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Route To:

Subject: Appeal of the Decision Notice and Finding of No Significant Impact for the Delich Land Exchange Project, Environmental Assessment, Bergland, Ontonagon and Watersmeet Ranger Districts, Ottawa National Forest, Appeal # 11-09-07-0013 A215

To: Regional Forester, Appeal Deciding Officer

This letter constitutes my recommendation for the above-referenced appeal filed by Mr. Joel Hovel on behalf of himself as an individual and on behalf of Partners in Forestry Cooperative (PIF). This appeal challenges the decision for the Delich Land Exchange Project on the Ottawa National Forest (ONF). Acting Forest Supervisor Keith B. Lannom signed the Decision Notice associated with this project on February 4, 2011. The legal notice for this decision was published in *Ironwood Daily Globe* on February 12, 2011.

My review has been conducted pursuant to 36 C.F.R. § 215 – "Notice, Comment, and Appeal Procedures for National Forest System Projects and Activities." To ensure that the analysis and decision were in compliance with applicable laws, regulations, policies, and orders, I have reviewed and considered the issues raised by the Appellant in his Notice of Appeal (NOA) and the decision documentation submitted by the Forest. My recommendation is based upon a review of the Project Record (PR), including but not limited to, the Environmental Assessment (EA), the Decision Notice (DN), and the Finding of No Significant Impact (FONSI).

The Delich land exchange involves one parcel of non-federal land (421 acres) and five parcels of federal land (240 acres). Consolidation of federal landownership and acquisition of land in a semi-primitive, non-motorized area are important components of the purpose and need for the project.

Appeal Issues

The Appellant expressed numerous concerns in the NOA, which have been consolidated into four issues for purposes of this review. The Responsible Official was not able to informally resolve any issues with the Appellant.

Issue 1: Public Interest Determination – *"(T)his decision notice is not in the public interest . . . . . the FS is trading away parcels with very substantial public interest, much more so than the acquired parcel."* (NOA, p. 1). *"As stated throughout this document, we reject the idea that the resource values and public objectives are better served in this proposal."* (NOA, p. 4).

- *"The importance of Wildcat Falls to the public is simply brushed off as one opportunity in many on the Ottawa."* (NOA, p. 2).

- *"One of the main reasons why the proposed Delich land exchange between the Ottawa National Forest and Mr. Delich is not in the public interest is the net loss of hemlock and old-growth forests."* (NOA, p. 2).

- *"A .32 mile loss of perennial stream [is not in the public interest]"* (NOA, p. 4).

- *"While the exchange may improve ownership pattern, the "old growth features" discussed would require little management so the argument for better management objective[s] becomes diminished."* (NOA, p. 4).

- *"Township zoning is inadequate to protect water degradation, long-term cumulative effects of development, and protection of rare communities of cedar and hemlock, which feature old growth characteristics."* (NOA, p. 4).

Response: The Appellant asserts that the subject land exchange is not in the public interest because certain resources would be conveyed out of federal ownership and would no longer be accessible or available for the public. Specifically, as discussed below, the Appellant is concerned about the loss of Wildcat Falls, the loss of hemlock stands, the loss of old growth stands, and the net loss of perennial stream frontage. The Appellant suggests that the loss of these resources outweighs the benefits associated with the acquisition of the non-federal 420-acre property. The Appellant also disagrees with several specific statements in the "Decision Rationale – Public Interest Determination" section of the DN.

Provisions of 36 C.F.R. § 254.3(b) require that the Responsible Official make a determination that the public interest will be well served by a land exchange. Numerous factors must be considered when assessing the public interest.[1] The Responsible Official must ultimately find that "[t]he resource values and the public objectives served by the non-Federal lands or interests to be acquired must equal or exceed the resource values and the public objectives served by the Federal lands to be conveyed." 36 C.F.R. § 254.3(b)(2)(i).[2] In this case, the DN contains the Responsible Official's determination that the public interest would be served by the exchange and provides the rationale associated with that determination. The DN generally indicates that

[1] The provisions of 36 C.F.R. § 254.3(b)(1) state the following: "When considering the public interest, the authorized officer shall give full consideration to the opportunity to achieve better management of Federal lands and resources, to meet the needs of State and local residents and their economies, and to secure important objectives, including but not limited to: protection of fish and wildlife habitats, cultural resources, watersheds, and wilderness and aesthetic values; enhancement of recreation opportunities and public access; consolidation of lands and/or interests in lands, such as mineral and timber interests, for more logical and efficient management and development; consolidation of split estates; expansion of communities; accommodation of existing or planned land use authorizations (§ 254.4(c)(4)); promotion of multiple-use values; implementation of applicable Forest Land and Resource Management Plans; and fulfillment of public needs."

[2] 36 C.F.R. § 254.3(b)(2) provides: "To determine that an exchange well serves the public interest, the authorized officer must find that – (i) The resource values and the public objectives served by the non-Federal lands or interests to be acquired must equal or exceed the resource values and the public objectives served by the Federal lands to be conveyed, and (ii) The intended use of the conveyed Federal land will not substantially conflict with established management objectives on adjacent Federal land, including Indian Trust lands."

consolidation of federal landownership and enhancement of recreational opportunities were viewed as important benefits of the exchange (DN, pp. 3-4). As discussed in the EA and the DN, management efficiencies associated with landownership consolidation and provision of additional recreational opportunities were principle components of the purpose and need for the project (DN pp. 1-2; EA pp. 2-3). The DN emphasizes the benefits associated with acquiring the non-federal tract, which is a large, consolidated block of land within a semi-primitive, non-motorized recreation area and immediately adjacent to Porcupine Wilderness State Park and the North Country Trail (DN, p. 4). The DN also acknowledges that "there are both positive and negative effects on landowners adjacent to the properties involved and to the general public," but concludes that "the negative effects, as described in the EA and within this decision, are minimal and limited in scope (EA, pp. 11-30)" (DN, p. 3). As required by provisions of 36 C.F.R. § 254.3(b)(2), the DN stipulates that "[t]he resource values and the public objectives served by the non-federal lands or interests to be acquired, exceed the resource values and public objectives served by the federal land to be conveyed (EA, pp. 11-30)" and that "[t]he intended residential and commercial timber harvesting use of the conveyed federal land will not substantially conflict with established management objectives on adjacent federal land" (DN, p. 3).

