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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

PARTNERS IN FORESTRY COOPERATIVE, *et al.*,	)	
	)	Case No. 2:12-CV-00184-RHB
Plaintiffs,	)	
	)	
v.	)	Hon. Robert Holmes Bell
	)	
UNITED STATES FOREST SERVICE, *et al.*	)	
	)	
Defendants;	)	
	)	

FEDERAL DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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APA	Administrative Procedure Act
AR	Administrative Record
CEQ	Council on Environmental Quality
DN/FONSI	Decision Notice/Finding of No Significant Impact
EA	Environmental Assessment
EIS	Environmental Impact Statement
FSH	Forest Service Handbook
FONSI	Finding of No Significant Impact
NCST	North Country Scenic Trail
NFS	National Forest System
NEPA	National Environmental Policy Act
NF	National Forest
NFS	National Forest System
NFMA	National Forest Management Act
ROD	Record of Decision
SIR	Supplemental Information Report

I. INTRODUCTION

In December 2011, the Forest Supervisor for the Ottawa National Forest approved the Delich Land Exchange Project ("Project"). As approved, the Project allows for the conveyance of approximately 240 acres of National Forest System land in exchange for approximately 421 acres of private property. The purpose of the Project is to adjust landownership patterns to facilitate the restoration, protection and management of forest resources, and to provide recreation opportunities. The Project also reduces management costs and enhances land management efficiencies for the Forest Service.

As part of the review process, the Forest Service prepared an environmental assessment ("EA") conducted pursuant to the National Environmental Policy Act ("NEPA"). Agency expert analysis and review of scientific literature, as well as participation by the public, contributed to the Agency's examination of the Project's environmental effects on a variety of resources. The Forest Service concluded that the Project did not have any significant environmental effects within the meaning of NEPA and authorized the Project with a Decision Notice and Finding of No Significant Impact.

Plaintiffs challenge the Project under NEPA. Plaintiffs disagree with the Forest Service's determination of no significant impacts and contend that the Agency did not adequately analyze impacts to vegetation resources and certain recreation sites, such as Wildcat Falls and old growth vegetation. Plaintiffs contend that the Forest Service should have prepared an environmental impact statement ("EIS") instead of an EA. As discussed herein, the Forest Service addressed Plaintiffs' concerns and explained why there are no significant effects within the meaning of NEPA. The Forest Service therefore properly relied on an EA, and an EIS was not required. The Court should reject Plaintiffs' claims and grant judgment in favor of the Forest Service.

II. BACKGROUND

The Ottawa National Forest ("NF") is located in the western end of Michigan's Upper Peninsula and encompasses approximately one million acres. AR03539.[1] The Forest is a frequent destination for residents of the Upper Midwest and is located within a day's drive of major metropolitan areas such as Detroit, Minneapolis-St. Paul, and Chicago. AR03539; *see* AR03542. Visitors to the Ottawa NF can enjoy a variety of motorized and non-motorized recreation opportunities, such as viewing natural scenery, hiking, hunting, fishing, and boating. AR03540. Winter sports such as skiing, snowmobiling, and ice fishing are popular. *Id.*

The Ottawa NF is characterized by landscapes shaped by glaciers, which have provided a variety of landforms from hilly glacial moraine to outwash sandplains. AR03539. The old growth forests that once dominated the landscape were harvested by 1920 and then suffered from a series of large, catastrophic fires. *Id.*; *see* AR03647. During the Great Depression, the Forest Service, in cooperation with the State of Michigan, acquired degraded tax-delinquent lands and reforested them with the assistance of the Civilian Conservation Corps. *Id.* The result of this collaborative relationship was to greatly accelerate renewal of the forest as a resource on what had been unproductive land. *Id.* The forests on the Ottawa NF today are predominantly second-growth northern hardwood tree species less than 100 years old with associated plants and animals. AR03540, 03547. Mixed stands of early successional tree species (aspen and birch) are common, as are lowland and upper conifer trees (pine and fir). AR03540.

One legacy of the way in which the Ottawa NF was established is that in some areas, the lands within the Forest boundary are a subject to a patchwork of ownership. *See* AR01902,

[1] The Forest Service lodged the Administrative Record on August 27, 2013. ECF No. 53. Citations to the Administrative Record are as follows: AR[5-digit Bates number].

04509 (maps); 03803 ("Within the Ottawa boundary, there is about 40% private ownership.").[2] Because this patchwork can present management challenges and inefficiencies, the Forest Plan for the Ottawa NF contains a goal to "[a]djust land ownership to facilitate restoration, protection, and management of resources; and to provide for recreation opportunities." AR04247. The Forest Plan provides several guidelines for prioritizing land adjustments, which include those adjustments that will provide public recreation opportunities, result in more efficient land ownership patterns, and result in lower resource management costs. AR04271.

In February 2007, Mr. Delich submitted a request to obtain parcels of National Forest System ("NFS") land through an exchange of land that he owns. AR01559. The initial proposal involved the exchange of seven small parcels of federal land totaling approximately 320 acres (Parcels 1 through 7) for a large parcel of private land totaling approximately 421 acres (Parcel 8).[3] *Id.* Parcel 8, the proposed acquisition, adjoins other lands currently within NFS ownership and is adjacent to the southern boundary of the Porcupine Mountains Wilderness State Park. AR01559; *see* AR01632. Parcels 1 through 7 are isolated from other federal ownership and located within non-federal holdings. *See* AR01628-31.

As part of the review process in deciding whether to approve the land exchange, the Forest Service analyzed the environmental effects of the Project in an EA conducted pursuant to NEPA, 42 U.S.C. §§ 4321-4370(h). AR01554-632. In a Decision Notice and Finding of No Significant Impact ("DN/FONSI"), the Forest Supervisor determined that the Project would not have any significant effects. AR01894-97. The Forest Supervisor also found that the Project was in the public interest because it (1) provides opportunities for more efficient timber

[2] The image in the Administrative Record for the map located at AR04509 is corrupted. A copy of the map is attached hereto as Exhibit 1.

