IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Regina M. Rodriguez

Civil Action No.: 1:21-cv-2994-RMR

SAN LUIS VALLEY ECOSYSTEM COUNCIL, SAN JUAN CITIZENS ALLIANCE, THE WILDERNESS SOCIETY, WILDEARTH GUARDIANS, and ROCKY MOUNTAIN WILD,

Petitioners,

v.

DAN DALLAS, in his official capacity as Forest Supervisor for the Rio Grande National Forest; and UNITED STATES FOREST SERVICE, a federal agency of the United States Department of Agriculture,

Federal Respondents, and

TRAILS PRESERVATION ALLIANCE, BACKCOUNTRY DISCOVERY ROUTES, COLORADO SNOWMOBILE ASSOCIATION, and THE COLORADO 500,

Intervenor Respondents.

ORDER DENYING
PETITIONERS' PETITION WITH PREJUDICE

The Rio Grande National Forest ("Forest") covers approximately 1.83 million acres in southwestern Colorado. It provides habitat for many species, including several that are listed as either threatened or endangered under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531–44. The two that are relevant to this action are the Uncompahgre fritillary butterfly ("UFB") and the Canada lynx ("lynx"), a medium-sized cat. The Federal Respondents include Dan Dallas, the Forest Supervisor for the Forest, and the U.S. Forest Service, a federal agency charged with managing the Forest and implementing

the ESA (collectively the "USFS"). Petitioners, made up of five non-profit conservation organizations, filed a Petition for Review Seeking Declaratory and Injunctive Relief (ECF Nos. 1,14) (the "Petition"), asserting that the Federal Respondents' approval of the revised management plan for the Forest (the "2020 Plan") in May 2020 violated the National Forest Management Act of 1976 ("NFMA"), 16 U.S.C. §§ 1600–87, and its implementation regulations, 36 C.F.R. Part 219 (the "2012 Planning Rule"), the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321–70h, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–06. The Petition has been fully briefed (ECF Nos. 29, 35, 39) and is **DENIED** for the reasons below.

I. PROCEDURAL BACKGROUND

On November 8, 2021, Petitioners filed this action (ECF No. 1), and on March 4, 2022, they filed an amended petition (ECF No. 14). The Petition alleges the following: First Claim, Counts I, II, and III; Second Claim; and Third Claim, Counts I and II. ECF No. 14 ¶¶ 139-213. On May 12, 2022, Trails Preservation Alliance, Backcountry Discovery Routes, and Colorado Snowmobile Association, all groups that work with other stakeholders to develop, fund, and maintain trail projects that make it possible for motorized recreational users to enjoy appropriately designated portions of the Forest, moved to intervene in the suit. ECF No. 17. On June 10, 2022, the Court granted the motion to intervene.[1] ECF No. 21.

[1] Intervenor Respondents "expressly endorse and adopt by reference all arguments put forth in Federal Respondents' Answering Brief . . . with the sole exception of footnote 2 of that brief, which discusses a proposed settlement." ECF No. 37 at 8. The Court therefore considers any necessary analysis of Intervenor Respondents' arguments to be incorporated in its analysis of the Federal Respondents' arguments.

In January 2023, the Petitioners and Federal Respondents reached an agreement to settle Petitioners' First Claim, Count III, and Second Claim. ECF No. 43-1. The Court dismissed and entered final judgement on Petitioners' First Claim, Count III, and Second Claim. ECF No. 44. The Court will address the remaining claims for relief. The First Claim alleges the Federal Respondents failed to comply with NFMA and the 2012 Planning Rule by not including species-specific plan components to contribute to the recovery of the UFB (Count I) or the lynx (Count II).[2] ECF No. 14 ¶¶ 139–168. The Third Claim alleges the Federal Respondents failed to take a "hard look" at the 2020 Plan's effects on the UFB and the lynx (Count I) and that the Environmental Impact Statement ("EIS") did not analyze a reasonable range of alternatives (Count II). *Id.* ¶¶ 187–213.[3]

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[2] Petitioners do not address Count II of Claim I—the agency's alleged failure to comply with NFMA and the 2012 Planning Rule by not including species-specific plan components to contribute to the recovery of the lynx. *See* ECF No. 29 (Opening Brief discussing NFMA violations related only to the UFB); ECF No. 39 (Reply Brief addressing the same). The Court finds Petitioners have forfeited their arguments asserting an NFMA violation related to conservation of the lynx by inadequately briefing that issue. *See Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1128 (10th Cir. 2011) ("[I]f [a] theory simply wasn't raised before the district court, we usually hold it forfeited."); *see also Sabeerin v. Fassler*, No. 1:16-CV-00497 JCH-LF, 2020 WL 4436421, at *3 (D.N.M. Aug. 3, 2020) ("Inadequately briefed issues . . . are forfeited because the Court is unable to meaningfully analyze a request unsupported by legal arguments.") (citing *Bronson v. Swensen*, 500 F.3d 1099, 1105 (10th Cir. 2007) ("[C]ursory statements, without supporting analysis and case law, fail to constitute the kind of briefing that is necessary to avoid application of the forfeiture doctrine.")). The Court thus declines to consider the merits of Count II.

[3] *Defenders of Wildlife v. United States Forest Service*, 94 F.4th 1210 (10th Cir. 2024) arose from a common set of facts as the present case and challenges the same federal agency action (the final EIS and Record of Decision for the 2020 Plan). While the claims here arise under NFMA and NEPA, the claims in *Defenders of Wildlife* arose under the ESA and APA. *Id*. at 1217. But, like NFMA and NEPA, the claims in *Defenders of Wildlife* were reviewed under the APA's "arbitrary and capricious" standard. *Id*. at 1220 (noting that "[b]ecause the ESA does not provide a private right of action for Section 7 claims, we review such claims under the APA" and that to prevail on an APA claim "the burden is on the petitioner to demonstrate that the action is arbitrary and capricious"). The Tenth Circuit there ultimately affirmed the district court's order denying the petition. *Id.* at 1241.

II. LEGAL STANDARDS

The challenges here are brought under NFMA and NEPA. Specifically, Petitioners argue the agency violated NFMA by failing to comply with certain requirements set forth in its implementing regulations and directives. They also argue the agency violated NEPA by failing to comply with two of the statute's procedural requirements.

A. APA

The standard of review for "NFMA and NEPA claims is the same because [courts] consider them both under the APA." *Biodiversity Conservation All. v. Jiron*, 762 F.3d 1036, 1059 (10th Cir. 2014). The APA provides that any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. As relevant here, "[t]he reviewing court shall set aside the agency action under § 706(2) if it is . . . 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . ..'" *Biodiversity*, 762 F.3d at 1059 (quoting 5 U.S.C. § 706(2)(A)).

A presumption of validity attaches to agency action, and the burden of proof rests with the party challenging the action. *See Citizens' Comm. to Save Our Canyons v. Krueger*, 513 F.3d 1169, 1176 (10th Cir. 2008). "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).[4] Nevertheless, "the agency must examine the relevant data and

[4] In June 2024 the U.S. Supreme Court in June 2024 overruled the longstanding precedent *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See Loper Bright Enterprises*

articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Id*. at 43 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156 (1962)). In reviewing that explanation, courts "must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" *Id*. (quoting *Bowman Transp. Inc. v. Arkansas-Best Freight System*, 419 U.S. 281, 285 (1974)).

A decision is "normally" arbitrary and capricious if it relies on factors that Congress did not intend the agency to consider, entirely fails to consider an important aspect of the problem, offers an explanation that is contrary to the evidence before the agency, or is so implausible it cannot be ascribed to a difference in view or the product of agency expertise. *See id*. Courts may not accept *post hoc* rationalizations for agency action; rather, "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Id*. at 50.

In this petition, the assertion that the agency's action (the revised Forest Plan) was "arbitrary, and capricious, an abuse of discretion, and/or otherwise not in accordance with

v. Raimondo, 144 S. Ct. 2244 (2024). *Chevron* concerned deference by courts to an agency's permissible construction of an ambiguous statute. In *Loper Bright*, the Court held that "courts must exercise independent judgment in determining the meaning of statutory provisions," though they may "seek aid from the interpretations of those responsible for implementing particular statutes." 144 S. Ct. at 2262. Few courts in this circuit have yet had occasion to apply *Loper Bright* in the months since it issued. The parties' briefing, filed in 2022, for obvious reasons does not discuss *Loper Bright*. But this Court has likewise found no basis to conclude it affects the analysis here, which—though it implicates the APA—does not involve any disputed statutory construction. The Tenth Circuit's analysis in the analogous case *Defenders of Wildlife*, 94 F.4th 1210, does not shed light on this question since that opinion issued in March 2024, before *Loper Bright* issued.

law" is premised on violations of NFMA and NEPA. ECF No. 14 ¶¶ 150-52, 168; 202, 213. The Court briefly discusses the relevant portions of each.

B. National Forest Management Act

NFMA requires the Secretary of Agriculture to "develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System." 16 U.S.C. § 1604(a); *see also Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 728 (1998) (quoting the same language from 16 U.S.C. § 1604(a)). "NFMA requires the Forest Service to manage forests using a two-step process." *Biodiversity*, 762 F.3d at 1049 (citing 16 U.S.C. §§ 1600–14). "First, the Forest Service must develop a Land and Resource Management Plan ('forest plan') for each national forest unit. Second, it must implement the forest plan through site-specific projects." *Id*. "Each forest plan envisions the forest will be used for multiple purposes, including 'outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness.'" *Utah Env't Cong. v. Troyer*, 479 F.3d 1269, 1272 (10th Cir. 2007) (quoting 16 U.S.C. § 1604(e)(1)). NFMA also requires the Forest Service to "provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives" in each forest unit. 16 U.S.C. § 1604(g)(3)(B). All agency actions, including site-specific projects, must also comply with NEPA and with the Forest Plan developed under NEPA. *See Defs. of Wildlife v. United States Forest Serv.,* 94 F.4th 1210, 1218–19 (10th Cir. 2024) (citing *Utah Env't Cong.*, 443 F.3d at 737 and *Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772, 785 (10th Cir. 2006)).