The Appellant's specific concerns with the public interest determination, as well as my findings with respect to each concern, are addressed in detail below.

- *"The importance of Wildcat Falls to the public is simply brushed off as one opportunity in many on the Ottawa."* (NOA, p. 2).

The presence of the waterfall and its importance to some members of the public is thoroughly discussed in the DN and other documents in the PR.[3] The DN acknowledges that Wildcat Falls "has given some who visit it a sense of place and attachment to the area" (DN, p. 7). The DN stipulates that the public's concerns about the loss of the waterfall were considered in the decision, but concludes that "while the falls are appealing, they are in fact not unique in regards to their particular form or character" (DN, p.7). The DN points out that "[u]nder the Forest Service Visual Management System, the area is classified as having minimal variety in its features and being within a low sensitivity area" and that "[t]he site itself is also not unique in the sense that it has no historical significance and similar sites may be found in many places in the Upper Peninsula" (DN, p.7). The existence of the waterfall and its recreational value are also discussed in the EA and the "Response to Comments" (EA, pp. 24-27; PR E045, p. 8). The "Response to Comments" specifically states the following: "As stewards of the public land, it is often a difficult balancing act to make decisions involving projects that include resources that are of personal interest to the public. In this instance, the EA acknowledges the presence of the scenic falls and the potential loss of public access to the site, while also recognizing the potential benefits the exchange would bring to SPNM recreation" (PR E045, p. 8).[4] I find sufficient evidence in the PR that the Responsible Official was adequately informed and appropriately considered Wildcat Falls in the public interest determination. The Appellant obviously disagrees

[3] The Appellant's concern related to the loss of Wildcat Falls was previously raised during the 30-day comment period.

[4] I note that, based upon various documents in the PR, it is not clear that perfected legal access to federal parcel #2 is available for the public. Private property must be crossed in order to reach Wildcat Falls on federal parcel #2 and the PR does not disclose the presence of any recorded right-of-way easements or other avenues of legal access.

with the decision of the Responsible Official and believes that the Responsible Official should have afforded the presence of this waterfall greater weight in the public interest determination. However, there is ample evidence that this resource was thoroughly considered in the decision and I find no violation of the regulations pertaining to the public interest finding.

- *"One of the main reasons why the proposed Delich land exchange between the Ottawa National Forest and Mr. Delich is not in the public interest is the net loss of hemlock and old-growth forests."* (NOA, p. 2).

Although the presence of hemlock and potential old growth are not specifically mentioned in the "Decision Rationale – Public Interest Determination" section of the DN, the "Environmental Consequences" section of the EA is referenced in the discussion of the public interest determination.[5] This section of the EA discloses the presence of hemlock and potential old growth areas on federal parcels 2 and 3. The EA states that the cedar and hemlock stands "were previously identified as potential old growth (e.g. possessing some old growth characteristics)," but that the stands were never formally designated as such through a NEPA decision (EA, p. 36).[6] Other documents in the PR indicate that large hemlocks are located on the federal parcels, but that the understory of these stands is "not particularly rich or diverse" (PR DB0004, pp. 2-3). The EA indicates that, if the exchange occurred, these stands could be harvested by the non-federal party and "future management options would be dictated by the type of harvest method used, and whether regeneration was achieved or not as a result of that harvest" (EA, p. 40). In response to statements by the Appellant during the formal 30-day comment period that these stands should be retained by the Forest and designated as old growth, the ONF concluded that retaining the parcels would not meet the purpose and need for the project, which involves consolidation of federal landownership and acquisition of property in a "semi-primitive, non-motorized area" (PR E045, p. 6). The "Response to Comments" states that "[i]t is important to note that stands consisting of hemlock, cedar and sugar maple are not unique, given other areas in the vicinity and across the Forest share the same characteristic" (PR E045, p. 6).

The EA discloses the presence of hemlock and potential old growth, as well as the effects of the proposed action on these resources. The Appellant's concerns regarding the loss of hemlock and potential old growth habitat were raised principally during the 30-day comment period. As stated above, the "Response to Comments" noted that hemlock and old growth stands are not unique on the Forest. I note that the Ottawa National Forest 2006 Monitoring and Evaluation Report indicates that over 20,000 acres of land have been classified as old growth within

[5] The Appellant's concerns related to the loss of both hemlock and potential old growth were raised during the 30-day comment period.

[6] The ONF Land and Resource Management Plan (Forest Plan) does not formally designate "old growth" areas on the Forest. Instead, old growth areas are designated on a case-by-case basis in project-level NEPA decisions. The Forest Plan sets forth desired future conditions related to old growth within specific "Management Areas" and provides a set of guidelines for the classification of old growth areas. These guidelines stipulate that old growth classifications should be based on landscape-level acreage numbers by management area. The Plan sets forth the following factors for consideration: Providing effective blocks for old growth dependant plant and animal species; providing for connectivity; enhancing or maintaining outstandingly remarkable values of Wild and Scenic Rivers; land considered unsuited for timber production; where access is poor for vegetation management; where visual quality objectives are emphasized; in water-influenced landscapes, including riparian areas; and in recreation use areas other than developed sites. (PR HP004 pp. 2-23 to 2-25).

Management Area (MA) 2.1. Although the DN does not reference the public's concern about hemlock and potential old growth, I find sufficient evidence that these isolated hemlock and potential old growth stands were adequately disclosed in the PR for consideration by the Responsible Official in the public interest determination and I find no violation of the regulations pertaining to the public interest finding.

- *"A .32 mile loss of perennial stream [is not in the public interest]"* (NOA, p. 4).

The Appellant's concern regarding the net loss of perennial stream frontage was not specifically raised prior to this appeal and, therefore, the concern is not directly addressed in the "Response to Comments" or the DN. The direct, indirect, and cumulative effects to riparian resources are generally addressed in the "Aquatic and Riparian Resources" section of the EA (EA, pp. 13-21). The EA appears to indicate that the federal properties involved in the exchange (parcels 1-4 and 7) contain approximately one mile of stream frontage, most of which is associated with perennially flowing streams (EA, pp. 14-17). In contrast, the EA indicates that the non-federal property contains approximately 2.29 miles of stream frontage, including approximately one-half mile of perennially flowing stream frontage (EA, p. 14-17). Thus, the EA indicates that the exchange would result in "a slight increase in [total] stream miles," but a slight decrease in perennial flowing stream miles (EA, p. 16).