[3] Legal descriptions are available at AR01613-14. Maps are available at AR01627-32.

management and public use by reducing the patchwork of Forest Service and private land in the Ottawa NF; (2) protects a large, contiguous expanse of land from conversion to other uses; (3) consolidates NFS lands within the a semi-primitive non-motorized area; and (4) reduces the potential risk of trespass and encroachment associated with interspersed ownership. AR01890. In addition to consolidating and increasing public ownership, the approved Project provides increased recreation opportunities, particularly for dispersed, semi-primitive non-motorized interests, such as hiking and camping. AR01892. The DN/FONSI approved the exchange of federal Parcels 1-4 and 7 (totaling approximately 240 acres) for private Parcel 8 (421 acres). AR01890-91.[4] Parcels 5 and 6 were excluded from the decision. AR01891. The proposed exchange also includes a cash payment of $26,000 from the Forest Service to Mr. Delich to balance the valuation of the Parcels. AR01493, 01890

Plaintiffs initiated this action on April 27, 2012. ECF No. 1. Their Amended Complaint presents four claims under NEPA to the Forest Service's approval of the Project. ECF No. 18, ¶¶ 39-62. For the reasons set forth below, the Court should reject Plaintiffs' claims and enter judgment in favor of the Forest Service.

III. STANDARD OF REVIEW

A. The Administrative Procedure Act

In order to prevail in a challenge to an agency's decision brought under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-06, a plaintiff must show that the agency's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in

[4] The Forest Service initially approved the Project based on a 2010 EA and February 11, 2011 DN/FONSI. AR01559; AR01202-60 (2010 EA); AR01292-313 (February 2011 DN/FONSI). This decision was appealed by two parties and later reversed by the Agency. AR01370-71, 01385-86. The revised October 2011 EA and December 2011 DN/FONSI address the concerns raised in the appeal process and are the operative documents for this litigation.

accordance with law." 5 U.S.C. § 706(2)(A); *Communities, Inc. v. Busey*, 956 F.2d 619, 623 (6th Cir. 1992). An agency action will be upheld if the agency has considered the relevant factors and articulated a rational connection between the facts found and choice made. *Balt. Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 105 (1983). The scope of review is narrow and the court is not to substitute its judgment for that of the agency. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

B. The National Environmental Policy Act

NEPA is a procedural statute that requires agencies to consider the impacts of, and alternatives to, federal actions significantly affecting the environment. 42 U.S.C. §§ 4321, 4331. Its purpose is to ensure that federal agencies take a "hard look" at the environmental consequences of their proposed actions before deciding to proceed. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989). Although NEPA establishes procedures by which agencies must consider the environmental impacts of their actions, it does not dictate the substantive results of agency decision making. *Robertson*, 490 U.S. at 350.

Challenges under NEPA are reviewed pursuant to the APA. *Sierra Club v. Slater*, 120 F.3d 623, 631 (6th Cir. 1997). Courts are to "ensure that the agency has adequately considered and disclosed the environmental impacts of its actions and that its decision is not arbitrary or capricious." *Balt. Gas & Elec. Co.*, 462 U.S. at 97-98; *see also Robertson*, 490 U.S. at 350 (explaining that NEPA "does not mandate particular results, but simply prescribes the necessary process"). A court is not to "substitute [its] judgment of the environmental impact for the judgment of the agency, once the agency has adequately studied the issue." *Crounse Corp. v. Interstate Commerce Comm'n*, 781 F.2d 1176, 1193 (6th Cir. 1986).

IV. ARGUMENT

A. The Forest Service's Determination That the Challenged Action Does Not Have Any Significant Environmental Impacts Was Not Arbitrary and Capricious.

Plaintiffs claim the Forest Service was required to prepare an EIS, rather than an EA, because impacts to certain resources and public controversy are significant within the meaning of NEPA. Pls.' Br. 9-12. Plaintiffs are wrong. The Forest Service correctly determined that the land exchange did not have any significant environmental impacts and thus no EIS was required.

NEPA requires the preparation of an EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). "To spare agencies the hardship of conducting exhaustive review of every [] proposal's environmental impact, CEQ [Council on Environmental Quality] authorized agencies to first prepare a less burdensome environmental assessment as a method for determining whether a proposal needed an environmental impact statement." *Ky. Riverkeeper, Inc. v. White*, 714 F.3d 402, 407-08 (6th Cir. 2013). An EA is a concise public document that briefly describes the proposal, examines alternatives, considers environmental impacts, and provides a list of individuals and agencies consulted. 40 C.F.R. § 1508.9. If, based on the EA, the agency determines that a project will have no significant environmental effects, it need not issue an EIS and instead may issue a DN/FONSI. *Save Our Cumberland Mountains v. Kempthorne*, 453 F.3d 334, 339 (6th Cir. 2006); 40 C.F.R. § 1501.4; *Friends of Fiery Gizzard v. Farmers Home Admin.*, 61 F.3d 501, 504 (6th Cir. 1995) ("[T]he environmental assessment functions as a screening device that allows agencies with limited resources to focus on truly important federal actions."). A decision not to prepare an EIS is reviewed under the deferential arbitrary and capricious standard. *Save Our Cumberland Mountains*, 453 F.3d at 339 (citing *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 763 (2004)); *Sierra Club v. Slater*, 120 F.3d 623, 635 (6th Cir. 1997).

