

USDA Forest Service, Region 2
Rocky Mountain Region
Attn: Objection Reviewing Officer
P.O. Box 18980
Golden, CO 80402
Submitted online via: <https://cara.ecosystem-management.org/Public/CommentInput?Project=51255>

RE: OBJECTION to Medicine Bow Landscape Vegetation Analysis Project (LAVA Project) #51255 Modified Final Environmental Impact Statement and Reissued Draft Record of Decision

To the Objection Reviewing Officer:

WildEarth Guardians, the Center for Biological Diversity and the Sierra Club Wyoming Chapter respectfully submit the following objection to the U.S. Forest Service's April 2020 Modified FEIS (hereafter, "MFEIS") and Reissued Draft Record of Decision (hereafter, "Reissued 2020 DROD") that identifies Alternative 2, the Modified Proposed Action, as the preferred alternative for the LaVA Project on the Medicine Bow-Routt National Forest. The Responsible Official is Russell M. Bacon, Forest Supervisor.

The Forest Service made some changes to the proposed LaVA Project and its analysis in the MFEIS in response to certain issues identified in 2018 comments and 2019 objections from the public. However, we were very disappointed to see that those changes are minimal, and the proposed action in the Reissued DROD as analyzed in the MFEIS still suffers from major flaws. Indeed, we were very disappointed to see the Forest Service re-issue its DROD for this project at all, given the extensive concerns raised in previous comments and objections. In fact, this reissued DROD and MFEIS appear to include very limited substantive changes to improve the April 2019 draft decision, instead merely adding verbiage (and at times eliminating important scientific information) to bolster the agency's prior decision and assumptions.

The LaVA Project authorizes various actions such as clearcutting, prescribed fire, and hand treatments on up to 360,000 acres on the Sierra Madre and Snow Range Mountain Ranges, including actions within portions of Inventoried Roadless Areas ("IRAs"). The Forest Service states the LaVA Project is needed to mitigate hazardous fuel loading, provide for recovery of forest products, enhance forest and rangeland resiliency to future insect and disease infestations, protect infrastructure and municipal water supplies, restore wildlife habitat, enhance access for forest visitors and permittees, and provide for human safety. The LaVA Project proposes to use a conditions-based analysis under which individual treatments will be authorized in pre-defined treatment opportunity areas over a 15-year period beginning in 2020 and ending in 2035. Authorization and implementation of individual treatments, including the actual locations and site-specific details about impacts, would be guided by an adaptive implementation and monitoring framework, but those decisions will receive no future site-specific NEPA analysis.

Specifically, the LaVA Project will include:

- Up to 95,000 acres of clear cutting;
- Up to 165,000 acres of uneven-aged or intermediate treatments;
- Up to 100,000 acres of other vegetation treatments (cutting green trees that are diseased, have reached culmination of mean annual increment; prescribed burning non-forested lands; removing conifer encroachment); and
- Construction of up to 600 miles of temporary roads.

Changes to the LaVA Project and Analysis

In its 2020 legal notice, the Forest Service states that modifications to the Modified Proposed Action are based on comments received during the comment period for the DEIS (July to August, 2018) and the objection process (April to May, 2019) and include but are not limited to:

- Clarifying the Modified Proposed Action to describe and depict where management actions and treatments would be emphasized during project implementation;
- Adding a monitoring plan and tracking mechanisms to Appendix A (Adaptive Implementation and Monitoring Framework);
- Clarifying IRA exemptions and where mechanical treatments may occur; and
- Prohibiting commercial activity in the Sheep Mountain Wildlife Refuge.

In addition, the Forest Service states that no more than 75 miles of temporary roads will be allowed open at one time, but the DROD still authorizes up to 600 miles of temporary roads. And the Forest Service's project website includes numerous new or revised specialist reports and documents, including but not limited to: (1) Feb. 20, 2020 Wildlife Biological Assessment for Canada lynx; (2) March 2020 Transportation Report; and (3) April 2020 Biological Evaluation. What's more, there have been advances in science and new understandings of law since the previous objection period that highlight additional new information that was not available during prior comment periods.

In this objection letter we identify concerns with the revised proposal, and also identify new issues based on new information that arose after the opportunities to comment closed in August of 2018. 36 C.F.R. § 218.8(c). Of particular concern is the continued failure to: (1) disclose site-specific impacts, (2) take a hard look at impacts including climate change, (3) consider reasonable alternatives in detail, (4) ensure future public involvement, and (5) demonstrate compliance with NEPA, the National Forest Management Act ("NFMA"), the Clean Water Act ("CWA"), or the Endangered Species Act ("ESA").

The lead objector, as required by 36 C.F.R. § 218.8(d):

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Interests of Objectors

WildEarth Guardians is a nonprofit conservation organization with offices in six states throughout the western United States. Guardians has more than 300,000 members and supporters across the United States and the world. Guardians protects and restores the wildlife, wild places, wild rivers, and health of the American West. For many years, WildEarth Guardians advocated for the Forest Service to maintain a balance between access, risks, impacts, and costs when managing its road system. We continue to advocate for that balance here, and are particularly concerned about the authorization of up to 600 miles of new temporary roads. We are also concerned that the Forest Service demonstrates compliance with all federal laws in analyzing and approving this project.

WildEarth Guardians' staff, members, and supporters use and enjoy the Medicine Bow National Forest and the lands within the LaVA Project area for recreation, photography, spiritual renewal, wildlife watching, and other activities. Guardians has and continues to advocate for greater protection of wild places and wildlife on public lands. WildEarth Guardians participated in the public process for this project by submitting scoping comments (August 17, 2017), DEIS comments (August 20, 2018), and an objection (May 17, 2019). Because many of the issues identified in Guardians' May 2019 objection were not addressed by the Regional Recommendations or changes to the MFEIS and Modified Appendix A, these objection points remain equally relevant to this MFEIS and Reissued DROD. These objection points are included herein.

The **Center for Biological Diversity** is a non-profit environmental organization with over 1.7 million members and supporters nationwide who value wilderness, biodiversity, old growth forests, and the threatened and endangered species which occur on America's spectacular public lands and waters. Center members and supporters use and enjoy the Medicine Bow National Forest for recreation, photography, nature study, and spiritual renewal. Headquartered in Tucson, Arizona, the Center has offices in Denver, Colorado.

The Center for Biological Diversity believes that the welfare of human beings is deeply linked to nature — to the existence in our world of a vast diversity of wild animals and plants. Because diversity has intrinsic value, and because its loss impoverishes society, the Center works to secure a future for all species, great and small, hovering on the brink of extinction. The Center does so through science, law and creative media, with a focus on protecting the lands, forests, waters and climate that species need to survive. The Center has and continues to actively

advocate for increased protections for species and their habitats across the Rocky Mountain West.¹

The Sierra Club is a nonprofit environmental organization with more than 3.6 million members and supporters throughout the United States, including nearly 5,000 members and supporters who reside in Wyoming. Since 1892, Sierra Club has worked to help people enjoy, explore and protect the planet, while practicing and promoting responsible and sustainable use of the earth's resources. Sierra Club Wyoming Chapter members and supporters regularly use the Medicine Bow National Forest for a wide variety of recreational activities, including camping, hiking, hunting, fishing, wildlife viewing, Nordic and backcountry skiing, snowshoeing, nature photography, bird watching, mountain biking, and enjoyment of solitude.

Maintaining the opportunity to enjoy these activities in a natural backcountry setting is very important to our constituency. We deeply value wild places and want significant areas of our national forests to ecologically function as they have for millennia, without highly visible and intrusive management by humans, and we do not expect our experiences in nature to be risk free. Our constituency does not want the majority of our national forests to be commercially developed, crisscrossed with roads in high density, or managed to the point of no longer offering meaningful opportunities for remote experiences or providing high quality wildlife habitat. Sierra Club Wyoming Chapter has participated in every step of the public process for the LaVA project, submitting scoping comments in 2017, DEIS comments in 2018, an objection in 2019, and an objection resolution meeting in 2019.

OBJECTION ISSUES

1. The Forest Service has provided inadequate time for meaningful review and objection.

The Forest Service failed to provide adequate time for meaningful review and objection. WildEarth Guardians submitted an email requesting additional time, and in the alternative a new round of objection.² The Forest Service denied the request.³

The Forest Service claims the entire action is a HFRA project, and thus gives 30 days to object.⁴ But there are parts of the proposal that are not authorized as a HFRA fuel reduction project

¹ 36 C.F.R. § 218.5(a) states that "Individuals and entities ... who have submitted timely, specific written comments regarding a proposed project or activity that is subject to these regulations during any designated opportunity for public comment may file an objection." The Forest Service did not provide an opportunity for the Center or any member of the public to file comments of any kind on the analysis in the Modified Final EIS and proposed in the revised draft ROD. Therefore, the Center may object to Modified Final EIS and revised draft ROD. In addition, Forest Service regulations allow objectors to raise issues not raised in prior comments where "the issue is based on new information that arose after the opportunities for comment." 36 C.F.R. § 218.5(c). Again, the Center raises issues based on the Modified Final EIS and the revised draft ROD, which arose after all opportunities for comment had ended.

² See May 8, 2020 email correspondence with Forest Supervisor Bacon (Attachment 14).

³ *Id.*

⁴ 36 C.F.R. § 218.8.

(see, e.g., WildEarth Guardians' May 2019 objection letter, pages 3-4), and therefore the Forest Service should have provided 45 days to object.⁵

Further, more than 30 days is necessary for the public to meaningfully review and respond to changes--especially in light of the large spatial scope and temporal extent of this project, and current "stay at home" orders due to the COVID-19 pandemic. Due to state "stay at home" orders to control the spread of COVID-19, many members of the public are now working from home, without childcare or similar support for the regular course of business.⁶ These circumstances are ongoing throughout the entirety of this objection period warrant providing more than 30 days for the public to review and object.

Indeed, the Forest Service itself required more than a 30-day response period to respond to objections raised in 2019.⁷ The Forest Service conducted additional analysis in the MFEIS and revised specialist reports over the course of almost one year.⁸ Plus, the Forest Service continued to add new reports and documentation to the analysis tab on the project website after the objection period began (for example, a "Final" Transportation Report on May 7, 2020, "Final" Invasive Plants Report on May 1, 2020, FWS concurrence on April 20, and Barrett Cr. Stream Health assessment, in addition to others).⁹ The public needs more than 30 days to meaningfully review these numerous changes and provide an informed objection. At the very least, the public should be given 30 days from the date all documentation on the project website is final to review and object. It is unreasonable to expect the public to continue checking for updates to project documentation in addition to reviewing the already voluminous project materials during the 30-day objection period.

2. The Forest Service fails to clearly identify changes in April and May 2020 documents, precluding meaningful public review and objection.

The Forest Service should clearly delineate any and all changes since the prior FEIS and DROD to allow for meaningful and informed public comment. The objection reviewing officer directed the Forest Service to make specific changes, some which are listed below and others of which are incorporated throughout this objection. Unfortunately, the Forest Service simply listed the

⁵ *Id.*

⁶ See, e.g., April 3, 2020 U.S. Forest Service, Washington Office, COVID-19 Pandemic New Comment or Objection Filing Period Guidance to Regional Foresters (Attachment 12) (noting "[s]everal factors can make public engagement exceptionally challenging" during the pandemic, including but not limited to "[r]eductions in capacity within stakeholder organizations"; "State, county, reservation, or city-wide stay-at-home orders"; and "A nation focused on economic hardship, loss of employment and wealth, risk to themselves, family and friends, and the strains placed on society generally.").

⁷ See Reissued DROD at 6 (noting the Forest Service needed more than the HFRA 30 days to review and analyze regional recommendations to respond to public concerns and strengthen the analysis in response to objections).

⁸ *Id.*

⁹ See Forest Service webpage for LaVA project (providing links to specialists reports prepared after April 2020, the date of the FEIS's completion, for: Barrett Creek stream health, invasive plants, inventoried roadless areas, management indicator species, silviculture, socioeconomics, soils, transportation, and wildlife; and a modified Adaptive Implementation and Monitoring Framework).

reviewing officer's directions in its DROD, but did not clearly demonstrate how it responded to that direction, much less clearly indicate the changes in the Reissued DROD or MFEIS with redlines or some other means.

The Forest Service's April 10, 2020 legal notice lists some changes since 2019, and then states that additional modifications are described in MFEIS. Table 1 in Chapter 1 of the MFEIS outlines a summary of changes in the MFEIS,¹⁰ but does not provide specifics about what those changes were meant to address and does not connect the changes to the reviewing officer's directions identified in the Reissued DROD. The public is left to sift through the numerous documents, and to compare them with prior versions, to determine whether and to what extent the agency responded to public comment, objection, and the reviewing officer's directions. This lack of clarity makes it very difficult for the public to discern what has changed since 2019. This is especially concerning given the tight deadline of only 30 days to review and object.

For example, in response to concerns that the analysis failed to consider a range of reasonable alternatives, the objection reviewing officer recommended the Forest Service clarify which alternatives were considered and include the rationale for eliminating them from detailed study. The Forest Service states that it added language to explain compliance with HFRA's requirements for considering alternatives, added language clarifying why an alternative that addressed Dr. Cohen's methods was eliminated, and added a new alternative explaining why not harvesting dead lodgepole pine does not meet the purpose and need.¹¹ These changes are referenced but not clearly identified in the MFEIS, making it very difficult for the public to understand whether and how the Forest Service revised or added to prior analysis. And the updated analysis still fails to consider a reasonable range of alternatives and provide rationale for eliminating alternatives that would meet (even portions of) the purpose and need.

3. The Forest Service fails to comply with NEPA, by failing to adequately or fully address and respond to comments in a meaningful way.