In the NOA, the Appellant references the "Management Indicator Species Report," set forth in Exhibit 2 of the EA (NOA, p. 4). The Report's discussion of the effects of the exchange to the Ephemeroptera-Plecoptera-Trichoptera (EPT) suite of aquatic species references the small net decrease in perennial stream miles under the exchange alternative (EA, p. 48). The Report states that, although the small decrease in perennial stream miles under the exchange could result in a slight negative impact on EPT, "[i]t is not expected that either alternative would have a noticeable effect on EPT or their habitat" (EA, p. 49).

I find that the PR contains sufficient information related to streams and other riparian resources for purposes of the Responsible Official's public interest determination. There is no requirement in law, regulation, or policy that stream miles entering federal ownership must meet or exceed stream miles leaving federal ownership in a land exchange. As explained above, the Responsible Official's public interest determination must take into account many factors, including the effects to all types of riparian resources. In this case, the PR reveals that the exchange would result in slight increases in some riparian resources (such as total stream miles and wetland acreage) and slight decreases in other riparian resources (such as pond acreage and perennial stream miles). I also note that, as disclosed in the DN and the EA, a deed covenant protecting the 17acres of floodplains on federal parcels 2 and 3 should afford some protection to the associated riparian areas, which accounts for much of the perennial stream frontage on the federal properties to be exchanged (DN, p. 2; EA, p. 24). I find no evidence that these resource tradeoffs were not

adequately documented in the PR and considered by the Responsible Official in the public interest determination.

- *"While the exchange may improve ownership pattern, the "old growth features" discussed would require little management so the argument for better management objective[s] becomes diminished."* (NOA, p. 4).

With this comment, the Appellant takes issue with paragraph #1 in the "Decision Rationale – Public Interest Determination" section of the DN. Paragraph #1 states that "[t]his exchange will provide improved land ownership patterns of federal land through consolidation of National Forest ownership, contributing to a contiguous land base where consistent management objectives are applied" (DN, p. 3). The Appellant appears to argue that the potential old growth stands on federal parcels 2 and 3 would require less of a commitment of management resources and, therefore, any consolidation-related benefits would be "diminished."

While I agree with the Appellant that certain types of management prescriptions might require fewer agency resources, I find significant evidence in the PR that the consolidation benefits of this exchange extend beyond the future ownership and management of the small hemlock stands on parcels 2 and 3. As a preliminary matter, it's important to note that the hemlock and cedar stands on federal parcels 2 and 3 have not yet been formally designated as old growth. As previously discussed, these stands are characterized as potential old growth in the EA (EA, p. 36). The EA states that, if the exchange was not completed and parcel 2 remained in federal ownership, "future vegetative management of some or all of the forested stands is a possibility . . ." (EA, p. 38). More importantly, the DN and other PR materials point out that the consolidation benefits associated with the exchange extend to both the federal and non-federal parcels. The DN states the following with respect to the consolidation benefits of the exchange: "The exchange would result in an overall increase of approximately 181 acres of public ownership. National Forest administration will be simplified and enhanced through acquisition of the non-federal land, and result in an improved federal ownership pattern. The resulting consolidation of landownership would decrease administrative costs, including the cost of landline maintenance." (DN, p. 3). It's important to note that costs associated with landline maintenance are present irrespective of the management prescription for the land. The DN also states that "[h]aving a single, larger, contiguous parcel in federal ownership would provide better recreational access than several smaller parcels that are for the most part surrounded by private lands." (DN, p. 4). With respect to this issue, I find that numerous consolidation-related benefits are identified in the PR and that the Responsible Official correctly considered these benefits in the public interest determination. I find no violation of law, regulation, or policy with respect to the Responsible Official's statements in paragraph #1.

- *"Township zoning is inadequate to protect water degradation, long-term cumulative effects of development, and protection of rare communities of cedar and hemlock, which feature old growth characteristics."* (NOA, p. 4).

The Appellant expresses disagreement with paragraph #3 in the "Decision Rationale – Public Interest Determination" section of the DN. This paragraph states the following: "The intended residential and commercial timber harvesting use of the conveyed federal land will not substantially conflict with established management objectives on adjacent federal land. It would also not conflict with current development or zoning restrictions on adjacent private land. Township zoning ordinances will regulate the amount and type of any future development of the property." (DN, p. 3). The Appellant asserts that township zoning would not protect various resources on the federal properties.

It appears that the Appellant is perhaps misinterpreting the intended meaning of the Responsible Official's statement in paragraph #3. In this paragraph, the Responsible Official is stipulating that the reasonably foreseeable uses of the federal property will not conflict with similar uses on adjacent federal and non-federal lands.[7] It is entirely correct to state that local zoning will apply to the federal properties (once those properties have been conveyed out of federal ownership) and that any applicable zoning will regulate the future uses of those properties. The Responsible Official does not state that township zoning will preclude timber harvest and/or residential development or that zoning will forever protect certain resources from such activities. Indeed, if local zoning prohibited timber removal or residential development, it is unlikely that those types of activities would be viewed as reasonably foreseeable for purposes of the environmental analysis (i.e. the reasonably foreseeable development must necessarily reflect permissible uses of the properties under local zoning).

The EA and other documents in the PR analyze the cumulative effects of the exchange associated with the reasonably foreseeable development. The effects to water quality and riparian resources are addressed in the "Aquatic and Riparian Resources" section of the EA (pp. 13-21), while the effects to hemlock, cedar, and potential old growth are addressed in the "Vegetation Management" section of the EA (pp. 35-41). I find no violation of law, regulation, or policy with respect to the Responsible Official's statements in paragraph #3 related to the public interest determination.