Whether environmental impacts are significant under NEPA and thus warrant preparation of an EIS depend on their context and intensity. 40 C.F.R. § 1508.27. "Context" captures the notion that "[s]ignificance varies with the setting of the proposed action." *Id.* § 1508.27(a). The term "intensity" refers to the severity of the impact. *Id.* § 1508.27(b). In evaluating intensity, NEPA regulations identify ten criteria that agencies should consider, including two raised by Plaintiffs in this litigation: unique characteristics of the geographic area and the degree to which the effects on the quality of the human environment are likely to be highly controversial. 40 C.F.R. § 1508.27(b)(3), (b)(4). "[A] project's potential to affect one of these [40 C.F.R. § 1508.27(b)] factors does not require an agency to prepare an EIS. The relevant analysis is the degree to which the proposed action affects this interest, not the fact it is affected." *Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Eng'rs*, 702 F.3d 1156, 1180 (10th Cir. 2012); *see Burkholder v. Peters*, 58 Fed. Appx. 94, 101 (6th Cir. 2003) (unpublished) ("The EA must include a 'brief discussion' of the impact on such resources.").

1. The Forest Service Considered the Significance of the Challenged Action.

The Forest Service expressly considered the significance of the challenged action based on context and intensity in accordance with NEPA regulations. AR01894-97. The DN/FONSI addressed the ten criteria used to evaluate intensity and referenced portions of the EA where these factors were evaluated and considered. AR01895-97; *see* AR01572-611 (Chapter 3); AR02005-12 (letter from Appeal Reviewing Officer). The analysis of impacts of the challenged action included consideration of the unique characteristics of the geographic area and the degree to which the effects are likely to be highly controversial within the meaning of NEPA. AR01895-96; AR01575-76, 01578-86. This analysis was based on the Agency's review of relevant literature and public comments. *See e.g.*, AR01574, 01578, 01580-84, 01740-44

(hemlock and other tree species); AR01575, 01581-82, 01585, 01741-43 (old growth components); AR01587-95, 01731-33 (perennial streams); AR01598-602 (recreation); AR01600, 01732-33, 01740 (Wildcat Falls). The Administrative Record, EA, response to comments, and DN/FONSI support the Forest Service's conclusion that the effects of the land exchange would not be significant within the context of NEPA. Because the impacts are not significant within the context of NEPA, the Forest Service was not required to prepare an EIS.

2. The Challenged Action Does Not Have Significant Impacts on Any Unique Characteristics of the Area.

Plaintiffs allege that the challenged action has significant impacts on unique characteristics of the area. Pls.' Br. 11-12. Specifically, Plaintiffs claim that "the land exchange will trade away old-growth, hemlock, cedar stands, and related wildlife habitat; and will remove from public ownership unique and rare geographic features…" *Id.* 11.[5] It will not.

The NEPA regulations require an agency to consider "[u]nique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas." 40 C.F.R. §1508.27(b)(3). Here, the Forest Service acknowledged in the DN/FONSI that

> many of the commenters have stated that they believe the cedar, hemlock, and old growth components found on the federal parcels near County Line Lake to be rare and 'unique.' The Revised EA demonstrates that these resources are found throughout the Ottawa and that the exchange would result in less than a [0.3%] reduction in total acres of classified old growth found within Management Area 2.1; the appropriate scale at which it is reasonable to assess the effects of the exchange based on Forest Plan direction.

[5] As discussed more fully in Part IV.C.2, *infra*, "old growth" is based on tree size, habitat characteristics, and placement on the landscape – not on the age of the trees. Most of the trees in the Ottawa NF are less than 100 years old and "old growth" type vegetation is predominantly potential old growth.

AR01895-96.[6] In addition to this summary in the Decision Notice, the Forest Service considered impacts to vegetation resources and related wildlife habitat. *See* AR01575-86 (discussion in EA of direct, indirect, and cumulative impacts to vegetation resources); AR01606-11 (discussion in EA of direct, indirect, and cumulative impacts to wildlife resources); *see also* AR01115-24 (biological evaluation). The Forest Service also addressed concerns to vegetation resources in the response to comments (AR01740-41) and in the Appeal Reviewing Officer's letter. AR01997-2000, 02006-07. Thus, the Agency evaluated the Project's impacts on the vegetation resourced identified by Plaintiffs and found that those impacts were not significant.

With regards to geographic features identified by Plaintiffs, the DN/FONSI acknowledged that Wildcat Falls was a scenic location that would no longer be federally owned but found that "while the falls are appealing, they are in fact not unique in regards to their particular form or character…it has no historical significance and similar sites may be found in many places in the Upper Peninsula." AR01896; *see* AR01740 (same). Additionally, the land exchange would not impact the falls' free-flowing condition since the decision authorizes only a change in ownership and there would be a deed covenant restricting development in the floodplains of parcels 2, 3, and 4.[7] AR01896; *see* AR01740 ("a deed covenant…would serve to protect the falls and adjacent areas from development as well, thus maintaining the ecological processes of the wetland areas and their associated riparian and stream environments."). The EA noted that while the proposed action would result in the lost recreational activity of visiting Wildcat Falls, AR01600, "there are many other opportunities within the Ottawa to gain similar recreation experiences." AR01601; *see* AR02009-10 (Appeal Reviewing Officer's letter);

[6] The DN/FONSI states the percentage is 0.003%. The Appeal Reviewing Officer's letter states this is a typographical error and that the correct percentage is 0.3%. AR01997.

[7] Wildcat Falls is located in Parcel 3 on Scott and Howe Creek. AR01588.

AR04347 (waterfall viewing opportunities in Black River Harbor); AR04351-53 (numerous falls on Wild and Scenic River segments).

Plaintiffs have not explained how the resources they value are "unique characteristics" within the meaning of NEPA or its implementing regulations. *See* Pls.' Br. 11-12. Nor do they explain how the Forest Service's consideration of the impacts to these resources was arbitrary and capricious. *See id.* Even if the Court were to assume that these areas are "unique" within the meaning of § 1508.27(b)(3), it does not follow that the Forest Service was required to prepare an EIS. *Hillsdale Envtl. Loss Prevention*, 702 F.3d at 1180. Plaintiffs utterly fail to meet their burden and judgment should be entered for the Forest Service.

