 523 U.S. at 732–733, citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148–149 (1967).

CONCLUSION

The 2016 Tongass Amendment is a rule for CRA purposes as it meets the definition of the term "rule" under APA, and none of the CRA exceptions apply.

If you have any questions about this opinion, please contact Robert Cramer, Associate General Counsel, at (202) 512-7227.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "S. Poling".

Susan A. Poling
General Counsel