In conclusion, I find that the decision documentation meets the requirements of 36 C.F.R. § 254.3(b) related to the public interest determination. The PR appears to contain adequate disclosures for purposes of the public interest determination and I find no evidence that the Responsible Official did not adequately consider all information. Although the DN does not reference the public's concern about hemlock and potential old growth, I recommend that the decision be affirmed as the Responsible Official understood the concern and concluded that the public interest factors supported the proposal. The Appellant obviously disagrees with the decision of the Responsible Official and believes that the Responsible Official should have afforded greater weight to certain factors or concerns in the public interest determination.

[7] Provisions of 36 C.F.R. § 254.3(b)(2)(ii) require that the authorized officer find that "[t]he intended use of the conveyed Federal land will not substantially conflict with established management objectives on adjacent Federal lands, including Indian Trust lands."

However, again, I see no evidence that these factors or concerns were not given due consideration. Therefore, I recommend that the decision be affirmed with respect to this issue.

Issue 2: Finding of No Significant Impact – *"We reject the finding of no significant impact."*

- *"Due to its rarity, hemlock forests should not be exchanged for ubiquitous aspen and second-growth northern hardwood cover types that cover Mr. Delich's property. In no way can the diminution of this rare resource be considered insignificant. In light of the fact that eastern hemlock is threatened with extinction due to the introduced invasive Hemlock Wooley adelgid, the Forest Service should make every effort to retain and protect these rare forests."* (NOA, p. 3).

- *"Old growth forests are also an extremely rare feature in the Upper Midwest . . . . . [t]he loss of these rare features are very significant because they are not increasing on the landscape."* (NOA, p. 3).

- *"A .32 mile loss of perennial stream is significant when coupled with our other concerns."* (NOA, p. 4).

- *"We do not agree that findings [related to reasonably foreseeable future development] are insignificant."* (NOA, p. 4).

Response: The Appellant disagrees with the determination (documented in the FONSI) that the subject land exchange would not significantly affect the quality of the human environment. Specifically, the Appellant argues that the loss of hemlock stands, the loss of old growth forest, the net loss of perennial stream frontage, and the environmental effects associated with reasonably foreseeable development on the federal parcels represent a significant impact on the environment. The Appellant also argues that a number of "intensity" factors associated with the FONSI were not properly considered.[8]

The National Environment al Policy Act (NEPA) requires that federal agencies examine the environmental impacts of proposed actions. If a federal agency proposes a "major federal action [that] significantly affect[s] the quality of the human environment," the NEPA requires that the agency prepare an Environmental Impact Statement (EIS), which (among other things) describes "the environmental impact of the proposed action." (42 U.S.C. § 4332(C)). Under the NEPA, an EIS is not required if the agency is able to provide "sufficient evidence and analysis" in an EA that the proposed action will not significantly affect the quality of the human environment. (40 C.F.R. § 1508.9). In those situations, the agency must document its conclusion that the proposed action will not significantly affect the environment in a FONSI (40 C.F.R. § 1508.13).

[8] Specific responses to the Appellant's assertions with respect to individual "intensity" factors are set forth below (See Issues 2(a)-(e)).

The Council on Environmental Quality (CEQ) regulations require consideration of "context" (significance of an action) and "intensity" (severity of an impact) when evaluating whether an action will significantly affect the environment. (40 C.F.R. § 1508.27). Intensity is subdivided into ten additional factors that agencies must consider when taking a "hard look" at whether an action will have a significant environmental impact.[9]

In this case, the FONSI considers the "context" and "intensity" of the land exchange and expressly addresses the ten intensity factors of the CEQ regulations (DN, pp. 6-8). The Appellant's specific concerns with the finding of no significant impacts, as well as my findings with respect to each concern, are addressed in detail below.

- *"Due to its rarity, hemlock forests should not be exchanged for ubiquitous aspen and second-growth northern hardwood cover types that cover Mr. Delich's property. In no way can the diminution of this rare resource be considered insignificant. In light of the fact that eastern hemlock is threatened with extinction due to the introduced invasive Hemlock Wooley adelgid, the Forest Service should make every effort to retain and protect these rare forests."* (NOA, p. 3).

- *"Old growth forests are also an extremely rare feature in the Upper Midwest . . . . . [t]he loss of these rare features are very significant because they are not increasing on the landscape."* (NOA, p. 3).

The Appellant asserts that the loss of hemlock and potential old growth on the federal properties would constitute a significant impact because the resources are "rare." The Appellant argues that these resources should not be exchanged for more common resources on the non-federal property and that the hemlock, in particular, should be retained and protected due to the presence of the *hemlock wooley adelgid*.

[9] The ten intensity factors set forth in 40 C.F.R. § 1508.27(b) include the following: "(1) Impacts that may be both beneficial and adverse . . .; (2) The degree to which the proposed action affects public health or safety; (3) Unique 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; (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial; (5) the degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks; (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration; (7) Whether the action is related to other actions with individually insignificant, but cumulatively significant, impacts; (8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources; (9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973; (10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment."

Information and analysis in the PR related to hemlock and potential old growth is disclosed above in my response to **Issue 1**. The EA states that the cedar and hemlock stands on parcels 2 and 3 "were previously identified as potential old growth (e.g. possessing some old growth characteristics)," but that the stands were never formally designated as such through a NEPA decision (EA, p. 36).

The PR does not appear to contain any evidence that the Appellant characterized the hemlock and potential old growth as "rare" prior to this appeal.[10] As a result, the PR does not contain clear documentation regarding the extent to which these resources are rare. With respect to potential old growth, I note that the Ottawa National Forest 2006 Monitoring and Evaluation Report indicates that over 20,000 acres of old growth have been classified within Forest Plan's Management Area (MA) 2.1. As previously indicated, the "Response to Comments" states that "[i]t is important to note that stands consisting of hemlock, cedar and sugar maple are not unique, given other areas in the vicinity and across the Forest share the same characteristic" (PR E045, p. 6).

The Appellant's concern regarding the *hemlock wooley adelgid* was not specifically raised prior to this appeal and, therefore, it was not directly addressed in the EA or the DN/FONSI. I note that the *hemlock wooley adelgid* is identified as an "imminent threat" (but not an immediate or current threat to hemlock stands on the ONF) in the Final Environmental Impact Statement (FEIS) for the 2006 Forest Plan (PR HP002, pp. 3-50, 3-91, 3-105). The Forest Monitoring and Evaluation Reports have not identified this invasive species on the Forest (PR HP005, HP006, HP007, HP008). These PR materials indicate that the ONF has been aware of forest health threats regarding hemlock and that the Forest has been monitoring the spread of this invasive species. Presently, it appears that there is no local, immediate threat to hemlock on the ONF, as this invasive species is not located on the Forest.