3. The Challenged Action Is Not "Highly Controversial" in the Context of NEPA.

Plaintiffs also allege that the Forest Service was required to prepare an EIS because the challenged action is highly controversial under 40 C.F.R. § 1508.27(b)(4). Pls.' Br. 12. It is not.

The term "highly controversial" means more than "some public opposition." Under Forest Service and CEQ regulations, this intensity factor pertains to the "degree to which the effects [of a proposed action] on the quality of the human environment are likely to be highly controversial." 40 C.F.R. §1508.27(b)(4). The Sixth Circuit has not interpreted this provision, but other circuits hold that this "requires a substantial dispute as to the size, nature, or effect of the major federal action." *Coliseum Square Ass' n, Inc. v. Jackson*, 465 F.3d 215, 234 (5th Cir. 2006) (internal quotation marks omitted); *Humane Soc'y v. Locke*, 626 F.3d 1040, 1057 (9th Cir. 2010) (same); *Ind. Forest Alliance v. U.S. Forest Serv.*, 325 F.3d 851, 857 (7th Cir. 2003) ("mere opposition to a proposed action will not create high controversy."); *North Carolina v. F.A.A.*, 957 F.2d 1125, 1133-34 (4th Cir. 1992) (equating controversy with opposition would allow the determination of whether to prepare an EIS to "be governed by a heckler's veto."); *see*

Lone Tree Council v. U.S. Army Corps of Eng'rs, 2007 WL 1520904, at *32 (E.D. Mich. May 24 2007) ("The plaintiffs' disagreements with Corps analyses simply do not suffice to establish a 'controversy' or substantial dispute such that the regulations would require the preparation of an EIS."). Thus, Plaintiffs' public opposition is not sufficient to render the Project "highly controversial" within the meaning of NEPA.

Here, the Forest Service considered the degree to which the effects might be highly controversial within the meaning of NEPA. AR01896, 02010. The Forest Service found that "the effects of the proposed action are reasonably predictable" based on previous implementation of similar projects and the analysis in the EA. AR01896. The Forest Service acknowledged, however, the opposition to the proposed action by some members of the public. *See id.* The comments received on the proposed action did not indicate controversy about the size, nature, or degree of effect of the proposed action, but instead focused on the preferences and values individuals and groups placed on the land. *See* AR01730-52 (response to comments).

Plaintiffs have not identified any controversy as to the "size, nature, or effect" of the land exchange. *See* Pls.' Br. 12. Instead, they urge this Court to reject the reasoning of other circuits and hold that mere public opposition constitutes a "highly controversial" action under § 1508.27(b)(4). *Id.* The two cases Plaintiffs cite do not support this interpretation of the regulation. In *Indiana Forest Alliance*, the Seventh Circuit held that "in order for a proposed action to be highly controversial it must be subject to a substantial dispute concerning the *specific environmental effects* of the action." 325 F.3d at 857 (emphasis added). Similarly, in *Town of Cave Creek v. F.A.A.*, the District of Columbia Circuit held that "[t]he term 'controversial' refers to cases where a substantial dispute exists as to the size, nature, or *effect* of the major federal action rather than to the existence of opposition to a use." 325 F.3d 320, 331

(D.C. Cir. 2003) (emphasis in original). Plaintiffs have not identified any substantial dispute as to the size, nature, or effect of the land exchange; they only state that "the trading away of Wildcat Falls, old growth, hemlock, cedar, and other public resources would not have a significant impact indicates that there is such a dispute." Pls.' Br. 12. This circular logic does not show that the predictable environmental effects of the land exchange are "highly controversial" within the meaning of Forest Service or NEPA regulations or relevant case law.

In sum, the Forest Service correctly determined that there were no significant impacts to any unique characteristics of the area and that the effects were not highly controversial. Thus, the Forest Service's decision to rely on an EA, and not an EIS, was not arbitrary and capricious. The Court should grant judgment in favor of the Forest Service on this claim.

B. The Forest Service Considered an Appropriate Range of Alternatives.

Plaintiffs claim that the Forest Service did not analyze an adequate range of alternatives. Pls.' Br. 12-16. That claim is belied by the record.

"[T]he range of alternatives that must be discussed under [NEPA] is a matter within an agency's discretion. In exercising that discretion, the agency should consider the purpose of the project and the environmental consequences of the project." *Save Our Cumberland Mountains,* 453 F.3d at 342 (internal quotations and citation omitted). "[A]n agency has fewer reasons to consider alternatives when it prepares an environmental assessment as opposed to when it prepares an environmental impact statement." *Id.*; *see also* 40 C.F.R. § 1508.9. An agency may reject alternatives that it determines to be "similar to alternatives actually considered, or alternatives which are infeasible, ineffective, or inconsistent with the basic policy objectives for the management of the area." *Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Engr's*, 524 F.3d 938, 955 (9th Cir. 2008).

The Forest Service considered four alternatives in the EA. Two of the alternatives were considered in detail and consisted of: (1) a no action alternative, where no land exchange would occur; and (2) the proposed exchange, where federal Parcels 1-7 and non-federal parcel 8 would be exchanged. AR01567-69, 01892. The Forest Service also considered two additional alternatives but eliminated them from detailed study. The first of the eliminated alternatives was one that excluded parcels 1, 2, and 3 from the land exchange and was considered to address concerns about the loss of public land in the County Line Lake area and Wildcat Falls. AR01569, 01893. The Forest Service did not analyze this alternative in detail because "excluding these Federal parcels [1, 2, and 3] would not fully meet the purpose and need….In particular, the opportunity to consolidate NFS land and concentrate resource management efforts in more effective blocks of land would not be achieved."). *Id.* The second of the eliminated alternatives involved the purchase of the non-federal parcels. AR01570, 01893. The Forest Service did not analyze this alternative in detail because the landowner was only interested in pursuing an exchange and because appropriated funds were insufficient. *Id.* In response to comments received on the revised EA, the Forest Service stated that further consideration of the two eliminated alternatives "would have resulted in a failed exchange agreement and the failure to meet the purpose and need of the project." AR01737-38; *see* AR01994-96.