The National Environmental Policy Act (NEPA) requires agencies to "pause before committing resources to a project and consider the likely environmental impacts of the preferred course of action as well as reasonable alternatives."¹² NEPA has twin aims: "First, it places upon an agency the obligation to consider every significant aspect of environmental impact of a proposed action. Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process."¹³ NEPA's requirements apply to hazardous fuel reduction projects.¹⁴

Failure to adequately or fully address and respond to comments in a meaningful way

¹⁰ See MFEIS at 3-6.

¹¹ MFEIS at 16.

¹² *N.M. ex rel. Richardson v. Bureau of Land Management*, 565 F.3d 683, 703 (10th Cir. 2008) (quoting *U.S. Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 756-57 (2004)).

¹³ *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 711 (10th Cir. 2010).

¹⁴ See 16 U.S.C. § 6514.

NEPA requires agencies preparing an EIS to “assess and consider comments both individually and collectively” and respond “by one or more of the means listed . . . stating its response in the final statement”: “(1) Modify alternatives including the proposed action[;] (2) Develop and evaluate alternatives not previously given serious consideration by the agency[;] (3) Supplement, improve, or modify its analyses[;] (4) Make factual corrections[;] (5) Explain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency’s position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response.”¹⁵

The Forest Service failed to adequately respond to WildEarth Guardians comments. As just one example, Guardians’ scoping and DEIS comments urged the Forest Service to consider the recommendations from the Medicine Bow National Forest’s Travel Analysis Reports (submitted as attachments to our Scoping comments) during project analysis to identify a minimum road system and unneeded roads that could be decommissioned under the proposed action.¹⁶ In response, the Forest Service explains, “the ‘Transportation’ section of chapter 3 was revised to better reflect the potential direct, indirect, and cumulative effects of the alternatives on the existing road system.”¹⁷ The analysis in the MFEIS discusses general road conditions, and provides estimates for the cost of maintenance and reconstruction, but the analysis lacks any mention of a minimum road system, fails to identify unneeded roads and proposes no decommissioning of system roads.¹⁸ The Forest Service also fails to provide any explanation for why it is not considering the recommendations in forest-wide travel analysis report, identification of the minimum road system, or road decommissioning in either its analysis in the FEIS or response to comments in Appendix B. The Forest Service completely fails to address its duty to comply with the Travel Management Rule under Subpart A, and ignores the bulk of WildEarth Guardians comments and concerns.¹⁹ The MFEIS cures none of these deficiencies.

4. The Forest Service must cure the FEIS’s deficiencies with a supplemental DEIS, not an MFEIS.

NEPA requires the preparation of a supplemental EIS when there is significant new information concerning the proposed action or its effects.²⁰ As explained throughout this objection, the changes to the analysis and documents relied on by the analysis (including specialist reports, BE, and BA) are significant enough to require a revised DEIS for which the Forest Service should provide for an additional public comment period. Because the changes to the analysis include more than simply accounting for new information, this is also not the appropriate situation for a Supplemental Information Report (SIR) or similar.

¹⁵ 40 C.F.R. § 1503.4.

¹⁶ Guardians’ Scoping at 1-4, Guardians’ DEIS comments at 13-15.

¹⁷ FEIS Appendix B at 8.

¹⁸ FEIS at 330-333.

¹⁹ 36 C.F.R. § 212.5(b)

²⁰ 40 C.F.R. § 1502.9(c).

Regardless, neither NEPA, nor CEQ's implementation regulations, nor the Forest Service's NEPA regulations define, describe, or envision anything titled a "modified" EIS.²¹

5. The Forest Service fails to maximize large tree and old growth retention as required by the Healthy Forest Restoration Act.

The reviewing officer directed the Forest Service to "[a]ugment the analysis in the environmental impact statement to demonstrate compliance of the modified proposed action with Sections 602(d) and (e) of the Healthy Forests Restoration Act."²² The Forest Service explains the 602 sections are applicable to the LaVA project, and the original 2019 DROD was in error.²³ The Forest Service also states that it supplemented the silviculture section in its analysis to address retention of large trees.²⁴ Yet, even with the augmented analysis and clarifications, the Forest Service still fails to demonstrate how it will comply with the requirements under HFRA to retain large trees. The agency states that "[o]utside of mapped and inventoried old growth, large live trees will be retained as appropriate for the forest type."²⁵ Yet, it then lists all the exceptions to this direction, explaining it does not apply in the following:

- spruce/fir stands that receive shelterwood treatments;
- lodgepole stands that do not receive irregular shelterwood harvest; or
- aspen, mixed conifer and Ponderosa pine stands that receive even-age treatments.²⁶

In these instances, the agency asserts that other forest plan direction adequately provides for large live tree retention, but then lists the minimum requirements for snag retention and continuing recruitment post-harvest.²⁷ What the analysis fails to explain is how these minimum requirements satisfy HFRA's direction to maximize large tree retention as required under Sec. 602(e). The Forest Service fails to explain how the desired conditions for snag retention and continuing recruitment translate into keeping enough live, large trees "to the extent that the trees promote stands that are resilient to insects and disease." For example, the spruce/fir requirements direct retaining "[a]t least 3 [trees] per acre over 25 feet or largest available."²⁸ Yet, the analysis fails to demonstrate how this direction maximizes retaining large, live trees per HFRA's requirements. It appears the Forest Service is establishing a minimum, rather than a maximum, threshold. Further, even if the Forest Service had explained how the minimum desired conditions listed in Table 108 of the MFEIS satisfied HFRA's mandate to maximize keeping large trees, the Forest Service provides exemptions:

²¹ For example, the word "modified" does not appear in the Forest Service NEPA Handbook Ch. 20 (on EISs), although the handbook envisions draft and supplemental EISs. Forest Serv. Handbook 1909.15, Ch. 23.3.

²² Reissued 2020 DROD at 7.

²³ MFEIS at 16.

²⁴ *Id.* at 17.

²⁵ MFEIS at 189.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

- “When using prescribed fire, and in treatments to reduce fuel in urban interface areas, it will be acceptable that snag retention and snag recruitment standards may not be met.”
- “If insufficient snags are available to meet the minimum diameter level in this table, retain the largest snags available. If insufficient snags are available, retain the higher number in the range of recruits/acre (above) to compensate. Not applicable to lodgepole pole sized stands.”
- “As described in table 1-11 large live trees are required to be retained except when conducting fuels treatments in urban interface areas or when using prescribed fire as a treatment method.”²⁹

HFRA does not exempt prescribed fire or treatments in the urban interface, and the exemptions listed in the augmented analysis fails to demonstrate how the reissued DROD complies with HFRA’s large tree retention requirements. Likewise, the Forest Service cannot rely on the Silviculture Report Addendum or augmented analysis in the MFEIS to satisfy HFRA’s old growth requirements under 602(e). The agency attempts to crosswalk a Forest Service publication describing old growth attributes with Table 108 by asserting, “[o]ne of the attributes is decadence in the form of broken or deformed tops or bole and root decay. These attributes describe trees preferred to leave as snag recruits as described in the table above.”³⁰ That same report lists several other attributes:

- large trees for species and site;
- variation in tree sizes and spacing;
- standing and down dead trees;
- multiple canopy layers; and
- gaps in the tree canopy and understory patchiness.³¹

The agency cannot focus on just one old growth attribute or characteristic and the minimum requirements displayed in Table 108 as a demonstration of HFRA compliance. The Forest Service fails to demonstrate how it accounts for each of these attributes, and in fact acknowledges that “[n]o modifications were made to the modified environmental impact statement relative to the analysis of old-growth stands.”³²

6. The Forest Service transportation analysis violates the Travel Management Rule and NEPA.

Travel Management Rule Compliance

²⁹ Silviculture Report Addendum (Oct. 2019) at 2.

³⁰ MFEIS at 189.

³¹ Mehl, M.S. 1992. Old-growth description for the major forest cover types in the Rocky Mountain Region. In Old-growth forests in the Southwest and Rocky Mountain Regions - Proceedings of a workshop. USDA Forest Service, Rocky Mountain Forest and Range Experiment Station. Fort Collins, CO.

³² MFEIS at 17.

Our previous comments and objection explained that the Forest Service should have included identifying a minimum road system and unneeded roads in its purpose and need statement, and analyzed an alternative that implemented a minimum road system in the project area.³³ The Forest Service continues to assert that it need not consider Subpart A in the LaVA project's purpose and need, or in any alternative.³⁴ As such, the Forest Service still fails to meaningfully reply to our comments or provide a reasonable range of alternatives in the MFEIS and Reissued DROD.

Temporary Roads

Our previous objection explained that the Forest Service failed to provide the requisite hard look analysis NEPA requires to disclose the environmental consequences from the construction and use of up to 600 miles of temporary roads, and failed to demonstrate that the agency will be able to ensure their removal.³⁵ In response, the reviewing officer provided the following recommendations:

- Clarify in the record of decision: a) the estimated miles of temporary roads that may be needed, by year, based on annual treatment estimates over the life of the project; and b) the projection and analysis tools that were used to estimate the volume, scope, and scale of temporary road access.
- Develop a limit to the number of temporary roads that may be open at one time.
- Create a temporary roads checklist within Appendix A: Adaptive Implementation and Monitoring Framework.³⁶

In response to the reviewing officer's recommendations, the Forest Service proposes to limit temporary road miles open at any given time to 75 miles, changed several sections of the MFEIS to reflect this limit, and included a workbook in Appendix A to track miles of planned, opened, and closed temporary roads.³⁷ In reviewing the reissued DROD and Appendix A, we did find the workbook template, and a checklist that includes one question asking if the treatment will utilize temporary roads.³⁸ However, the reissued DROD did not clarify the estimated miles of temporary roads that may be needed by year over the life of the project, or the tools to estimate the volume, scope and scale of temporary road access, thus failing to comply with the reviewing officer's recommendation.³⁹ The Forest Service fails to provide any rationale for defying the reviewing officer.

³³ Guardians' 2019 objection at 4-5, 26-27.

³⁴ MFEIS at 17-18.

³⁵ Guardians' May 2019 objection at 18, 20-21.

³⁶ MFEIS at 25.

³⁷ MFEIS at 25.

³⁸ Reissued 2020 DROD, Appendix A at 25, 30.

³⁹ This failure also violates NEPA's "hard look" mandate because the Forest Service continues to fail to take the required hard look at the impacts of temporary road construction.

Further, simply limiting the number of temporary roads *open* in a given year does not necessarily limit their *construction*, since the agency could close the road until needed. The length of time a temporary road could persist on the ground is still very much unclear since the design features only direct that “rehabilitation of temporary roads will occur within 3 years after the vegetation management treatments have been completed. (DF-RdT-1).”⁴⁰ The Forest Service’s clarification actually demonstrates the significant amount of time a temporary road can cause impacts. “Temporary roads are typically in service for 1 to 4 years and then closed and rehabilitated within 3 years (LaVA Project design feature: timing #1), with 1 to 5 years for ground cover to effectively reduce erosion and runoff to pre-disturbance conditions.”⁴¹ This is not short term.

The programmatic nature of the LaVA MFEIS and reissued DROD precludes the delineation of specific treatment areas or their duration, and as such the length of time that temporary roads may be present or open is still unclear, but the potential for long term impacts is high. The Forest Service recognizes that long term effects are those that occur beyond five years, and it is possible numerous closed and rehabilitated temporary roads could negatively affect water quality for up to 12 years by the agency’s own analysis.⁴² In other words, limiting the length of open temporary roads at any given time to 75 miles does little to address our original concerns and objection to their construction and use. The Forest Service seems to assert that temporary roads only have an impact when open, which discounts the harm from construction and the fact that even when closed, roads still have significant harmful environmental consequences as we explained in previous comments.⁴³

In order to address any potential negative environmental consequences from temporary road construction and use, and to ensure effective post-project rehabilitation, the Forest Service continues to rely on its Adaptive Implementation and Monitoring Framework. Such reliance fails to adequately respond to our previous objection noting the framework cannot replace the need for site-specific analysis:

These responses fail to adequately respond to our comments, namely due to the lack of site-specific information regarding where the Forest Service will actually authorize temporary road construction, but also because the FEIS lacks any supporting evidence regarding the history of previous temporary road removal and how well timber sale purchasers met the reclamation requirements.⁴⁴

⁴⁰ Reissued 2020 DROD, Appendix A at 62.

⁴¹ MFEIS at 319.

⁴² *Id.* See also *id.* at 408 (defining “long term” as five years).

⁴³ See WildEarth Guardians 2017 scoping comments citing Attachment E, The Wilderness Society, Transportation Infrastructure and Access on National Forests and Grasslands: A Literature Review (May 2014), and the Forest Service’s General Technical Report synthesizing the scientific information on forest roads (Gucinski 2001).

⁴⁴ Guardians’ May 2019 Objection at 20-21.

We acknowledge the monitoring components and decision-making triggers put in place to limit temporary road construction in the event purchasers fail to decommission them.⁴⁵ While we generally support such monitoring, it does not address our concerns that decommissioning treatments themselves must be effective and ensure the road no longer persists on the landscape. The Forest Service design features fails to require fully recontouring the road, rather they list potential rehabilitation treatments that include a variety of actions. To provide for erosion control, the design features direct fully recontouring temporary roads, but to address compaction, they direct ripping the road.⁴⁶ Then, for post treatment standard operating procedures, the Forest Service directs the following:

*Ensure temporary roads are obliterated appropriately and adequately. Methods for obliterating temporary roads **may** include the following (DF RdEC-1, DF RdEC-2, DF RdEC-3, DF RdCom-1, DF RdVis-1, DF RdT-1, DF RdT-2, MON-8b):

- o Re-contouring the road
- o Ripping and scarifying the roadbed
- o Removing culverts
- o Installing drainage features
- o Creating physical barriers to preclude motorized travel
- o Scattering wood and rock debris onto the road
- o Applying seed and mulch to the area
- o Posting signs prohibiting travel⁴⁷

To be clear, the best method for rehabilitating any road, system or temporary, is through full recontouring in order to completely remove it from the landscape.⁴⁸ Guardians completed an update to the literature review we provided in previous comments and cite to in our past objection that provide several studies documenting the benefits of fully recontouring roads for ecological restoration, and we provide that with this objection.⁴⁹ The Forest Service needs to clarify that all temporary roads will be recontoured and treated to fully remove them from the landscape.