As noted above, documentation in the PR suggests that the mature hemlock and the potential old growth are not unique or rare resources on the ONF. The PR does not contain clear documentation of the analysis supporting this conclusion, but it does indicate that the Responsible Official considered this issue. As a result, I recommend that the Responsible Official's decision be affirmed with respect to this issue.

- *"A .32 mile loss of perennial stream is significant when coupled with our other concerns."* (NOA, p. 4).

The Appellant asserts that the net loss of perennial stream miles would constitute a significant impact "when coupled with" other concerns. Although the Appellant previously raised concerns about the loss of Scott and Howe Creek on parcels 2, 3, and 4, the Appellant's concern regarding the net loss of perennial stream frontage was not specifically raised prior to this appeal.

[10] The PR indicates that, during the 30-day comment period, the Appellant characterized the hemlock and potential old growth stands as "unique."

Information and analysis in the PR related to streams and riparian features is disclosed above in my response to **Issue 1**. As indicated above, the direct, indirect, and cumulative effects to riparian resources are generally addressed in the "Aquatic and Riparian Resources" section of the EA (EA, pp. 13-21). The EA indicates that the exchange would result in "a slight increase in [total] stream miles," but a slight decrease in perennial flowing stream miles (EA, p. 16).

As previously discussed, the EA reveals that the exchange would result in slight increases in some riparian resources (such as total stream miles and wetland acreage) and slight decreases in other riparian resources (such as pond acreage and perennial stream miles) (EA, pp. 16-17). As disclosed in the DN and the EA, a deed covenant protecting the 17acres of floodplains on federal parcels 2 and 3 should afford some protection to the associated riparian areas, which accounts for much of the perennial stream frontage on the federal properties to be exchanged (DN, p. 2; EA, p. 24).

The PR documents that the ONF took the requisite "hard look" at the effects to riparian resources for this exchange. The Appellant provides no additional information related to perennial streams or riparian resources (in general) to support the contention that the net loss of a small amount of stream frontage would necessarily constitute a significant impact, regardless of whether that net loss is "coupled with" other factors. I recommend that the Responsible Official's decision be affirmed with respect to this issue.

- *"We do not agree that findings [related to reasonably foreseeable future development] are insignificant."* (NOA, p. 4).

The Appellant argues that the reasonably foreseeable future development on the federal parcels would constitute a significant impact.[11] Disclosure and analysis of the cumulative effects associated with the reasonably foreseeable development of the federal land is discussed below in my response to **Issue 3**.

The EA identifies the reasonably foreseeable uses of the federal properties involved in the exchange and discloses the direct, indirect, and cumulative effects of the exchange alternative. With regards to the reasonably foreseeable uses, the EA discloses that, if the exchange was consummated, the timber on the federal property might be harvested utilizing a selection harvest method (EA, p. 9). In addition, federal parcel 1 might be subdivided into 5-acre lots and sold for residential development (EA, p. 9). The effects of these reasonably foreseeable uses are disclosed in Chapter 3 of the EA entitled "Affected Environment and Environmental Consequences" (EA, pp. 11-41). The Responsible Official reviewed the information in the EA and concluded in the FONSI that "[t]he cumulative effects of this decision, when considered in

[11] The Appellant previously raised concerns regarding the development of federal parcel 1 during the 30-day comment period.

conjunction with other past, ongoing and reasonably foreseeable activities, are not expected to be significant" (DN, p. 8).

The Appellant obviously disagrees with the conclusion of the Responsible Official that the environmental effects associated with future development will not likely be significant. However, the Appellant has not provided any information or evidence concerning reasonably foreseeable effects that has not already been considered in the analysis. The cumulative effects associated with the reasonably foreseeable activities on these particular parcels are disclosed in the EA as set forth above. I find no violation of any law, regulation, or policy with regard to the determination in the FONSI that the effects associated with reasonably foreseeable development would not be significant and I conclude that the PR documents the fact that the Forest took a hard look at cumulative impacts and supports the DN/FONSI with respect to this issue. Therefore, I recommend that the Responsible Official's decision be affirmed with respect to this issue.

In conclusion, I find that the PR contains sufficient information and analysis to support the Responsible Official's finding of no significant impact. The PR addresses the loss of hemlock stands, the loss of old growth forest, the net loss of perennial stream frontage, and the environmental effects associated with reasonably foreseeable development on the federal parcels. As previously indicated, although the PR does not contain clear documentation of the analysis supporting the hemlock and old growth conclusions, the PR does indicate that the Responsible Official considered these issues. Therefore, I recommend that the decision be affirmed with respect to this issue.

Issue 2(a): Intensity 40 C.F.R. § 1508.27(b)(1) – *"The FS states that the exchange will be beneficial overall, but there are many negative effects, including the loss of old growth cedar/hemlock, the loss of a unique waterfall, and the loss of a portion of an important perennial stream."* (NOA, p. 4).

Response: The Appellant argues that the loss of cedar/hemlock, the loss of old growth, the loss of Wildcat Falls, and the loss of perennial stream frontage are adverse effects that constitute a significant impact. Provisions of 40 C.F.R. § 1508.27(b)(1) require consideration of "[i]mpacts that may be both beneficial and adverse." This subsection of the NEPA regulations acknowledges that there are often tradeoffs associated with proposals that must be evaluated in the analysis and considered by the deciding official. The NEPA regulations acknowledge that some adverse effects may be associated with a selected alternative. At the same time, the presence of some negative effects does not necessarily give rise to the level a significant effect on the environment. The NEPA is procedural and not a results-driven statute (*i.e.* the Act does not prohibit actions that may have adverse effects). It is well-established that even an agency action with adverse environmental effects can comply with the NEPA so long as the agency has considered those adverse effects and made an informed decision. Section 1508.27(b)(1) simply requires that both beneficial and adverse effects be considered.

