



File Code: 1570-1

Date: March 13, 2008

Dr. Michael L. Cline  
Executive Director  
Tin Mountain Conservation Center  
1245 Bald Hill Road  
Albany, NH 03818-7306

RE: Appeal of the Decision Notice and Finding of No Significant Impact for the Chase Hill Project Environmental Assessment, Saco Ranger District, White Mountain National Forest, Appeal # 08-09-22-0028 A215

On January 09, 2008, you filed a notice of appeal pursuant to 36 CFR 215.11, on behalf of the Tin Mountain Conservation Center. District Ranger Terry Miller signed the Decision Notice on December 11, 2007, and the legal notice was published in *The Conway Daily Sun* and *The Manchester Union Leader* on December 14, 2007. I have reviewed the Appeal Record and have also considered the recommendation of the Appeal Reviewing Officer (ARO), District Ranger Douglas Oliver, Mark Twain National Forest, regarding the disposition of your appeal. The ARO's review focused on the decision documentation developed by the Responsible Official, District Ranger Terry Miller, and the issues in your appeal. The ARO's recommendation is enclosed. This letter constitutes my decision on the appeal and on the specific relief requested.

### **FOREST ACTION BEING APPEALED**

The Chase Hill Project proposes partial harvest of a 57 acre stand containing a mix of tree species characterized as oak/pine. This stand contains five sub populations of a federally threatened orchid, small whorled pogonia (*Isotria medeoloides*). Recent efforts elsewhere suggest that further daylighting of the understory and soils will enhance or expand pogonia habitat.

### **APPEAL REVIEWING OFFICER'S RECOMMENDATION**

The ARO found no evidence that the Responsible Official's decision violated law, regulation, or policy. He found the decision responded to comments raised during the analysis process and public comment period and adequately assessed the environmental effects of the selected action. In addition, he found the issues raised in your appeal were addressed, where appropriate, in the decision documentation. Based on this review, the ARO recommended that District Ranger Terry Miller's Chase Hill Decision Notice and Finding of No Significant Impact be affirmed.



**DECISION**

After careful review of the Project Record and the appeal, I concur with the ARO's analysis and findings regarding your appeal issues. To avoid repetition, I adopt his rationale as my own, and refer you to the enclosed ARO's recommendation letter, dated March 10, 2008, for further details. It is my decision to affirm District Ranger Terry Miller's Decision Notice and Finding of No Significant Impact for the Chase Hill Project on the White Mountain National Forest.

Pursuant to 36 CFR 215.18(c), this decision constitutes the final administrative determination of the Department of Agriculture. This decision may be implemented on, but not before, the 15<sup>th</sup> business day following the date of this letter (36 CFR 215.9(b)).

Sincerely,

*/s/ Thomas G. Wagner*  
THOMAS G. WAGNER  
Appeal Deciding Officer  
Forest Supervisor

Enclosure

cc: Terry Miller, Douglas F Oliver, Patricia R Rowell, Stacy Lemieux



United States  
Department of  
Agriculture

Forest  
Service

Mark Twain National Forest  
Poplar Bluff Ranger District

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File Code: 1570-1

Date: March 10, 2008

Route To:

Subject: Appeal of the Decision Notice and Finding of No Significant Impact for the Chase Hill Project, Saco Ranger District, White Mountain National Forest, Appeal # 08-09-22-0028 A215

To: Appeal Deciding Officer, Thomas Wagner

This letter constitutes my recommendation for the subject appeal filed by Dr. Michael L. Cline, on behalf of the Tin Mountain Conservation Center, on the Chase Hill Project, Saco Ranger District of the White Mountain National Forest (WMNF). District Ranger Terry Miller signed this Decision Notice on December 11, 2007. A legal notice of the decision was published on December 14, 2007 in the *Manchester Union Leader* and *Conway Daily Sun*.

My review was conducted pursuant to 36 CFR § 215, "Notice, Comment, and Appeal Procedures for National Forest System Projects and Activities." To ensure the analysis and decision are in compliance with applicable laws, regulations, policies and orders, I have reviewed and considered each of the points raised by the Appellant and the decision documentation submitted by the WMNF. My recommendation is based upon review of the Project Record (PR) including but not limited to the scoping letter, public comments, Environmental Assessment (EA), Decision Notice (DN), and Finding of No Significant Impact (FONSI).

District Ranger Terry Miller, Kathy Starke, Rod Wilson, and Michael Maguire met with Dr. Cline on February 5, 2008, with further discussions on February 7, 12, and 15. No resolution was reached on any of the appeal issues.