Flawed 2020 Transportation Report

The 2019 DROD and FEIS contained an incomplete transportation report.⁵⁰ The objection reviewing officer directed the Forest Service to revise the Transportation Report Appendix A (BMPs), Appendix B (engineering design guidelines), and Appendix C (road definitions and

⁴⁵ Reissued 2020 DROD, Appendix A at 54 (Decision trigger 11: “Do not allow new temporary road construction until more than 95% (yellow light trigger) of constructed temporary roads have been effectively decommissioned within 3 years.”).

⁴⁶ *Id.* at 62.

⁴⁷ *Id.* at 78, (emphasis added).

⁴⁸ MFEIS at 325 (Noting, “decommissioning returns a road to a natural state when it is completely removed from the landscape.”).

⁴⁹ See Attachment 7, The Environmental Consequences of Forest Roads and Achieving a Sustainable Road System. March 2020 at 27-29.

⁵⁰ MFEIS at 26.

standards) to incorporate specifics about temporary roads.⁵¹ In response, the Forest Service stated it made no modifications to the MFEIS, and instead produced a supplemental transportation report to include the missing appendices.⁵² The additional information fails to resolve our previous objection and concerns about the use, construction, or reconstruction of both temporary and system roads.⁵³ For example, the supplemental transportation report includes the same table as the original report displaying road reconstruction costs for ML 1-5 system roads and construction costs for system roads.⁵⁴ Yet, we explained:

The revised Transportation Report includes cost estimates for maintenance level 1-5 roads and temporary roads, but fails to consider, disclose or discuss long term funding expectations to support the road system. The transportation analysis also fails to specify the number of currently closed roads that would be opened or reconstructed under the proposed action.⁵⁵ Without this information, the analysis does not disclose, and the Forest Service cannot determine, the potential environmental consequences from reconstruction activities, from new and increased traffic, or assess the effectiveness of its proposed mitigation measures.⁵⁶

Providing estimated reconstruction costs does not address the need for the Forest Service to demonstrate its capacity to maintain its current road system to standard, especially since deferred maintenance may result in significant harmful environmental consequences. The gap in analysis is a serious concern given “[l]evel 1-5 reconstruction and maintenance costs are largely paid by the Agency.”⁵⁷

Further, listing BMPs and engineering design guidelines in the transportation report does not address our previous objection questioning their effectiveness. The Forest Service guidelines and directives, along with the Water Conservation Practices Handbook, have been in place for years, yet studies show the Forest Service cannot assume successful implementation and effectiveness of those BMPs.⁵⁸ Simply listing BMPs and providing project design features does not alleviate the agency’s duty to demonstrate their success through site-specific analysis, especially given evidence of past failure and questionable effectiveness due to changing climate conditions.⁵⁹

By simply assuming successful implementation and effectiveness of BMPs, guidelines and directives, without evidence to these assumptions, the Forest Service also fails to disclose the

⁵¹ *Id.*

⁵² *Id.*

⁵³ Guardians May 2020 Objection at 18 - 22.

⁵⁴ Medicine Bow Nat’l Forest, Transportation Report Landscape, Vegetation Analysis (LaVA) (May 2020), at 7, Table 3.

⁵⁵ FEIS at 288.

⁵⁶ Guardians May 2020 Objection at 19.

⁵⁷ MFEIS at 332.

⁵⁸ The Environmental Consequences of Forest Roads and Achieving a Sustainable Road System. March 2020 (Attachment 7) at 25-26.

⁵⁹ *Id.*

potential harmful environmental consequences NEPA requires. In fact, the Forest Service provides an example of a previous failure in its LaVA Supplemental Information on Temporary Road Water Resources Effects. The specialists report shows that one year after a road was blocked and water barred in the Soldier Summit Timber Sale, monitoring revealed runoff and erosion during a just moderate rainfall event.⁶⁰ The Forest Service provides this evidence to demonstrate the proposed design features directing temporary road decommissioning will prevent future instances of such failures, but the analysis fails to account for more frequent storm events and increased precipitation due to climate change.⁶¹ Further, the BMPs, guidelines and directives added to the specialists' report include direction for treating system roads during location, construction, use, maintenance and storage (where applicable), yet the Forest Service only focuses its analysis on temporary roads, further violating NEPA's hard-look requirements.

7. The LaVA project's flawed 2020 Wildlife Biological Assessment violates NEPA, the ESA, and NFMA.

Violates NEPA

As noted above, the Forest Service fails to identify the changes made between this 2020 Wildlife BA and the previous, February 2019 Wildlife BA.⁶² This makes it difficult if not impossible for the public to understand the response, if any, to concerns raised in prior comments and objection. It also prevents meaningful public comment in violation of NEPA.

Based on a side-by-side comparison of the February 2019 Wildlife BA and the new April 2020 Wildlife BA, it appears the Forest Service:

- added information in the environmental baseline, including information related to linkage corridor vegetation.⁶³
- added information to the environmental consequences section.⁶⁴
- broke out the tables with separate titles (increasing the number, but essentially retaining the same content), and it increased the number of figures identified.⁶⁵
- added justification for not analyzing impacts to Preble's meadow jumping mouse.⁶⁶

⁶⁰ Landscape Vegetation Analysis Supplemental Information on Temporary Road Water Resources (Mar. 4, 2019) at 2.

⁶¹ See climate change discussion in Appendix 7 at 12-20.

⁶² See also 2020 Wildlife BA at 16 (noting the BA reflects slight modifications to the project after objection review and Forest Service internal review, but failing to identify those modifications in the BA analysis itself).

⁶³ 2020 Wildlife BA, pages 20-26.

⁶⁴ *Id.* at 28-50.

⁶⁵ *Id.* at 3.

⁶⁶ *Id.* at 9-15.

But the substance of the analysis, assumptions, and conclusions appear to be essentially the same as the 2019 Wildlife BA. Thus, the issues identified in our first objection letter remain valid (and are included herein). Namely:

The biological assessment improperly concludes the project will have no effect on Preble's meadow jumping mouse, endangered Wyoming toad, threatened piping plover, endangered least tern, endangered whooping crane, endangered pallid sturgeon, endangered bonytail chub, endangered Colorado pikeminnow, endangered humpback chub, endangered razorback sucker, and threatened yellow-billed cuckoo. Because the Forest Service fails to provide site-specific information about the location, timing, and extent of vegetation treatments and roads (system and temporary), neither the public nor the decisionmaker is able to discern how those actions relate to wildlife or its habitat, and are precluded from meaningful analysis on these impacts.

At bottom, without site-specific information and analysis, the analysis in the Wildlife BA is flawed and fails to allow for meaningful public comment, much less informed decision making in violation of NEPA. For example, without knowing where the up to 95,000 acres of clear cuts might occur across the Treatment Opportunity Areas, much less in relation to the 13 LAUs and two linkage corridors within the project area, it is impossible to meaningfully comment on this project or the Forest Service's analysis in this Wildlife BA.

Violates the ESA

The Forest Service states its analysis in the Wildlife BA conforms to the ESA's legal requirements. It concludes that the LaVA project may affect, and is likely to adversely affect Canada lynx. But the analysis is flawed and does not meet the requirements of the ESA for several reasons, including but not limited to failing to consider relevant factors (including the site-specific impacts of each of the different treatment types, either individually or in the cumulative, and cumulative impacts from extensive use of SRLA exemptions and exceptions), failing to analyze whether the project will inhibit the survival and recovery of lynx, relies on a vague and hypothetical description of the proposed action that prevents meaningful analysis of impacts, relies on inadequate and unduly speculative conservation and mitigation measures that are not reasonably specific, certain to occur, capable of implementation, or enforceable, and fails to use the best available science. By failing to disclose site-specific information or analysis of the actual activities that will occur, it fails to evaluate the potential effects of the proposal on listed or proposed species and critical habitats, as required by the ESA.

The Forest Service asserts the Canada lynx is the only ESA listed species affected by the LaVA Project. But this project is proposed for a duration of 15 years, with actions on up to 360,000 acres. Wildlife is not stationary. During the course of this time, it is highly likely that many of the ESA listed species in Table 1 of the Wildlife BA will change location. By limiting the effects analysis to whether actions are proposed in habitat that is currently identified as suitable is unreasonable for a project of this scope and temporal duration. The Forest Service improperly

fails to consider impacts to Preble's meadow jumping mouse, and the justification for eliminating the mouse from further analysis in the 2020 Wildlife BA is flawed.⁶⁷

In response to concerns that the Forest Service failed to consider impacts to suitable Preble's meadow jumping mouse habitat, the objection reviewing officer directed the Forest Service to (1) provide a map of the location of Preble's meadow jumping mouse habitat in the BA, (2) clarify in the analysis which accounting units contain suitable habitat and provide a location in the description of the affected accounting unit, and (3) clarify that treatment opportunities would not occur in Preble's meadow jumping mouse habitat. In response, the Forest Service added a new map, Figure 9 (Preble's meadow jumping mouse area of influence).

One major flaw is that the Forest Service still assumes no impacts will occur to Preble's meadow jumping mouse simply based on a lack of geographic overlap between Treatment Opportunity Areas for vegetation management and the mouse's Area of Influence. The analysis in the Biological Assessment states:

The Area of Influence (AOI) within the LaVA project area ranges up to 8400 feet. This is 800 feet elevation above any Preble's meadow jumping mouse captured in Wyoming and 300 feet above any current Preble's meadow jumping mouse capture (8100 ft.). The Area of Influence also extends well above the 100-year flood plain, another indicator of potential Preble's meadow jumping mouse habitat (USDI 2014). Still, to ensure that LaVA implementation could not possibly result in an impact to a Preble's meadow jumping mouse, the Design Criteria prohibits any LaVA vegetation management within the entire Preble's meadow jumping mouse Area of Influence. This will increase the no vegetation management area by 766 acres. The Design Criteria states "No treatment will occur in the Preble's meadow jumping mouse Area Of Influence that occurs in the LaVA project area" (Figure 6), located adjacent to the upper Laramie River in the southeast corner of the Fox Wood accounting unit. This area occurs within Township 13 North, Range 77 West, section 33 and Township 12 North, Range 77 West, section 04." Additionally, the pre-implementation checklist includes an item to review each individual LaVA project to ensure they do not occur in this Area of Influence. These measures will continue to ensure there are no remotely possible impacts to Preble's meadow jumping mouse because treatment will be excluded to the limits of any potential geographic distribution of Preble's meadow jumping mouse, above the known elevation distribution of Preble's meadow jumping mouse, and well above the 100-year flood plain.⁶⁸

This ignores numerous impacts, including but not limited to direct, indirect, and cumulative impacts from log hauling trucks and other equipment using existing system and new temporary roads to access specific treatment units, especially if those roads cut through Preble's meadow

⁶⁷ See 2020 Wildlife BA at 9-15.

⁶⁸ 2020 Wildlife BA at 14-15.

jumping mouse suitable habitat. None of the maps in the Biological Assessment show Preble's meadow jumping mouse suitable habitat or area of influence in relation to treatment opportunity areas, forest roads to access treatment areas within those treatment opportunity areas, or locations of possible temporary roads. The Biological Assessment ignores this relevant factor.

The Forest Service could have adopted a measure prohibiting new road construction in Preble's meadow jumping mouse suitable habitat to avoid these impacts. The fact that the Forest Service did not do so indicates that such impacts may occur and must be disclosed and consulted upon. But without site-specific information or analysis of the actual treatment units, it is impossible for the public to locate where and how this would be a problem. Reliance on project design criteria and the Framework is insufficient to mitigate all impacts to the mouse or its habitat. The lack of information masks impacts that will become reasonably foreseeable during implementation, but well after the close of public comment and completion of ESA consultation. This lack of information highlights the pitfalls, and arbitrary and capricious nature, of the Forest Service's conditions-based approach to such a large scale, long-term project.

Violates NFMA

The revised Wildlife BA still fails to demonstrate compliance with Southern Rockies Lynx Amendment (SRLA) or the 2003 Medicine Bow Forest Plan in violation of NFMA, and suffers from many of the flaws identified in our first objection letter.⁶⁹ Without site-specific information and analysis, it is impossible for the Forest Service to demonstrate compliance with SRLA and the Medicine Bow Forest Plan.

The agency notes that its proposed actions could occur in 13 LAUs and two linkage corridors (Snowy Range and Northgate). It states that vegetation management will occur in currently unsuitable habitat, nonhabitat, and suitable lynx habitat in the LAUs, relying on exemptions and exceptions to SRLA standards. But what type of vegetation management will occur in suitable lynx habitat, in the LAUs generally, and in linkage corridors? Which SRLA components will apply to these actions?

The Forest Service states that there will be 11,573 acres of exemptions. It states there will be 3,978 acres of the 1% precommercial thinning exceptions. It is unclear what assumptions the Forest Service is relying on to calculate compliance with the 1% precommercial thinning exception under the SRLA. If the Forest Service is comparing the almost 4,000 acres to the total project area for a project lasting 15 years, this is unreasonable, and not what was intended when the SRLA was finalized. This would under-estimate the reliance on that exception. And the Forest Service states that there will be 2,893 acres of exception for incidental damage to winter snowshoe hare habitat. We reiterate the concerns identified in our first objection letter regarding the extensive use of these exemptions and exceptions, especially when the SRLA

⁶⁹ See WildEarth Guardians May 2019 objection letter, pages 35-37.

analysis did not anticipate such extensive use of these exemptions and exceptions in a single project authorization.