Information and analysis in the PR related to the hemlock, old growth, and riparian resources is disclosed above in my responses to other issues. The FONSI specifically addresses this intensity

factor on page 6 of the DN.[12] My review of the PR indicates that the Forest thoroughly investigated the resources that could potentially be affected by the exchange proposal, including the specific resources mentioned by the Appellant. The PR documents that both beneficial and adverse effects on those resources were disclosed. While the Appellant questions the conclusions of the Responsible Official with respect to the finding of no significant impact, he does not provide any support for the assertion that the Forest violated Section 1508.27(b)(1) by failing to assess the beneficial and adverse effects on the resources identified by the Forest. In fact, potential adverse effects to each of the resources described by the Appellant (hemlock, old growth, waterfall, and perennial stream) were identified and considered by the ONF. I find that the DN/FONSI and other PR documents adequately identified those resources affected by the proposal and that the DN/FONSI documented both beneficial and adverse effects of the various alternatives. Therefore, I recommend that the decision be affirmed with respect to this issue.

Issue 2(b): Intensity 40 C.F.R. § 1508.27(b)(3) – *"Wildcat Falls is an ecologically important feature, and we disagree with the lack of emphasis placed on this feature. There are also important plant and riparian resources at risk as are discussed throughout this appeal."* (NOA, p. 4).

Response: The Appellant argues that Wildcat Falls and associated riparian resources are unique features and that the loss of these features would constitute a significant impact. Provisions of 40 C.F.R. § 1508.27(b)(3) require consideration of "unique 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."[13]

Information in the PR related specifically to Wildcat Falls is disclosed above in my responses to other issues. As a threshold matter, the Appellant's reasons for characterizing Wildcat Falls as a unique ecological feature for purposes of Section 1508.27(b)(3) are not clear. While the waterfall is considered scenic by some individuals and while this resource is conveniently located in closer proximity to County Line Lake than other waterfalls on the Forest, it has not been identified by the State or the ONF as a unique feature. Again, the Responsible Official determined that "[t]he site [of the waterfall] itself is also not unique in the sense that it has no

[12] The FONSI states the following with respect to the 40 C.F.R. 1508.27(b)(1) intensity factor: "I considered both the beneficial and adverse impacts associated with the alternatives as presented in Chapter 3 of the EA. No significant adverse resource effects from implementing the project were identified in the EA (see Chapter 3), or disclosed by commenters during the scoping period. Concern was expressed by commenters about future management of the currently federal parcels. However, the proposed future uses of the parcels (timber management, recreation and development of private home sites) is not inconsistent with established uses on adjacent lands and is not inconsistent with local zoning ordinances. Beneficial impacts within the project area include consolidating NFS lands for more efficient and lower resource management costs. It would also increase public recreation opportunities by providing additional lands within a SPNM area, adjacent to the Porcupine Mountains Wilderness State Park. Overall, this exchange would progress the Ottawa's landbase towards the desired conditions as outlined in the Forest Plan. I have given careful consideration to these factors and I have determined that there will be no significant impacts from implementing this project."

[13] The FONSI for the exchange decision specifically addresses the Section 1508.27(b)(3) intensity factor on page 7 of the DN.

historical significance and similar sites may be found in many places in the Upper Peninsula" (DN, p.7).

Even if the waterfall was considered to be a unique feature, the Appellant has not shown that the mere presence of the waterfall requires a finding that the exchange might have a significant effect on the environment. *See Indiana Forest Alliance v. Forest Service*, 2001 WL 912751 at 13 (S.D. Ind. July 5, 2001) ("The mere presence of unique features does not require the Forest Service to prepare an EIS") affirmed, 325 F.3d 871 (7th Cir. 2003); *see also Presidio Gold Club v. NPS*, 155 F.3d 1153, 1162 (9th Cir. 1998) (proximity of a project to a sensitive area does not *per se* warrant an EIS). Again, the direct, indirect, and cumulative effects to riparian resources and wetland features are addressed in the "Aquatic and Riparian Resources" section of the EA (EA, pp. 13-21) and the "Soils and Landform" section of the document (EA, pp. 21-24). The Responsible Official specifically addressed the waterfall in the DN/FONSI and also noted that the deed covenant protecting the 17acres of floodplains on federal parcels 2 and 3 should afford some protection to the waterfall (DN, p. 7).

I find that the DN/FONSI and other PR documents adequately identified this resource concern and that the Responsible Official adequately considered the waterfall in the DN/FONSI. Therefore, I recommend that the decision be affirmed with respect to this issue.

Issue 2(c): Intensity 40 C.F.R. § 1508.27(b)(4) – *"The degree to which effects on the quality of the human environment are likely to be highly controversial are understated . . . [t]he comments from the public on the prior EA indicate that there is considerable controversy about the FS exchanging out of the County Line Lake Road parcels."* (NOA, p. 4).

Response: The Appellant incorrectly argues that public opposition to the exchange represents controversy for purposes of this intensity factor. In this context, the term "controversy" refers to scientific disagreement concerning the degree of the effects on the human environment, rather than opposition to the project. Numerous courts have held that public opposition to a proposal is not "controversy" as the term is utilized in Section 1508.27(b)(4). The Ninth Circuit Court of Appeals, for example, has held that scientific controversy regarding the degree of environmental effect may not be manufactured by project opponents. In other words, "controversy" is not synonymous with public opposition. *See* Northwest Environmental Defense Ctr. V. BPA, 117 F. 3d 1520, 1526 (1997); Greenpeace Action v. Franklin, 14 F3d 1324, 1333-1335 (9th Cir. 1993), *see also* North Carolina v. FAA, 957 F.2d 1125, 1133 (4th Cir. 1992).

I find that the DN/FONSI and other documents in the PR do not contain any evidence of controversy with regard to the degree of environmental effects.[14] Controversy in this context relates to a substantial dispute about environmental effects, and the Appellant has not provided any information regarding such a scientific dispute. Therefore, I conclude that the decision should be affirmed with respect to this issue.

[14] The FONSI for the exchange decision specifically addresses the Section 1508.27(b)(4) intensity factor on page 7 of the DN.

