



# NATIONAL WILDLIFE FEDERATION®

*People and Nature: Our Future Is in the Balance™*

Alaska Office

October 23, 2002

USDA Forest Service  
Attn: NFS – EMC Staff (Barbara Timberlake)  
Stop Code 1104  
1400 Independence Avenue, SW  
Washington D.C. 20250-1104

Re: Notice of Administrative Appeal of the Chugach National Forest Revised Land and Resource Management Plan and Final Environmental Impact Statement.

Dear Ms. Timberlake and NFS – EMC Staff:

The Alaska Center for the Environment, Coastal Coalition, Eyak Preservation Council, National Wildlife Federation, and the Sierra Club (collectively NWF), pursuant to the Forest Service regulations contained in 36 C.F.R. part 217, submit the following administrative appeal of the Chugach National Forest Revised Land and Resource Management Plan (Revised Plan) and Final Environmental Impact Statement (EIS) approved by Dennis Bschor, Regional Forester, in a Record of Decision (ROD) dated May 31, 2002. Legal notice of the Revised Plan was published on July 26, 2002. See 67 Fed. Reg. 48894 (July 26, 2002). The specific portions of the Revised Plan, EIS, and ROD to which NWF objects, as well as the grounds for these objections, are described in the following sections.

## **I. Copper River Delta**

### **A. As a matter of sound public policy, the Forest Service should have recommended that portions of the Copper River Delta be protected by Congress as a wilderness area.**

From a pure resource standpoint, there is little question that the Copper River Delta would be one of the crowning glories of the National Wilderness Preservation System. The wild, pristine, and beautiful Delta is one of America's premier wetlands. The largest wetlands complex on the Pacific coast of North America, the Delta provides some of the most important shorebird habitat in the western hemisphere. Every year, millions of shorebirds and waterfowl from the Pacific flyway stage or nest in the Delta's watery embrace. It is also home to the world's largest concentrations of sea otters, beaver, and nesting trumpeter swans, to the entire population of dusky Canada geese, and to moose, wolves, brown bear, mountain goats, and a host of marine mammals. Hundreds of glacial and clear-water tributaries of the Copper River wend their way through the immense Delta, creating a fertile but fragile nursery for wild Copper River salmon. Copper River chinook, sockeye, and coho are among the most highly-prized salmon in the world and are a mainstay of the region's subsistence and commercial economies.

Under the Wilderness Act of 1964, it is the "policy of Congress to secure for the American people of present and future generations the benefits of an enduring resource of wilderness." The Copper River Delta is precisely the kind of natural treasure the Wilderness Act was intended to protect. One of the most unique and ecologically-significant areas in the entire national forest system, the Delta has been declared a Western Hemisphere Shorebird Reserve Network Site, an emphasis area in the North American Waterfowl Management Plan, and a State Critical Habitat Area. Congress itself recognized the exceptional environmental value of the Delta in the Alaska National Interest Lands Conservation Act (ANILCA), which directs the Forest Service to manage the region primarily for "the conservation of fish and wildlife and their habitat." The Delta is one of only two areas in the national forest system subject to this kind of statutory directive. The Delta also provides one-of-a-kind opportunities for scientific research. During the Good Friday earthquake of 1964, much of the Delta was lifted six to ten feet, allowing scientists from around the world to observe the changes marked by ecological succession.

Five years ago, the Forest Service began the revision process with a survey of randomly selected households in 12 Alaska communities surrounding the Chugach National Forest and a random sampling of residents from communities statewide. This innovative survey showed striking support for wilderness and wilderness values among those Alaskans who live closest to the Chugach National Forest. For instance, 72.7% of all respondents favored or strongly favored managing the Chugach for wilderness. Only 15.3% opposed or strongly opposed wilderness. In Cordova, over 77% of the respondents favored or strongly favored managing the forest for wilderness. In fact, Cordova was more strongly disposed towards wilderness protection than any of the other communities surveyed.

This strong public support for managing the forest as wilderness was repeatedly demonstrated during the more than 100 public meetings and multiple comment periods that led up to the Forest Service's adoption of the preferred alternative. For instance, 30 management alternatives were developed in Forest Service meetings, public workshops, and community gatherings. Seventeen of these alternatives were developed by members of the public and addressed management of the Delta. Of these 17 alternatives, 14 alternatives recommended that a substantial portion of the Delta be protected as wilderness. Eventually, the Forest Service reduced the 30 alternatives to six composite alternatives for detailed analysis. Four of these six final alternatives recommended protecting some portion of the Copper River Delta as wilderness, a proportion that reflects the widespread public support for protecting wilderness values in the Chugach.

Consistent with the results of the Forest Service survey, Cordovans generally supported wilderness during the revision process. According to a memorandum prepared by the Cordova Ranger District's public relations staff person, Bob Behrends, the Cordova public submitted five of the original thirty alternatives and was well represented in the revision process. Four of the five alternatives fell within the range of Alternatives D - F, meaning four of the alternatives proposed a wilderness designation for at least the entire eastern half of the Delta. Mr. Behrends described the sentiment in Cordova as follows:

Having worked extensively (hours and weeks and months listening to the public from Cordova), and hearing every different perspective imaginable, and after summarizing the Forest Plan public input/letters from Cordova, it is clear to me that although not everyone agrees, the majority of the public, and people from Cordova, fall between "D" and "E" with regard to the Cordova Ranger District.