1. 2012 Planning Rule

Implementing regulations provide standards and guidelines that guide the agency in creating a Forest Plan and approving any accompanying site-specific projects. *See* 16 U.S.C. § 1604(g); *Biodiversity*, 762 F.3d at 1049. When reviewing a challenge to a Forest Plan or a site-specific project, courts must determine whether the plan or the project complies with NFMA and NFMA's implementing regulations. *See Biodiversity*, 762 F.3d at 1049. "The NFMA regulations have been amended numerous times." *Id*. The version relevant here is the 2012 Planning Rule codified at 36 C.F.R. §§ 219.1–219.19.

The requirements of the Planning Rule are formidable. The Rule requires "public notification and participation [], assessment [], developing a proposed plan, considering the environmental effects of the proposal, providing an opportunity to comment on the proposed plan, providing an opportunity to object before the proposal is approved [], and, finally, approving the plan or plan revision." 36 C.F.R. § 219.7(c)(1). The 2012 Planning Rule provides substantive requirements for each Forest Plan and dictates the necessary components—including desired conditions, objectives, standards, guidelines, and suitability of lands. 36 C.F.R. §§ 219.7(e). Each plan is intended to provide the ecological conditions necessary to "contribute to the recovery of federally listed threatened and endangered species . . . and maintain a viable population of each species of conservation concern within the plan area." 36 C.F.R. § 219.9(b)(1). The 2012 Planning Rule also requires the USFS to balance the competing uses of the forests. 36 C.F.R. § 219.10.

2. Federal Service Directives

In addition to implementing regulations, federal service directives guide USFS action, including its implementation of the 2012 Planning Rule in developing the challenged Forest Plan. *See* 36 C.F.R. § 200.4. Two directives used by USFS officers to develop and revise Forest Plans under the 2012 Planning Rule include the Forest Service Manual ("FSM"), ECF No. 24-6 at 65 (Rvsd Plan – 00001321-1362),[5] and Forest Service Handbook ("FSH"), ECF No. 24-6 at 120 (Rvsd Plan – 00001375-1509).

C. National Environmental Policy Act

Generally, "before taking a 'major Federal action significantly affecting the quality of the human environment,' 42 U.S.C. § 4332(2)(C), NEPA requires agencies to prepare an environmental impact statement ('EIS'), which determines how much a proposed agency action will affect the environment, 40 C.F.R. § 1502.1–1502.25." *Biodiversity*, 762 F.3d at 1050–51. An EIS informs federal agency decision making and the public and must "provide full and fair discussion of significant [environmental] effects" as well as reasonable alternatives that would avoid or minimize those effects or enhance the quality of the human environment. 40 C.F.R. § 1502.1. "Because a forest plan governs the majority of the Forest Service's actions in managing a forest, 'the creation of a forest plan' and 'any significant amendments' require 'the preparation of an EIS.'" *Biodiversity*, 762 F.3d at 1051 (quoting *Silverton Snowmobile Club*, 433 F.3d at 785).

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[5] Petitioners refer to the Administrative Record as "AR_Bates Number." Federal Respondents refer to the Administrative Record as "FSBates Number." The Court will cite to the Administrative Record as "Rvsd Plan – Bates Number" because the documents filed with the Court are stamped in that format in their bottom right corners.

Under NEPA, an EIS "must consider 'any adverse environmental effects.'" *Biodiversity*, 762 F.3d at 1051 (quoting 42 U.S.C. § 4332(2)(C)(iii)). This review "cannot be superficial—agencies must 'take a hard look at the environmental consequences of proposed actions utilizing public comment and the best available scientific information.'" *Id*. (quoting *Colorado Envt'l. Coal. v. Dombeck*, 185 F.3d 1162, 1171 (10th Cir.1999)); *see also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 333, 350–51 (1989) (noting that the EIS requirement "ensur[es] that agencies will take a 'hard look' at environmental consequences" and thus effectuates NEPA's policy goals of mitigating adverse environmental consequences and facilitating public dissemination of information). The "hard look" standard ensures the "agency did a careful job at fact gathering and otherwise supporting its position." *Biodiversity*, 762 F.3d at 1052 (quoting *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 704 (10th Cir. 2009) (internal quotations omitted)).

In addition, under NEPA, an EIS must contain "a detailed statement" regarding "alternatives to the proposed agency action." 42 U.S.C. § 4332(2)(C)(iii). The agency must "[r]igorously explore and objectively evaluate reasonable alternatives" for the proposed action in response to a specified "underlying purpose and need." 40 C.F.R. §§ 1502.13, 1502.14(a); *see also High Country Conservation Advocs. v. United States Forest Serv.*, 951 F.3d 1217, 1223 (10th Cir. 2020). The range of "reasonable alternatives" must at least include the alternative of taking "no action," 40 C.F.R. § 1502.14, which courts have described as "the option of taking no new planning action."

Richardson, 565 F.3d at 690. However, "NEPA does not require agencies to analyze the environmental consequences of alternatives it has in good faith rejected as too remote, speculative, or impractical or ineffective." *Id.* at 708 (internal quotations omitted).

To determine whether a challenged EIS analyzed "all reasonable alternatives," courts apply a "rule of reason," in which the reasonableness of the alternatives "is measured against two guideposts." *Id*. at 708-09. "First, when considering agency actions taken pursuant to a statute, an alternative is reasonable only if it falls within the agency's statutory mandate." *Id*. at 709. "Second, reasonableness is judged with reference to an agency's objectives for a particular project." *Id*.

And, even if an EIS is deficient in some way, courts do not necessarily conclude the agency has violated NEPA. Instead, courts look to whether the deficiency "defeat[s] NEPA's goals of informed decisionmaking and informed public comment." *Id*. at 704 ("Deficiencies in an EIS that are mere 'flyspecks' and do not defeat NEPA's goals of informed decisionmaking and informed public comment will not lead to reversal.").

D. Endangered Species Act

Finally, Forest Plans must comply with the ESA.[6] Section 7 of the ESA requires the USFS to consult with the relevant Secretary, here the Secretary of the Interior, to

[6] Petitioners here do not challenge the agency's action under the ESA. *See* ECF No. 1 at 1–2 ("This suit alleges violations of the National Forest Management Act ('NFMA'), 16 U.S.C. §§ 1600 et seq.; Forest Service regulations, 36 C.F.R. Part 219 (2012 forest planning rules) and 36 C.F.R. Part 212 (Travel Management Rule); the National Environmental Policy Act ('NEPA'), 42 U.S.C. §§ 4321 et seq.; the Administrative Procedure Act ('APA'), 5 U.S.C. § 551, et seq., and any implementing regulations for these statutes."). The Court briefly describes the ESA here because it is a significant portion of the statutory framework governing development and implementation of the challenged action, but the Court does not find any dedicated ESA analysis to be necessary.

ensure that agency action "is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. § 1536(a)(2). If an action agency's assessment determines a proposed action "may affect listed species," then the action agency is required to consult with a "consultant agency" either the Fish and Wildlife Service ("FWS") or the National Marine Fisheries Service, depending on the species involved. *See Defs. of Wildlife*, 94 F.4th 1210, 1219 (citing *See* 50 C.F.R. § 402.14(b)(2)). Here, the USFS is the action agency and the FWS is the consultant agency.

III. BACKGROUND

In December 2014, the USFS set out to revise the 1996 Forest Plan by filing in the Federal Register a notice of its intent to initiate the assessment phase. ECF No. 29 at 19 (Opening Brief); ECF No. 35 at 15 (Answering Brief); ECF No. 25-11 at 711 (Rvsd Plan – 00017668). In March 2016, the USFS circulated its assessments and a Need for Change document initiating the development phase of the revision process. ECF No. 24-7 at 3 (Rvsd Plan – 00001510). In September 2016, the agency published in the Federal Register a notice of intent to prepare an EIS. ECF No. 25-13 at 282 (Rvsd Plan – 00018558). In September 2017, the USFS released a draft EIS, ECF No. 24-15 at 296 (Rvsd Plan – 00004506), and draft plan, ECF No. 25-7 at 134 (Rvsd Plan – 00015649). ECF No. 29 at 19; ECF No. 35 at 15. In December 2017, the Petitioners commented on the draft EIS and draft plan. ECF No. 29 at 19.

In September 2018, the USFS submitted a Biological Assessment to the FWS, which determined that the proposed plan "may affect, but is not likely to adversely affect

the [UFB] and that the proposed [p]lan may affect, and is likely to adversely affect the [] lynx." ECF No. 35 at 15; *see* ECF No. 24-15 at 151 (Rvsd Plan – 00004361). Because the Biological Assessment concluded an action "may affect listed species," federal regulations required the USFS to formally consult with the relevant consultant agency—here, the FWS. *See* 50 C.F.R. § 402.14(a) ("Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required. . . ."). In March 2019 the FWS issued a Biological Opinion concurring with the USFS's determination that the draft plan was not likely to adversely affect the UFB and was "likely to adversely affect the [lynx]," but "not likely to jeopardize the continued existence of the lynx." ECF No. 25-11 at 682, 701 (Rvsd Plan – 00017639, 0017658).

In August 2019, the USFS published a draft Record of Decision ("ROD") summarizing the findings in the EIS and the basis for its decision to approve the 2020 Plan. ECF No 25-7 at 383 (Rvsd Plan – 00015898). Petitioners filed administrative objections to the 2020 Plan. ECF No. 29 at 19. In April 2020, the USFS issued the final EIS and final ROD. ECF No. 25-13 at 270 (Rvsd Plan – 00018546). In May 2020, the USFS issued an erratum to the final ROD. ECF No. 29 at 19; ECF No. 35 at 16; ECF No. 25-13 at 339 (Rvsd Plan – 00018615).

IV. DISCUSSION

A. Standing

As a threshold jurisdictional matter, neither Federal nor Intervenor Respondents challenge Petitioners' assertion of standing, but the Court has an independent duty to ensure its subject matter jurisdiction. *See Dine Citizens Against Ruining Our Env't v. Bernhardt*, 923 F.3d 831, 840 (10th Cir. 2019). ("Because standing is jurisdictional, [the court] must first determine whether [Petitioners] have standing to bring their claims."). As relevant here, one basis for an organization to bring suit on behalf of its members is that the "members would otherwise have standing to sue in their own right." *Id*. (citing *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)). For an individual plaintiff to establish standing, the individual "must show: (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id*. (citing *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000)).