### Appeal Issues:

Dr. Cline raised four main issues in this appeal of Chase Hill Project. Many of the larger issues contained sub-issues. All issues were submitted to the Responsible Official during the scoping or 30-day comment period unless otherwise noted. Dr. Cline also emailed his resume and a proposal to resolve his concerns to the Appeal Deciding Officer on February 12, 2008. These documents cannot be used in the appeal review since they were submitted outside the appeal filing deadline (January 28, 2008). Appeal regulations state, "Any additional information or attachment to an appeal that is not filed within the 45-day appeal-filing period shall not be considered with the appeal." (36 CFR 215.16(b)).

**Issue 1:** *"Because of the imminent threat to a federally threatened species, the Proposed Action should not be categorically excluded from further documentation in an EA or EIS. Since it is likely that the Proposed Action would result in deleteriously harming of a viable population of a federally threatened species, it is an inappropriate use of the category."* Dr. Cline claims, *"The WMNF, USFWS [United States Fish and Wildlife Service], Wildflower Society of New England, The Nature Conservancy, Tin Mountain Conservation Center, or*



*anyone else can not claim the extensive practice and experience upon which to base the Proposed Action under the categorical exclusion, which requires the actions ‘not have a significant environmental effect.’” (NOA, p. 2).*

**Response:** Dr. Cline is obviously mistaken with this comment. An EA was completed for the Chase Hill Project. Forest Service procedures for complying with and implementing the National Environmental Policy Act (NEPA) are set out in Forest Service Handbook (FSH) 1909.15. Although a categorical exclusion (categories of actions that do not normally have significant impacts on the human environment) may have been appropriate for evaluating this project, the Responsible Official chose to complete an EA. This EA evaluated the potential impacts of the action and came to the conclusion that the project will not have a significant effect on the quality of the human environment (DN/FONSI, Section 5.0).

The BE (PR, Vol. 1, Tab 10B) analyzed species that are threatened, endangered, of special concern, or sensitive, and likely to be present. Enhancing habitat for the small whorled pogonia (SWP) was a primary reason for proposing this project. Direct, indirect, and cumulative effects are well documented. The proposed actions “would likely benefit the species by improving suitable habitat characteristics.” (Ibid, p. 17). This project proposal was supported by the United States Fish and Wildlife Service (USFWS) in a concurrence letter dated November 30, 2007 concluding that the proposed harvest “will beneficially affect the small whorled pogonia at Chase Hill.” (PR, Vol. 1, Tab 11K). Experts from the USFWS, Forest Service, New England Wildflower Society, New Hampshire Natural Heritage Bureau, and the Nature Conservancy were consulted on developing a management plan at Chase Hill for this species (PR, Vol. 2, Tab 34, Konen, 2006, p.26).

**Sub-Issue 1.1:** Dr. Cline further asserts, “*District Ranger Terry Miller claims to have based his decision on the best available science and maintains that the ‘record demonstrates a thorough review of relevant scientific information, consideration of responsible opposing views ...’ An objective review of the record and the body of scientific information runs contrary to Mr. Miller’s claim.*” (NOA, p. 3).

- “*There are no published articles in the literature supporting the beneficial effects on *I. medeoloides* for the Proposed Action ... while the information may be good, it’s not widely distributed nor has it undergone critical peer review.*” (NOA, p. 3).
- “[T]he WMNF has interpreted results beyond the data according to the lead author ....” (NOA, p. 3).
- The rationale for success “*in improving the viability of current small whorled pogonia populations*” may be related to “*some other factor.*”
- “*The Proposed Actions rely upon anecdotal results of one logging operation on frozen site conditions that included no scarification.*” (NOA, p. 3).

- “[T]he information sources cited by the WMNF, do not provide a compelling case for the Proposed Actions. In fact, the observations in the two cited sources are in direct contradiction. Other literature maintains that *I. medeoloides* sites should be treated differently.” (NOA, p. 5).
- “By dismissing ‘Local Site Treatment,’ the Proposed Actions eliminated the treatment that is best supported by the literature and past local results ... This is a small viable population that should not be the target of experimentation.” (NOA, p. 8).

**Response:** This project was planned under the 2000 Rule and the Interpretative Rule of September 29, 2004 (DN, Section 3.0). The 2004 Interpretive Rule states, “Projects implementing land management plans and plan amendments ... must be developed considering the best available science in accordance with 219.36 (a) ... and must be consistent with the provisions of the governing plan.” (Appendix B to §219.35). In plain language, the Interpretive Rule says that projects proposed and carried out must be consistent with the Land and Resource Management Plan (LRMP) and show consideration of “best available science.”