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I do not think "large portions of the public" are not represented. I probably know over half the people in this community, and over 90% of those who are active in the community. I know, those people who care, have been in, most of them more than once, and told us what they think. There is not a large unrepresented hidden group out there.

Mr. Behrends concluded that most of Cordova supports Alternative 7 (which was developed by Cordovans and incorporated into Alternative D) and wants "thoughtful development" of the west Delta while providing "longterm protection of the East Delta as 501(b) Wilderness."

A second memorandum was prepared on March 20, 2000, by Cal Baker, at that time the Cordova District Ranger. Mr. Baker prepared a rationale in support of potential wilderness designation for the Cordova Ranger District, particularly the eastern portion of the Copper River Delta. Mr. Baker emphasized that:

There has been substantial support both locally, and outside of the Cordova environment for wilderness designation throughout the public involvement process. A large number of alternatives formulated by the public, including key alternatives from Cordova residents, proposed wilderness on the Copper River Delta.

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Support for a wilderness designation, while not universal, has tended to cross a variety of user and interest groups that represent varied and opposing interests on the delta.

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The Copper River Delta is unique within the National Forests, in terms of its resources, spectacular scenery, and legislative history.

Thus, two well-respected Forest Service employees—the employees with perhaps the best feel for the pulse of Cordova—concluded that there was substantial support in the Cordova community for recommending substantial portions of the Delta as wilderness.

During the official comment period, the public as a whole expressed extraordinarily strong support for a wilderness designation on the Delta. The Forest Service received over

30,000 comment cards, letters, and faxes supporting wilderness—even more comments than the agency received during the revision of the Tongass National Forest management plan several years ago. Commenters overwhelmingly supported a wilderness designation regardless of whether they live in Alaska or Outside, and regardless of whether they submitted a “form” letter or expressed an opinion in a more original format. Overall, 99.8% of the commenters who expressed an opinion supported Delta wilderness. Of those commenters who submitted non-form letters, 97.6% supported wilderness. Of the Alaskan commenters who expressed an opinion, 93.4% favored a Copper River Delta wilderness. And among Alaskans and Alaska-based organizations expressing an opinion by non-form letter, 85.6% supported wilderness.

Even in Cordova, where the issue of a wilderness designation on the Delta is perhaps most controversial, 64% of the commenters supported wilderness on at least the eastern Delta. This level of support was also seen among fishermen. Twenty-eight Cordova commenters identified themselves as commercial fishermen. Of that total, 19 or 67.9% supported Delta wilderness. While Cordova District Fishermen United (CDFU) officially opposed wilderness, three of the letters supporting wilderness were from former CDFU board members who stated that they did not believe the organization’s position represented the majority of its members’ views. One stated:

When I served on the CDFU board in the 1980’s, controversial issues such as this were brought to the membership for a vote. Despite repeated requests from others and myself for a membership vote on whether to support Wilderness in the eastern Delta, the board has refused to do so. This dodge—over two years!—leads me to believe that the board is aware of the lack of membership support for its position. I certainly hope that the Revision Team will pay more attention to letters from CDFU members and fishermen who support Wilderness than the CDFU board has.

Several other commenters, fishermen and non-fishermen, also noted that CDFU did not speak for many of the fishermen in the area.

Support for wilderness was not only the majority view among Cordova commenters, it also reflected the opinion of residents from across the political and social spectrum. Supporters included:

- Two biologists—Mary Anne Bishop and Shelton Gay. Ms. Bishop stated that the 501(b) – 2 prescription “allows for increased human use infrastructure, including parking lots, boat docks and landings, new trails, campgrounds, viewing sites, electric utility corridors, new cabins, and oil drilling, mineral development, and transportation on public lands. All of these uses introduce incremental degradation and elimination of fish habitat through erosion, stream blockage, sedimentation, and introduction of hazardous waste and toxic substances into the natural environment.”
- Three former CDFU board members.

- Nineteen fishermen.
- One member of the Cordova City Council.
- One former mayor of Cordova.
- The Copper River Watershed Planning Team.
- Two charter company operators who stated that their businesses depend on wilderness.
- The Eyak Preservation Council.

Taken as a whole, the comment letters indicate that the designation of the Copper River Delta as a wilderness area enjoys support within Cordova and that wilderness opponents, while vocal, are in the minority.

Despite the enormous public support, its own survey results, and the unsurpassed ecological values of the area, the Forest Service has chosen not to recommend any portion of the Copper River Delta for wilderness designation. Instead, approximately three-quarters of the Delta have been placed in the 501(b) - 2 prescription, which allows oil and gas exploration and drilling, hard rock mineral exploration and mining, and the mining of gravel and other salable minerals as well as the construction of parking lots, boat docks and ramps, and gold mining with motorized suction dredges.