Plaintiffs claim that the EA should have considered in detail the two alternatives eliminated from further study. Pls.' Br. at 12-13. In support of this argument, Plaintiffs rely on a regulation that applies to an EIS not an EA, Pls. Br. 13-14 (citing 40 C.F.R. § 1502.14), and a series of cases from outside this circuit interpreting alternatives analysis in an EIS. Pls.' Br. 14-16 (citing cases). The only case cited by Plaintiffs that involved an EA upheld the agency's alternatives analysis. In a case challenging a regulation to reduce the risks from the

transportation of radioactive material (HM-164), the Second Circuit held that "we are of the view that an agency's finding of no significant impact, if otherwise valid, permits the agency to consider a narrower range of alternatives than it might be obliged to assess before undertaking action that would significantly affect the environment." *City of New York v. U.S. Dep't of Transp.*, 715 F.2d 732, 744-45 (2d Cir. 1984). As in *City of New York*, the Forest Service correctly determined that the impacts of the proposed action were not significant within the context of NEPA and the Agency was not required to consider a broader range of alternatives.[8]

The Forest Service complied with NEPA because the Agency considered the two alternatives favored by Plaintiffs and explained why they would not be considered in detail. *See Meister v. U.S. Dep't of Agric.*, 623 F.3d 363, 377 (6th Cir. 2010) (finding a NEPA violation because the Agency rejected a proposed alternative without any discussion). The Agency reasonably chose to eliminate these two alternatives from further study, which was in the Forest Service's discretion to do so. *Save Our Cumberland Mountains*, 453 F.3d at 342; *see Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1247 (9th Cir. 2005) ("Alternatives that do not advance the purpose of the [Project] will not be considered reasonable or appropriate."); *Buck Mountain Cmty. Org. v. TVA*, 629 F. Supp. 2d 785, 798 (M.D. Tenn. 2009) (rejecting plaintiffs' claim that the EA presented a "binary choice" because the agency "considered a

[8] Plaintiffs rely heavily on *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800 (9th Cir. 1999) (per curiam), for the proposition that the Forest Service must consider an alternative to purchase the land. Pls.' Br. 14-15. *Muckleshoot* addressed alternatives in an EIS, not an EA. *Muckleshoot* is further distinguishable because here the Forest Service provided two reasons for eliminating the purchase alternative: the landowner was not interested and appropriated funds were insufficient. AR01570, 01893. Plaintiffs also rely on *National Parks & Conservation Association v. BLM*, 606 F.3d 1058 (9th Cir. 2010), for the proposition that the "purpose and need was unreasonably narrow because it restricted the proposed action to fulfilling the private entity's needs." Pls.' Br. 15. *NPCA* also involved an EIS, not an EA. Additionally, in this case three goals stated in the purpose and need unquestionably benefit the Forest Service. AR01560 (purpose and need for the action include access to public recreation activities, more efficient land ownership patterns, and lower resource management costs).

number of alternatives in addition to the Action Alternative and the No Action Alternative" and "provides a brief discussion of each alternative and articulates why each is not feasible."). The two alternatives did not meet the purpose and need because they would have resulted in a failed exchange. Plaintiffs did not meet their burden to show that the Forest Service's decision to exclude their favored alternatives from further consideration was arbitrary and capricious. The Court should grant judgment in favor of the Forest Service on this claim.

C. The Forest Service Analyzed the Environmental Impacts of the Land Exchange.

Plaintiffs claim that the Forest Service did not adequately address impacts from the land exchange. Pls.' Br. 16-22. Specifically, they contend that the EA did not analyze the impacts on Wildcat Falls and perennial streams, old-growth hemlock and other native species, and recreation. *Id.* Plaintiffs' claim is without merit.

NEPA regulations provide that EAs "[s]hall include brief discussions of…the environmental impacts of the proposed action and alternatives." 40 C.F.R. § 1508.9(b). Impacts include direct, indirect, and cumulative impacts.[9] 40 C.F.R. §§ 1508.7. 1508.8. In reviewing an agency's discussions of the environmental impacts, courts "need only determine whether the agency has adequately reviewed the issue and taken a 'hard look' at the environmental impact of its decision." *Neighbors Organized to Insure a Sound Env't, Inc. v. McArtor*, 878 F.2d 174, 178 (6th Cir. 1989) (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)).

In chapter 3 of the EA, the Forest Service analyzed the direct, indirect, and cumulative impacts to a variety of resources, including: vegetation, heritage, aquatic and riparian, soils and landform, recreation, rare plants, non-native invasive plants, and wildlife. AR01573-611. This analysis is supported by dozens of resource specialist input documents from the 2010 EA, *see*

[9] NEPA regulations use the terms "effects" and "impacts" synonymously. 40 C.F.R. § 1508.8.

AR00377-1141, and documents for the revised EA. *See* AR01436-531; *see also* AR02173- 4997 (references). The Forest Service also responded to comments from the public, which allowed for additional consideration of the Project's impacts. AR01261-90 (original EA), AR01554-632 (revised EA). The Forest Service continued to analyze impacts in accordance with NEPA regulations even after release of the DN/FONSI, when it reviewed new information related to unknown animal tracks and the relocation of the North Country National Scenic Trail ("NCNST" or "NCST"). AR02108-66. Based on this thorough review of literature, specialist reports, and input from the public, it is apparent that the Forest Service fully complied with NEPA and considered the direct, indirect, and cumulative impacts of the land exchange.