FSH 1901.12.41 provides guidelines for documenting “best available science”. Specific criteria are listed under the format of questions including:

- Is the correct scientific information taken into account?
- Is the scientific information reasonably interpreted and applied and accurately presented?
- Are the uncertainties associated with the relevant scientific information acknowledged and documented?
- Are the relevant management implications noted, evaluated, and documented (including associated risks and uncertainties)?

Likewise, the Chief of the Forest Service in a letter dated May 2, 2007 established recommendations for documenting consideration of “best available science” in planning and project level environmental analyses:

- The NEPA document should identify methods used, reference scientific sources relied on, discuss responsible opposing views, and disclose incomplete or unavailable information, scientific uncertainty, and risk.
- The Project Record should reference all scientific information considered: papers, reports, literature reviews, review citations, peer reviews, science consistency reviews, results of ground-based observations, etc. Specialists’ reports should include a discussion substantiating that consideration of the aforementioned material was a consideration of the best available science.
- The Responsible Official should include a statement in the Record of Decision, DN or Decision Memo showing consideration of the best available science as the basis for the decision.

In reviewing the documentation for the Chase Hill Project, I find the Responsible Official followed these guidelines. He incorporated the most recent knowledge about the SWP into project design. In doing so, he sought out experts from various agencies who had experience with, jurisdiction of, or an interest in managing this species (PR, Vol. 1, Tab 11G). He appropriately summarized this information in the EA and referenced additional supporting documents within the Record. He found the project was consistent with the goals, objectives, standards and guidelines of the White Mountain National Forest LRMP (DN, Section 6.0).

Dr. Cline further claims that the WMNF has interpreted results beyond the data. I have read the research report by Lougee and Cairns, (Madison Boulder Study, 2002) and reviewed the EA and DN and it is unclear to me what was misinterpreted. This research report states that long-term effects of scarification could possibly include the establishment of new SWP plants, but such an effect has not been documented (PR, Vol. 2, Tab 23, p. 16). The report lists other considerations including the statement that timber harvests should leave at least 50 percent of the basal area standing over SWP populations and that skid roads should be located away from plants (PR, Vol. 2, Tab 23, p. 17). These actions are similar to those proposed in the Chase Hill Project. In fact, Sara Cairns, one of the authors of the Madison Boulder Study, participated in design of the Chase Hill Project (PR, Vol. 1, Tab 11G). Although subsequent monitoring in 2002 and 2003 on the Madison Boulder Project did not result in increases in the number of SWP stems, as Dr. Cline states, other studies show more promising results. Research at Alton and Warner New Hampshire indicates an increase in the number of plants and their “robustness” (PR, Vol. 1, Tab 12B).

Several things are clear from my review of the available science, more monitoring is needed, and uncertainties do exist. Other factors may contribute to improving the viability of the SWP populations. The Responsible Official acknowledged this in his Response to Comments (EA, pp. 47-48) and further stated “(r)elatively little is known about SWP and how it responds to specific management activities ... One goal of this project is to learn more about the SWP’s response to commercial forest management.” (EA, p.5) (DN, Section 1.0). Clearly, the Responsible Official did not rely solely on the results of one logging study as Dr. Cline suggests, but based his decision on the “best available science” involving expert opinions from those most involved with maintaining the viability of the species. I find no reference within the EA or DN stating that these studies constituent “extensive practice and experience” as Dr. Cline states.

Dr. Cline also claims the sources cited do not provide a compelling case for the Proposed Action. He further states that the Proposed Action eliminated the treatment that is best supported by the literature and past local results. Dr. Cline summarizes several articles by Mehrhoff (1980), Brumback and Fyler (1983) and Rawinski. These research articles were not submitted as part of this appeal. I am unable to verify the information that Dr. Cline purports to be true. Apparently, these papers were not supplied to the Responsible Official during the scoping or comment period when they would be most valuable in making the decision. Nevertheless, my review of the Record indicates these same authors have more recent studies that support the proposed actions of the Chase Hill Project. Brumback et al. (2005) concludes:

“[T]he removal of 25% of the basal area of trees in Group Y, along with removal of shrubs, approximately doubled the amount of direct and diffuse light being

transmitted to the forest floor in the experimental area compared to the control. Coincident with the increase in light was a greatly increased number of emerging stems [SWP], and an overall increase in the reproduction of the plants in Group Y.” (PR, Vol. 2, Tab 17, Brumback et al., 2005).

Likewise, Mehrhoff (1989) found that population of SWP appears to be influenced by light conditions:

“Specific reasons for declines in population size and reproductive output are not known, but may be related to an increase in the amount of associated vegetation surrounding individual *I. medeoloides* plants. Populations with flowering individuals were generally found in situations with low to moderate amounts of ground, shrub, and canopy cover. Populations without flowering plants had greater amounts of vegetative cover. Sites at which *I. medeoloides* populations had become extinct had the highest vegetative cover values. Survivorship and flowering of individual plants was positively correlated with estimates of available light.” (PR, Vol. 2, Tab 34, Mehrhoff, 1989).