These number are not calculated based on a worst-case scenario, but rather on the Forest Service's own opaque assumptions about yet-to-be determined locations of vegetation management. Tiering to the consultation conducted under the SRLA does not resolve the Forest Service's need to conduct site-specific analysis to consider and disclose the impacts of its proposed actions both for purposes of NEPA and the ESA. Because the Forest Service does not yet know precisely which of the acres of mapped lynx habitat will be treated, it should take the conservative approach of assuming that *all* lynx habitat in the project area will be treated. Without more detailed information, the Forest Service's estimated numbers for acreage of LAUs affected are likely too low and an improper assumption that renders the biological assessment flawed under the ESA.

Given the extensive use of exemptions and exceptions to SRLA standards, the Forest Service should seek a Forest Plan amendment. As it stands, the proposed action violates NFMA.

8. The flawed 2020 Biological Evaluation violates NEPA.

Fails to Identify Changes, Precluding Meaningful Review

The February 2019 Biological Evaluation, Management Indicator Species, and Species of Local Concern Report (hereafter, "2019 BE") totals 254 pages. There are no page numbers throughout the 2019 BE, making it even more difficult to compare with the April 2020 Biological Evaluation, Management Indicator Species, and Species of Local Concern Report (hereafter, "2020 BE"), which totals only 176 pages. Yet a simple comparison of page numbers indicates there are big changes between the two documents. For the 2019 BE, the analysis appears to end on page 228 of the pdf document, references are listed on pages 229-241 of the pdf, and Appendix A (A Review of Literature concerning road impacts to wildlife) is on pages 241-254. For the 2020 BE, the analysis ends at page 146, references are listed on pages 147-157, and Appendix A (A Review of Literature concerning road impacts to wildlife) is on pages 158-168. In addition, the 2020 BE contains some changes to the Tables on pages v to vii, including the addition of Tables listed (breaking out many of the original tables without any apparent modifications to the content itself). Despite these differences, the Forest Service does not highlight or explain its changes between the documents, much less identify in redline the changes. This prevents meaningful public review and comment, violating NEPA.

Fails to Explain Deleted Analysis & Science

Based on a more detailed comparison, it appears the Forest Service deleted analysis and scientific references in the 2020 BE, including a portion of the analysis from the 2019 BE that disclosed differing scientific conclusions regarding large wildfires and protecting the forest or habitat from wildfires. Specifically, starting on page 26 of the 2019 BE the Forest Service states (emphasis in bold added):

For the Draft EIS, some commenters requested clarification on large wildfires and protecting the forest or habitat from wildfires. This brief review of wildfire management science **suggests some varied conclusions among research experts**. Generally, it appears conclusions have changed over time with **more recent studies suggesting mountain pine beetle mortality has little to no influence on fire severity, frequency or size and climatic factors such as increased temperatures and drought are the primary drivers of wildland fire behavior**.

Early research suggested mountain pine beetle outbreaks may trigger stand replacing fire, or alternately, bring about the release of shade-tolerant understory conifers (Waters 1985). Similarly, Crookston and Stark (1985) indicated the standing dead and downed wood resulting from mountain pine beetle epidemics increase the probability and intensity of stand-replacing fires.

More recent research suggested the phase of the MPB outbreak was the most important contributing factor to fire behavior. Gillette et al. (2014) stated “The influence of mountain pine beetle caused tree mortality on wildfire behavior, however, depends primarily on the time elapsed since the outbreak, with wildfire risk initially heightened but diminishing over time. Generally, extreme fire potential exists in stands that have suffered high levels of mountain pine beetle caused tree mortality until the likelihood of torching (the transition of fire from the surface to the canopy) and crowning (spread from crown to crown) are minimized, and this process can take a decade.” With more than a decade passing since the initial MPB outbreak on the Medicine Bow National Forest, **this area is in the gray, needle[-le]ss phase that Gillette et al. described as having less influence on wildfire**.

Recent studies in the western United States have found that the mountain pine beetle (MPB) epidemic across the west has not increased the risk of fire danger (Hart et al. 2015, Fire Science Digest 2012), nor has there been an increase in occurrences of high-fire severity in southern Wyoming (Kulakowski and Jarvis 2011). Another study looked at the effect of salvage logging MPB stands on wildfire. They found that **logging of MPB stands increases fuel surface loads post-harvest and these surface fuels have the potential to exacerbate fire behavior**. In other areas salvage logging removed the forest canopy and thus eliminated the risk of crown fire, but the surface fires that burned through harvested areas had similar effects to crown fires in uncut areas (Rhoades et al. 2018). Jenkins et al. (2008) concludes “...**the interaction of western bark beetles, fuels and fire in forest systems is inherently complex and much remains unknown**...Additionally, differences in the physical environment, stand conditions, the amount and distribution of available fuels, and weather make “one size fits all” management approaches ineffective”.

Romme et al. (2007) provides considerable information on the lodgepole pine and spruce-fir forest types common on this National Forest. They conclude that these forests have always burned infrequently (decade to century-long intervals for lodgepole and century-long for spruce-fir) but at high intensity. **The research suggests insect outbreaks have a little to no effect on fire severity in these forest types.** Additionally, tree-killing insects do not increase the amount of fuels in forested stands but shift fuels from live to dead and **both live and dead fuels carry fire under very dry weather conditions.** Romme et al. points out that recent, severe fires burned under very dry weather conditions, which is considered the norm for the occurrence of these fire events. Kulakowski and Jarvis (2011) also concluded that **dry conditions, rather than fuels associated with outbreaks, influence the occurrence of severe fires.**

This National Forest has averaged 17 fires annually over the past 7 years. These fires have burned an average of 4900 acres annually since 2004 and 10,300 acres annually since 2012. This average is 605 acres/fire/year since 2012. Wildfire soil burn severity is expected to continue at levels similar to the previous 15 years (2003 – 2017). As such, 13% would remain unburned; burn severity would be low on 45% of an affected area; burn severity would be moderate on 35% of an affected area; and severity would be high on 7% of an affected area.

Although it is impossible to predict where and when a fire will start, fires that start within or near treated areas will be more conducive to being managed under the full range of management strategies such as Direct, Perimeter, or Prescription control allowing fire managers and agency decision makers to evaluate and implement the best course of action. Impacts from wildfire will be reduced within the Wildland Urban Interface and infrastructure (Communities at Risk, Municipal Water Supplies, powerlines) by reducing fuels concentrations.

...

In the No Action Alternative strategic options available to fire managers when fires start will remain quite limited due to the risk to firefighters in the form of standing dead trees, as well as the limited effectiveness of ground and aerial firefighting resources resulting from the high amounts of large dead and down fuels due to heavy dead and down fuels, hazard trees and limited access. Fires that start in treated areas are more conducive to direct control response. However, smaller scale treatments at a slower pace are not likely to effectively link past treatments and existing fire scars into a cohesive fuels transition zone where firefighters can work safely and have a higher probability of success. **Still, wildfire management is complex. It would be a bold statement to suggest that large wildfires would occur more often under the no action alternative and impact more wildlife habitat. As stated by Jenkins et al. (2008), "...the**

interaction of western bark beetles, fuels and fire in forest ecosystems is inherently complex and much remains unknown...Additionally, differences in the physical environment, stand conditions, the amount and distribution of available fuels, and weather make “one size fits all” management approaches ineffective”.

This analysis as well as the scientific references cited are completely eliminated from the 2020 BE, without any explanation or mention.⁷⁰ Notably, the deleted analysis acknowledges that drought and dry conditions may have a greater, or at least major, impact on severity of wildfire. It also acknowledges that logging mountain pine beetle stands may actually exacerbate wildfire severity. These acknowledgements highlight the importance of taking a hard look at climate change and drought conditions in the project area, given the purpose and need for the LaVA Project, and also are critical to comparing the environmental effects of the no action and action alternatives.

There is likely additional information removed in the 2020 BE, but due to the lack of information regarding changes it is extremely difficult for the public to identify (much less assess) these changes within the 30-day objection period. For example, sections analyzing “wildfire” impacts within species-specific sections were removed.⁷¹ These changes lack any explanation or justification and are arbitrary and capricious, and make it difficult to understand the impacts to wildlife.

The 2020 BE also eliminates any reference to scientific studies that refute some of the agency’s assumptions and conclusions it relies on in support of the LaVA Project and to support its analysis of impacts to wildlife and wildlife habitat. In particular, the 2020 BE removed disclosure, analysis, or reference to at least (but not likely limited to) the following relevant scientific citations, which contradict some of the BE’s assumptions on the likelihood of wildfire in the wake of beetle-kill:

- Gillette, N.E., D.L. Wood, S.J. Hines, J.B. Runyon, J.F. Negron. 2014. The Once and Future Forest: Consequences of Mountain Pine Beetle Treatment Decisions. *For. Sci.* 60(3): 527-538.
- Hart, S.J., T. Schoennagel, T.T. Veblen, and T.B. Chapman. 2015. Area burned in the western United States is unaffected by recent Mountain Pine Beetle Outbreaks. *Proceed. Natl. Acad. Sci.* 112(14):4375-4380.
- Kulakowski, D. and D. Jarvis. 2011. The influence of mountain pine beetle outbreaks and drought on severe wildfires in northwestern Colorado and southern Wyoming: A look at the past century. *For. Ecol. And Manage.* 262:1686-1696.
- Jenkins, M.J. 2008. Bark beetles, fuels, fires and implications for forest management in the Intermountain West. *For. Ecol and Mgt.* 254:16-34.

⁷⁰ See 2020 BE at 12.

⁷¹ Compare, e.g., 2020 BE at 25 with 2019 BE at 43.

- Romme, W. H., Clement, J., Hicke, J., Kulakowski, D., MacDonald, L. H., Schoennagel, T. L., and Veblen, T. T. 2007. Recent forest insect outbreaks and fire risk in Colorado forests: A brief synthesis of relevant research.
https://www.researchgate.net/publication/237285146_Recent_Forest_Insect_Outbreaks_and_Fire_Risk_in_Colorado_Forests_A_Brief_Synthesis_of_Relevant_Research

And the 2020 BE includes the following scientific citation as a reference, but does not cite to or analyze it anywhere in the document itself:

- Rhoades, C.C., K.A. Pelz, P.J. Fornwalt, B.H. Wolk, and A.S. Cheng. 2018. Overlapping bark beetle outbreaks, salvage logging and wildfire restructure a lodgepole pine ecosystem. *Forests* 9(3):101- 115 (stating that two “Colorado studies along with those conducted elsewhere [57,58] suggest that (1) uncut beetle-infested stands will develop into well-stocked, conifer-dominated forests with more subalpine fir than prior to the beetle outbreak and that (2) salvage-logged, beetle-infested stands will regenerate into pine-dominated stands, similar to those that existed at the time of the outbreak.”).

We question why the Forest Service did not address or consider this study despite referencing it. The Forest Service fails to address the study, including the idea of leaving the affected MPB stands to be restocked or converted to subalpine fir.

The elimination of conflicting science from the BE leads one to conclude that the Forest Service is engaged in a white-wash to ignore science that calls into question the Forest Service’s entire approach, the precise opposite of the hard look NEPA requires.

Flawed Analysis

The 2020 BE states the LaVA Project “will have variable effects” on wildlife of concern⁷², and that potential effects to species will vary from one analysis unit to the next dependent on a variety of factors including how much of the analysis unit is in wilderness or other excluded area, and how much has been treated in prior projects.⁷³ Because both the BE and MFEIS fail to include the necessary site-specific information or analysis, these statements are largely meaningless and only underscore the lack of site-specific analysis in the BE and MFEIS. The 2020 BE fails to provide sufficient analysis to support the MFEIS in meeting NEPA’s requirement to take a “hard look” at impacts from the LaVA Project to Management Indicator Species (MIS) and species of concern. The 2020 BE fails to analyze and determine the likely effects of the proposed action and no action alternative on Forest Service sensitive species. The Forest Service’s analysis also relies on assumptions that run contrary to best available science. For example, without any details to support, the Forest Service assumes that the yet to be determined vegetation management will improve future wildlife habitat compared to what currently exists.

⁷² 2020 BE at 1.

⁷³ See, e.g., *id.* at 87.

We challenge the Forest Service’s assumption and conclusion that tree stands with high tree mortality and a sparse understory provide little habitat quality to terrestrial wildlife, which runs contrary to best available science showing that tree stands with high mortality can and often do provide quality habitat to wildlife of concern.

The agency notes that where management (presumably, burning or logging) occurs in stands of mature live trees or with low to moderate amounts of tree mortality, habitat for wildlife dependent on old forest will decrease in quality or be removed for decades. But because the Forest Service fails to identify specific locations for where management of live trees will occur, it is impossible to understand or assess the impacts to the wildlife of concern supposedly addressed in this 2020 BE.

The Forest Service asserts the LaVA Project *could* accelerate the rate of habitat improvements because it provides a single authorization for 15 years.⁷⁴ In particular, the Forest Service highlights claimed benefits to bighorn sheep, Rocky Mountain elk, and mule deer. This assertion ignores that these are simply habitat improvement *opportunities*, not commitments to habitat improvement. The speculative nature of the proposal, combined with the lack of site-specific information or analysis, is equally detrimental to assessing any potential *positive* impacts from the LaVA Project as it is to assessing negative impacts. What’s more, the analysis improperly assumes that these same benefits would not occur under the no action alternative—improperly ignoring that site-specific individual projects *are* likely to be implemented in the absence of a programmatic 15-year authorization for such projects, and that these site-specific projects may also benefit bighorn sheep, Rocky Mountain elk, and mule deer. Plus, the beneficial impacts of such site-specific projects would be more discernible because they would be based on site-specific information and analysis, providing support for any claimed benefits.