<u>Issue 2(d)</u>: Intensity 40 C.F.R. § 1508.27(b)(5) – *"The loss of old growth cedar/hemlock, and a unique waterfall do involve unknown risks. It may prove to be impossible to grow cedar/hemlock stands to this age and condition ever again (because of the numerous problems facing these tree species – climate change, disease, deer herbivory, etc.) . . . Delich's development of the parcel [with Wildcat Falls] may negatively affect the watershed and change the unique riparian plant and animal community found in the area near the waterfall."* (NOA, p. 5).

Response: The Appellant argues that the loss of hemlock and cedar stands, the loss of potential old growth, and the loss of Wildcat Falls represent unknown risks that amount to significant impacts. The 40 C.F.R. § 1508.27(b)(5) regulations require consideration of "[t]he degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks."[15]

Information and analysis in the PR related to hemlock/cedar and potential old growth is disclosed above in my response to other issues. The Appellant speculates that the loss of hemlock/cedar and potential old growth involve unknown risks "because of the numerous problems facing these tree species – climate change, disease, [and] deer herbivory" (NOA, p. 5). The Appellant's concerns regarding these problems and his speculation that it might not be possible to grow hemlock/cedar (to the age of the stands currently occupying federal parcels 2 and 3) were not specifically raised prior to this appeal and, therefore, the concerns are not directly addressed in the DN/FONSI. However, various landscape-scale issues such as those mentioned by the Appellant are generally addressed in the 2006 Final Environmental Impact Statement (FEIS) for the Forest Plan. The FEIS acknowledges issues with hemlock regeneration (PR HP002, pp. 3-55, 3-101), including issues related to deer herbivory, (PR HP002, pp. 3-116, 3-128). Implementation of the revised Forest Plan is expected to improve hemlock regeneration on the ONF (PR HP002, p. 3-104) and, in his decision, the Responsible Official concludes that the exchange proposal would "progress the Ottawa's landbase towards the desired conditions as outlined in the Forest Plan" (DN, p. 6).

The PR further suggests that the reasonably foreseeable timber harvest that might occur on federal parcels 2 and 3 is not generally an uncommon activity in Northern Michigan and that this type of activity on a small isolated parcel would not involve unique or unknown risks. As the PR documentation indicates, the hemlock/cedar and potential old growth are relatively small stands located on small, isolated parcels (EA, pp. 35-37). If a select harvest is implemented on these parcels, the EA indicates that "future management options would be dictated by the type of harvest method used, and whether regeneration was achieved or not as a result of that harvest" (EA, p. 40). As previously stated, the ONF has determined that "stands consisting of hemlock, cedar and sugar maple are not unique, given other areas in the vicinity and across the Forest share the same characteristic" (PR E045, p. 6). The Responsible Official concludes in the FONSI that "[b]ased upon my knowledge and professional experience, I am confident that we understand the effects of the selected actions" and that "[e]nvironmental effects described in the EA have been analyzed in detail to determine predictable results" (DN, p. 7).

[15] The FONSI for the exchange decision specifically addresses the Section 1508.27(b)(5) intensity factor on page 7 of the DN.

Information and analysis in the PR related to Wildcat Falls is disclosed above in my response to previous issues. The direct, indirect, and cumulative effects to riparian resources are addressed in the "Aquatic and Riparian Resources" section of the EA (EA, pp. 13-21) and the "Soils and Landform" section of the document (EA, pp. 21-24). The Responsible Official specifically addressed the waterfall in the DN/FONSI and also noted that the deed covenant protecting the 17acres of floodplains on federal parcels 2 and 3 should afford some protection to the waterfall and associated riparian areas (DN, p. 7). The Appellant does not provide any information related to any unknown or uncertain risks associated with the waterfall or the riparian environment. I find sufficient evidence in the PR that the Responsible Official thoroughly considered the effects of the proposed exchange on the waterfall and associated riparian areas.

The PR does not disclose any uncertain or unique/unknown risks with respect to the hemlock/cedar, potential old growth, or riparian resources and the Responsible Official, after consideration of all available information, reasonably concluded that no uncertainty or unique/unknown risks exist. The Appellant speculates that future, landscape-scale conditions might inhibit the growth of hemlock/cedar in the region, but does not offer sufficient information that can be analyzed at the site-specific level. The direct, indirect, and cumulative effects associated with the loss of these isolated lands were reviewed by the ONF's interdisciplinary team and the Responsible Official. I conclude that the PR contains sufficient information to affirm the decision with respect to this issue.

Issue 2(e): 40 C.F.R. § 1508.27(b)(6) – *"We see this action as a possible precedent setting move, as the public values to be traded are very important, and if dismissed in this action, are more likely to be dismissed in future actions with similar attributes."* (NOA, p. 5).

Response: The Appellant is concerned that this exchange (involving resources that the Appellant feels should remain in federal ownership) could establish a precedent for future exchanges involving similar resources. The 40 C.F.R. § 1508.27(b)(6) regulations require consideration of "[t]he degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration."[16]

The PR indicates that the subject parcels were identified for exchange for a variety of reasons related to the location and attributes of the specific parcels. The PR contains no evidence that this exchange is part of a phased action or process; rather, the documentation indicates that the proposal has a unique purpose and need based upon local resource conditions and circumstances. The Appellant has pointed to no evidence that the analysis or decision would establish a precedent for future actions. To the contrary, each future land exchange must be preceded by appropriate NEPA compliance, involving the consideration of site specific factors. The public will have notice and the opportunity to participate in any future analyses that might occur. Based upon my review of the DN/FONSI and other documents, I find that the Responsible Official adequately considered Section 1508.27(b)(6) and documented the rationale for his finding of no

[16] The FONSI for the exchange decision specifically addresses the Section 1508.27(b)(6) intensity factor on page 8 of the DN.

significant impact. I recommend the Responsible Official decision be affirmed with respect to this issue.

Issue 3: Cumulative Effects – *"We strongly feel that you need to consider and disclose the cumulative/indirect effects resulting from any reasonably foreseeable future development of the lands to be exchanged."* (NOA, p. 4).

Response: The Appellant asserts that the indirect and cumulative effects associated with reasonably foreseeable development are not adequately disclosed and considered in the EA and other project record documents. In particular, the Appellant asserts that the analysis failed to adequately analyze reasonably foreseeable future development of the federal parcel.
The NEPA requires that federal agencies disclose, analyze, and consider the direct, indirect, and cumulative effects associated with proposed actions.[17] A cumulative effects analysis must include those effects associated with reasonably foreseeable future actions. (See 40 C.F.R. § 1508.7).