I also take note that Rawinski’s unpublished report was as product for the Nature Conservancy. As stated previously, the Nature Conservancy was consulted for this project and is well aware of, and supports, the proposal. Dr. Cline believes the Responsible Official failed to consider all the relevant science, my review shows otherwise.

Dr. Cline’s concern over dismissal of his proposal was also handled appropriately. The Responsible Official evaluated and documented his rationale for not considering the alternative in more detail (EA, p. 49; Section 2.3). Most studies at other project sites have used timber management prescriptions that were more confined to the removal of adjacent trees to increase light. “The orchid is often found on private land where landowners want to actively manage their lands. There is a desire and need by USFWS and botanists to gain knowledge regarding the effects of timber management practices at the stand level.” (EA, p. 49). Dr. Cline’s proposal also does not meet the projects purpose and need including increased vigor and seed production of residual trees (Ibid).

The Proposed Action was developed to meet the Purpose and Need for Action (EA, p. 4). The Purpose and Need for Action meets specific LRMP goals and objectives at Chase Hill. Specifically, the LRMP calls for maintaining or enhancing habitat conditions around known occurrences of SWP, including consideration of vegetation management to increase light levels if needed (LRMP, p. 1-9). Additionally, the Chase Hill project area lies within Management Area 2.1, whose purpose is to provide a balanced mix of habitats and provide high quality sawtimber and other timber products on a sustained yield basis. Clearly, the Responsible Official based this proposal on direction from the LRMP and incorporated the most current science into the decision framework.

I find no violation in law, regulation or policy related to the standard of “best available science” as Dr. Cline claims. In fact, my review of the Chase Hill Project Record confirms that “best

available science” was used in the analysis as is stated in Section 6.0 of the DN. Dr. Cline’s allegations are not substantiated.

**Sub-Issue 1.2:** Dr. Cline continues to claim, “*The Reasons for the Decision outlined in the Decision Notice attempt to put the best face on Proposed Actions that will have significant adverse effects on public resources beyond the I. medeoloides population.*” (NOA, p. 3).

- “*The current harvest prescription (Alternative 3) differs in no substantive way from that originally proposed as a shelterwood harvest. Now, it is called a thinning; however, the target basal area remains 90-100 ft<sup>2</sup>/ac, and the trees targeted for removal are the same ... It is impossible for the harvests described in the Chase Hill Project to be a shelterwood in one case and a thinning in another. This not only sloppy from a forestry perspective, but it greatly misleads the public about the intensity of the harvest operation.*” (NOA, p. 3).
- “*Mr. Miller claims to have made his decision ‘Based on input from botanists, biologists, and foresters, ...’ It is argued that the decision was based upon input from selected natural scientists and foresters that agreed with the Proposed Actions.*” (NOA, p. 4).
- “*The Decision Notice maintains that the Proposed Action ‘will result in beneficial effects and no significant adverse effects.’ Further, ‘effects to timber, scenery, wildlife, and T&E [Threatened and Endangered] species will generally be beneficial, ...’ This is a completely subjective statement.*” (NOA, p. 4).
- “*Miller continues by saying that the Proposed actions ‘will provide valuable information through monitoring;’ however, no specific monitoring methods or program are outlined in the EA.*” (NOA, p. 4).
- “*The final Reason for the Decision states the ‘There are no future connected actions.’ The ‘thinning,’ which in reality and as prescribed is a selection (regeneration) harvest, is a ‘stand-alone commercial harvest.’ In truth, nothing has changed from the original Proposed Actions except to say that future management actions are unclear.*” (NOA, p. 4).

**Response:** Dr. Cline claims that Alternative 3 differs in no substantive way from the originally proposed shelterwood preparatory cut. Dr. Cline does not understand how these silvicultural terms were applied to this project. The EA clearly limits the Proposed Action to a preparatory cut where the Responsible Official describes it as being similar to a thinning (EA, p. 10). Documents within the Record support this characterization of a preparatory cut. Smith, Larson, Kely and Ashton in, “*The Practice of Silviculture*” (PR, Vol. 2, Tab 27) state, “Preparatory cutting, very similar to thinnings, may be conducted before the real regeneration cuttings in order to strengthen and improve the vigor of trees designed to be left in the establishment cuttings.” The EA further describes the preparatory cut and how the stand should be thinned (EA, p. 11), followed by a description of the thinning associated with Alternative 3 (EA, p. 12). The Responsible Official clearly states that the proposal to thin in Alternative 3 does not imply the



need for subsequent harvest treatments in the near future (EA, p. 12) and states in the DN that there are no future connected actions. “Any future harvests clearly will be the result of monitoring the results of this project on the species and communities of concern, and will be subject to further NEPA and public involvement.” (DN, Sec. 3.2). The proposed harvest is not a regeneration harvest (DN, Section 4.3). The EA and DN do not mislead the public as Dr. Cline claims.