1. The Forest Service Considered Impacts to Wildcat Falls and Perennial Streams.

Plaintiffs claim that the Forest Service did not adequately analyze impacts to Wildcat Falls and perennial streams. Pls.' Br. 16-17. Yet Plaintiffs themselves specifically cite to documents in the Administrative Record where the Forest Service discussed impacts to these resources. *See id.* (citing AR00386-87, 00390-91, 01313, 01618, 01967).[10] In addition to the citations identified by Plaintiffs, the EA considered impacts to Wildcat Falls and perennial streams in the EA in the sections entitled "Aquatic and Riparian Resources," AR01587-95, and "Recreation Resources." AR01598-602; *see also* AR01618- 20 (discussing impacts to aquatic insect and plant inhabitants of perennial streams); AR00383-97 (hydrology specialists report); AR00835-40 (recreation specialists report); AR01731-33 (response to comments on aquatic resources); AR01740 (response to comments on recreation, including Wildcat Falls). The Forest Service acknowledged the loss of the recreation opportunity of visiting Wildcat Falls, AR01600, but found that this loss was not significant in the NEPA context because the falls are not unique

[10] Plaintiffs cite to AR01313, which is the errata for the original 2010 EA. The corrected information appears in the Revised EA (AR01601) and December 2011 DN/FONSI (AR01896).

in their form or character. AR01896; *see* AR04347 (waterfall viewing opportunities in Black River Harbor); AR04351-53 (numerous falls on Wild and Scenic River segments). Additionally, the Forest Service recognized the beneficial effects the land exchange would have on recreation because it acquires land adjacent to an existing state park and NFS lands used for recreation. AR01559; *see* AR01632. With regards to impacts to perennial streams, the Forest Service reasonably concluded that no significant adverse effects to water quality would occur if timber harvest occurs in Parcels 2, 3, and 4 due to best management practices required by the State of Michigan and a deed covenant restriction limiting development in the floodplain and wetlands. AR001509, 01590, 01731-33, 01740. Additionally, based on the amount of activity proposed in Parcel 1, the Forest Service concluded that the resulting effects "would be minor and overall water quality changes within the lake would be indiscernible." AR01591; *see* AR02000-01, 02009-10 (Appeal Reviewing Officer).

Plaintiffs do not explain how the Forest Service's discussion of impacts to Wildcat Falls and perennial streams was arbitrary and capricious. *See* Pls.' Br. 16-17. Instead, they simply assert that more analysis is required. That is not enough to establish a NEPA violation.

2. The Forest Service Considered Impacts to Old Growth and Vegetation Resources.

Plaintiffs then claim that the Forest Service did not adequately analyze impacts to what they characterize as old-growth hemlock and other native species. Pls.' Br. 17-21. Here too they specifically cite to documents in the Administrative Record where the Forest Service discussed impacts to these resources. *See id*. (citing AR01241, 01574, 01576-77, 01710, 01895-96, 02026-27, 02059, 03559).[11]

As an initial matter, it is important to recognize that vegetation classified as "old growth"

[11] Plaintiffs cite to the 2010 EA for the description of impacts. Pls.' Br. 17 (citing AR01241). This description was clarified in the 2011 EA. AR01582, 01585.

refers to vegetation stands with certain characteristics, and not merely the age of trees. These characteristics include large tree component and stand characteristics, connectivity, effective blocks for dependent plant and animal species, lands considered unsuitable for timber production, visual quality, difficulty of access, and recreation. AR04259; *see* AR04260 (Table 2-2, Old Growth Stand Characteristics). On the Ottawa NF, most trees are less than 100 years in age and the vegetation characterized as "old growth" is predominantly "potential" old growth. *See* AR01742 (Table 1); AR03647 ("The majority of stands on the Ottawa are second growth stands."); AR03539 (most old growth forests harvested by 1920). Under the Forest Plan, the Ottawa NF is to (1) classify stands as old growth in patterns and arrangements that provide for the desired spatial arrangement within the management area and across the landscape; (2) select stands that are currently in an old growth condition or have the ecological potential to become old growth; and (3) maintain a representation of all forest types. AR04258-59. The classifications are based on landscape percentages by management area. AR04259. In other words, this classification as potential old growth means that the vegetation does not currently possess all of the characteristics of old growth, but rather has some of the characteristics and has the ecological *potential* to become old growth. AR04259, 01742.

Contrary to Plaintiffs' claim that the Forest Service did not analyze impacts to old-growth hemlock and other tree species, the EA contains a thorough analysis of impacts to these resources in the section entitled "Vegetation Resources." AR01573-87. The effects analysis in this section was specifically prepared to address public concerns raised about the loss of eastern hemlock and northern white cedar communities and stands with old growth potential. AR01573. The EA described the existing affected environment (AR01573-77), discussed monitoring and threats to forest health (AR01577-79), and then evaluated the direct, indirect, and cumulative

impacts of the land exchange on the vegetation resources in the parcels. AR01579-86). This analysis in the EA is supported by additional documents in the Administrative Record. *See* AR00312-20, 00333-40 (interdisciplinary team notes discussing old growth and vegetation), 01436-37 (parcel 8 field review), 01438-52 (vegetation specialist report for EA), 04939-96 (vegetation and old growth documents for 2006 Forest Plan). Based on this analysis, the Forest Service concluded that the impacts to old growth and other vegetation resources were not significant because the exchange of approximately 60 acres of land classified as potential old growth results in less than a 0.3 percent reduction in total acres of land classified as old growth found within Management Area 2.1. AR01896, 01997.[12]

Plaintiffs claim without citation that "forests that contain these [old growth] characteristics, no matter the size or whether adjacent, are rare." Pls.' Br. 17-18. Plaintiffs do not link their claim to a failure to satisfy NEPA's procedural requirements. Nor do they accurately characterize the Forest Plan. As set out in the Forest Plan, old growth is managed on a landscape scale based on spatial arrangement, ecological potential, and with the requirement for a representation of all forest types. AR004258-59. The impacts to these resources were adequately considered in the EA. Plaintiffs also claim that the Forest Service "ignored" information they provided during the administrative appeal period. Pls.' Br. 19-20 (citing AR02026-27). Plaintiffs did not provide this information until April 3, 2012 (AR02024), which