As an example of how the lack of site-specific information and analysis precludes meaningful public comment, for the brown creeper and three-toed woodpecker the Forest Service notes that temporary roads associated with clearcutting under the proposed action will have little impact where tree mortality is high.⁷⁵ This conclusion is based on the agency’s assumptions (noted above) that stands with high tree mortality do not provide suitable habitat for species like brown creeper or the three-toed woodpecker. For snowshoe hare, the revised BE notes that stand initiation and associated temporary roads will eliminate hare habitat in suitable but low-quality habitat.⁷⁶ And it somehow concludes that clear cutting and associated temporary roads to access those clear cuts “could benefit bighorn sheep.”⁷⁷ This, despite acknowledging concerns about bighorn sheep habitat connectivity and declining bighorn populations.⁷⁸ Apparently the Forest Service ignores the “associated temporary roads” that necessarily will

⁷⁴ 2020 BE at 1.

⁷⁵ See 202 BE at 22, 36.

⁷⁶ See 2020 BE at 29.

⁷⁷ 2020 BE at 89.

⁷⁸ See *id.* at 85.

accompany any “stand initiation” clear cuts on up to 95,000 acres, and how those roads will most certainly have negative impacts to bighorn sheep.

The agency’s analysis ignores impacts that will result from truck and equipment hauling on temporary roads (noting only that noise from machinery use will cause “temporary” disruption). It also ignores impacts from the changed landscape of temporary roads even after they are “obliterated and returned to the land base” for certain treatments. Walking through a forest even many years following a logging sale, it is still very easy to spot “temporary” road beds because road construction dramatically alters the landscape, including slope and the type of vegetation that returns.

The Forest Service’s analysis also fails to consider how the location of such roads will result in different magnitudes of impacts to brown creeper, snowshoe hare, three-toed woodpecker, bighorn sheep, and other species. Even with the new 75-mile cap on new temporary roads at any one time, if those 75 miles of roads are located near one another they will likely have far greater cumulative impacts (both in terms of habitat fragmentation but also disruption to wildlife) than if they are spaced far apart. Thus, disclosure of the actual location of individual treatment areas and the roads (both system and temporary) that will be used to access those treatment areas is essential to understanding the reasonably foreseeable impacts to wildlife and wildlife habitat including brown creeper, snowshoe hare, three-toed woodpecker, and bighorn sheep.

9. Fails to consider best available science, including new science.

Analysis in the MFEIS, reissued DROD, and other supporting documents fails to consider the best available science. As noted above, the 2020 BE eliminated analysis and science acknowledging that drought and dry conditions may have a greater impact on the severity of wildfire than mountain pine beetle (MPB) infestation, and that logging MPB stands may actually exacerbate wildfire severity. In addition, the Forest Service still fails to acknowledge or consider science that WildEarth Guardians identified in our comments and objection.

As one example, it does not address a 2018 study that found during MPB outbreaks, beetle choice may result in strong selection for trees with greater resistance to attack, and therefore retaining survivors after outbreaks (as opposed to logging them) to act as primary seed sources could promote adaptation for the forest.⁷⁹ As another example, the Forest Service fails to assess the import of a 40-page report identified in previous comment and objection by Duane Keown, showing no regeneration after some wildfires and only minimal regeneration if there was any due to lack of moisture from climate change.⁸⁰ The Forest Service added a reference to

⁷⁹ See Six, D.L., Vergobbit C. and Cutter M. (2018) Are Survivors Different? Genetic-Based Selection of Trees by Mountain Pine Beetle During a Climate Change-Driven Outbreak in a High-Elevation Pine Forest, *Front. Plant Sci.* 9:993, doi: 10.3389/fpls.2018.00993 (Attachment 1 to WildEarth Guardians’ DEIS comments).

⁸⁰ See Camille Stevens-Rumann et al (Feb. 2018), Evidence for declining forest resilience to wildfires under climate change, *Ecology Letters* (Attachment 21).

this article in the MFEIS list of references, but fails to discuss or address its content in light of the proposed project.

Emerging science shows that warming and drying trends are having a major impact on forests, resulting in tree die-off even without wildfire or insect infestation.⁸¹ Studies show resisting wildfire through fire suppression and fuels management is inadequate, and instead policies promoting adaptive resilience to wildfire are needed.⁸² Simply treating more area may not help to achieve long-term fire and land management goals if wildland fire cannot be safely managed.⁸³ Rather, strategically placing fuel treatments to create conditions where wildland fire can occur without negative consequences and leveraging low-risk opportunities to manage wildland fire are critical.⁸⁴ The Forest Service should also consider new science recognizing the profound effects of historical and contemporary logging of forests on fire severity and frequency.⁸⁵

Analysis in the MFEIS, reissued DROD, and other supporting documents also fails to consider or disclose new science that is directly relevant to the LaVA Project and the stated purpose and need. For example, a 2020 Review in Science examined recent progress in scientific understanding of how the future looks for forests growing in a hotter and drier atmosphere, in light of the high susceptibility of trees to rapid changes in climate.⁸⁶ It notes “the extremely rapid pace of climate change appears to be introducing enormous instability into the mortality rates of global forests.”⁸⁷ The Forest Service must consider climate change, and in particular

⁸¹ See, e.g., Camille Parmesan 2006; Breshears et al. 2005; Allen et al. 2010; Anderegg et al. 2012; Williams et al. 2012; Overpeck 2013; Funk et al. 2014; Millar and Stephenson 2015; Luo and Chen 2015 (“Our results suggest that the consequences of climate change on tree mortality are more profound than previously thought”); Gauthier et al. 2015; McDowell and Allen 2015; Ault et al. 2016 (“business-as-usual emissions of greenhouse gases will drive regional warming and drying, regardless of large precipitation uncertainties”); Zhang et al. 2017; Vose et al. 2016 (“In essence, a survivable drought of the past can become an intolerable drought under a warming climate”).

⁸² See Schoennagel et al. (2017) Adapt to more wildfire in western North American forests as climate changes (Attachment 8).

⁸³ See Barnett (2016) Beyond Fuel Treatment Effectiveness: Characterizing Interactions between Fire and Treatments in the US (Attachment 9); Treatment-wildfire scale (2019) Wildfires RARELY encounter forest fuel treatments in West (Attachment 10).

⁸⁴ See Attachment 9.

⁸⁵ Lindenmayer et al. (2020) Recent Australian wildfires made worse by logging and associated forest management (Attachment 11).

⁸⁶ See Brodribb, T.J., et al. (2020), Hanging by a thread? Forests and drought, Science 368 (6488): 261-266, DOI: 10.1126/science.aat7631 (attached hereto as Attachment 1).

⁸⁷ *Id.* See also Sullivan, B.K. (2020) Climate Adaptation: Warmest Oceans on Record Adds to Hurricanes, Wildfire Risks (Attachment 3); Domke, G.M. et al. (2020) Greenhouse gas emissions and removals from forest land, woodlands, and urban trees in the United States, 1990-2018, Resource Update FS-227 (Attachment 6).

We note that while the Domke (2020) article is helpful in some respects, there are major problems with the wood product pool assumptions and wood substitution that do not comport with new studies. Industry exaggerates the wood substitution and wood store claims. The Domke article does not consider managing forests to protect and maximize stocks, instead focusing on managing forests as a net sink for forest carbon. There is currently an emerging debate between the scientific community and land managers on this issue, with scientists calling for more attention to maximizing stocks and avoiding emissions, thereby maximizing atmospheric carbon stored in

hotter and drier conditions, as uncertain and rapidly changing conditions that may exacerbate the impacts and undermine the stated intent of the LaVA Project under all of the alternatives.

In September of 2019, NASA's Earth Science News Team released an article tracking how the world has increasingly warmed over the past several decades, and its increasing potential to burn.⁸⁸ "High temperature and low humidity are two essential factors behind the rise in fire risk and activity, affecting fire behavior from its ignition to its spread,"⁸⁹ and thus these are two factors the Forest Service should assess in detail in its analysis of the LaVA Project. A new study focused on the western United States and northern Mexico suggests an emerging megadrought, and that climate change is playing a key role.⁹⁰ The authors of the study predict recent droughts are merely the beginning of a more extreme trend toward megadrought as global warming continues. Evidence of a trend toward megadrought in the region of the LaVA Project further highlights the importance of considering science that shows climate change, and in particular hotter and drier conditions, as uncertain and rapidly changing conditions that may exacerbate the impacts and undermine the stated intent of the LaVA Project under all of the alternatives.

A recent study looking at geospatial data and firefighter observations found no effect of red or gray stage MPB outbreak on either daily area burned or observed fire behavior.⁹¹ Instead, the study found greater daily area burned and observations of high-extreme fire behavior occurred during warmer, drier, and windier weather conditions and where pre-outbreak fuels were characterized by lower canopy base heights and greater canopy bulk densities, and suggested efforts to reduce the risk of extreme fire activity should focus on societal adaptation to future warming and extreme weather.

This scientific information is important in light of the stated needs to mitigate hazardous fuel loads, protect infrastructure and municipal water supplies, restore wildlife habitat, enhance access for forest visitors and permittees, provide for human safety, and provide management adaptability and flexibility in the face of uncertainty and rapidly changing conditions. Considering this new science and what it means in terms of reasonably foreseeable impacts from the LaVA Project is especially important given the project duration of 15 years, over the course of which climate change and the hot and dry conditions it is causing are likely to worsen.

The Forest Service improperly ignores much of the science that highlights the importance of taking a hard look at climate change and drought conditions in the project area, given the

forests. Thus, in addition to the information in the Domke article, the Forest Service should consider stocks and not just the net sink.

⁸⁸ See Gray, E., (2019) Satellite Data Record Shows Climate Change's Impact on Fires (attached as Attachment 2).

⁸⁹ *Id.*

⁹⁰ See Krajick, K. (2020) Climate-Driven Megadrought Is Emerging in Western U.S., Says Study (Attachment 4); see also Williams, A.P. et al. (2020) Large contribution from the anthropogenic warming to an emerging North American megadrought, *Science* 368 (6488): 314-318 (abstract included in Attachment 4).

⁹¹ See Hart, S.J. and D.L. Preston (2020) Fire weather drives daily area burned and observations of fire behavior in mountain pine beetle affected landscapes (Attachment 5).

purpose and need for the LaVA Project to respond to changed forest vegetation conditions caused by the bark beetle epidemics on the Medicine Bow National Forest by (1) mitigating hazardous fuel loads, (2) providing for recovery of forest products, (3) enhancing forest and rangeland resilience to future insect and disease infestations, (4) protecting infrastructure and municipal water supplies, (5) restoring wildlife habitat, (6) enhancing access for forest visitors and permittees, (7) providing for human safety, and (8) providing management adaptability and flexibility in the face of uncertainty and rapidly changing conditions.⁹²

10. Fails to address, respond to, or acknowledge opposing scientific views.

NEPA requires agencies to explain opposing viewpoints and their rationale for choosing one viewpoint over another.⁹³ Federal courts have set aside NEPA analysis where the agency failed to respond to scientific analysis that calls into question the agency's assumptions or conclusions. For example, in *High Country Conservation Advocates v. Forest Service*, the District of Colorado concluded the Forest Service violated NEPA by failing to mention or respond to expert report on climate impacts.⁹⁴

Here, in its 2020 BE the Forest Service eliminated reference to and analysis of opposing scientific views regarding the impacts of climate change and drought conditions on the severity of wildfire as compared to insect or disease, and that logging MPB stands may actually exacerbate wildfire severity. The Forest Service also failed to acknowledge or consider additional opposing scientific viewpoints.⁹⁵ The Forest Service's failure to address, respond to, or acknowledge opposing scientific views violates NEPA.

11. The timing, nature, scope, and lack of detailed information make this proposal inappropriate for a project-level NEPA analysis and decision.

Lack of information and analysis

⁹² See Reissued 2020 DROD at 11.

⁹³ 40 C.F.R. § 1502.9(b) (requiring agencies to disclose, discuss, and respond to "any responsible opposing view").

⁹⁴ 52 F. Supp. 3d 1174, 1198 (D. Colo. 2014) (noting that although the Forest Service reprinted the report and its criticisms as a public concern, the agency's "failure to engage with [the] report violates 40 C.F.R. § 1502.9(b)). See also *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1168 (9th Cir. 2003) (finding Forest Service's failure to disclose and respond to evidence and opinions challenging EIS's scientific assumptions violated NEPA); *Seattle Audubon Soc'y v. Moseley*, 798 F. Supp. 1473, 1482 (W.D. Wash. 1992) ("The agency's explanation is insufficient under NEPA – not because experts disagree, but because the FEIS lacks reasoned discussion of major scientific objections."), *aff'd sub nom. Seattle Audubon Soc'y v. Espy*, 998 F.2d 699, 704 (9th Cir. 1993) ("It would not further NEPA's aims for environmental protection to allow the Forest Service to ignore reputable scientific criticisms that have surfaced").

⁹⁵ See, e.g., Six, D.L., Vergobbit C. and Cutter M. (2018) Are Survivors Different? Genetic-Based Selection of Trees by Mountain Pine Beetle During a Climate Change-Driven Outbreak in a High-Elevation Pine Forest, *Front. Plant Sci.* 9:993, doi: 10.3389/fpls.2018.00993 (Attachment 1 to WildEarth Guardians' DEIS comments); Camille Stevens-Rumann et al (Feb. 2018), Evidence for declining forest resilience to wildfires under climate change, *Ecology Letters* (Attachment 21).