Dr. Cline argues that the decision was based on input from selected scientists and foresters that agreed with the Proposed Action. My review of the Project Record indicates that input came from a wide variety of individuals and sources. Over 50 references are cited in Appendix C of the EA (pp. 62-64). In addition the proposal was reviewed and concurred with by the USFWS (PR, Vol. 1, Tab 11K) who has responsibility for protection and recovery of the species. Furthermore, the EA contains a list of WMNF resource managers and specialists, and other natural resource professionals (e.g., USFWS, the New England Wildflower Society, and The Nature Conservancy) who provided input on the project (EA, p. 35). Dr. Cline’s concerns and those of the Tin Mountain Conservation Center were appropriately considered as part of the NEPA process (EA, pp. 43-54).

Dr. Cline further claims the comments on effects to timber, scenery, wildlife and T&E species are “subjective statement[s].” The EA (p. 15) describes how the residual trees would respond to the release from current competition for resources, resulting in increased vigor and seed production. Species composition for the desired oak/pine forest type would also benefit by favoring those species for retention. The stand prescription was developed by a certified Silviculturist and supported by additional documentation within the Project Record (Vol. 1, Tab 16F). A registered Landscape Architect also completed an analysis of the project and recommended certain design criteria to lessen the visual impacts such as reducing the amount of slash within 100 feet of the roadside (PR, Vol. 1, Tab 11L). The EA actually prescribes slash treatment for 125 feet from roads or private property (EA, p. 13).

Concerning wildlife, the oak/pine forest type has been identified as important for wildlife and plant species (LRMP, p. 1-20). In accordance with direction provided in Forest Service Manual (FSM) 2672.42 and Section 7 of the Endangered Species Act, the District Biologist prepared a Biological Evaluation to address the potential effects of the proposed project on federally endangered, threatened and proposed species, and Regional Forester Sensitive Species that may occur in the project area. That analysis concluded that Alternative 3 would benefit the SWP by improving suitable habitat characteristics. It was further determined that no other species of concern would trend toward federal listing or a loss of viability (PR, Vol. 1, Tab 10B). On November 30, 2007 the USFWS concurred on those conclusions (PR, Vol. 1, Tab 11K).

Dr. Cline takes issue that no specific monitoring method or program is outlined in the EA. The EA (p. 10) states that the “Forest Botanist has prepared a detailed monitoring protocol for the SWP population within the project area. This protocol includes gathering baseline data and then monitoring the effects of this project for a 15-20 year period. The USFWS has reviewed and supports this protocol.” I have reviewed the Monitoring Protocol (PR, Vol. 1, Tab 11H) and letter from USFWS supporting the proposed Protocol (PR, Vol. 1, Tab 11E). Although this document was not included in the EA, it was clearly referenced and available for Dr. Cline upon

request. An EA is a “concise public document ... that serves to briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of non significant impact.” (40 CFR § 1508.9) (Emphasis added).

In summary, it is clear from my review that “best available science” was used in making this decision. I find no violation in the NEPA. I also find the Responsible Official meet the specific guidelines established by the National Forest Management Act for prescriptions involving vegetative manipulation for the National Forests (DN, Section 6.0).

***Issue 2: “Because the Record shows that the Forest failed to properly apply known scientific information about the effect of Proposed Actions on the I. medeoloides population on Chase Hill and failed to select the alternative that was supported by the known scientific information and past positive results on the Chase Hill property, the Forest improperly analyzed extraordinary circumstances related to the Proposed Actions.”*** (NOA, p. 5).

**Response:** Refer to my response in Issue 1.

***Issue 3: “The Record does not demonstrate compliance with law, regulation, and policy.”*** (NOA, p. 8). Dr. Cline claims:

- *“The policies and regulations of the U.S. Forest Service and the WMNF Forest Plan require efforts to solicit public involvement in the decisions regarding the management of publicly owned resources and to accurately convey the facts of any such decision ... Tin Mountain Conservation Center has scientists and naturalists on staff and on the Board of Trustees, but none were approached for their input on the Proposed Actions despite bordering the project lands.”* (NOA, p. 8).
- *“Perhaps the most objectionable statement in the Decision Notice was ‘There was no scientific controversy surrounding the potential benefits of the proposed activities to the existing populations of small whorled pogonia.’ Tin Mountain Conservation Center’s comments, developed by Dr. Michael Cline in consultation with biologists and naturalists on staff, the Board of Trustees, and others, object to the Proposed Actions and represent controversy.”* (NOA, p. 8).
- *“District Ranger Terry Miller maintains that his decision ‘is consistent with’ the National Forest Management Act (NFMA) and ‘based on the best available science.’ ... This is just awful! The best available science requires using the information to form a conclusion, not stating a conclusion and then trying to find a citation to support the conclusion.”* (NOA, p. 8).