The most biologically valuable portion of the Delta--the southeast--has generally been designated 501(b) - 1. However, more than 50,000 acres in the southeast Delta have been designated 501(b) - 2, presumably to make oil and gas drilling permissible in this area. The 501(b) - 1 prescription is generally protective, but does not offer the same level of protection as a wilderness recommendation. For instance, 501(b) - 1 allows the mining of gravel and other salable minerals, boat docks and ramps, parking lots, viewing sites, increased outfitter/guide capacity, and virtually any activity that can be characterized as "resource management."

The Chugach National Forest is public land and the Copper River Delta is a treasure shared by all Americans. It does not matter whether one fishes for a living, or drives a taxi in New York City, we all have a stake in the way this spectacular area is managed. The Forest Service's abrupt and surprising decision not to recommend any wilderness in the Delta is a sad departure from the rational proceedings we had come to expect. NWF urges the Forest Service to focus once again on the multi-year process that repeatedly demonstrated public and scientific support for a comprehensive Copper River Delta wilderness.

More specifically, NWF recommends that the 501(b) – Recommended Wilderness prescription be applied to all of the eastern Copper River Delta and to all barrier islands and islands in the Copper River's mouth. In addition, the 501(b) - Recommended Wilderness prescription should be applied to all polygons on the western side of the Delta south of the Copper River Highway and north of polygons C082 and C097. Wilderness in the recommended

areas will preserve the 700,000-acre wetlands complex that defines the Delta, maintain the wild character of the beautiful and remote eastern Delta, and help buffer and protect the incomparable Copper River.

NWF also recommends that the Forest Service revise the 501(b) - Recommended Wilderness prescription to allow airboat use only in moving channels of water and only from September 1<sup>st</sup> through October 30<sup>th</sup>. Use of airboats in 501(b) - Recommended Wilderness areas should be phased out during the next ten years. There are approximately 20 airboaters in Cordova and few people actually use their boats on the Delta more than several times a year. The proposed conditions are designed to allow local residents to continue hunting moose by airboat for a reasonable amount of time. However, given the small number of airboat users, and the noise and vegetation damage associated with airboat use, NWF believes recreational use of airboats should not be permanently authorized in 501(b) - Recommended Wilderness areas.

NWF further encourages the Forest Service to clarify when snowmachines, motorboats, and fixed-wing airplanes may be used in 501(b) – Recommended Wilderness areas. In particular, the Forest Service should define “traditional uses” to refer to those activities associated with consumptive uses of forest resources that occurred prior to enactment of ANILCA, or with travel to and from villages and homesites.

**B. The Forest Service improperly changed the management prescription for portions of the eastern Copper River Delta.**

Forest plan revisions must be prepared in compliance with the National Environmental Policy Act (NEPA) and regulations promulgated by the Secretary of Agriculture. In addition, the Forest Service’s own regulations establish a procedure for revising land and resource management plans (LRMP). During the initial stage, a team under the direction of the Forest Supervisor develops a proposed LRMP together with a draft and final environmental impact statement (EIS). 36 C.F.R. § 219.10(b). This interdisciplinary team formulates and evaluates a broad range of alternative management scenarios with the objective of identifying the alternative that maximizes net public benefits. 36 C.F.R. § 219.12(f). After reviewing the proposed plan and final EIS, the Regional Forester is directed to “either approve or disapprove the plan.” 36 C.F.R. § 219.10(c). If the proposed plan is disapproved, the Regional Forester must return the plan and EIS to the Forest Supervisor with a written statement of the reasons for disapproval. Id.

In the preferred alternative of the draft Chugach LRMP and EIS, the interdisciplinary team recommended managing 449,210 acres in the northeast Copper River Delta as 501(b) – Recommended Wilderness. In the final preferred alternative, the team reduced the acreage figure slightly, from 449,210 acres to 442,490 acres, but still recommended that the large majority of the northeast Delta be designated as 501(b) – Recommended Wilderness. In the final EIS, the interdisciplinary team provided a description of the environmental consequences of each management prescription. Among other things, the final EIS estimated direct, indirect, and cumulative effects resulting from activities permitted in each alternative and displayed the output levels for each alternative. Notably, the Forest Service’s discussion of the environmental effects and outputs for the final preferred alternative assumed that the northeast Delta would be largely managed as recommended wilderness.

Upon reviewing the proposed plan and final EIS, the Regional Forester did not approve or disapprove the plan. Instead, he prepared a Record of Decision (ROD) which made a number of modifications to the preferred alternative as described in the final EIS. Among other things, the Regional Forester changed the management prescription in the northeast from recommended wilderness to 501(b) – 2, changed the proposed route of the Katalla to Carbon Mountain road corridor to 501(b) – 3, and changed Controller Bay and Katalla Oil and Gas Zone 1 to the 501(b) – 2 prescription. These were significant changes with substantial environmental consequences that were not adequately addressed or analyzed in the final EIS and were not supplemented with appropriate NEPA documentation. Moreover, by failing to return the plan to the Chugach Forest Supervisor with a written statement of reasons for disapproval, the Regional Forester improperly usurped the role of the Forest Supervisor. For these reasons, the Forest Service should prepare a supplemental EIS in accordance with NEPA.