The analysis in *Dine Citizens* is illustrative. The court there ultimately concluded that a plaintiff organization had standing to bring claims under NEPA on behalf of its members. First, the court found the members had satisfied the injury-in-fact requirement, because the facts indicated the agency's approval of hundreds of applications to drill oil in a certain region created a risk of harm to members' sensory and recreational enjoyment

of the area. Specifically, the members alleged they would be harmed by "light pollution, more truck traffic, drilling rigs sticking up from the land, smells, dust, and more industrialization." *See id*. at 841. The court found the facts were "sufficient to establish 'an increased risk of environmental harm due to [the agency's] alleged uninformed decisionmaking.'" *Id*. (quoting *Comm. to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 451 (10th Cir. 1996)). In addition, the court found the causation and redressability requirements for standing were satisfied. *Id*. at 843–44. Petitioners established causation by alleging that the agency did not comply with procedural requirements set forth by statute, resulting in "uninformed decisionmaking." *Id*. at 844. And because "a favorable decision ordering compliance with NEPA's procedures would avert the possibility that the [agency] may have overlooked significant environmental consequences of its actions," the court concluded the petitioners' alleged harms were redressable. Similarly, the court in *Biodiversity* found the plaintiffs had "stated aesthetic and recreational injuries caused by the Forest Service's Phase II Amendment and redressable through this lawsuit" and had therefore established Article III standing. 762 F.3d at 1059.

Here, like in *Dine Citizens* and *Biodiversity*, petitioner organizations have alleged that the agency harmed members' interests by violating statutory requirements. Specifically, Petitioners allege "[t]he aesthetic, recreational, scientific, spiritual, vocational, and educational interests of Petitioners' members have been and will be adversely affected and irreparably injured if the Forest Service is allowed to continue implementing the Revised Plan as approved." ECF No. 1 at 8 ¶ 16. For example,

"Petitioners' staff and members use and enjoy the Rio Grande National Forest for skiing, snowshoeing, hiking, fishing, hunting, camping, photographing scenery and wildlife . . .," and "Petitioners' staff and members work to protect habitat for imperiled species on the Rio Grande National Forest, including Canada lynx and Uncompahgre fritillary butterfly." ECF No. 1 at 7 ¶¶ 13, 1. Like in *Dine Citizens*, Petitioners allege failures to follow the procedures required by the Planning Rule, directives, and statutes, which resulted in uninformed decisionmaking impacting this region of the Rio Grande National Forest and the populations of Canada lynx and UFB that live there. And, as in *Dine Citizens*, this alleged procedural injury would be redressable by vacatur and remand to the agency for additional analysis. *See* 923 F.3d at 840–41.

The Court finds the allegations in the Petition are sufficient to establish Article III standing for the claims it sets forth.

B. NFMA and Planning Rule Claims Regarding the UFB

The 2012 Planning Rule provides that a plan "must include plan components, including standards or guidelines, to maintain or restore the diversity of ecosystems and habitat types throughout the plan area." 36 C.F.R. § 219.9(a)(2). Plan components mandated under 36 C.F.R § 219.9(a) are often called coarse-filter plan components. *See* National Forest System Land Management Planning, 77 Fed. Reg. 21,174 (Apr. 9, 2012). In addition, 36 C.F.R § 219.9(b) provides that "[t]he responsible official shall determine whether or not the plan components required by paragraph (a) of this section [coarse-filter components] provide the ecological conditions necessary to: contribute to the

recovery of federally listed threatened and endangered species, conserve proposed and candidate species, and maintain a viable population of each species of conservation concern within the plan area." 36 C.F.R § 219.9(b)(1).

If the official determines that the coarse-filter plan components are insufficient to restore or maintain a viable population of the species of conservation in the area, "then additional, species-specific plan components, including standards or guidelines, must be included in the plan to provide such ecological conditions in the plan area." *Id.* These species-specific plan components are often called fine-filter plan components. *See* 77 Red. Reg. 21,175 ("The fine-filter provisions are intended to provide a safety net for those species whose specific habitat needs or other influences on their life requirements may not be fully met under the coarse-filter provisions.")

Here, Petitioners allege the USFS failed to comply with NFMA and the 2012 Planning Rule and in doing so, acted arbitrarily and capriciously, when it failed to include in the 2020 Plan fine-filter plan components targeted to the recovery of the UFB, a federally endangered species. *See* ECF No. 29 at 19. Petitioners argue that coarse-filter plan components included in the 2020 Plan are not sufficient to protect the key ecological condition necessary to contribute to the recovery of the UFB—large patches of snow willow located above 12,000 feet. In addition, Petitioners maintain that the coarse-filter components in the 2020 Plan do not adequately mitigate threats to the UFB from illegal collection, recreation, livestock grazing, and climate change. ECF No. 29 at 21; *see also* ECF No. 24-4 at 27 (Rvsd Plan – 000433) (Assessment 5); ECF No. 24-14 at 306

(Rvsd – Plan 00004156) (FWS's UFB 5-Year Review); ECF No. 24-15 at 151 (Rvsd Plan – 00004361) (Biological Assessment).

Petitioners argue the USFS's decision not to include fine-filter components in the 2020 Plan is arbitrary and capricious for three reasons. First, Petitioners argue the USFS tacitly acknowledged that fine-filter components *were* necessary by including them in the draft plan and draft EIS, before summarily removing them from the 2020 Plan and final EIS. ECF No. 29 at 22-23. Second, Petitioners note the analyses of the UFB's viability in the final EIS (published in 2020) "remains nearly identical" to that in the draft EIS (published in 2017) despite the elimination of fine-filter components specific to the UFB, which—Petitioners suggest—demonstrates the agency "did not take a hard look" at the effect of that change. ECF No. 29 at 23. Third, Petitioners argue the 2020 Plan does not "establish desired conditions for key ecological characteristics" relevant to the UFB, "demonstrate how coarse-filter plan components address stressors for those characteristics," or "determine whether the ecological conditions necessary" for the UFB (large patches of snow will located above 12,000 feet) "are likely to result." ECF No. 29 at 23. The Court will address each of the Petitioners' arguments in turn.

1. Elimination of Fine-filter Plan Components from Draft Plan.

Recall, in September 2017, the USFS released a draft plan. ECF No. 25-7 at 134 (Rvsd Plan – 00015649). The draft plan included three components that Petitioners characterize as fine-filter components: (1) Desired Condition ("DC") Species of

Conservation Concern ("SCC") DC-SCC-4;[7] (2) Management Approach ("MA") MA-SCC-2;[8] and (3) Guideline ("G") – Threatened, endangered, proposed, and candidate species ("TEPC")-4.[9] Petitioners do not explain how they identified these as fine-filter components; in fact, the first two explicitly identify multiple species. *See* DC-SCC-4 (concerning the UFB, the Western bumblebee, and "many other species"); MA-SCC-2 (concerning the UFB and "other high-alpine pollinators"); *cf.*, *e.g.*, ECF No. 25-7 at 164–67 (Rvsd Plan – 00015679-82) (setting forth standards, objectives, and management approaches specific to the Canada lynx, designated specifically with the identifier LYNX). Presumably, Petitioners identified these three components as fine-filter plan components concerning the UFB because each includes a specific reference to the UFB.

Petitioners argue the removal of these fine-filter components from the draft plan in the final plan was arbitrary and capricious. The Court is unpersuaded for several reasons. First, assuming these are properly understood as fine-filter components for the UFB, they

[7] DC-SCC-4: "Plant species that are necessary for species of conservation concern as food (including grazing, forage, and nectar for pollinators) or structure are identified and occur in numbers viable enough to fulfill that function. This includes snow willow (necessary for the Uncompahgre fritillary butterfly), flowering plants (nectar producing species for the Western bumblebee) and many other species. (Forestwide)." ECF No. 25-7 at 161 (Rvsd Plan – 00015676).

[8] MA-SCC-2: "Continue to support the Interagency Recovery Team efforts for the Uncompahgre fritillary butterfly, as necessary, to provide for the recovery of the species and the protection of the alpine habitat components that support it and other high-elevation alpine pollinators. (Forestwide)." ECF No. 25-7 at 164 (Rvsd Plan – 00015679).

[9] G-TEPC-4: "Management approaches to recreation and ground-disturbing activities in snow willow habitats occupied by the Uncompahgre fritillary butterfly: [1] Be consistent with recovery plan objectives, as necessary and in accordance with site-specific needs; [and 2] Avoid new trail development within occupied colony sites, and manage existing trails and access as necessary to discourage off-trail use. (Forestwide)." ECF No. 25-7 at 168 (Rvsd Plan – 00015683).

do not appear to have been *eliminated* in the final version. Instead, they may have been condensed into other components in the 2020 Plan. For example, the component DC-SCC-5[10] in the final plan identifies as a desired condition the maintenance of a snow willow population sufficient to "meet the needs of associated species, including species of conservation concern." ECF No. 24-5 at 20 (Rvsd Plan – 00854). This component substantively incorporates the draft plan's DC-SCC-4, which set forth the desired condition that "plant species that are necessary for species of conservation concern as food . . . or structure" would "occur in numbers viable enough to fulfill that function." ECF No. 25-7 at 161 (Rvsd Plan – 00015676).

Likewise, draft component MA-SCC-2's stated objective to "[c]ontinue to support the Interagency Recovery Team efforts for the Uncompahgre fritillary butterfly, as necessary" is reflected in the final plan's "Management Approaches" section. ECF No. 24-5 at 36 (Rvsd Plan – 000000870) ("[The USFS] continues to participate in and support recovery and conservation efforts including but not limited to conservation agreements for . . . pollinators, Uncompahgre fritillary butterfly, [and] . . . snow willow.").[11]

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[10] DC-SCC-5: "Structure, composition, and function of alpine ecosystems, including cushion plant communities, snow willow, alpine fell fields, and talus slopes, meet the needs of associated species, including species of conservation concern. (Forestwide)." ECF No. 24-5 at 20 (Rvsd Plan – 00000854).