- “Miller’s second point in the NFMA section states, ‘The Chase Hill Project does not prescribe a regeneration harvest that would require restocking National Forest lands.’ Merely changing the name of a harvest does not change the prescription.” (NOA, p.9).
- “Although in the NFMA section #3 indicates that alternative #3 was ‘not chosen because it would give the greatest dollar return or greatest output of timber,’ it is clear that it would yield the most since alternative #2 (which otherwise would have) was not going to be viable.” (NOA, p. 9).
- “The NFMA also requires that soil and water resources are conserved ... Tin Mountain Conservation Center believes the measures prescribed to protect water resources, in particular Chase Pond and Chase Brook, are insufficient.” (NOA, p. 9).

**Response:** Dr. Cline takes issue with the efforts the Responsible Official took to solicit public involvement, specifically that the Tin Mountain Conservation Center was not approached for their input on the Proposed Action. The project was first listed in the Schedule of Proposed Actions in April, 2006. A 30-day comment period was announced in the *New Hampshire Union Leader* and the *Conway Daily Sun* in July, 2006. At the same time a scoping letter was sent to 70 interested individuals and agencies, including the Tin Mountain Conservation Center. On July 7, 2006 the Responsible Official received comments via e-mail from Dr. Cline (PR, Vol. 1, Tab 4C). There is no law, regulation, or policy that requires the Forest Service respond in a written format to comments received. However, on July 12, 2006 the project coordinator responded to Dr. Cline via e-mail (PR, Vol. 1, Tab 4D). Additional phone conversations occurred with Dr. Cline on July 21, 2006 (PR, Vol. 1, Tab 4F). Additionally, an e-mail with an attached map showing potential SWP habitat was sent to Dr. Cline on August 21, 2006 (PR, Vol. 1, Tab 4G). This whole process was again repeated with a new comment period for the EA in April, 2007 (PR, Vol. 1, Tab 9A). Dr. Cline submitted comments on behalf of the Tin Mountain Conservation Center (PR, Vol. 1, Tab 9H). In fact, my review of the Record indicates that the Responsible Official took extraordinary steps to solicit input not only from Dr. Cline, but other members of the public. Clearly, all laws and regulations were followed.

Dr. Cline also challenges the FONSI, specifically the Responsible Official’s statement on “controversy” (DN, Sec. 5.2.4). Dr. Cline claims that controversy did exist since members of the Tin Mountain Conservation Center objected to the Proposed Action. Implementing regulations for NEPA (40 CFR 1508.27) contain significance criteria that must be addressed in order to determine whether a FONSI may be issued. One of these criteria, 1508.27(b)(4), requires consideration of “[t]he degree to which the effects on the human environment are likely to be highly controversial.” The regulation is clear that the controversy involved here concerns ***the degree of the effects on the human environment***. Numerous courts have also held that opposition to a proposal is not “controversy” as it is referred to in Section 1508.27(b)(4). The Ninth Circuit, for example, has held that scientific controversy regarding the degree of environmental effect may not be manufactured by project opponents, that is, “controversy” is not synonymous with public opposition. Northwest Environmental Defense Ctr. V. BPA, 117 F. 3d 1520, 1526 (1997); Greenpeace Action v. Franklin, 14 F3d 1324, 1333-1335 (9<sup>th</sup> Cir. 1993), see also North Carolina v. FAA, 957 F.2d 1125, 1133 (4<sup>th</sup> Cir. 1992). Controversy as Dr. Cline claims is simply disagreement over how Stand 26 will be managed in the future and the

associated effects of that decision. The mere disagreement about the effects of a project does not amount to scientific controversy (*Indiana Forest Alliance, Inc. v. United States Forest Service* 2001 U.S. Dist. LEXIS 11996, \*27(S.D. Ind. July 5, 2001). I find the Responsible Official appropriately evaluated the potential effects of this project and concluded these effects were not “highly controversial”.

Dr. Cline further takes issue with the statement that “[a]lternative 3 is not chosen because it would give the greatest dollar return or greatest output of timber.” (DN, Sec. 6.0). The Responsible Official discloses his reasons for the decision in the DN.