[12] Plaintiffs also allege that "the land exchange runs contrary to the 2006 Final Forest Plan…," Pls.' Br. 18; *see id.* 18-21 (AR03559, 04335-36 (citing 2006 Forest Plan). To the extent this may be construed as a challenge under the National Forest Management Act ("NFMA"), 16 U.S.C. §§ 1600-1614, Plaintiffs did not plead a NFMA claim and may not do so now. *See* Am. Compl. ¶¶ 39-62 (alleging violations of NEPA); *Mitchell v. McNeil*, 487 F.3d 374, 379 (6th Cir. 2007). Additionally, Plaintiffs do not provide any legal argument for how the project is inconsistent with the Forest Plan – they only provide a summary of what they consider to be characteristics of certain management areas and parcel 8. *See* Pls.' Br. 18-19, 21. The EA and DN/FONSI found that the Project is consistent with the Forest Plan. AR01896. Plaintiffs provide no support to dispute this conclusion.

was well after the 45-day appeal period closed on February 27, 2012. AR01899 (written appeal must be received within 45 days of legal notice); AR01915 (Jan. 12, 2012 legal notice). Plaintiffs have forfeited any objection to the EA on this ground. They did not present this information during the NEPA process and thus deprived the Agency of a meaningful opportunity to respond. *Public Citizen*, 541 U.S. at 764 ("Persons challenging an agency's compliance with NEPA must structure their participation so that it alerts the agency to the parties' position and contentions, in order to allow the agency to give the issue meaningful consideration.") (internal alterations omitted). Additionally, the Forest Service did not "ignore" this information because it was not new and merely recast Plaintiffs' previous objections concerning old growth. The Appeal Reviewing Officer's recommendation to affirm the Project responded to the old growth objections raised in Plaintiffs' timely appeal. AR02035-37 (responding to appellant Garske's claim on old-growth); AR02017-18 (Garske's claim on old growth in February 23, 2012 appeal).

Plaintiffs' citation to *League of Wilderness Defenders v. Allen*, for the proposition of a de facto rule of no impacts to old growth habitat is wide of the mark. Pls.' Br. 18 (citing 615 F.3d 1122 (9th Cir. 2010)). First, the cited language has no bearing on whether NEPA has been satisfied, but instead focuses on substantive obligations for other statutes not at issue here. What matters for purposes of NEPA is whether the Forest Service considered and disclosed the effects of a proposed action and properly documented the reasons for its conclusion that any effects on potential old growth stands would not be significant, which is precisely what the Forest Service did here. Moreover, the portion of *Allen* quoted by Plaintiffs is from the dissenting opinion in a case that upheld the Forest Service's analysis of a commercial timber harvest in Oregon.[13]

[13] The majority in *Allen* characterized the dissent as articulating "a different point of view, and an extreme one at that" which was inconsistent with jurisprudence to defer to the Forest Service's technical analyses and refrain from second guessing. 615 F.3d at 1131; *see Lands Council v.*

Similarly, Plaintiffs' citation to *Foundation for North American Wild Sheep v. U.S. Department of Agriculture*, Pls.' Br. 20 (citing 681 F.2d 1172 (9th Cir. 1982)), is inapposite because in that case the Ninth Circuit invalidated an EA for failing "to address certain crucial factors." *Found. for N. Am. Wild Sheep*, 681 F.2d at 1178. Plaintiffs do not explain which "crucial factors" they believe were ignored here. *See* Pls.' Br. 20-21. As the preceding paragraphs demonstrate, the Forest Service considered effects to vegetation resources, including old growth, and made a reasoned decision that the impacts of the land exchange were not significant. AR01896.

3. The Forest Service Considered Impacts to Recreation.

Finally, Plaintiffs claim that the Forest Service did not adequately address impacts to recreation because the Forest Service discounted the area's appeal to hikers and other recreationists. Pls.' Br. 21-22. The Administrative Record contains a detailed discussion of the direct, indirect, and cumulative impacts to recreation. AR01598-602; *see* AR01740 (response to comments on recreation). Plaintiffs present no argument for how the Forest Service's decision was arbitrary and capricious. *See* Pls.' Br. 21-22. They imply only that the Forest Service should defer to their own subjective recreation preferences. *See id.* A subjective preference, however, is not an environmental impact to the physical environment that must be analyzed by the agency. *Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1466 (9th Cir. 1996) ("NEPA does not require that an agency take into account every conceivable impact of its actions, including impacts on citizens' subjective experiences."). The Forest Service acknowledged the high personal value that many of the commenters placed on the federal

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McNair, 537 F.3d 981, 993 (9th Cir. 2008) ("We are to be most deferential when the agency is making predictions, within its area of expertise, at the frontiers of science."), *overruled on other grounds by Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009); *Cellnet Comm's, Inc. v. FCC*, 149 F.3d 429, 441 (6th Cir. 1998) ("[A]n agency's predictive judgments about areas that are within the agency's field of discretion and expertise are entitled to particularly deferential review.").

parcels, but stated that because it "act[s] as land stewards for all of the public[,] it is [the agency's] responsibility to take into account the larger picture, and to implement those projects that benefit the resources and the public at large; rather than those that benefit only the few." AR01740. The decision rationale of the Forest Supervisor supports the Agency's conclusion that the land exchange will serve the broader public interest because it improves ownership patterns and provides increase recreation opportunities, among other reasons. AR01891-92.

In sum, the Forest Service took the requisite hard look at the Project's environmental impacts on Wildcat Falls and perennial streams, old growth and other vegetation resources, and recreation. *Ky. Riverkeepers*, 714 F.3d at 407; *Neighbors Organized*, 878 F.2d at 178. The Court should grant judgment in favor of the Forest Service on this claim.

D. <u>The Forest Service Was Not Required to Conduct Supplemental NEPA Analysis.</u>

Plaintiffs' final claim is that the Forest Service should have prepared a supplemental NEPA analysis because a section of the NCST is being moved and because the federal parcels may contain lynx habitat. Pls.' Br. 22-25. This claim fails.