[11] USFS's explanation for the change in formatting (from the draft plan's bullet-pointed list of management approaches to the final plan's narrative format) was that the change responded to a "public comment that indicated confusion of management approaches with other traditional plan components." ECF No. 25-13 at 224-25 (Rvsd Plan – 00018500-01). The formatting change, as described above, does not appear to have resulted in omission of the content of MA-SCC-4 as Petitioners assert.

And, as to the third fine-filter component Petitioners identify, the agency explained G-TEPC-4 in the draft plan was combined with three other plan components each concerning other endangered species and replaced with a single, more general guideline. ECF No. 35 at 28. The draft plan's instruction to manage "recreation and ground-disturbing activities in snow willow habitats occupied by the Uncompahgre fritillary butterfly . . . in accordance with site-specific needs" and to discourage off-trail use are, the government argues, subsumed within the final plan's instruction that "management actions should be designed with attention to threatened, endangered, proposed, or candidate species and their habitats." *Compare* G-TEPC-4 (draft) *with* G-TEPC-1 (final).[12] The agency clarifies that not *all* the plan components contributing to the protection of the snow willow and species reliant on it were condensed into G-TEPC-1. Other plan components setting forth detailed conditions and guidelines for its conservation remained in the final plan. *See* ECF No. 35 at 28 (citing DC-SCC-5, which states the desired condition that "alpine ecosystems, including . . . snow willow . . . meet the needs of associated species, including species of conservation concern," and G-SCC-4, which states as a guideline that permanent ground-disturbing activities within 100 feet of certain alpine features should be avoided "to support alpine-related species of conservation

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[12] G-TEPC-1: "To avoid or minimize adverse effects to listed species and their habitat, management actions should be designed with attention to threatened, endangered, proposed, or candidate species and their habitats. (Forestwide)." ECF No. 24-5 at 25 (Rvsd Plan – 00000859).

concern”). Thus, it seems the revisions did not, as Petitioners assert, substantively eliminate conditions and guidelines aimed at protecting the snow willow and the UFB.[13]

Furthermore, the revisions do not seem to have been made without reason. The agency explained in the final EIS, contemporaneously with the publication of the final plan, that it had revised the draft plan in response to public comments. *See* ECF No. 25-11 at 749–50 (Rvsd Plan – 17706–07). “Many of the comments received,” the agency explained, “addressed the need to make forest plan direction more consistent with the intent of the 2012 Planning Rule, while making the forest plan simpler and easier to understand.” ECF No. 25-11 at 749 (Rvsd Plan – 17706). Specifically, commenters “felt that plan components were not in compliance with the rule direction” and noted that the draft’s “Management Approaches were improperly used to supplement plan direction.” ECF No. 25-11 at 749 (Rvsd Plan – 17706). In response to those comments, the agency revised the components to “better meet the intent and direction of the 2012 Planning Rule,” to “combine[] like or redundant direction,” and to “add[] clarity and specificity.” ECF No. 25-11 at 749 (Rvsd Plan – 17706). With respect to the plan components concerning “wildlife,” the agency described that it had “clarified and rewritten” the thirteen desired

[13] Petitioners seem to argue that DC-SCC-4 and MA-SCC-4 could not substantively protect the UFB, because the UFB is not an SCC (Species of Conservation Concern) but instead an endangered species. ECF No. 39 at 14 (citing 36 C.F.R. § 219.9(c) (defining SCC as “a species, other than federally recognized threatened, endangered, proposed, or candidate species, that is known to occur in the plan area and for which the regional forester has determined that the best available scientific information indicates substantial concern about the species' capability to persist over the long-term in the plan area”). However, it is difficult to reconcile Petitioners’ argument that the revision arbitrarily removed protections for the UFB (set forth in SCC components) by not including these SCC components in the final plan, with this argument that SCC components cannot afford protection to the UFB. Petitioners’ challenge here relies on the premise that SCC components *can* affect the survival of the UFB.

conditions in the draft plan, condensing them into six desired conditions. Likewise, the draft plan's fourteen standards "were clarified and simplified into one." ECF No. 25-11 at 750 (Rvsd Plan – 17707).

It may be true, as petitioners argue, that the draft versions of the three components they identify in this petition "provided for the specific habitat and recovery needs of the UFB with greater 'clarity and specificity'" than did their counterparts in the final version. ECF No. 39 at 21 (quoting ECF No. 35 at 28). But the agency did not claim it made every plan component in the draft plan more specific; it explained it had undertaken revisions intended to make clearer and simpler the plan *as a whole*, in response to public comments.

Petitioners do not explain why condensing these three components into other components or removing them for redundancy was "a clear error of judgment" sufficient to overcome the presumption of validity attaching to the agency's action. *See Motor Vehicle Mfrs.*, 463 U.S. at 43. They would have the Court read the inclusion of more specific language in the draft version as an admission that fine-filter components were essential in the final version. This argument is unpersuasive. The agency has explained the changes were responsive to public comment and intended to reduce redundancy and promote clarity. There is no indication that the revisions were "so implausible [they] could not be ascribed to a difference in view or the product of agency expertise." 463 U.S. at 43. There is no requirement that the agency enumerate plan components in as much specificity as possible; instead, the agency need only include fine-filter components if it

concludes that coarse-filter components are inadequate to "maintain a viable population of each species of conservation concern within the plan area." 36 C.F.R § 219.9(b)(1).[14] Thus, the Court is not persuaded by the argument that the removal of three components of the draft plan was inherently arbitrary and capricious.

2. Discussion of the UFB in the Draft and Final EIS.

In a similar vein, Petitioners argue that "because the analysis between the Draft and Final EIS is nearly identical, and because the [agency] eliminated protective fine-filter plan content between the Draft and Final EIS without making other changes to plan content that would provide for the recovery of the UFB," the change was arbitrary and capricious. ECF No. 39 at 9–10. There was, Petitioners argue, was "no evidence in the administrative record supporting this shift." ECF No. 39 at 10. They argue essentially that the final plan should have been identical to the draft plan because "neither the status review or Biological Assessment contain any different information than what was before the agency when it published the [draft] EIS." ECF No. 39 at 10. "The analysis would," they presume, "be different between the [draft] EIS and [final] EIS" if the agency had "take[n] a hard look at this issue." ECF No. 29 at 23.

This inferential leap does not suffice to carry Petitioners' burden of showing the agency's determination was arbitrary and capricious. First, the premise of Petitioners' argument does not appear to be true. The agency notes that in the time between the

[14] The Court will address Petitioners' argument that the agency did not properly determine coarse-filter components would suffice in part (3) of this section.

publication of the draft plan in 2017 and the publication of the 2020 Plan, the agency received updated information about threats to the UFB in the plan area. This updated information included the FWS's five-year review of the UFB, ECF No. 24-14 at 306 (Rvsd Plan – 00004156), published September 28, 2018, and the USFS's Biological Assessment for the 2020 Plan, ECF No. 24-15 at 151 (Rvsd Plan – 00004361), also published September 28, 2018.

The FWS's five-year review noted no known illegal collection of the UFB occurring since the species was listed as endangered in 1991. The FWS concluded that "since listing the only on-the-ground activities that have impacted known UFB colonies are minor habitat modification from hiking and sheep grazing." ECF No. 24-14 at 319 (Rvsd Plan – 0004169). In the preceding five years, the FWS reported no population impacts had been observed from hiking (although hiking remained a "potential impact" because of anticipated increases in recreational hiking). ECF No. 24-14 at 319 (Rvsd Plan – 0004169). And the FWS determined sheep grazing was not a threat to the UFB, because the USFS allows only minor sheep trailing within UFB colonies, rather than bedding or long-term grazing. *See* ECF No. 24-14 at 319 (Rvsd Plan – 0004169). Based on the information the agency received between the draft EIS and final EIS, it is not clear that Petitioners are correct when they assert the agency during revision received no "different information" potentially justifying modifications to the components protecting the UFB against hiking and grazing threats.[15]

[15] In addition, the draft EIS does not even appear to contain the fine-filter components that Petitioners argue were arbitrarily and capriciously removed from the draft plan. This undermines the premise of Petitioners'

Second, even if the FWS report and Biological Assessment did not provide new information, Petitioners do not carry their burden by merely stating a wish for more explanation. This argument misunderstands the APA's arbitrary and capricious standard. The revised plan is entitled to a presumption of validity, and Petitioners can prevail in their challenge only if they demonstrate that the agency clearly erred or considered factors that Congress did not intend to be part of the analysis. *See Citizens' Comm.*, 513 F.3d at 1176. Petitioners make no argument that the agency considered the wrong factors. Nor do they point to record evidence suggesting the eliminated species-specific components would have provided for butterfly recovery in a way that the remaining ecological plan components would not. They cannot prevail by merely demanding that the agency explain *ad infinitum* each revision in spelling, punctuation, and word choice and then complaining that the agency failed to do so.

3. Adequacy of the Coarse-Filter Plan Components.

In addition to challenging, in effect, the adequacy of the agency's explanation for the revisions to the draft plan, Petitioners challenge the underlying premise of the revision—that the plan adequately protected the UFB without fine-filter components tailored to that species. Petitioners argue "the record does not support the sufficiency, alone, of coarse-filter components to contribute to the recovery of the butterfly." ECF No. 29 at 23.

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argument that the draft and final EISs differed on that basis and should have had corresponding analytical differences. Instead, it appears the agency may not have analyzed fine-filter components in *either* version of the EIS. Because Petitioners have not carried their burden in any event, the Court assumes *arguendo* the premise that the draft EIS did include fine-filter components.

During the objection filing period after publication of the proposed plan, objectors argued "the [2020 P]lan does not include sufficient plan components to provide ecological conditions or species-specific protections adequate to provide for recovery of the threatened [UFB]." *See* ECF No. 25-11 at 651 (Rvsd Plan – 00017608) (summarizing objections). The objectors believed the plan should include two additional Standards: 1) "Close Uncompahgre fritillary colony sites and potential recovery areas to recreation, including hiking and trail building"; and 2) "Close Uncompahgre fritillary colony sites and potential recovery areas to livestock grazing." ECF No. 25-11 at 651 (Rvsd Plan – 00017608).