- “It addresses our purpose and need for action.
- It will result in beneficial effects and no significant adverse effects.
- It will produce benefits to both the small whorled pogonia and to the oak-pine stand in which it resides.
- It will provide valuable information through monitoring.
- It can serve as a management model for others.
- There are no future connected actions.” (DN, Sec. 3.2)

Clearly economic return was not a factor used in making this decision on Chase Hill.

Additionally, Dr. Cline challenges the measures prescribed to protect the water resources, in particular Chase Pond and Chase Brook. The EA contains a detailed discussion of the affected environment and the direct, indirect, and cumulative effects in relation to Soil (EA, pp. 17-20) and Water Resources (EA, pp. 20-21). The analysis specifically recognizes the intermittent channel known as Chase Brook, and Chase Pond outside the project boundary (EA, p. 20), and addresses Dr. Cline’s concerns on page 52 of the EA (Response to Comments). The Forest Soils Scientist completed a Soils Report which supports the timely application of well-known best management practices (BMPs). “The State of Maine recently published monitoring data that supports the conclusion that properly applied BMPs will mitigate effects from soil erosion (Maine Department of Conservation, Maine Forest Service 2005. Maine Forestry BMPs Use and Effectiveness 2001-2003, 2005), and while the results of a similar study in New Hampshire have not yet been published, Maine and New Hampshire BMPs and soils are similar...” (PR, Vol. 1, Tab 10D). The EA (pp. 19, 21) as required by the LRMP calls for the use of BMPs to minimize effects to soils and limiting direct and indirect effects and protecting water resources during timber harvest operations. “Previous harvesting on similar land types with similar drainages has not shown any extreme erosion on the WMNF.” (EA, p. 52).

In conclusion, Dr. Cline challenges the utilization of the “best available science” (See my response to Sub-Issue 1.1) and concerns over the harvest prescription (See my response to Sub-Issue 1.2).

In summary, I find the Project Record demonstrates considerable efforts to seek public input, no scientific controversy, and no violations of the NFMA. It is clear from my review that the Responsible Official did comply with all applicable laws, regulations, and policy.

**Issue 4:** *“The ‘FS [Forest Service] Responses’ to public comments provided (May 2007) failed to address legitimate concerns in a meaningful manner suggesting there was a failure to either understand the comments or develop convincing responses based upon the best available science.”* (NOA, p. 9).

Dr. Cline summarizes numerous comments including the following concerns:

- *“[T]he dismissive process and tone of the responses to opposing comments associated with the Chase Hill Project.”* (NOA, p. 9).
- *“[A] poor understanding of ecological principles and components of wildlife habitat in forest stands.”* (NOA, p. 10). *“[N]o regard for enlightened forest management.”* (NOA, p. 13).
- *“Information presented was assigned to the wrong articles, results of managed stands were extended to unmanaged stands, and finally, the non-supportive information from the literature was dismissed.”* (NOA, p. 10).
- *“FS Responses ... are supported by anecdotal observations.”* (NOA, p. 10).
- *“[R]educing the original basal area from 142 ft<sup>2</sup>/ac to 90-100 ft<sup>2</sup>/ac, will result in a regeneration harvest; not a thinning.”* (NOA, p. 11).
- *“Aesthetics is subjective ...”* (NOA, p. 11).
- *“[N]o basis to state that [the SWP] population is in decline ... or that knowledge is limited ... [C]omments are wrong”* (NOA, pp. 11, 12).
- *“[O]ak stocking guides ... once again do not fit the required criteria.”* (NOA, p. 12).
- *“[C]itations [are] misleading.”* (NOA, p. 13).
- *“F.S. Response ... is simply inappropriate and does not address the comment.”* (NOA, p. 13).
- *“Conclusions on the comprehensive report to the WMNF assessing the terrestrial biodiversity ... by Dr. Michael Cline [are incorrect.]”* (NOA, p. 13).
- Statements on *“[A]cquir[ing] adjacent lands”* [are inaccurate] and indicate bias ....” (NOA, p. 14).

**Response:** The regulations at 36 CFR § 215.6(b) requires the Responsible Official to consider comments:

“The Responsible Official **shall consider** all written and oral comments submitted in compliance with paragraph (a) [36 CFR 215.6(a)]. All

written comments received by the Responsible Official shall be placed in the project file and shall become a matter of public record. The Responsible Official shall document and date all oral comments received in response to the legal notice (§ 215.5) and place them in the project file [emphasis added].”

Scoping for this project began in January, 2006 with a formal 30-day comment period on the pre-decisional EA in April, 2007 (See Issue 3). “A Forest Service interdisciplinary team [IDT] examined the public comments and identified the issues raised both internally and externally. Issues were used to aid in the development of alternatives and specific design features.” (EA, p. 9). There is no law, regulation, or policy that requires the Forest Service *respond* in a written format to all comments; however the Responsible Official did so for this EA (pp. 36-55).