In this case, the EA identifies the reasonably foreseeable uses of the federal and non-federal properties involved in the exchange and discloses the direct, indirect, and cumulative effects of the proposal. With regards to the reasonably foreseeable uses, the EA discloses that, if the exchange was consummated, the timber on the federal property might be harvested utilizing a selection harvest method (EA, p. 9). In addition, federal parcel 1 might be subdivided into 5-acre lots and sold for residential development (EA, p. 9). The EA states that, under the proposed exchange alternative, the non-federal property would be managed by the ONF in accordance with direction for Management Area (MA) 6.1 for semi-primitive, non-motorized recreational areas (EA, p. 9).

The direct, indirect, and cumulative effects associated with the proposed action are disclosed and analyzed in Chapter 3 of the EA by resource type. The EA discloses effects on heritage resources (EA, pp. 12-13); aquatic and riparian resources (pp. 15-21); soils and landform (pp. 22-24); recreation resources (pp. 25-27); rare plants (pp. 28-29); non-native invasive species (pp. 29-32); wildlife resources (pp. 33-35); and vegetation (timber) (pp. 37-41). As a general matter, I find that the EA adequately discloses and addresses the cumulative effects associated with the above-mentioned reasonably foreseeable development. The possibility of timber operations and residential development associated with the exchange are repeatedly disclosed and analyzed throughout the Chapter 3 discussion.

Based upon various comments, the Appellant appears to be mostly concerned about the environmental effects associated with timber operations and development on federal parcels 1, 2, and 3. However, the Appellant has not provided any information or evidence concerning the reasonably foreseeable effects that has not already been considered in the analysis. The cumulative effects associated with the reasonably foreseeable activities on these particular parcels are disclosed in the EA as set forth above. I find no violation of any law, regulation, or

[17] 40 C.F.R. § 1508.7 defines cumulative impact as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." See also 40 C.F.R. § 1508.8 for information regarding direct and indirect effects.

policy with regard to the EA's disclosure and analysis of cumulative effects and I recommend that the DN/FONSI be affirmed with respect to this issue.

Issue 4: Range of Alternatives – *"Purchasing the non-federal parcel was inadequately considered, in our opinion. We also feel that NOT enough consideration was given to using Land and Water Conservation Funds as an alternative."* (NOA, p. 4).

Response: The Appellant asserts that an alternative involving the purchase of the non-federal 420-acre property should have been carried forward for detailed consideration in the EA. The NEPA requires that federal agencies study, develop, and describe appropriate alternatives to proposed actions that involve unresolved conflicts or alternative uses of available resources (*See* 42 U.S.C. § 4332). The CEQ regulations require that agencies explore and objectively evaluate all reasonable alternatives, and briefly discuss the reasons for eliminating alternatives from detailed study (40 C.F.R. § 1502.14(a)). Agencies have the discretion to determine appropriate alternatives that are viable and that meet the purpose and need of the proposal. Neither the NEPA nor its regulations require that a set number of alternatives be analyzed. Agencies need not analyze alternatives that are infeasible or impractical. Likewise, the range of alternatives may be limited to those alternatives that meet the purpose and need of the proposed action (*See* 36 CFR 220.5(e)).

The federal courts have held that the range of alternatives diminishes as the expected impacts diminish. *See, e.g. Sierra Club v. Espy*, 38 F.3d 792, 796, 803 (5th Cir. 1994) ("While an EA must contain a discussion of alternatives, the range of alternatives that the [agency] must consider decreases as the environmental impact of the proposed action becomes less and less substantial" [internal quotes omitted]). In other words, the agency is under no obligation to develop alternatives to a project that it has determined will have no significant environmental effects anyway. The courts have also recognized that appellants bear the burden of presenting to the agency "specific, detailed," and "feasible" alternatives. Morongo Band of Mission Indians v. FAA, 161 F.3d 569, 576 (9th Cir. 1998), *see also* Vermont Yankee Nuclear Development Corp. v. NRDC, 435 U.S. 519, 553-554 (1978) ("cryptic and obscure" references to alternatives that someone believes should be considered are not sufficient to trigger an obligation to do so by the agency).

In this case, Chapter 1 of the EA sets forth the purpose and need for the exchange proposal (EA, pp. 1-6). The two alternatives that are analyzed in detail in the EA respond to the purpose and need for the project. The range of alternatives analyzed for this exchange is also documented in the PR. For example, the DN and the "ERRATA for the January 2010 Environmental Assessment" indicate that an alternative involving the acquisition of the non-federal property by purchase (rather than by exchange) was considered during the development of the range of alternatives, but was eliminated from detailed consideration. The DN states that "this [purchase] alternative was not analyzed in detail as the landowner was not interested in selling the parcels involved; he was interested only in pursuing an exchange of lands." (DN, p. 5). The DN also states that "current levels of appropriated funding for acquisitions would prevent the purchase from occurring." (DN, p. 5).

In this instance, the PR demonstrates that the purchase alternative was addressed and sets forth a reasoned, detailed explanation as to why a full analysis of the alternative was not appropriate. As the PR indicates, a purchase alternative is simply not viable if the non-federal party is not interested in selling the private property to the federal government and if funding for the particular purchase has not been (and likely will not be) appropriated by Congress. The PR clearly indicates that the purchase alternative is neither practical, nor feasible, and therefore, the ONF was correct in not analyzing the alternative in detail. The PR reflects that adequate consideration was given to this alternative and I find no violation of law, regulation, or policy. Therefore, I recommend that the DN/FONSI be affirmed with respect to this issue.

Recommendation

After reviewing the Project Record for the Delich Land Exchange Project on the Ottawa National Forest, and after reviewing and considering the issues raised by the Appellant, I recommend that the decision by Acting Forest Supervisor Keith B. Lannom for this project be affirmed. I found no violation of law, regulation, or policy with respect to the concerns of the Appellant.

/s/ Leanne M. Marten
LEANNE M. MARTEN
Appeal Reviewing Officer
Forest Supervisor

cc: Patricia R Rowell