The USFS concluded these changes were not necessary. The reviewing officer explained the 2020 Plan did "contain[] adequate plan components to protect the [UFB] and contribute[] to recovery (DC-TEPC-1,[16] G-TEPC-1, DC-WLDF-3,[17] DC-SCC-5, DC-SCC-3.[18])." ECF No. 25-11 at 651 (Rvsd Plan – 00017608). The reviewing officer also highlighted that "the Biological Assessment and supporting documentation . . . demonstrate that those threats [the objectors highlighted], specifically livestock grazing and recreation use, have minimal adverse effects . . . to Uncompahgre fritillary butterfly

[16] DC-TEPC-1: "Maintain or improve habitat conditions that contribute to either stability or recovery, or both, for threatened, endangered, proposed, and candidate species. (Forestwide)." ECF No. 24-5 at 24–25 (Rvsd Plan – 00000858-59).

[17] DC-WLDF-3: "Habitat connectivity is provided to facilitate species movement within and between daily home ranges, for seasonal movements, for genetic interchange, and for long-distance movements across boundaries. (Forestwide)." ECF No. 24-5 at 37 (Rvsd Plan – 00000871).

[18] DC-SCC-3: "Structure, composition, and function of riparian areas, including streams, willow thickets, and cottonwood galleries, meet the needs of associated species, including species of conservation concern. (Forestwide)." ECF No. 24-5 at 20 (Rvsd Plan – 00000854).

and its habitat." ECF No. 25-11 at 651 (Rvsd Plan – 00017608). These effects are minimal because, as the agency noted in both the draft EIS and final EIS, "all but perhaps one of the [UFB] populations on the Forest occur in remote areas that are not known to attract considerable human foot traffic"; "[t]he Forest [plan] prohibits sheep grazing and trailing in occupied Uncompahgre fritillary butterfly habitat"; and there was "no scheduled cattle grazing on Uncompahgre fritillary butterfly habitat in the plan area." ECF No. 25-12 at 86-88 (Rvsd Plan – 00017909–17911). The agency explained that "[p]rotective measures prescribed in revised management direction" would suffice to "manage potential negative impacts" on the UFB population from the threats objectors identified. ECF No. 24-16 at 90 (Rvsd Plan – 00004731); ECF No. 25-12 at 86-87 (Rvsd Plan – 00017909-10) (Final EIS). Some of the plan's protections even approximated objectors' own suggestions. For example, the final EIS included a provision "allow[ing for] dispersed recreation sites to be closed if unacceptable environmental damage occurs [in the UFB habitat]"—an option that mirrors objectors' suggestions to close colony areas to human traffic and livestock grazing. *See* ECF No. 25-12 at 170 (Rvds Plan – 00017993). After considering objectors' arguments and the agency's responses, the reviewing officer affirmed the agency's determination that additional plan components were not necessary. *See* ECF No. 25-11 at 651-52 (Rvsd Plan – 00017608-09).

Petitioners here renew their arguments that the coarse-filter components in the 2020 plan inadequately provide for UFB recovery.[19] In particular, they identify five plan

[19] In their Reply Brief, Petitioners assert that the USFS waived any opposition to their arguments criticizing the adequacy of the coarse-filter components by failing to "address th[ese] argument[s] in its responsive

components as the targets of their criticism: DC-TEPC-1, DC-WLDF-3, DC-SCC-3, DC-SCC-5, and G-TEPC-1. They maintain that these components do not "establish desired conditions for key ecological characteristics relevant to the butterfly," do not "address stressors for those characteristics," or do not permit a forecast about "whether the ecological conditions necessary for the species . . . are likely to result." ECF No. 29 at 23.

Specifically, Petitioners argue DC-TEPC-1—which sets forth the objective of "[m]aintain[ing] or improv[ing] habitat conditions that contribute to either stability or recovery" of endangered species in the plan area—is inadequate because it is not "specific enough to allow progress towards [its] achievement to be determined." ECF No. 39 at 12 (citing 36 C.F.R. § 219.7(e)(1)(i) ("Desired conditions must be described in terms that are specific enough to allow progress toward their achievement to be determined, but do not include completion dates.")). They do not, however, provide any authority indicating what level of detail is required; nor was the Court able to locate caselaw defining that requirement. Therefore, the Court cannot say that this desired condition failed to comply with the requirements of 36 C.F.R § 219.7(e)(1)(i). It certainly seems possible to

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brief." *See* ECF No. 39 at 13. "Therefore," Petitioners argue, the agency "is barred from responding on reply." ECF No. 39 at 11 (citing *United States v. Harrell*, 642 F.3d 907, 918 (10th Cir. 2011) ("[A]rguments raised for the first time in a reply brief are generally deemed waived.")). First, this characterization is not accurate. The agency *did* respond to Petitioners' critiques of the plan components by arguing that the Petitioners did not provide sufficient evidence to permit the Court to conclude the action was arbitrary and capricious under the APA's deferential standard and that the agency needed only "guide *future* project and activity decisionmaking" with the Forest plan rather than "tak[ing] concrete actions." ECF No. 35 at 30. Second, the authority on which Petitioners rely is inapt here. *Harrell* concerns an appellate court's decision not to consider arguments raised for the first time in appellant's reply brief, not—as here, the outcome of a defendant's alleged failure to respond to certain arguments raised in plaintiff's opening brief. The Court finds waiver doctrine inapplicable here, and therefore considers the agency's responsive arguments.

measure whether the snow willow population in that area is "maintaining or improving." This argument is unpersuasive.

Petitioners also argue that "[t]he Desired Conditions pertaining to Species of Conservation Concern ('SCC')"—DC-SCC-3 and DC-SCC-5—"likewise do not suffice to provide the key ecological conditions necessary to contribute to the recovery of the butterfly" because the butterfly is an "ESA-listed species" rather than an SCC. ECF No. 39 at 13–14. But as the Court explained, Petitioners' argument that the agency arbitrarily removed protections for the UFB when it eliminated certain SCC plan components contradicts its present assertion that SCC components do not apply to the UFB. It seems SCC plan components do contemplate some protections for the UFB. For example, DC-SCC-4 in the draft plan specifically mentioned the UFB and set forth the condition that the snow willow would "occur in numbers viable enough" to support the UFB. *See* ECF No. 25-7 at 161 (Rvsd Plan – 00015676). Therefore, the Court is unpersuaded by the assertion that protections for the UFB set forth in SCC components in the final plan should be disregarded.

Petitioners likewise maintain that DC-WLDF-3—which provides for "habitat connectivity . . . to facilitate species movement" for seasonal migration, genetic interchange, and other long-range travel—is inadequate because it addresses only "one stressor for the UFB" (low genetic variability), and because the record does not provide specific information about how this condition will be implemented. ECF No. 39 at 13. But under the 2012 Rule, "[p]lan components guide future project and activity

decisionmaking." 36 C.F.R. § 219.7(e). Petitioners point to no authority suggesting that desired conditions must be self-executing, or that each component must simultaneously address all possible threats to a given species. The Court finds that notion unpersuasive.

Finally, Petitioners assert that G-TEPC-1 does not provide significant protections for the UFB. Recall, G-TEPC-1 provides that "management actions should be designed with attention to threatened, endangered, proposed, or candidate species and their habitats" to "avoid or minimize adverse effects to listed species and their habitat." ECF No. 24-5 at 25 (Rvsd Plan – 00000859). Petitioners maintain that this guideline "poorly parrots the requirements of the ESA" rather than setting forth specific requirements to protect the UFB. ECF No. 39 at 14–15. And, Petitioners argue, the phrase "with attention to threatened, endangered, proposed, or candidate species" is insufficiently specific and "unlawfully affords the project-level decisionmaker unlimited discretion to decide what 'attention to' entails." ECF No. 39 at 15.

Again, however, Petitioners do not provide any authority to support their assertion that the guideline insufficiently constrains the agency's future management actions. They seem to believe that the 2020 Plan must be an exhaustive enumeration of all requirements for future site-specific actions. It does not. Instead, the Forest Plan is a programmatic management tool not intended to specifically determine any future actions in the forest. *See Forest Guardians v. Forsgren*, 478 F.3d 1149, 1155 (10th Cir. 2007) ("Rather than actions themselves, [Forest Plans] appear more akin to 'road maps' on which the Forest Service relies to chart various courses of action. A [forest plan] is, in the

truest sense, a document that creates a vision by integrating and displaying information relevant to the management of a national forest.") By contrast, site-specific projects in the plan area that could affect the UFB will necessarily undergo additional, specific environmental review and section 7 ESA consultation, as appropriate. *See* ECF No. 25-13 at 291 (Rvsd Plan – 00018567); ECF No. 24-14 at 320-321 (Rvsd Plan – 00004170-71) ("While the UFB is still listed, activities on USFS or BLM lands require section 7 consultation and preparation of a National Environmental Policy Act (NEPA) document, both of which can stipulate measures to avoid and minimize impacts to the UFB."). The Court is thus unpersuaded by Petitioners' request to, in effect, superimpose the requirements for approving site-specific projects onto its review of the more general Forest Plan at issue here.

In sum, Petitioners' challenges to individual coarse-filter components are unavailing. Petitioners have not carried their burden of establishing these components were inadequate or violated the law. Rather, the Court finds the USFS exercised its prerogative to determine whether fine-filter components were necessary to provide for the key ecological conditions to contribute to the recovery of the UFB. *See* 36 C.F.R. § 219.9(b)(1). Here, where that analysis "requires a high degree of technical expertise," the Court properly "defer[s] to the informed discretion of the responsible agency." *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 361 (1989). The Court "must uphold the agency's action if it has articulated a rational basis for the decision and has considered

relevant factors." *Copart, Inc. v. Admin. Review Bd.*, 495 F.3d 1197, 1202 (10th Cir. 2007) (quotation omitted).

This Court has reviewed the articulated bases for the agency's action. Petitioners have not shown that the analysis was erroneous or that it was unreasonable for the USFS to conclude that the components in the 2020 Plan sufficiently facilitate the recovery of the UFB and that additional fine-filter components are not necessary. Petitioners have not, for example, identified record evidence that counters the USFS's position, demonstrates the agency entirely failed to consider an important aspect of the problem, or shows the USFS's determination "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43. A mere difference in view concerning the USFS's conclusion is not enough to establish that the removal of the fine-filter components, or exclusion of fine-filter components, was arbitrary and capricious. *See Citizens' Comm.*, 513 F.3d at 1176 (noting that a presumption of validity attaches to agency action, and the burden of proof rests with the party challenging the action). Thus, Petitioners' argument that the agency action violated NFMA is unavailing.