Dr. Cline is concerned with the tone of the responses indicating to him the failure to understand his concerns. To evaluate Dr. Cline’s allegations, I reviewed the responses to his comments found in Section 6.4 of the EA (pp. 43-54). I find the Responsible Official adequately and objectively addressed the issues. Responses were detailed with supporting references to either research and/or discussions within the EA. I find no dismissive language as Dr. Cline claims.

It is obvious that not all concerns are addressed in a way that satisfies Dr. Cline. For example, he argues that the population of SWP is not in decline. The Responsible Official, in his Response to Comments, tries to clarify the issue. My review of that response indicates it was accurate and on-point. The EA (p. 27) clearly shows the population numbers for the Chase Hill area. Although surveys from 1994 to 2007 do show variations in the number of plants (which may be explained by changes in perception), an increase in reproductive capsules has not been observed. It is these reproductive capsules that are a concern to botanists. “The ultimate goal of the recovery strategy is to ensure long-term viability, and allow for the removal of the species from the federal list.” (PR, Vol. 2, Tab 34, p. 23). The knowledge learned from this project will help accomplish that goal (USFWS Concurrence Letters, PR, Vol. 1, Tab 11E and 11K).

Likewise, Dr. Cline challenges the use of the oak stocking guides. My review of the extensive literature within the Record supports the conclusions reached and summarized in the Response to Comments. Stand 26 is a mix of different species. Consequently, the stocking guide chosen is only a guideline. Ultimately, the issue is not to obtain maximum growth, as stocking guides help predict, but provide optimal growing conditions for the SWP. To ensure these guides were appropriate, “the proposed action [was] reviewed by numerous certified, practicing, and reputable foresters/silviculturists including the coauthor of the three stocking guides associated with white pine, William Leak.” (PR, Vol. 1, Tab 8e/f). These experts agreed with the tools used in the silvicultural analysis.

Dr. Cline further claims the comments on aesthetics are “subjective”. The EA (p. 17) describes the likely appearance of the stand (i.e., more open condition, a stand with fewer large trees and better formed trees). It also prescribes certain design criteria to lessen the visual impacts of the project (e.g., treat or remove slash within 50 feet of a road or private property and reduce the height of slash to a maximum of two feet within an additional 75 foot zone.). This analysis was completed by a registered Landscape Architect and supported by additional documentation

within the Project Record (Vol. 1, Tab 11L). Reference to the preparatory cut as being the first part of a three-stage shelterwood method with reserves is not inappropriate. The intent here was to describe, in laymen's terms, how it might appear when compared to other timber harvest methods (i.e., shelterwood). The proposed harvest is not a regeneration harvest (DN, Section 4.3). This action will retain older trees that develop to biological maturity in the absence of natural disturbances (EA, p. 46). See my response to [Sub-Issue 1.2](#)

Dr. Cline also takes issue with statements related to the use of the [Assessment of Terrestrial Biodiversity in the White Mountain National Forest](#), a publication commissioned for preparation of the Forest Plan. The Responsible Official's summary of this document is supported by my assessment of the peer reviewed reports (PR, Vol. 2, Tab 34). Peer review identified missing literature and a potential bias by the authors. Nevertheless, the information provided in the Assessment was used in the development of the Forest Plan as it "was originally intended as a compilation of information and scientific resources. The Terrestrial Assessment was not intended to be a piece of scientific literature in its own right, or as a guidance document to help steer future management on the White Mountain National Forest." (Lemieux Report, Vol. 2, Tab 34).

In summary, Dr. Cline simply disagrees with the responses provided by the Responsible Official. It is clear from my review that every attempt was made to answer his concerns and accommodate his views into project development. In fact, the IDT specifically considered an alternative submitted by Dr. Cline and the Tin Mountain Conservation Center, but eliminated it from further study since it did not fully meet the projects purpose and need (EA, pp. 12-13). There remains a need by USFWS and botanists to gain knowledge regarding the effects of timber management practices at the stand level on SWP. This project will contribute knowledge to that end. I find no violation in law, regulation or policy relating to Dr. Cline's issue on inadequate response to comments.

### **Recommendation:**

I find that the project decision is based on the "best available science" in combination with thorough field work. After reviewing the Project Record for the Chase Hill Project, and considering the issues brought by the Appellant, I recommend District Ranger Terry Miller's December 11, 2007, Decision Notice be affirmed.

/s/ Douglas F. Oliver  
DOUGLAS F. OLIVER  
Appeal Reviewing Officer  
District Ranger

cc: Patricia Rowell