Guardians' 2019 objection letter explained how the Forest Service's approach to the LaVA Project runs contrary to Forest Service policy and violates NEPA, including due to the timing, nature, and scope of the action as well as the lack of site-specific information or analysis. See WildEarth Guardians May 2019 objection letter, pages 2-32. Specifically, we explained the following:

The depth of analysis (or lack thereof) in the LaVA FEIS is more akin to what one would expect in a forest plan or programmatic EIS. Forest Plans set out management area prescriptions with standards and guidelines for future decision-making and are adjustable through monitoring and evaluation, amendment and revision.⁹⁶ Similarly, this FEIS sets out treatment opportunity areas with project design criteria and an "adaptive Framework" in Appendix A with plans to adjust future actions through monitoring and evaluation. Like a Forest Plan that must be revised every 10 to 15 years,⁹⁷ the Forest Service proposes to authorize this project for a period of 15 years. The Forest Service claims a need for flexibility and adaptability, but that is the Medicine Bow Forest Plan provides.⁹⁸ The Forest Service cannot have both forgo site-specific analysis claiming the need for flexibility of a Forest Plan and claim this as a project-level decision under 36 C.F.R. Part 218.⁹⁹

In contrast, project decisions are critical decisions that change the environment and require additional NEPA and environmental law compliance.¹⁰⁰ "The second level [of] planning involves the analysis and implementation of management practices designed to achieve the goals and objectives of the Forest Plan. This level involves site-specific analysis to meet NEPA requirements for decisionmaking."¹⁰¹ The Forest Service appears to ignore these distinctions. As a result, the analysis fails to provide the information and details necessary for an informed analysis of a project level decision under NEPA and to demonstrate compliance with all other environmental laws.

EPA Region 8's comments suggested the Forest Service view this FEIS as programmatic, given the extensive amount of site-specific information, details, and studies that are missing from the analysis. In its final guidance for the use of

⁹⁶ 2002 Natural Resources Division, Overview of Forest Planning and Project Level Decisionmaking, page 4 ("The Forest Plan management area prescriptions and forest-wide direction are the "zoning ordinances" under which future decisions are made.").

⁹⁷ 16 U.S.C. § 1604(f)(5).

⁹⁸ Final ROD for the 2003 Medicine Bow Forest Plan at 1-2 ("the Revised Plan provides overall system guidance and establishes management direction to govern future actions. The *flexibility and adaptability* of this Plan to changing conditions is an important factor in my decision.") (emphasis added).

⁹⁹ *Id.* at 51 ("Unlike the programmatic decisions" of the Forest Plan, management activities "are site-specific and require analysis and disclosure of effects under NEPA"); 51-52 (As opposed to site-specific analysis of proposed activities that will determine what can be accomplished, the "outcomes specified in the Revised Plan are estimates and projections based on available information, inventory data, and assumptions").

¹⁰⁰ 2002 Natural Resources Division, Overview of Forest Planning and Project Level Decisionmaking at 3.

¹⁰¹ 2002 Natural Resources Division, Overview of Forest Planning and Project Level Decisionmaking at 3 (citing FSM 1922, 53 Fed. Reg. 26807, 26809 (July 15, 1988)).

programmatic NEPA reviews, the Council on Environmental Quality (CEQ) explained:

A well-crafted programmatic NEPA review provides the basis for decisions to approve such broad or high-level decisions such as identifying geographically bounded areas within which future proposed activities can be taken or identifying broad mitigation or conservation measures that can be applied to subsequent tiered reviews....Using programmatic NEPA reviews allows an agency to subsequently tier to this analysis, and analyze narrower site- or proposal-specific issues.¹⁰²

Again, the Forest Service appears to ignore the distinction between a programmatic FEIS (with future tiering of EAs) and a project level FEIS.

This FEIS provides a broad, high-level analysis that may appropriately support future analysis of site-specific actions in geographically discrete areas over a very long timeframe, so long as those future analyses are subject to NEPA. In describing the treatment opportunity areas, the Forest Service explains “. . . areas emphasize where different management actions would be prioritized during LaVA project implementation and include fuels treatment and safety emphasis, forest and rangeland resiliency and forest products emphasis, wildlife emphasis, recreation emphasis, scenic and aspen emphasis, and special emphasis areas (figure 16).”¹⁰³ Further, the Forest Service created 14 accounting units to describe generally the potential environmental consequences of the proposed action in the different treatment opportunity areas.”¹⁰⁴ The Forest Service also explains specific treatments in these areas would be “developed and authorized for implementation over a 15-year period beginning in 2019 and ending in 2034.”¹⁰⁵

However, the Forest Service does not describe its FEIS as a programmatic analysis.¹⁰⁶ In fact, the Forest Service makes it clear that future authorization for specific treatments will **not** be done under NEPA stating, “[s]ubsequent decisions authorizing individual treatments that tier to the LaVA analysis are not planned.”¹⁰⁷

Given its large scope, time scale, lack of details or site-specific information, the proposed action is not a project level NEPA decision. The Forest Service’s plans to rely on post-decision implementation checklists to consider details and site-specific

¹⁰² Council on Environmental Quality. 2014. [Final Guidance for Effective Use of Programmatic NEPA Reviews](#) at 10. See also 79 FR 76986.

¹⁰³ FEIS at 37.

¹⁰⁴ *Id* at 80.

¹⁰⁵ *Id*.

¹⁰⁶ FEIS Summary at v and FEIS Appendix B at 12 (explaining, “...that while the range of treatments or activities authorized are described and analyzed in this environmental impact statement, treatment locations and methods would be determined during project implementation, as outlined in appendix A, the adaptive implementation and monitoring framework.”).

¹⁰⁷ FEIS Appendix B at 12.

information undermines the purposes of NEPA to ensure agencies consider and disclose the impacts of their actions **before** making a decision.¹⁰⁸ The implications are much greater than merely semantics. As explained in later sections, the Forest Service's approach here improperly allows the agency to forgo public scrutiny of actual, site-specific actions, essentially creating a blank check for a range of future activities.

The MFEIS cured none of these deficiencies.

Prince of Wales Case

In addition to that reasoning, the Forest Service should consider and learn from the recent federal court decision that rejected the agency's attempt to rely on a broad, vague EIS to approve logging and road building across a vast landscape over the course of more than a decade.¹⁰⁹ The District Court for the District of Alaska underscored the Forest Service's legal duty under NEPA to disclose when, where, and how logging projects will be implemented before approving project-level actions.¹¹⁰

This LaVA Project is very similar to the Prince of Wales Landscape Level Analysis that was proposed for the Tongass National Forest, and suffers from the same legal flaws under NEPA. The Prince of Wales Project EIS "provide[d] that 'site-specific locations and methods' for activities such as timber harvest 'w[ould] be determined during implementation' over the 15-year lifespan of the Project."¹¹¹ Similarly, for the LaVA Project the Forest Service states that it will identify specific treatment units, as well as the specific objectives for each treatment unit, during project implementation.¹¹² The actual type of treatment and method, including timing and location, will depend on current unknowns, including staffing, funding, site-specific resource conditions (identified through project-specific field reviews), and project design features based on the particular objective.¹¹³ The current NEPA analysis identifies only "Treatment Opportunity Areas" within which logging or other types of treatment *may* occur somewhere, not the location or design of sale units.¹¹⁴ The failure to identify the location of treatment units, objectives for those treatments, or location of roads makes the disclosure and analysis of site-specific impacts impossible. It is impossible for the public or the decisionmaker to understand the impacts to values or site-specific resource conditions that might be affected by treatment units or roads.

¹⁰⁸ See, e.g., Draft ROD at 14 (explaining how the agency will use implementation checklists to ensure the future, yet-to-be-determined vegetation treatment projects are consistent with this ROD and FEIS).

¹⁰⁹ See *Southeast Alaska Conservation Council v. U.S. Forest Service*, 2020 WL 1190453, Case No. 19-00006-SLG (D. Alaska Mar. 11, 2020).

¹¹⁰ *Id.* at *19 (stating that "[t]he Project EIS's omission of the actual location of proposed timber harvest and road construction within the Project Area falls short" of NEPA's mandate "that environmental analysis be specific enough to ensure informed decisionmaking and meaningful public participation").

¹¹¹ *Id.* at *8.

¹¹² See, e.g., MFEIS at 8.

¹¹³ *Id.*

¹¹⁴ *Id.*

For example, the Forest Service fails to address and disclose site-specific direct, indirect, and cumulative watershed impacts. The objection reviewing officer directed the Forest Service to clarify that BMPs will be monitored, analyze all indicators that could potentially affect the Watershed Condition Framework, and add a requirement to monitor cumulative watershed effects. Yet without site-specific information, we still don't know where or how logging activities, prescribed burns, or road construction may impact watersheds. It is especially difficult to understand potential cumulative impacts without this information. Because of the lack of site-specific information or analysis, we are not able to provide meaningful public comment and this violates NEPA.

The Prince of Wales Project EIS "explain[ed] that siting decisions and the parameters of actual timber sales will be determined pursuant to an Implementation Plan . . . However, the EIS makes clear that these subsequent, site-specific decisions will not be subject to additional NEPA review. The Forest Service terms this approach 'conditions-based analysis.'"¹¹⁵ Likewise, for the LaVA Project the Forest Service states that authorization of individual treatments will be "guided by an adaptive implementation and monitoring framework" (Appendix A),¹¹⁶ with no future NEPA review of site-specific information.¹¹⁷ The Forest Service explicitly notes the LaVA Project uses a "condition-based implementation approach,"¹¹⁸ just like the large landscape-scale Prince of Wales proposal rejected by the federal court. The amount of treatments and activities conducted annually would be contingent upon available funds and staff.¹¹⁹ There is no estimate of the number of acres for prescribed burning, much less the location.

The Prince of Wales EIS made assumptions "to capture the 'maximum effects' of the Project."¹²⁰ It identified larger areas within which smaller areas of logging would later be identified, and approved the construction of 164 miles of road, but did "not include a determination--or even an estimate--of when and where the harvest activities or road construction authorized by each alternative will actually occur."¹²¹ The Forest Service attempts the same with this LaVA Project, relying on Treatment Opportunity Areas and setting limits only on the number of temporary roads that can be open at any given time, with no regard to location.

Because the LaVA Project analysis is similar to that set aside by the U.S. District Court in the *Southeast Alaska* case, the LaVA Project will also likely be found to violate NEPA. The Forest Service should abandon its current approach and comply with law.

Tennessee Creek Case

¹¹⁵ 2020 WL 1190453 at *8.

¹¹⁶ MFEIS at 8.

¹¹⁷ *Id.* at 28.

¹¹⁸ *Id.* at 33.

¹¹⁹ MFEIS at 7.

¹²⁰ 2020 WL 1190453 at *7.

¹²¹ *Id.* at *19.

The Tenth Circuit's decision in *WildEarth Guardians v. Conner* does not absolve the Forest Service of its duty to provide more detailed information in its analysis of the LaVA Project in the MFEIS.¹²² In *Conner*, the Tenth Circuit upheld the Forest Service's EA for Tennessee Creek, a tree-thinning project across 16,450 acres designed to address beetle infestation on the White River and San Isabel National Forests.¹²³ The size of proposed action was on a much smaller scale than the 360,000 acres proposed for the LaVA Project. The court concluded that despite not specifying the precise locations within a project area that will be affected, the Forest Service's "analysis accounted for the uncertainty about treatment locations by evaluating the Project's effects on lynx in a worst-case scenario in which all the mapped lynx habitat in the Project area is treated, and by including conservation measures to protect high-quality lynx habitat, such as not treating healthy spruce-fir stands or any stands with greater than 35% dense horizontal cover."¹²⁴

As noted in Guardians' 2019 objection, here the Forest Service did not assume a worst-case scenario in assessing impacts of the LaVA Project to Canada lynx and its habitat. The Forest Service assumes a worst-case scenario only for assessing impacts to state and private land to estimate acres affected, but for its own impact the Forest Service does not use a worst-case scenario.¹²⁵ Instead, the Forest Service relies on its own assumptions about yet-to-be determined locations of vegetation management.

Moreover, the court stated the Forest Service used its "discretion reasonably, assessing the Project's maximum possible effect on lynx habitat while also conserving agency resources and retaining flexibility to respond to changing conditions."¹²⁶ It reasoned that under an EA, "an agency considers environmental concerns yet reserves its resources for instances where a full EIS is appropriate."¹²⁷ Here, however, the Forest Service prepared an EIS and thus does not have the same excuse for reserving resources.¹²⁸

The Reissued 2020 DROD, MFEIS, and revised Appendix A still lack crucial site-specific information and analysis to ensure the Forest Service took a hard look at the impacts from the LaVA Project to allow for informed decisionmaking and meaningful public participation. In light of these legal flaws, and *Southeast Alaska* opinion rejecting the Forest Service's condition-

¹²² 920 F.3d 1245 (10th Cir. 2019).

¹²³ *Id.* at 1254.

¹²⁴ *Id.* at 1258 ("the Service was not postponing the requisite environmental analysis until it picks the specific sites for treatment under the Project; rather, it was saying that such future analysis would be unnecessary because, in its expert opinion, whatever sites it ultimately chooses (within the constraints imposed by the Project), there would not be a negative impact on the lynx.").

¹²⁵ *See, e.g.*, 2020 BA at 39-42; MFEIS at 251-255.

¹²⁶ *Id.*

¹²⁷ *Id.* (quoting *Utah Shared Access Alliance*, 288 F.3d at 1213).

¹²⁸ *See also Southeast Alaska Conservation Council*, 2020 WL 1190453 at *11 ("the difference between an EA and an EIS renders that case inapplicable" because "[w]hile an agency's analysis of a proposed action's maximum potential impacts may be appropriate for an EA, the Forest Service's analytical framework in this case is not sufficient to meet the requirements for an EIS.").

based implementation approach, the Forest Service should abandon this “big gulp” large landscape-scale project and instead move forward with site-specific projects under NEPA.