C. NEPA Claims

Petitioners allege that the Forest Service violated NEPA by (1) failing to take a hard look at the plan's effects on the lynx; (2) failing to take a hard look at the plan's effects on the UFB; and (3) failing to adequately analyze reasonable alternatives regarding the designation of two special interest areas in the Forest. The USFS maintains

that it satisfied NEPA's procedural requirements. The Court will address each of the Petitioners' arguments in turn below.[20]

1. Hard Look at the Effects of the 2020 Plan on Lynx

In 2008, the USFS adopted the Southern Rockies Lynx Amendment ("SRLA"), which applied to the Forest and established goals, objectives, standards, and guidelines for protecting lynx against several risk factors, including human use projects and vegetation management projects. ECF No. 24-5 at 201 (Rvsd Plan – 00001034). The SRLA divides the lynx habitat in the Forest into lynx analysis units ("LAUs"), 25-50 square-mile areas designed to represent the home range of a theoretical female lynx. ECF No.

[20] The agency briefly mentions the possibility that Petitioners' NEPA claims are not ripe for adjudication. *See* ECF No. 35 at 35 (arguing that "[t]o the extent that Petitioners have concerns about the effect of snow compaction from motorized travel or other projects on lynx, they can raise those concerns during the NEPA process for a future, site-specific project" and that "[u]ntil then, any complaints about the effects on lynx of snow compaction from motorized travel are not ripe") (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)).

The Court acknowledges that the Tenth Circuit has cited with approval cases suggesting that "general challenge[s] to the sufficiency of [a] forest plan [are] not ripe" and instead that only "site-specific claims" or challenges alleging specific or concrete harms are justiciable. *See San Juan Citizens All. v. Stiles*, 654 F.3d 1038, 1048 (10th Cir. 2011) (citing *Wilderness Soc. v. Thomas*, 188 F.3d 1130, 1133 (9th Cir. 1999)); *see also id.* at 1048 (quoting *Sierra Club v. Robertson*, 28 F.3d 753, 758–59 (8th Cir.1994) for the proposition that Petitioners do "not have standing to challenge [a] Forest Plan" when the plan is merely a "'general planning tool' that d[oes] 'not effectuate any on-the-ground environmental changes'").

But the Court would distinguish *San Juan Citizens* from the present case. That case concerned a substantive NEPA challenge—an assertion that the forest plan at issue there "permitted excessive logging and clearcutting." *Id.* at 1046. The NEPA claims here, as Petitioners note, are procedural—whether the USFS "adequately assessed the Revised Plan's effects" on lynx and the butterfly and whether the agency examined a "reasonable range of alternatives." *See* ECF No. 39 at 20, 22. The Supreme Court in *Ohio Forestry Association, Inc. v. Sierra Club* distinguished between the ripeness analyses for substantive and procedural challenges to agency action. *See* 523 U.S. 726, 737. There, the plaintiff's substantive challenge under the NFMA to the agency's forest plan was unripe because the plan had not yet been implemented at the site-specific level. *Id.* at 739. But the Court specifically distinguished its holding from cases where procedural injuries are alleged, explaining that, by comparison, a person injured by "a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get riper." *Id.* at 737. Because the claims here, unlike those in *San Juan Citizens* and *Ohio Forestry*, allege completed procedural violations under NEPA, this Court concludes they are ripe.

24-5 at 210 (Rvsd Plan – 00001044). LAUs are used to implement and assess conservation measures in quantifiable terms. For example, SRLA Standard-VEG-S2 permits logging on only 15% of an LAU. *See* ECF No. 24-5 at 202 (Rvsd Plan – 00001036).

The SRLA did not anticipate a spruce beetle epidemic beginning in 2004, which affected vegetation within the lynx habitat. *See* ECF No. 29 at 35. In 2013, the USFS commissioned a study by Dr. John Squires and other top lynx researchers to examine how the lynxes in the fir forests of the Southern Rockies were affected by the spruce beetle epidemic ("Squires study"). In 2018, based on an interim report from the Squires study,[21] the USFS redrew the LAUs in 2018. The 2018 update showed a significant change from the prior 2011 maps, with a decrease in available suitable habitat in LAUs ranging from 0.1% to 59.8%, and an average percent decrease in available suitable habitat of 24%. ECF No. 24-15 at 167–68 (Rvsd Plan – 00005377–78).

Another factor affecting the lynx population in the plan area is recreational use of snowmobiles. Snowmobile use and road and trail grooming for snowmobile access result in snow compaction. ECF No. 25-12 at 100 (Rvsd Plan – 00017923). Snow compaction can disrupt normal interspecies competition by mitigating the lynx's predatory advantage from its uniquely adapted paws suited to walking over deep, uncompacted snow. In recognition of the threat of snow compaction for lynx populations, SRLA limits the permissible areas of "consistent snow compaction" and the circumstances under which

[21] The final Squires study was published in 2020. ECF No. 29 at 36 (citing Rvsd Plan – 00024254).

the agency can allow expansion. ECF No. 24-5 at 207 (Rvsd Plan – 00001041, SRLA Guideline HU G10) ("Designated over-the-snow routes or designated play areas should not expand outside baseline areas of consistent snow compaction, unless designation serves to consolidate use and improve lynx habitat").

In 2016, the USFS performed an analysis that "resulted in a new map of snow routes and suspected compacted routes for the Forest." ECF No. 25-12 at 100 (Rvsd Plan – 00017923). From this map, the USFS determined that "the compacted routes [as identified in 2016] [we]re believed to be similar to the 2008 [SRLA] baseline,"[22] although "total routes used by snowmobiles had nearly doubled." ECF No. 25-12 at 100 (Rvsd Plan – 00017923).

When the agency redrew the LAU map in 2018, it factored in not only the vegetation data from the Squires study but also snow compaction trends from the baseline conditions of the 2008 SRLA.[23] The agency did not, however, calculate new

[22] "Baseline [compaction] conditions" are the permissible "miles of groomed over-snow routes, i.e., compacted snow" in the Forest set by the SRLA. *See* ECF No. 25-12 at 100 (Rvsd Plan – 00017923). The snow compaction baseline is "not to be exceeded without following the objectives and guidelines in the *Human Uses* section of the [SRLA] and documenting the rationale for this deviation." ECF No. 25-12 at 100 (Rvsd Plan – 00017923).

[23] The USFS maintains that it "used 2008 baseline conditions for snow compaction *and* the 2016 map of routes and suspected compacted routes to generate the 2018 update" to the LAU map. ECF No. 35 at 34 (citing Rvsd Plan – 00017923, 00004377). The cited portions of the administrative record do not necessarily support this position. The portion of page 17923 on which the USFS appears to rely states only that "[a]dditional GIS work completed in 2016 resulted in a new map of snow routes and suspected compacted routes for the Forest," not that this new map was later used to redraw the LAUs. ECF No. 25-12 at 100. And the portion of page 4377 on which the USFS relies notes that "[i]n February 2018, baseline habitat conditions within the planning area were updated using the most recent corporate GIS data." ECF No. 24-15 at 167. But this statement appears in the section concerning the Squires study on the spruce beetle epidemic—discussion of snow compaction occurs pages later in another section of that document. *See* ECF No. 24-15 at 171 (Rvsd Plan – 00004381). Instead, it appears that the agency may have concluded that snow compaction conditions in 2016 resembled the 2008 conditions and, on that basis, decided it was

snow compaction values. *See* ECF No. 25-11 at 647 (Rvsd Plan – 00017604) (noting that "baseline [snow] compaction conditions were not recalculated" when the agency remapped the LAUs). Instead, the agency appears to have relied on 2008 baseline snow compaction data in generating the 2018 update. *See* ECF No. 35 at 35 (arguing Petitioners did not show "the 2008 baseline conditions could not be relied on to generate the 2018 update used to analyze the effects of winter motorized recreation on lynx").

In turn, the agency used the updated 2018 LAU map for its NEPA analysis of the 2020 Forest Plan. The agency did emphasize, though, that "all projects that implement the new forest plan should undergo a compaction analysis where proposed actions interface with the newly remapped LAUs to meet the requirements of the Southern Rockies Lynx Amendment (SRLA)." ECF No. 25-11 at 647 (Rvsd Plan – 00017604).[24]

Petitioners argue that the USFS violated NEPA by "fail[ing] to take the requisite hard look at the effects of the [2020 Plan] on lynx" when it "failed to disclose and apply updated information regarding the location of LAUs." ECF No. 29 at 35. This failure, Petitioners maintain, resulted in an inadequate analysis of "the Revised Plan on lynx in the context of winter motorized recreation." ECF No. 29 at 38. In other words, Petitioners believe that the agency did not apply its 2018 update for snow compaction to the 2018 LAU map, meaning that the agency was not considering the new locations of the LAUs

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not necessary to update the 2018 LAU map for any changes in snow compaction levels. *See* ECF No. 35 at 35 (arguing that Petitioners did not show that "the 2008 baseline conditions could not be relied on to generate the 2018 update used to analyze the effects of winter motorized recreation on lynx").

[24] The agency also noted that it planned to complete "baseline remapping of compaction and the overlap with associated LAUs . . . as soon as practical." ECF No. 25-11 at 647 (Rvsd Plan – 00017604).

when analyzing the effects of the 2020 Plan's winter motorized recreation components on lynx. *See* ECF No. 39 at 19.

The agency maintains that it used the best available information in the EIS, "which consisted of baseline conditions from the Southern Rockies Lynx Amendment (SRLA), and a 2016 map of snow routes and suspected compacted routes," to create the 2018 update for snow compaction. ECF No. 35 at 33. Then, the agency explains, it reasonably concluded that the compacted routes as identified in 2016 were similar to the 2008 baseline. ECF No. 35 at 34. Presumably, the agency's position is that if the compacted routes were similar in 2008 and 2016, it could adequately assess the likely effects of the winter motorized recreation components of the 2020 Plan without recalculating snow compaction values for the updated LAU locations in the 2018 map.