"[A]n agency need not supplement [a NEPA analysis] every time new information comes to light…To require otherwise would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made." *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 373-74 (1989); *Price Rd. Neighborhood Ass'n v. U.S. Dep't of Transp.*, 113 F.3d 1505, 1510 (9th Cir. 1997) ("To require more would task the agencies with a sisyphean feat of forever starting over in their environmental evaluations, regardless of the usefulness of such efforts."). CEQ's implementing regulations, however, require agencies to prepare supplements to an EIS if there "are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its

impacts." 40 C.F.R. § 1502.9(c)(ii). The regulations do not address an agency's obligation to supplement an EA, *see id.*, but supplementation of an EA may be appropriate if significant new information or circumstances suggest that the agency's EA and FONSI may no longer be valid. *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1152 (9th Cir. 1998), *overruled on other grounds by McNair*, 537 F.3d at 997. To determine whether new information is sufficiently significant to trigger the need for a supplemental NEPA, the Forest Service often prepares a Supplemental Information Report ("SIR"). Forest Service Handbook ("FSH") 1909.15 § 18.1;[14] *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 555 (9th Cir. 2000); *Northwoods Wilderness Recovery, Inc. v. U.S. Dep't of Agric.*, 192 Fed. Appx. 369, 377, 371, 376 (6th Cir. 2006) (unpublished). The agency's decision about whether to supplement a NEPA analysis implicates agency expertise and is reviewed under the arbitrary and capricious standard. *Sierra Club*, 120 F.3d at 632-33.

In their administrative appeal, Plaintiffs claimed that "acquiring the Delich tract will not protect the NCNST or enhance the experience of Trail users at all" because a portion of the NCTS is being rerouted by the Ni-Miikanaake Chapter of the North Country Trail Association, the local chapter responsible for the relevant section of the Trail. AR02026. The Forest Service addressed this issue in the "North Country Trail Relocation Supplemental Information Report for Delich Land Exchange." AR02166-72. The Forest Service considered the study of a possible trail relocation to be new information and then proceeded to analyze the information in a SIR. AR02166. The Forest Service found that even if the Agency (in cooperation with the Chapter and the National Park Service) ultimately decided to relocate the trail, "[i]t is probable that a recreation trail – either with or without the NCTS designation – will still remain at the location at

[14] For the Court's convenience, a copy of this section of the FSH is attached hereto as Exhibit 2.

issue on the boundary of the nonfederal parcel [Parcel 8] for the foreseeable future." AR02167. Although the protection and enhancement of the NCTS would no longer be an element of the purpose and need for the proposed action, the other purpose and need statements would remain. AR02170; *see* AR01560 (purpose and need for action include public recreation activities, more efficient land ownership patterns, and lower resource management costs). Based on this assessment of the new information, the Forest Service concluded that "[t]he documents concerning possible NCTS relocation do not provide significant new information that requires supplementation." AR02171. Plaintiffs do not acknowledge the fact that the Forest Service prepared a SIR to address the NCTS relocation, nor do they demonstrate that the conclusions were arbitrary and capricious. *See* Pls.' Br. 22-25 (citing only AR01599, 1609 (Revised EA) and AR2025-26, 2028-29 (Plaintiffs' comments on the administrative appeal)).

Plaintiffs' administrative appeal also claimed that the Forest Service did not properly acknowledge the suitability of Parcels 3 and 4 for lynx habitat. AR02028-29. Plaintiffs state that these parcels are suitable for lynx because they include boulders, rock ledges, and cliffs. AR02029. Plaintiffs' characterization of the habitat is not new information requiring supplementation under NEPA – the Forest Service was well aware of the geographic features of the parcels in question and considered the features in connection with the EA analysis. *See, e.g.*, AR01588, 01596, 01602, 03539. Additionally, Plaintiffs' claim that lynx habitat is present ignores the finding of the Biological Evaluation, which determined that neither Canada lynx nor their habitat were documented in the Project area. AR01457. This conclusion is further supported by five prior surveys implemented under the National Lynx Survey Protocol wherein no lynx were detected in the Ottawa NF. AR03338, 03341; *see* AR03466 ("we conclude that it is extremely unlikely that Canada lynx are currently present on the Ottawa National Forest…. ").

Indeed, the most recent record of Canada lynx in the State of Michigan is from 2003, which was the first documented lynx specimen in approximately 20 years.[15] AR03342; AR02156. Plaintiffs have not identified any new information on the parcel's suitability for lynx habitat or the presence of lynx in the parcels. Essentially, Plaintiffs disagree with the Forest Service's assessment of lynx habitat suitability, but that argument is not a basis for this Court to conclude that the determination was arbitrary and capricious or that there is new information requiring supplemental NEPA. *Sierra Club*, 120 F.3d at 633 ("In short, the plaintiffs believe that the defendants reached the wrong conclusion. That, it is plain, is not the type of argument that allows a court to conclude that an agency's decision was arbitrary and capricious.").

Based on the foregoing, it is apparent that neither of Plaintiffs' claims contained new significant information. Supplemental NEPA analysis therefore was not required, and the Court should grant judgment in favor of the Forest Service on this claim.

V. CONCLUSION

For the foregoing reasons, the Forest Service analyzed the challenged action in accordance with NEPA and all other applicable laws. The Court should deny Plaintiffs' motion for summary judgment and grant judgment in favor of the Forest Service on all claims.

Respectfully submitted on this 7th day of February, 2014.

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[15] In response to reports of unidentified animal tracks in Parcels 3 and 4 in the spring of 2012, the Forest Service completed a SIR to analyze the possible presence of lynx. AR02155-58. The Forest Service thoroughly investigated the tracks and consulted with its own biologists and non-agency biologists in the region. AR02156-57. There was no consensus among the experts regarding the species that made the tracks in question, AR02157, and the SIR concluded that there was no significant new information that required supplemental NEPA analysis. AR02158.

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CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2014, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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