12. Flawed purpose and need of project.

WildEarth Guardians’ comments and 2019 objection identified flaws in the Forest Service’s stated purpose and need for the LaVA Project:

NEPA directs federal agencies to “briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.”¹²⁹ Our comments questioned the Forest Service’s justification, or claimed need, for its stated purposes.¹³⁰ Specifically, it is not clear that the entirety of this project is appropriate under the Forest Service’s HFRA authorities. HFRA was enacted in 2003 to “reduce wildfire risk to communities, municipal water supplies, and other at-risk federal land” by “[a]s soon as practicable” implementing “authorized hazardous fuel reduction projects.”¹³¹ Nothing in HFRA points to congressional intent to authorize projects on an expedited review process that aim to provide for recovery of forest products, enhance access for forest visitors and permittees, or provide for agency management adaptability and flexibility. These portions of the project do not “reduce the risk or extent of, or increase the resilience to, insect or disease infestation; or . . . reduce hazardous fuels.”¹³² The Forest Service is unreasonably attempting to apply its HFRA authorities to a project that, in its entirety, is not merely a HFRA project.

Our comments questioned the Forest Service’s assumption that logging will achieve desired conditions for a more resilient forest and greater public safety. We identified science refuting the Forest Service’s claims that logging will result in forests that are resilient to insect and disease infestation.¹³³

And our comments urged the Forest Service to include identifying the minimum road system and unneeded system roads as a purpose of the LaVA project to address the agency’s overall need to make progress towards a more sustainable transportation system.¹³⁴ Considering this as a purpose is especially important given the large geographic scope and lengthy duration of this project, and in light of the stated purpose to enhance access for forest visitors and permittees. In response the Forest Service merely reiterated the transportation analysis in the DEIS was revised to better address

¹²⁹ 40 C.F.R. § 1502.13.

¹³⁰ Guardians’ DEIS comments at 2-4.

¹³¹ 16 U.S.C. §§ 6501(1), 6512(a).

¹³² 16 U.S.C. § 6591a(d)(1).

¹³³ See Guardians’ DEIS comments, Attachment 1 (study by Six *et al* (2018) that found during mountain pine beetle outbreaks, beetle choice may result in strong selection for trees with greater resistance to attack, and therefore retaining survivors after outbreaks (as opposed to logging them) to act as primary seed sources could act to promote adaptation).

¹³⁴ Guardians’ Scoping at 4 and DEIS comments at 4.

environmental effects of the alternatives on the road system.¹³⁵ But as noted above, this wholly fails to address or meaningfully respond to our comment or recognize the (regulatory, financial, and environmental) need to reduce the miles in the overall transportation system.

Including compliance with Subpart A of the Travel Management Rule and decommissioning unneeded roads as a project purpose and need would have allowed the forest to improve ecological conditions across a substantial portion of the forest, one of the stated purposes. Though the Forest Service proposes several large-scale road management activities, the project's purpose and need remains singularly focused on vegetative management: "[t]he purpose of and need for the LaVA Project is to respond to changed forest vegetation conditions caused by the bark beetle epidemics on the Medicine Bow National Forest."¹³⁶ The narrowness of the purpose and need precludes alternative actions that could result in a more ecologically and economically sustainable transportation system.

The objection response and 2020 revisions since that time did not address these concerns.

13. Flawed analysis and failure to address relevant socio-economic impacts.

We again question whether the project is targeting a healthy ecosystem, or instead is merely a ruse to subsidize the forest industry. One of the stated purposes for the LaVA Project is to "[p]rovide for recovery of forest products."¹³⁷ The corresponding stated need is to "[p]romote vegetation management to recover merchantable products" and "[p]rovide commercial forest products to local industries at a level commensurate with forest plan direction and goals."¹³⁸ Under this proposal, up to 260,000 acres could be commercially harvested, which is nearly 1/3 of the forest. This is an enormous increase in the volume of lumber production annually. There is almost no justification for this increased demand.

"These activities are expected to cost the agency approximately \$19,000,000 to implement and would produce approximately \$2,000,000 in revenue from stumpage receipts per year."¹³⁹ Based on the agency's own numbers, over a 15-year period we calculate the project will cost \$255 million. In other words, a quarter of a billion dollars. Compare this with the private landowners the project is designed to protect: The Forest Service states that "[s]ince most homes in the wildland-urban interface in the analysis area are second homes, the individuals with the highest exposure to wildfire risk are expected to be relatively affluent."¹⁴⁰ We understand there may be benefits to protecting water supplies, but \$255 million dollars of public taxpayer money to protect second homes seems like a huge subsidy. The Forest Service

¹³⁵ FEIS Appendix B at 8.

¹³⁶ FEIS at 3.

¹³⁷ MFEIS at 32.

¹³⁸ *Id.*

¹³⁹ MFEIS at 382.

¹⁴⁰ MFEIS at 382.

should provide a more complete, quantified or monetized articulation of the project cost and benefits.

14. Precludes opportunity for meaningful public review.

Guardians' 2019 objection stated the Forest Service impermissibly plans to gather site-specific information and provide for informal public involvement for future decisions only after it makes a final decision on the LaVA Project.¹⁴¹ This violates NEPA.¹⁴² In the MFEIS, the Forest Service improperly defers its information gathering and assessment to the future per the LaVA Adaptive Implementation and Monitoring Framework, and then will provide only non-NEPA public engagement opportunities. This undermines the purpose of NEPA to, *inter alia*, assess and disclose the impacts of a proposal to allow for meaningful public comment **before** approving a project, to ensure that the agency responds to such comments, to analyze alternative courses of action in the light of site-specific information, and to ensure that the public can hold the agency accountable when its actions violate the law.¹⁴³

The agency's assertions that the Framework provides the public meaningful opportunities to provide input on individual treatment proposals is not an adequate substitute for the formal notice and comment process under NEPA. The Forest Service recognizes this fact by explaining, "[p]ublic feedback periods associated with individual treatment proposals will be considered informal in that there are no regulations requiring comment or objection periods associated with LaVA Project implementation (36 CFR 218)."¹⁴⁴ The Forest Service does not specify how it will notify the public, the time period people will be able to provide input, and requires people to consistently check the LaVA implementation website for updates.¹⁴⁵ After a field review, the "packaged project" will be sent to the district ranger for review and approval.¹⁴⁶ This is precisely the time when people would have the best opportunity to review and comment on specific project activities. In place of this, the Framework directs the public to check the LaVA website to stay informed.¹⁴⁷ In other words, the public has no opportunity to meaningfully comment or challenge a packaged project in violation of NEPA. While the Framework provides for public engagement, the opportunity is not on par with what NEPA requires.

¹⁴¹ See, e.g., Guardians' DEIS comments at 6 (noting how the reliance on the future implementation and monitoring framework to address the lack of site-specific information at this stage in the environmental analysis will occur well after the close of any notice and comment period in violation of NEPA).

¹⁴² See *New Mexico ex rel. Richardson v. Bureau of Land Management*, 565 F.3d 683, 703 (10th Cir. 2009) (citing *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989)) ("By focusing both agency and public attention on the environmental effects of proposed actions, NEPA facilitates informed decisionmaking by agencies and allows the political process to check those decisions."); 40 C.F.R. § 1500.1(b) ("NEPA procedures must insure that environmental information is available to public officials and citizens *before* decisions are made") (emphasis added).

¹⁴³ See 36 C.F.R. § 220.4(c)(2) & (3).

¹⁴⁴ FEIS Appendix B at 59.

¹⁴⁵ FEIS Appendix A at 8-10.

¹⁴⁶ *Id.* at 10-12.

¹⁴⁷ *Id.*

It appears the Forest Service intends to avoid NEPA's implementing procedures and remove the public's ability to legally challenge site-specific actions following this decision, which is devoid of sufficient detail to assess its future actions.

Even with the revisions in the Reissued DROD and MFEIS, the public engagement opportunities are still insufficient to comply with NEPA. In response to this objection point, the objection reviewing officer directed the Forest Service to update the Adaptive Implementation and Monitoring Framework in Appendix A to guarantee annual public meetings and field trips, include timelines for projected engagement efforts, clarify mechanisms for providing feedback on individual treatments, include measures for "monitoring the effectiveness of public engagement opportunities," and analyze the commitments under Appendix A as compared to an Insect and Disease CE project. Even if the Forest Service met this direction from the reviewing officer, this approach would not comply with NEPA's procedural requirements.

In particular, comparing the requirements in Appendix A to an Insect and Disease CE project improperly assumes that all of the actions authorized under this 15-year authorization fit within an Insect and Disease CE. For one, the Insect and Disease CE was never created to authorize activities across 360,000 acres and the course of 15 years. The cumulative impacts from such an authorization were never considered under the Insect and Disease CE. There is no reasonable basis for relying on the Insect and Disease CE public involvement as a standard, as it is wholly irrelevant to this project. The standard is set forth under NEPA, and the informal public engagement envisions in Appendix A fails to comply with NEPA.

At bottom, the Adaptive Implementation and Monitoring Framework is inadequate to ensure resource protection and unlawfully eliminates the public voice meant to ensure meaningful and informed decision making.

Refusing to provide NEPA analysis for future implementation of individual treatments that will be based on site-specific details acquired after the close of this comment period unlawfully eliminates the public voice (as well as the public's ability to hold the agency accountable) and eliminates the opportunity for wise agency decision making, contrary to the twin purposes of NEPA. It is all the more egregious given the project duration of 15 years – as long as the life of a Forest Plan. Given the agency's historic patterns of decision making and current attempts to rollback Forest Service NEPA regulations, we do not trust the agency to achieve wise decision making on its own, without public input and oversight.

NEPA requires environmental analysis that is specific enough to ensure informed decision-making and meaningful public participation. The lack of site-specific information or analysis for this enormous programmatic decision precludes informed and meaningful public comment at this stage, and the failure to provide for site-specific NEPA analysis in the future cuts public voice out of implementation and decision making in violation of NEPA.

15. Failure to ensure compliance with the Roadless Rule and NEPA, and otherwise avoid unroaded areas.

The U.S. Forest Service adopted the Roadless Area Conservation Rule (Roadless Rule) in 2001 “to protect and conserve inventoried roadless areas on National Forest System lands.”¹⁴⁸ The rule observed:

Inventoried roadless areas provide clean drinking water and function as biological strongholds for populations of threatened and endangered species. They provide large, relatively undisturbed landscapes that are important to biological diversity and the long-term survival of many at risk species. Inventoried roadless areas provide opportunities for dispersed outdoor recreation, opportunities that diminish as open space and natural settings are developed elsewhere. They also serve as bulwarks against the spread of non-native invasive plant species and provide reference areas for study and research.¹⁴⁹

The Rule “prohibits road construction, reconstruction, and timber harvest in inventoried roadless areas because they have the greatest likelihood of altering and fragmenting landscapes, resulting in immediate, long-term loss of roadless area values and characteristics.”¹⁵⁰

Despite the institutional command that the Forest Service safeguard and conserve these areas, the LaVA Project attempts to squeeze through the Roadless Rule’s narrow exceptions nearly 80,000 acres of logging and heavy equipment use in roadless areas – probably one of the largest single roadless area logging projects in the two decades since the Rule was adopted. The LaVA Project does so without the site-specific analysis the Forest Service required and expected when it adopted the Roadless Rule. Further, what analysis the MFEIS contains does not demonstrate that the proposed action will meet any of the requirements of the Roadless Rule exceptions. Because the Forest Service’s proposal and analysis of roadless area logging violates the Roadless Rule, it must be set aside.

WildEarth Guardians’ and Sierra Club’s comments urged the Forest Service to avoid unroaded areas, including IRAs.¹⁵¹ The Forest Service rejected Guardians’ proposal to consider an alternative that excludes all unroaded areas.¹⁵²

¹⁴⁸ Forest Service, Special Areas, Roadless Area Conservation, Final Rule, 66 Fed. Reg. 3244 (Jan. 12, 2001).

¹⁴⁹ 66 Fed. Reg. at 3245.

¹⁵⁰ 66 Fed. Reg. at 3244.

¹⁵¹ Scoping at 8-9; DEIS comments at 15. See also WildEarth 2019 Objection at 37-39.

¹⁵² FEIS Appendix B at 25 (explaining that it “would not allow for a holistic, landscape approach to address the purpose and need for the project” and it would “undermine the collaborative relationships that have been strengthened throughout the planning process.”) As noted above, this is not a legitimate reason to not consider an alternative that excludes all unroaded areas. This proposal would meet at least a portion of the stated purposes and needs, including those that better fit within the HFRA definition, and therefore should have been considered.

A. The Roadless Area Conservation Rule.

The Roadless Area Conservation Rule (Roadless Rule) generally prohibits road construction and timber removal within IRAs.¹⁵³ The Roadless Rule contains exceptions to the logging prohibition, but they are narrowly tailored:

Notwithstanding the prohibition in paragraph (a) of this section, timber may be cut, sold, or removed in inventoried roadless areas if the Responsible Official determines that one of the following circumstances exists. The cutting, sale, or removal of timber in these areas *is expected to be infrequent*.