Petitioners maintain that the agency's approach—analyzing the effects of the winter motorized recreation components on lynx without first updating the 2018 LAU map for changes in snow compaction levels—was arbitrary and capricious. ECF No. 39 at 19. They contend that to properly analyze those effects would not require USFS to create new data but rather merely to use the data available to it. ECF No. 39 at 18 ("[T]he issue is not the unavailability of data but the failure to utilize the data already before the agency.").

The Court agrees that the request to integrate the updated snow compaction route map and updated LAU map appears reasonable at first blush. But Petitioners do not explain, and it is not clear from the record, why a failure to do so would constitute a

procedural defect sufficient to overcome the presumption of validity attaching to the agency's analysis. It is not apparent exactly how the 2018 LAU map changed in relation to the 2008 map. The Court understands that there was a 24% decrease in suitable habitat from the prior map, and that some LAUs had been abandoned while others had been used more heavily because of the spruce-beetle pandemic. *See Defs. of Wildlife*, 94 F.4th at 1222. But Petitioners neither assert nor explain why it was unreasonable, unlawful, or patently incorrect for the agency to determine that it was either not necessary or not practicable to recalculate compaction conditions for the new LAU locations. The agency explained that the decision was justified by its determination that there had been no significant changes in the compaction routes and noted that it was committed to "remapping of compaction and the overlap with associated LAUs . . . as soon as practical." ECF No. 25-11 at 647 (Rvsd Plan – 00017604). Petitioners have provided no non-speculative basis for the Court to doubt this explanation.

The best available science/information standard "requires the agency to 'seek out and consider all existing scientific evidence relevant to the decision' and to not 'ignore existing data.'" *Defs. of Wildlife*, 94 F.4th at 1234 (quoting *Ecology Ctr., Inc. v. USFS*, 451 F.3d 1183, 1194 n.4 (10th Cir. 2006)). But although the agency must use "good science—that is reliable, peer-reviewed, or otherwise complying with valid scientific methods," the Court lacks scientific expertise and thus "afford[s] especially strong deference to the agency's choice of 'which data are the most accurate, reliable, and relevant.'" *Id*. (quoting *Ecology Ctr., Inc.*, 451 F.3d at 1194 n.4). And the requirement that agencies use the best

scientific and commercial data available "does not require an agency to conduct new studies when evidence is available upon which a determination can be made." *Heartwood, Inc. v. U.S. Forest Serv.*, 380 F.3d 428, 436 (8th Cir. 2004); *see also Ecology Ctr.*, 451 F.3d at 1194 n.4. It is clear from the record that the USFS considered and applied what it considered to be the best available science in approving the revised Forest Plan.

Petitioners have not demonstrated that data needed to map the 2018 snow compaction onto the 2018 LAUs was available, or that it was incorrect for the agency to determine such recalculation was not necessary given the minimal changes in snow compaction routes since 2008. In the absence of any such demonstration, Petitioners' argument appears to be more of a methodological quibble or "a flyspeck than an accusation of arbitrariness or capriciousness." *High Country Conservation Advocs.*, 52 F. Supp. 3d at 1189. "The deference we give agency action is especially strong where the challenged decisions involve technical or scientific matters within the agency's area of expertise." *See San Juan Citizens All. v. Stiles*, 654 F.3d 1038, 1045 (10th Cir. 2011) (internal quotations omitted). Therefore, the Court will not disturb the agency's action based on an unelaborated assertion that it was arbitrary and capricious for the agency not to re-analyze and re-map data for every possible condition affecting every species protected by the 2020 Forest Plan.

2. Hard Look at Effects of the 2020 Plan on UFB

Petitioners allege the USFS violated NEPA by failing to take the requisite hard look at the effects of the 2020 Plan on the UFB. In support, Petitioners essentially restate their argument that the exclusion of fine-filter components from the 2020 Plan violated the NFMA and APA. *See* ECF No. 29 at 40. They maintain that "[t]he agency failed to provide any explanation of why it removed the fine-filter components in the Revised Plan or demonstrate that it took the hard look at the impacts of its action as NEPA requires." ECF No. 29 at 40 (citing *Richardson*, 565 F3d at 704 ("In considering whether the agency took a 'hard look,' we consider only the agency's reasoning at the time of decisionmaking.")).

The Court is unpersuaded by this argument, for largely the same reasons as it determined the USFS exclusion of the fine-filter components was not arbitrary and capricious under NFMA. Recall, the "hard look" standard requires that the agency must in its EIS "consider 'any adverse environmental effects. . . utilizing public comment and the best available scientific information.'" *Biodiversity*, 762 F.3d at 1051. The "hard look" standard "ensures the 'agency did a careful job at fact gathering and otherwise supporting its position.'" *Id*. (quoting *Richardson*, 565 F.3d at 704).

As the Court explained, the agency action is entitled to a presumption of validity. The agency need not, as Petitioners imply, "demonstrate that it took the hard look at the impacts of its action that NEPA requires," ECF No. 29 at 40; rather, Petitioners must demonstrate that it did not. *See Citizens' Comm.*, 513 F.3d at 1176. The Court has already determined that Petitioners did not carry their burden of demonstrating that the agency

acted unreasonably or incorrectly when it determined that coarse-filter components would suffice to protect the UFB and omitted or consolidated fine-filter components from the draft version when revising the plan. The Court, as it explained, will not infer from the mere fact that the draft version included components that could be characterized as fine-filter components that the agency conceded that such fine-filter components were necessary. And the Court has considered and rejected Petitioners' complaints regarding the specific coarse-filter components they identified as inadequate.

Thus, as explained above, the Court finds the Petitioners did not establish a NEPA violation concerning the agency's analysis of the UFB.

3. Reasonable Range of Alternatives

Finally, Petitioners argue that USFS violated NEPA by failing to adequately analyze a reasonable range of alternatives in the final EIS. *See* ECF No. 29 at 41. Recall, under NEPA, an EIS must contain a detailed statement regarding alternatives to the proposed action. 42 U.S.C. § 4332(2)(C)(iii). The agency must "[r]igorously explore and objectively evaluate *reasonable* alternatives" for the proposed action. 40 C.F.R. § 1502.14(a) (emphasis added).

However, "NEPA does not require agencies to analyze the environmental consequences of alternatives it has in good faith rejected as too remote, speculative, or impractical or ineffective." *Richardson*, 565 F.3d at 708 (internal quotations omitted). And the agency need not analyze alternatives that are not "significantly distinguishable" from alternatives already considered. *Id.* at 711. To determine whether a challenged EIS

analyzed all "reasonable alternatives," courts consider (1) whether the proposed alternative "falls within the agency's statutory mandate," and (2) whether the proposed alternative would reasonably fulfill the "agency's objectives for a particular project." *Id*. at 709. "The APA's reasonableness standard applies both to which alternatives the agency discusses and the extent to which it discusses them." *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1166 (10th Cir. 2002).

Petitioners contend the USFS failed to adequately consider two of their proposed Special Interest Areas ("SIAs"). "National Forest System lands within the Forest boundary have been divided into nine management areas, each with a different emphasis that is intended to direct management activities on that particular piece of land. Management area allocations are specific to the areas across the Forest with similar management needs and desired conditions." ECF No. 24-5 at 62 (Rvsd Plan – 00000896). SIAs are one category of management area; other categories include scenic byways, ski-based resorts, and research areas. *See* ECF No. 24-5 at 62 (Rvsd Plan – 00000896). The 2012 Planning Rule allows the responsible official to "determine whether to recommend any additional areas for designation." 36 C.F.R. § 219.7(c)(2)(vii).

In December 2017, Petitioners commented on the draft plan and draft EIS, proposing the designation of two additional special interest areas: the Spruce Hole/Osier/Toltec Special Interest Area ("Spruce Hole SIA") and the Wolf Creek Pass SIA. ECF No. 29 at 43, 46. The Spruce Hole SIA area, they argue, provides "a key movement path for a variety of wildlife species between southern Colorado and northern

New Mexico." ECF No. 29 at 43. As part of the Spruce Hole proposal, Petitioners proposed eighteen plan components. ECF No. 29 at 43-44. The Wolf Creek Pass SIA area, they argue, is a "primary lynx linkage area" and "provides some of the most expansive habitat in the Southern Rockies" for lynx. ECF No. 29 at 46.

Petitioners assert that the two proposed SIAs were "reasonable alternatives" and that the USFS did not consider them adequately to fulfill NEPA's requirements. *See* 40 C.F.R. § 1502.14 (requiring the agency to "[r]igorously explore and objectively evaluate reasonable alternatives to the proposed action, and, for alternatives that the agency eliminated from detailed study, briefly discuss the reasons for their elimination"). The agency seems to argue that the proposed SIAs were not "reasonable" alternatives and that it was therefore excused from performing a detailed analysis of their likely effects in the EIS. *See* ECF No. 35 at 42–43 (applying the two "guideposts" from *Richardson* and concluding that "it was not arbitrary and capricious for the Forest to decline to consider every alternative proposed by the public").

Under the first guideline from *Richardson*, Petitioners argue designating the Spruce Hole and Wolf Creek Pass SIAs would have fallen "within the agency's statutory mandate" of implementing NFMA to "'maintain or restore the ecological integrity of terrestrial and aquatic ecosystems and watersheds in the plan area . . . to maintain or restore their structure, function, composition, and connectivity.'" ECF No. 29 at 44 (quoting 36 C.F.R. § 219.8(a)) (emphasis omitted). Petitioners also note the agency's statutory mandate under the 2012 Planning Rule to "'determine whether to recommend

any additional areas for designation'" under the Forest Plan. ECF No. 29 at 45 (quoting 36 C.F.R. § 219.7(c)(2)(vii)). Petitioners believe designating the Spruce Hole SIA—which facilitates the connectivity of different areas—and the Wolf Creek Pass SIA—which is a key habitat for lynx—falls within the agency's statutory mandate.