**C. The Forest Service failed to adequately evaluate and consider the Copper River Delta as potential wilderness and failed to provide a rationale explanation for its decision not to recommend any of the Copper River Delta for wilderness protection.**

NEPA requires the Forest Service to prepare an EIS that contains a reasonably thorough discussion of the probable environmental consequences of its decision. The EIS's form, content, and preparation must foster both informed decision-making and informed public participation. In addition, the Administrative Procedure Act (APA) applies to decisions under NFMA. Under the APA, the Forest Service must examine the relevant data and articulate a satisfactory explanation for its actions including a rational connection between the facts found and the choice made. Put simply, the Revised Plan must be satisfactorily explained, supported by the evidence in the record, and not clearly erroneous.

From an informational standpoint, the EIS is a formidable document. It contains over 1,000 pages of discussion about the Chugach. It is clear that the interdisciplinary team worked hard to compile a great deal of information. However, a great deal of information, by itself, does not make an EIS useful or legal. An EIS is intended to make meaningful distinctions between various alternatives so that an agency may make an informed decision. According to the Council on Environmental Quality, an EIS "shall be analytic rather than encyclopedic." 40 C.F.R. § 1502.2(a). Unfortunately, the final EIS's analysis of wilderness on the Copper River Delta is superficial, often incorrect, and sometimes based on faulty assumptions.

The Forest Service's discussion of recreation and tourism illustrate some of the problems that characterize the final EIS. The section contains huge amounts of general information about the Resource Opportunity Spectrum (ROS), regulatory tools, historic use patterns, demographics, and national, state, and regional recreation projections. Nevertheless, it is impossible for a reader to determine—on a practical level—how tourism and recreation would differ under the various alternatives because the Forest Service substitutes broad comparison tables for analysis. In its "in-depth" evaluation of the consequences and effects of each alternative, the Forest Service split the forest into three regions, including the Copper River Delta. However, the Delta is a huge area and the tables describing the ROS, recreation facilities, recreation capacity, etc. contain raw figures that do not make meaningful distinctions between parts of the Delta that are really very

different. For example, in table 3-63, the dispersed recreation capacity of Alternatives A and C appear comparable, suggesting they are similar management schemes, yet these alternatives represent very different approaches to managing dispersed recreation in the various parts of the Delta. In reality, the table provides little useful information as to why one alternative might be preferable to another.

Similarly, the scant narrative analysis in the EIS does little to distinguish the alternatives. For instance, in the recreation conflicts and situations section, the Forest Service identifies the major issues in the Copper River Delta as potential changes in access, national interest in wilderness and fish and wildlife management, and strong local interest in maintaining the status quo for recreation opportunities. However, there is nothing in the section that describes the nature of these issues or provides a context for determining which alternative might best resolve them. Moreover, the EIS does not provide enough information to distinguish between the alternatives. With respect to recreation conflicts, the Forest Service describes the alternatives as if they are functionally the same, noting that all the alternatives would allocate Roded ROS classes along the Copper River Highway and Carbon Mountain Road, and inaccurately implying that the alternatives would provide similar primitive and semi-primitive recreation opportunities on the rest of the Delta.

In another example, the Forest Service discusses the application of vegetative management in general in some detail. However, the discussion does not provide the information necessary to inform the Forest Service's choices on-the-ground. Although the ROD suggests that the need to improve moose habitat is one of the reasons the Forest Service chose not to recommend 501(b) wilderness on the southeastern Delta, the EIS says nothing about moose management on the Copper River Delta. Without information on the current extent of moose habitat management on the southeast Delta, the expected moose habitat management on the southeast Delta, and the expected yield of that management, the public is unable to judge the trade-offs inherent in the Forest Service's decision to prioritize moose habitat over wilderness designation.

When information is available, it is often wrong. For instance, the Forest Service's analysis frequently assumes that under the preferred alternative portions of the Delta will be managed as wilderness, making many of the tables and graphs that support the EIS incorrect and any conclusions about the preferred alternative and Revised Plan suspect.

At bottom, the EIS is inadequate because it provides no analysis of the activities and developments that really are material to the management of the Chugach National Forest. For example, the Forest Service acknowledges the substantial interest in building a road to Chitna. Road access from Chitna to Cordova could have a tremendous impact on tourism and recreation on the Delta. Yet, the agency never assessed the possibility of the road actually being built or analyzed the various alternatives to determine which would best address the resulting increase in visitation. The Regional Forester should have closely considered these issues before he changed the prescription on the northeast Delta from 501(b) – Recommended Wilderness to 501(b) – 2, since the two prescriptions manage recreation very differently. The final EIS simply did not provide a clear and relevant basis for choice among the various options and therefore cannot

justify the Forest Service's decision not to recommend any wilderness on the Copper River Delta.

Compounding the problem is the Regional Forester's failure to articulate a rational explanation for his decision not to recommend wilderness. The ROD does not explain the reasoning behind most of the important determinations and, when there were attempts at explanation, the explanations were devoid of the comparative analysis that would have made them useful to the public or a judicial reviewer. Like the final EIS, most of the ROD describes the prescriptions the Forest Service would apply rather than discussing the reasons for the agency's decision. In the three pages devoted to the Copper River Delta, approximately two paragraphs can generously be construed as explaining the "reasoning" behind the Forest Service's opinion.