The USFS disagrees, arguing that this *Richardson* first factor "does not point in a clear direction," because while the statutory mandate requires Forest Plans to provide for the diversity of plant and animal species, it also requires Forest Plans to provide for multiple use, sustained yield, and other economic and environmental impacts of renewable resource managements. ECF No. 35 at 42. The agency appears to argue that its mandate is to balance competing interests, not to attempt to maximize one interest at the expense of others, and that it permissibly concluded those alternatives would not reasonably permit it to balance the interests set forth by statute.

The Court finds the first *Richardson* guideline favors Petitioners. The Forest Service's statutory mandate grants it broad discretion to "manage the national forests for multiple uses, including outdoor recreation, range, timber, watershed, and wildlife and fish purposes." *High Country*, 951 F.3d at 1224 (internal quotations omitted). Thus, like the Tenth Circuit in *High Country*, the Court has "little trouble concluding" here that the proposed alternatives, which would provide for species diversity and wildlife habitat connectivity, "fall[] within the Forest Service's statutory mandate." *See* 951 F.3d at 1224.

Under the second guideline from *Richardson*, Petitioners argue the designations "would meet 'the agency's objectives' for revising the plan," because the agency is

required to develop plan components that provide for wildlife connectivity and a diversity of plant and animal communities in the plan area. ECF No. 29 at 45 (quoting *Richardson*, 565 F.3d at 709). Petitioners note each of the proposed SIAs would have fulfilled that objective—the Spruce Hole SIA would promote connectivity among areas and the Wolf Creek Pass SIA would supplement the protections of SRLA by protecting linkage areas. ECF No. 29 at 45–46. The USFS responds that the "objective for the Forest Plan is multiple use," ECF No. 35 at 43, and emphasizes the "need to revise and update management area designation and plan direction to minimize complexity and promote ecosystem integrity and connectivity," ECF No. 25-11 at 755 (Rvds Plan – 00017712). It seems to argue that designating these additional SIAs would conflict with the objective of minimizing complexity, and therefore that those alternatives would not fulfill the agency's objectives. *See* ECF No. 35 at 43.

The Court agrees with Petitioners that the SIAs "would appear to fit within the stated project's goals" of promoting ecosystem integrity and connectivity. *See High Country*, 951 F.3d at 1224. The *possibility* that an alternative would be inconsistent with an objective of the agency is not a sufficient basis to reject that alternative as unreasonable; instead, it seems the alternative must "necessarily violate" an agency objective to be unreasonable under the second guideline. *See Richardson*, 565 F.3d at 710 (holding that "an alternative that closes the [area] to development does not necessarily violate the principle of multiple use," and therefore that "the multiple use

provision of [the Federal Land Management Policy Act was] not a sufficient reason to exclude [the] alternative[] from consideration”).

Because both guidelines favor a finding that the Spruce Hole and Wolf Creek Pass SIAs were reasonable alternatives under *Richardson*, the Court agrees with Petitioners that the agency was not excused from considering those alternatives in the final EIS. However, the USFS maintains that even if the two SIAs *were* reasonable alternatives, its analysis fulfilled the requirements of NEPA. *See* ECF No. 35 at 43–44. The agency argues that its analysis of other alternatives adequately explained its decision not to designate the Spruce Hole and Wolf Creek Pass SIAs. ECF No. 35 at 43–44 (quoting ECF No. 29 at 36) (arguing that “[o]ne of the alternatives [it] considered in detail, Alternative D, . . . included Petitioners’ desired Spruce Hole SIA” and that Alternative D facilitated the same objectives as both the Spruce Hole SIA and the Wolf Creek Pass SIA—of “‘foster[ing] wildlife migration and connectivity for large game species’”). Then, because Petitioners did not “offer any rationale for how their alternatives for two additional SIAs” were “significantly distinguishable” from alternatives already considered, the agency would conclude that Petitioners have not shown the agency was required to separately analyze the two proposed SIAs. ECF No. 35 at 44.

a) Spruce Hole SIA

Petitioners acknowledge that the USFS discussed the Spruce Hole SIA in the final EIS but maintain that the discussion was “cursory” and failed to discuss Petitioners’ fifteen proposed plan components. ECF No. 29 at 44. The USFS correctly notes that the final

EIS considered five alternatives in detail, Alternatives A, B, B Modified, C, and D—and that alternative D included the Spruce Hole SIA. ECF No. 35 at 39. The final EIS discussed Alternative D and the Spruce Hole SIA and explained why, specifically, the Spruce Hole SIA was not recommended for designation. ECF No. 25-12 at 199-200 (Rvsd Plan – 00018022-23). First, the agency noted, "the wildlife values represented by the Spruce Hole/Osier/Toltec area [we]re adequately protected through sections of the plan dealing with species of conservation concern; federally listed, proposed, and candidate species; and plants and wildlife." ECF No. 25-13 at 129 (Rvsd Plan – 00018405). Second, "the creation of additional special interest areas would increase the complexity of management areas in contradiction of Revision Topic 3, which was included in the need for change." ECF No. 25-13 at 129 (Rvsd Plan – 00018405).

The Court concludes that Petitioners have not discharged their burden of showing the USFS's selection and discussion of alternatives here was arbitrary and capricious. The USFS needed not analyze the Spruce Hole SIA separately from its analysis of Alternative D unless the two options were "significantly distinguishable." *Richardson*, 565 F.3d at 711. In relevant part, the court in *Richardson* held that the agency had failed to analyze a reasonable range of alternatives when it had considered only an alternative of no development in the plan area *as a whole* rather than considering an alternative of no development for a specific portion of the plan area that "represent[ed] a small portion of the overall plan area." *Id*. at 711. The court concluded the agency had acted arbitrarily

and capriciously in failing to consider any alternative other than "the obvious extremes." *Id*. at 711 n.32.

This situation here is unlike the one in *Richardson*. Here, the agency *did* "provide legitimate consideration" to a range of alternatives designating different areas and setting forth different components to facilitate competing objectives—it did not merely propose and reject "the obvious extremes." *Cf*. *id*. at 711 n.32; *see also* ECF No. 35 at 43 (noting the multiple objectives of the Forest Plan revision and explaining that the alternatives were meant to balance "ecosystem integrity, habitat connectivity, sustainable recreation, wilderness and other special designations, timber suitability and management, risk management, social and economic sustainability, and fire as a management tool").

Petitioners note that "the Spruce Hole SIA would provide an important connectivity area to allow wildlife movement across National Forest System boundaries" and that "[n]owhere else in the Service's NEPA analysis does the agency acknowledge the unique connectivity corridor provided by the Spruce Hole landscape." ECF No. 39 at 24. But aside from arguing that the agency did not verbally acknowledge the unique characteristics of the Spruce Hole area, Petitioners provide no basis for the Court to conclude that Alternative D "would result in significantly different regulatory requirements in terms of environmental protection" or lynx conservation as the Spruce Hole SIA would have alone. *See Colorado Env't Coal. v. Off. of Legacy Mgmt.*, 819 F. Supp. 2d 1193, 1215 (D. Colo. 2011), amended on reconsideration, No. 08-CV-01624-WJM-MJW, 2012 WL 628547 (D. Colo. Feb. 27, 2012) (concluding plaintiffs had not carried their burden of

showing a NEPA violation based on the inadequate consideration of alternatives). The Court is left to speculate about what the regulatory differences might be between the Spruce Hole SIA alone and the Spruce Hole SIA as specified within Alternative D. It declines to do so.[25]

Thus, Petitioners have not sufficiently shown that the option of designating the Spruce Hole SIA was "significantly distinguishable" from the designations in Alternative D. Their argument that the agency violated NEPA on this basis is unavailing.

b) Wolf Creek Pass SIA

Similarly, the Court concludes Petitioners did not discharge their burden of demonstrating the Wolf Creek Pass SIA was significantly distinguishable from the alternatives the agency considered in the final EIS. The agency considered as an alternative but eliminated from detailed study the designation of Wolf Creek Pass SIA. It explained that "[b]ecause linkage areas and associated direction are adequately identified in the Southern Rockies Lynx Amendment, no additional plan direction [wa]s included." ECF No. 25-11 at 611 (Rvsd Plan – 00017568). The SRLA provides management direction through "an objective, standard, and guidelines that apply to all projects within linkage areas in occupied habitat[s]." ECF No. 25-11 at 612 (Rvsd Plan – 00017569). Therefore, the agency appeared to conclude, designation of the Wolf Creek Pass SIA

[25] Petitioners have similarly not shown the fifteen suggested plan components included in their proposal regarding the Spruce Hole SIA would have had significantly different regulatory implications from Alternative D. Therefore, the Court cannot conclude the agency improperly omitted that portion of the proposed alternative from detailed consideration.

would either have been redundant with the protections of SRLA[26] or would not have promoted the objectives of balancing competing interests in the plan area. If the former were true, the addition of the Wolf Creek Pass SIA would not have significantly altered the no action alternative, in which SRLA was presumably in effect. If the latter were true, the Wolf Creek Pass SIA alternative would not be reasonable, and the agency would not be required under 40 C.F.R. § 1502.14 to analyze it in detail. In any event, Petitioners have not shown the agency failed to analyze a reasonable range of alternatives by eliminating the Wolf Creek Pass SIA from detailed study.

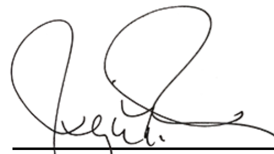
The Court finds that Petitioners have not demonstrated the USFS failed to consider a reasonable range of alternatives when it discussed and rejected the two proposed SIAs.

V. CONCLUSION

For these reasons, the Court **DENIES** the Amended Petition (ECF No. 14). The Clerk is directed to **CLOSE** this case.

DATED: December 13, 2024.

BY THE COURT:



REGINA M. RODRIGUEZ
United States District Judge

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[26] The agency also argues now that the Wolf Creek Pass SIA alternative is not significantly distinguishable from Alternative D. *See* ECF No. 35 at 42–43. But that explanation appears to be a *post hoc* rationalization, which the court cannot consider. *See Motor Vehicle Mfrs.*, 463 U.S. at 50. The Court considers the rationale the agency provided at the time, which was essentially that the Wolf Creek Pass SIA alternative was not significantly distinguishable from SRLA. ECF No. 25-11 at 611 (Rvsd Plan – 00017568).