The reasons that are provided are offered cursorily and without explanation (perhaps because many are inexplicable). For instance, the Forest Service's primary reason for not recommending wilderness on the Delta seems to be the perceived conflict with 501(b) of ANILCA. However, as discussed in the following section, the Forest Service has repeatedly rejected the idea that there is an inherent conflict between 501(b) and recommended wilderness. Nothing in the ROD explains why the Forest Service is now reversing its position.

The Forest Service also suggests that it decided not to recommend any wilderness on the Delta because it might prevent local access or hinder commercial fishing. Yet, the agency resolved both of these concerns during the public process by specifically tailoring the 501(b) – Recommended Wilderness prescription to meet local needs while protecting the Delta from the most harmful kinds of activities. Among other things, the prescription would guarantee reasonable access to private lands, allow snowmachines, motorboats, and airplanes for traditional activities, and authorize the use of airboats for hunting and fishing. Moreover, the draft revised forest plan explicitly stated that the prescription was tailored to accommodate existing uses such as "[c]onservation and perpetuation of commercial, sport and subsistence fisheries." Here again, the Forest Service's decision not to recommend wilderness for the Delta seems to have been influenced by concerns that are unfounded on their face, and which were previously discounted by the agency itself. Contrary to its legal obligation, the Forest Service did not provide a satisfactory explanation for its decision.<sup>1</sup>

The Forest Service's explanation was not just superficial, in many respects it was implausible. For instance, in the ROD, the Regional Forester indicated that interest in exploration and production of locatable, leasable, and saleable minerals was "wide and varied." He further suggested that his decision not to recommend wilderness protection for the Copper River Delta was influenced by his unwillingness to forgo mineral development opportunities. However, NWF attended the majority of public meetings and reviewed all of the public

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<sup>1</sup> Similarly, the Forest Service ROD suggests in many places that the Service chose not to recommend wilderness and wild and scenic river designations throughout the Forest in order to preserve inholders' access to their lands. ANILCA, of course, guarantees reasonable access to inholdings across wilderness and wild and scenic river designations as well as across other conservation system unit lands. The ROD never explains the reasoning behind the Forest Service's claim, leaving the public without an understanding or legally adequate explanation of many of the Service's wilderness and wild and scenic river decisions.

comments. The interest expressed in mineral development was so minimal as to be almost trivial. Moreover, the section on minerals in the final EIS, while characteristically unhelpful, suggests that the potential for mineral development on the Delta is slight. For instance, the Forest Service notes there is no development interest in the Bering River coal field and little likelihood of significant oil and gas activity in the near future. With respect to the northeast Delta, where the Regional Forester overrode his staff and removed the recommendation for wilderness, the final EIS concluded that there was “limited value for mineral development because of the glaciers, ice fields, and rugged topography.”

Even more baffling was the Regional Forester’s frequent assertion that a wilderness recommendation on the Delta would be incompatible with ANILCA’s 501(b) mandate while, at the same time, adopting the far less conservation oriented 501(b) – 2 and 501(b) – 3 prescriptions for the vast majority of the Delta. As various sections in the EIS attested, protecting wilderness values is entirely consistent with preserving biodiversity and protecting fish and wildlife from harmful development and recreation activities. On the other hand, the 501(b) – 2 and 501(b) – 3 management prescriptions permit motorized recreation, mining, and numerous development and construction activities that are plainly harmful to the conservation of fish, wildlife, and their habitat. The Forest Service’s position that developing recreation nodes and transportation corridors is consistent with section 501(b), while protecting any portion of the Delta as wilderness is not, does not meet the straight-face test.<sup>2</sup>

**D. The Forest Service’s decision not to recommend any of the Copper River Delta for wilderness protection was arbitrary and capricious.**

**1. The Forest Service gave an unreasonable amount of deference to a small number of local individuals and organizations.**

In NWF’s comments on the draft revised plan, we expressed our concern with the Forest Service’s biased approach to Cordova comments. We noted that the Forest Service had originally recommended the entire eastern Copper River Delta as 501(b) – Recommended Wilderness in recognition of the environmental values of the Delta as well as the strong national and local support for wilderness. “Unfortunately,” we stated, “the Forest Service then undermined the process by holding several meetings effectively restricted to Cordova organizations and individuals who had already expressed concern with a wilderness designation. Based upon these one-sided ‘public’ meetings, the Forest Service revised the [draft] preferred alternative to recommend wilderness for only the northeastern portion of the Delta.”

Prior to the completion of its final plan, the Forest Service skewed the process even further by holding a selective public meeting in Cordova after the official close of the comment period. This meeting was specifically held to address concerns with the preferred alternative’s recommendation of wilderness on the Delta. While at least one environmentalist was invited, the attendees at the meeting were predominantly vocal wilderness critics. The Forest Service did not include the vast majority of Cordovans who had commented in favor of wilderness, nor did it

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<sup>2</sup> Other decisions with clear local impacts that the ROD simply ignored include the decision to alter the plan to allow ORVs and snowmachines south of the Delta highway and the decision to designate the northeast Delta 501(b)(2) instead of 501(b)(1).

invite the over twenty-five thousand Americans (including many Alaskans) who commented in favor of wilderness in the national forest. Subsequently, the Forest Service changed the final revised plan to eliminate any wilderness recommendation for the Delta.<sup>3</sup>

The Forest Service's decision was arbitrary and capricious. A huge majority of commenters favored wilderness protection for the Copper River Delta. Even among Cordovans, almost two-thirds of the commenters explicitly supported a wilderness recommendation. Nevertheless, the Forest Service deferred to the wishes of a few dozen Cordova residents and businesses who opposed any federal designations on the Delta. We understand that forest planning involves more than merely counting comments or "votes." The problem is that the Forest Service applied a double standard. The agency gave little weight to the number of wilderness commenters—unless the commenter was someone from Cordova who opposed wilderness. Then, the Forest Service carefully recorded every vote. In essence, it gave "veto power" to one tiny community of 2,500 residents.<sup>4</sup>

The Forest Service has a duty to be evenhanded and to consider everyone's interest in the fate of a national treasure like the Copper River Delta. Certainly, it is appropriate to take into account the views of local communities, and local residents may sometimes provide information that is unavailable from any other source. On the other hand, we need to maintain some perspective and sense of fair play. As the Forest Service itself frequently acknowledged, the arguments against a wilderness designation on the Delta were largely based on misinformation, a skewed view of the law, or a general antipathy to the national policies embodied in the Wilderness Act. The Forest Service's decision to allow the unfounded concerns of a very small number of people in one community to drive the future management of the Chugach National Forest is inconsistent with the agency's legal obligations and offensive as a matter of public policy.

**2. The Forest Service incorrectly concluded that a wilderness recommendation was incompatible with section 501(b) of ANILCA.**

In the Record of Decision, the Regional Forester noted that some local residents, fishermen, and tribal officials opposed wilderness on the Delta because they feared that the prescription might limit or preclude wildlife habitat improvement projects. Apparently sharing this fear, he stated that he was not recommending any wilderness protection for the Delta because: "I believe the current Congressional direction to manage the area for the primary purpose of the conservation of fish and wildlife and their habitat is appropriate and I am not willing to limit opportunities for improving wildlife habitat." The Regional Forester then changed the preferred alternative so that the management prescription on the northeast Delta

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<sup>3</sup> This meeting and possibly others violated the Federal Advisory Committee Act, which sets strict controls on federal agencies' establishment of advisory committees.

<sup>4</sup> This emphasis on a "local" Cordova veto is in marked contrast to the Revised Environmental Assessment prepared for oil and gas exploration in the Katalla area of the southeast Copper River Delta. There, the Forest Service denied local interest in the area and suggested that Cordova was not, in fact, local at all, stating in response to comments emphasizing the impact of the project on locals that, "It should be noted that there are no residents of Katalla, and Cordova is the closest community, about 56 miles away with no road access. One of the guides lives in Cordova, but the others live in other areas of Alaska or out of state. We believe that almost all of the fishing and hunting around Katalla is guided, and the clients are from outside of the local area and many are from out of state."

was 501(b) – 2 instead of 501(b) – Recommended Wilderness. He also declined to adopt any alternative that contained a wilderness recommendation for the Delta because it “would unduly restrict the Forest’s ability to manage for fish and wildlife habitat conservation.”

The notion that section 501(b) of ANILCA is somehow incompatible with a designated wilderness area was raised during the planning process and repeatedly rejected by the Forest Service. In fact, the final EIS itself states that “[w]ilderness designation would be compatible with the conservation of wildlife and fish on ANILCA 501(b) lands.” Furthermore, the Forest Service specifically designed the 501(b) – Recommended Wilderness prescription so that it would be consistent with section 501(b) of ANILCA. The prescription states that “[f]ish and wildlife habitat restoration or enhancement activities will occur to conserve fish and wildlife and their habitats, but will be designed to minimize impact to the wilderness character” of the Delta. The prescription also provides that “[u]nresolvable conflicts between conserving fish and wildlife and their habitat, and maintaining the area’s potential for wilderness designation, will be resolved by conserving fish and wildlife and their habitat.” Nowhere does the Regional Forester explain why the Forest Service has reversed its position and now considers 501(b) – Recommended Wilderness to be incompatible with section 501(b). Indeed, the assertion that section 501(b) somehow precludes a wilderness designation appears incorrect as a matter of law.

## **II. Prince William Sound**

### **A. The Revised Forest Plan must encompass, plan for, and manage the waters of Prince William Sound.**

#### **1. The Forest Service owns the submerged lands of Prince William Sound and must plan for and manage the waters of the Sound.**

The Forest Service has acknowledged ownership of the submerged lands within Chugach National Forest. ROD at p. 45. NFMA requires that the Chugach National Forest LRMP form one integrated plan for all of the lands and resources of the conservation unit. See 16 U.S.C. § 1600 et seq. NEPA requires that the Forest Service prepare an EIS on the Chugach National Forest that encompasses all of the resources found there, including the tidelands and submerged lands of Prince William Sound. See 42 U.S.C. § 4321 et seq.

Despite the Forest Service’s ownership of the submerged lands, the legal mandates for planning for the entire forest, and the clear purpose and need for this revision set out by the Forest Service for Chugach National Forest, the EIS and the Revised Plan completely fail to address significant impacts to and management of the tidelands and submerged lands that are a part of Chugach National Forest.

In comments on the DEIS, the Forest Service was asked to complete the forest planning process through an expansion to include an EIS and a Revised Plan that address all of Chugach National Forest, including Prince William Sound. The ROD, EIS and the Revised Plan failed to address the concerns raised in the DEIS comments, instead noting that the State of Alaska disputes the Forest Service’s ownership of submerged lands in Prince William Sound. The Forest Service must adequately plan for and protect its resources regardless of the State’s

position. The EIS and the final plan are thus legally inadequate. NWF requests that the Forest Service conduct a new NEPA process that adequately addresses all necessary planning for all of the resources in the forest.

**2. The Forest Service has ignored its duty to regulate activities on water to protect terrestrial wilderness quality.**

NWF has noted the Forest Service's authority and obligation to regulate activities adjacent to designated federal land to protect the purposes for which the land was designated. Kleppe v. New Mexico, 426 U.S. 529, 546 (1976); Minnesota v. Block, 660 F.2d 1240 (8<sup>th</sup> Cir. 1981). In its response to comments on this issue, the Forest Service stated only that it "knows of no activities on the waters of the Sound that are degrading the uplands." This, however, is contrary to other Forest Service admissions about the impacts of water-based activities on the uplands, and on the users of the uplands. For example, the Forest Service noted that cruise ships operating on the waters leave a visible trace of air emissions, thus polluting the viewshed for upland users in the general vicinity of the cruise ship activity. Similarly, motorized vessels create noise which impacts upland users as well as wildlife in the vicinity of the vessels. Some of the impacted wildlife species use the uplands, including marbled murrelets, black oystercatchers, many species of nesting seabirds, as well as Steller sea lions. Of course, the most obvious impact of all is simply that most users access Prince William Sound lands via the water.

Thus, while water-based activities may not "degrade" the uplands in the sense of physically disturbing the ground, they clearly impact the uplands, including the wildlife and wilderness character of upland areas. As such, it is arbitrary and capricious for the Forest Service to refuse to consider the impacts of, or analyze whether to regulate, water-based activities as part of the Forest Plan, on the ground that these activities do not degrade the uplands.

**3. The Forest Service failed to adequately analyze the impacts of its plan on threatened and endangered species in Prince William Sound.**

As the Forest Service notes in the EIS, section 7 of the Endangered Species Act (ESA) requires the agency to prepare a biological assessment to assess the effects of the Forest Plan revision on endangered or threatened species and ensure that proposed actions would not jeopardize the continued existence of listed species. The Forest Service prepared an assessment analyzing the impacts of the Forest Plan on humpback whales, Steller sea lions, and Steller's eider.

Although the Forest Service's biological assessment notes that many activities in the marine environment could impact the threatened and endangered species on the Forest, it states that "few of these activities are under Forest Service jurisdiction." As a result, the assessment argues that the revised plan will not have an adverse impact on the species. As described above, the Forest Service has a duty to manage the waters of the Sound and a concurrent duty to ensure that threatened and endangered species are not jeopardized by its management. Given these duties, the biological assessment for the impacts of the Forest Plan must include the impacts of all activities on the waters of Prince William Sound. The Forest Service does not have the

luxury of ignoring a class of actions it is statutorily required to manage. The Forest Service's biological assessment of the Forest Plan's impacts was inadequate because it failed to consider the impacts of the vast majority of activities on the waters of the Prince William Sound. The Forest Service should prepare a new biological assessment that acknowledges its responsibility to manage the waters and wildlife of the Sound and meets the requirements of the ESA.

**B. The Forest Service's decisions regarding recreation, fish and wildlife conservation, and wilderness in Prince William Sound are bad public policy, not adequately explained, and arbitrary and capricious.**

**1. Backcountry Group prescription**

The Forest Plan identifies two areas, one at the north end of Esther Passage and another on Glacier Island, for large recreational group facility development. Groups of up to 100 people could be housed at these facilities under the "Backcountry Group" prescription. ROD. There is little discussion of the relative merit of these locations versus other possibilities, and the EIS does not address the impacts of placing 100 people in or adjacent to wilderness or recommended wilderness. A 100-person facility at the north end of Esther Island would have a dramatic impact on Harriman Fjord, Barry Arm and College Fjord, which are home to some of the Sound's most spectacular mountains and tidewater glaciers.<sup>5</sup> It would almost certainly result in regularly exceeding the maximum of ten group encounters contemplated by the Semi-Primitive Nonmotorized ROS class proposed for the surrounding area.

Simply put, introduction of a large recreational facility in the northwestern Sound is not compatible with protecting the wilderness value of the area, or with the stated management intent for the area. It is important to explore the question whether a facility of that size is appropriate at all in Prince William Sound and, if so, the advantages and disadvantages of a spectrum of locations, before circling areas on the map. While we support the Forest Service's philosophy of concentrating development in nodes and not allowing sprawl, a thorough discussion about the location, size, and likely impacts of various possible nodes is a necessary prerequisite to identifying them. The Revised Plan identifies nodes without the benefit of this type of evaluation.

**2. Fish and Wildlife Conservation prescription**

As commenters pointed out during the planning process, the Fish and Wildlife Conservation prescription allows, either conditionally or outright, several activities potentially harmful to fish and wildlife, including mining, logging, marine transfer facilities, boat docks and ramps, electronic sites, utility systems, motorized access, and recreation equipment storage/cache. Indeed, except for making non-motorized access conditional instead of simply allowed, it is difficult to see what the "Fish and Wildlife Conservation" prescription does to benefit wildlife that isn't better accomplished with other prescriptions.

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<sup>5</sup> Similarly, placing 100 people on Glacier Island would impact Columbia and Heather Bays, as well as a substantial Steller sea lion haulout on Glacier Island.

The Forest Service's response is merely that the Fish and Wildlife Conservation prescription is best suited to protect fish and wildlife. It is entirely unclear, however, why the Forest Service believes that a prescription allowing the activities listed above will best conserve fish and wildlife values. This is particularly important on Montague Island, the northern portion of which scientists have identified as one of the most biologically productive areas in the Sound, if not the most productive area. See National Wildlife Federation, Prince William Sound Biological Hotspots Workshop Report 2002 (attached).

Intuitively, if the "Fish and Wildlife Conservation" prescription is intended to apply to those places, like Montague Island, that have the most outstanding fish and wildlife values in the forest, then the prescription should be protective of those values. It should be a 100-level prescription that provides maximum protection for fish and wildlife and their habitat, such as the 501(b) – Recommended Wilderness prescription. It is arbitrary and capricious to conclude that the Fish and Wildlife Conservation prescription, as written, will best conserve fish and wildlife.

In other contexts, the Forest Service has cited a reason, however implausible, why it did not apply a more restrictive prescription despite good reason to do so. For example, on Knight Island, which lies within the existing WSA, has outstanding recreational values, and would benefit from the protection afforded by a wilderness designation, the Forest Service applied the Backcountry prescription to allow mining, because of stated mining potential on the island. Mining potential also played a role in the Forest Service's decision to apply the Backcountry prescription to the west side of Port Wells, rather than the wilderness prescription. On the north end of Montague Island, the Forest Service identifies no particular potential use or activity to justify affording far less than full protection for the fish and wildlife resources of the area.

### **3. Prince William Sound Recommended Wilderness prescription**

The Forest Service has limited its Recommended Wilderness to areas within the existing Wilderness Study Area, and in so doing has ignored overwhelming public support at the national, state and local level for the creation of other wilderness areas in Prince William Sound. Over 90% of the commenters on the DEIS nationally and statewide supported wilderness for areas such as Knight and Montague Islands which, respectively, are among the highest value recreational and biological areas in the Sound. Locally, the City of Valdez, the Valdez State Parks Advisory Commission, and some individual Valdez residents supported creating wilderness areas in the eastern Sound, but the Forest Service chose not to implement these suggestions. The Forest Service applies a double standard in Prince William Sound when it identifies the City of Cordova's opposition as a major reason it did not recommend wilderness for the Copper River Delta despite overwhelming public support, but then ignores the City of Valdez's support for wilderness in the eastern Sound.

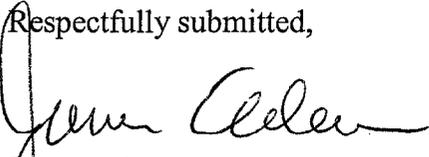
### **III. Conclusion**

The Forest Service spent five years of time and effort on the revised Chugach National Forest Revised Land and Resource Management Plan and strongly encouraged the interested public to do the same. The public responded by submitting a record number of comments on a forest plan and spending countless hours in public meetings with the Forest Service.

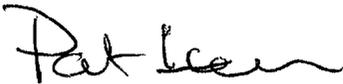
Unfortunately, there is a significant disjunct between that five-year effort and the final decisions made for "on-the-ground" management of the forest. The final plan as published in July of 2002 generally ignores public sentiment. A remarkable number of decisions—many the apparent product of last minute changes--were made without explanation or appropriate analysis. And the final EIS, while loaded with "big picture" information, fails to provide the information necessary to explain or justify the choice of prescriptions on the ground.

As discussed throughout this appeal, the Forest Service has acted arbitrarily and capriciously by promulgating this plan. NWF requests that the Forest Service prepare a supplemental EIS and ROD that meet the Forest Service's statutory duties to manage the entire Chugach National Forest and make and explain long-term planning decisions based on careful analysis.

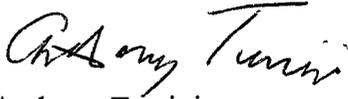
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