- (1) The cutting, sale, or removal of *generally small diameter timber* is needed for one of the following purposes *and will maintain or improve one or more of the roadless area characteristics* as defined in § 294.11.
 - (i) To *improve* threatened, endangered, proposed, or sensitive species habitat; or
 - (ii) To maintain or restore the characteristics of ecosystem composition and structure, such as to reduce the risk of uncharacteristic wildfire effects, within the range of variability that would be expected to occur under natural disturbance regimes of the current climatic period.¹⁵⁴

The Roadless Rule defines “roadless area characteristics” as including:

- (1) High quality or undisturbed soil, water, and air;
- (2) Sources of public drinking water;
- (3) Diversity of plant and animal communities;
- (4) Habitat for threatened, endangered, proposed, candidate, and sensitive species and for those species dependent on large, undisturbed areas of land;
- (5) Primitive, semi-primitive nonmotorized and semi-primitive motorized classes of dispersed recreation;
- (6) Reference landscapes;
- (7) Natural appearing landscapes with high scenic quality;
- (8) Traditional cultural properties and sacred sites; and
- (9) Other locally identified unique characteristics.¹⁵⁵

The Roadless Rule anticipates that the Forest Service will engage in a highly site-specific analysis before it can consider logging in IRAs, given the regulation’s emphasis on “*locally identified*”

The Forest Service noted on the cover of FEIS Appendix B that “Nothing changed based on the 2019 objection process.” *Id.* at cover.

¹⁵³ 36 C.F.R. § 294.12(a) (generally prohibiting road construction); 36 C.F.R. § 294.13(a) (generally prohibiting timber removal).

¹⁵⁴ 36 C.F.R. § 294.13(b)(1) (emphasis added).

¹⁵⁵ 36 C.F.R. § 294.11.

unique characteristics.”¹⁵⁶ The Roadless Rule’s preamble reinforces the need for such a site-specific analysis.

Because of the great variation in stand characteristics between vegetation types in different areas, a description of what constitutes “generally small diameter timber” is not specifically included in this rule. Such determinations are best made through *project specific* or land and resource management plan *NEPA analyses*, as guided by ecological considerations such as those described below. The intent of the rule is to limit the cutting, sale, or removal of timber *to those areas that have become overgrown with smaller diameter trees....*

[A]ll such *determinations of what constitutes “generally small diameter timber”* will consider how the cutting or removal of various size classes of trees would affect the potential for future development *of the stand*, and the characteristics and interrelationships of plant and animal communities associated with the site and the overall landscape. *Site productivity due to factors such as moisture and elevational gradients, site aspect, and soil types will be considered, as well as how such cutting or removal of various size classes of standing or down timber would mimic the role and legacies of natural disturbance regimes in providing the habitat patches, connectivity, and structural diversity critical to maintaining biological diversity.* In all cases, the cutting, sale, or removal of small diameter timber will be consistent with maintaining or improving one or more of the roadless area characteristics as defined in § 294.11.¹⁵⁷

Vegetative management would focus on removing generally small diameter trees while leaving the overstory trees intact. The cutting, sale, or removal of trees pursuant to 294.13(b)(1) *must be clearly shown through project level analysis to contribute to the ecological objectives described.* Such management activities are expected to be rare and to focus on small diameter trees.¹⁵⁸

B. The Forest Service’s proposed decision.

The Reissued Draft ROD “authoriz[es] vegetation treatments ... on up to 123,000 roadless area acres [across 25 IRAs] over the 15-year treatment authorization period.”¹⁵⁹ The decision would authorize heavy equipment (feller-bunchers, skidders, and masticators) to remove trees within the boundaries of IRAs.¹⁶⁰ Under the proposed action, treatments could affect more than half (53 percent) of the acreage of IRAs in the analysis area.¹⁶¹ The MFEIS asserts that the acreage

¹⁵⁶ *Id.* (emphasis added).

¹⁵⁷ Forest Service, Roadless Area Conservation Rule, 66 Fed. Reg. 3244, 3257 (Jan. 12, 2001) (emphasis added).

¹⁵⁸ *Id.* at 3258 (emphasis added).

¹⁵⁹ Reissued DROD at 14.

¹⁶⁰ Reissued DROD at 14 (omitting reference to heavy equipment contained in DROD at 5); MFEIS at 66, 173, 353 (acknowledging heavy equipment use in roadless areas).

¹⁶¹ FEIS at 308; MFEIS at 353. *See also* MFEIS at 334 (project area encompasses 230,200 acres of IRAs).

requiring the use of *exceptions* to the Roadless Rule will involve “approximately 35 percent of analysis area IRAs,” or “up to approximately 80,000 acres of the potential inventoried roadless area treatments.”¹⁶² Thus, the Forest Service is approving mechanical treatments within roadless lands over an area of 125 square miles, nearly twice the size of the District of Columbia, and larger than Arches National Park.

The Forest Service asserts roadless area logging is necessary “to treat wildland-urban interface areas and to maintain or restore the characteristics of ecosystem composition and structure..., such as reducing the risk of uncharacteristic wildfire effects within the range of variability expected to occur under natural disturbance regimes of the current climatic period (36 CFR 294.13(b)(1)(ii)).”¹⁶³ The Forest Service states there is a need to treat IRAs “to enhance forest and rangeland resiliency to future insect and disease infestations, provide for the protection of infrastructure and restoration of wildlife habitat, and mitigate hazardous fuel loading.”¹⁶⁴ The MFEIS also states that the proposed action was “approved ... as an exception to the 2001 Roadless Rule” in two rounds of “roadless review” in 2017 and 2018, which approval was apparently verbal and memorialized via email, and without the provision of any information concerning the specific roadless areas, their values, or how or why the exceptions would be applied.¹⁶⁵

Further, although the LaVA EIS is the only time the agency will review the impacts to roadless areas pursuant to NEPA, the MFEIS makes clear that the Forest Service has yet to identify the specific where, the when, and the site-specific impacts of logging within roadless areas. The MFEIS repeatedly states that that document identified roadless area acreage “where treatment opportunities *could be proposed* and implemented during LaVA project implementation,” making clear that the specifics of roadless treatments has not yet been set, though the ROD will approve them.¹⁶⁶

The Forest Service explains that roadless area logging “will require additional review by the responsible official prior to implementation,” but only *after* the Forest Service has approved the logging in roadless forest via the Reissued Draft ROD, and only *after* all opportunities for public comment and the consideration of alternatives through NEPA is complete.¹⁶⁷ The Rocky

¹⁶² MFEIS at 353.

¹⁶³ MFEIS at 352. *See also* FEIS at 308 (incorrectly citing to 36 C.F.R. § 294.13(b)(ii)).

¹⁶⁴ MFEIS at 98. *See also* FEIS at 63.

¹⁶⁵ MFEIS at 352 (“In June 2017, the responsible official for the Forest Service’s Rocky Mountain Region approved the modified proposed action as an exception to the 2001 Roadless Rule.... The project was also approved through a second round of roadless review in December 2018, prior to issuing the draft record of decision.”). *See also* email of M. Martin, Medicine Bow-Routt NF to T. Schillie, Rocky Mountain Region (June 24, 2017) (Attachment 15); email of C. Wehrli, Rocky Mountain Region to M. Martin, Medicine Bow-Routt NF (Dec. 7, 2018) (Attachment 16).

¹⁶⁶ MFEIS at 66 (emphasis added). *See also* MFEIS at 71 (identifying the 123,00 acres as “treatment opportunity areas”); *id.* at 113 (same); *id.* at 352 (the “modified proposed action includes approximately 123,000 acres of *potential* vegetation treatments” in IRAs) (emphasis added).

¹⁶⁷ Reissued DROD at 14; *see also* MFEIS at 353 (“all projects in inventoried roadless areas would undergo additional review by the responsible official prior to implementation.”); FEIS Appendix B, Response to Comments (2019) at 92 (“no specific treatments in inventoried roadless areas are proposed at this time. In the future, all

Mountain Region will review such proposals only later, “prior to” or “during” project implementation¹⁶⁸. This post-NEPA process will include “additional site-specific review,”¹⁶⁹ although the Forest Service does not explain what “site-specific” analysis was allegedly undertaken previously in the MFEIS.

The Regional office’s post-NEPA procedure require the appropriate official to complete two forms. The first, the “Roadless Area Characteristics Worksheet,” “evaluates and summarizes the expected effects to each of the 9 Roadless area characteristics.”¹⁷⁰ This worksheet requires the Forest Service to “identify,” “describe,” and “evaluate” roadless area values,¹⁷¹ data not included in the MFEIS. The second, the Region 2 Roadless Area Review form, requires the Forest Service to address, among other things, whether it has engaged in outreach to state and Tribal governments, but not to the public.¹⁷² Again, neither the characteristics worksheet nor the Region 2 review form allows for any kind of public input, because these forms will be completed prior to implementation but are blank during the notice and comment period, and objection periods.

C. The proposed decision violates the Roadless Rule because the Forest Service failed to ensure logging in IRAs will be “infrequent.”

The LaVA MFEIS fails to ensure that the “cutting, sale, or removal of timber” will be “infrequent” as the Roadless Rule requires.¹⁷³ Neither the draft nor final EIS addressed this mandate at all. The MFEIS contains a grand total of two sentences:

While potential treatments could occur on up to 53 percent of the inventoried roadless area in the analysis area, the use of exceptions is expected to be infrequent, as exceptions are only needed for up to approximately 80,000 acres of the potential inventoried roadless area treatments, which is only approximately 35% of the 230,000 acres of the total inventoried roadless acres within the LaVA project area. Additionally, the actual number of acres of treatment requiring the use of exceptions would be much lower as many of these acres would be treated using prescribed burning rather than a tool that requires tree cutting.¹⁷⁴

specific projects proposed in inventoried roadless areas will be subject to further review and approval by the USDA Forest Service Rocky Mountain Regional Office prior to implementation.”).

¹⁶⁸ See MFEIS Appendix A at 70 (“Treatments planning an exception will be reviewed by the Deputy Regional Forester. The Deputy Regional Forester will make a ‘determination’ on the applicability of any exceptions to individual treatments.”); MFEIS at 352 (“prior to”); MFEIS at 56 (“[d]uring project implementation”).

¹⁶⁹ MFEIS at 56, 66, 352.

¹⁷⁰ MFEIS Appendix A at 70.

¹⁷¹ Forest Service, Worksheet – Roadless Area Characteristics (Attachment 17).

¹⁷² MFEIS Appendix A at 70; Forest Service, Rocky Mountain Region, Roadless Project Evaluation Form (Attachment 18).

¹⁷³ 36 C.F.R. § 294.13(b).

¹⁷⁴ MFEIS at 353.

This response is arbitrary and capricious. The Forest Service decision would approve the use of three exceptions for logging over *more than one-third* of roadless areas in the project area, steadily, over a 15-year period. This logging will occur over an area almost twice as large as the District of Columbia. “Infrequent” is defined as “seldom happening or occurring” and “rare.”¹⁷⁵ There is no reasonable construction of the term under which logging over this massive area, this significant portion of all roadless areas within the project area, over this time scale, could be considered “infrequent.”

Further, the maps provided with the MFEIS indicate that the decision will authorize logging in roadless areas on virtually every acre within one-half mile of state or private property.¹⁷⁶ This demonstrates that the Forest Service is not using its discretion to carefully and infrequently authorize logging in roadless areas, but has apparently adopted a blanket policy authorizing tree removal in IRAs at the request of the State of Wyoming, without any consideration for the individual, site-specific values at stake in each area, or even whether a ½-mile “buffer” has any basis in science.¹⁷⁷ This again demonstrates that the Forest Service has ignored and violated the Roadless Rule’s requirement that logging within roadless area’s only occur “infrequently.”

D. The Forest Service violated the Roadless Rule and NEPA by failing to undertake a site-specific analysis of authorized roadless area logging, including regarding small diameter timber.

As noted above, the Forest Service directed that “[t]he cutting, sale, or removal of trees pursuant to 294.13(b)(1) must be clearly shown through project level analysis to contribute to the ecological objectives described.”¹⁷⁸ The Roadless Rule preamble anticipated that the Forest Service would “consider how the cutting or removal of various size classes of trees would affect the potential for future development of the stand,” and would consider “[s]ite productivity due to factors such as moisture and elevational gradients, site aspect, and soil types ... as well as how such cutting or removal of various size classes of standing or down timber would mimic the role and legacies of natural disturbance regimes in providing the habitat patches, connectivity, and structural diversity critical to maintaining biological diversity.”¹⁷⁹

The MFEIS does not demonstrate that the Forest Service has undertaken the necessary evaluation. While the MFEIS contains some information about IRAs and where logging will occur within those areas, that data does not permit either the public or the decision-maker to

¹⁷⁵ Merriam-Webster online dictionary (last viewed May 8, 2020).

¹⁷⁶ See Forest Service, Roadless Map Packet (Feb. 2019) (Attachment 19).

¹⁷⁷ See letter of G. Engelskirger, Wyoming State Forestry Division to M. Martin, Medicine Bow National Forest (Apr. 21, 2017) at 3 (seeking “1/2 mile buffers around State and private lands” including within roadless areas) (Attachment 20). This letter contains no scientific support for this buffer, nor does it address the Roadless Rules unique requirements that limit logging in IRAs. The mere fact that the HFRA defines the wildland-urban interface to extend ½ mile from the boundary of an at-risk community does not mean that science, site-specific conditions, or the Roadless Rule permit tree removal in such areas.

¹⁷⁸ 66 Fed. Reg. at 3258 (emphasis added).

¹⁷⁹ 66 Fed. Reg. at 3257.

understand the values of each specific roadless area, how logging will impact those areas, why logging on the specific acreage identified may meet the requirements of specific exemptions, or why logging a certain diameter of tree may be appropriate.

For example, the MFEIS contains descriptions of individual “accounting units,” and identifies where those units overlap with IRAs.¹⁸⁰ But these maps and tables only describe the location and acreage of various Forest Plan management areas and a few other values (old growth and wildlife security areas), largely omitting data concerning critical values on the ground (slope, forest type, soils, wildlife use, etc.).¹⁸¹ The MFEIS also contains maps identifying areas where logging would be authorized under various Roadless Rule exceptions,¹⁸² but fails to explain why or how those boundaries were created and generally contains no information about how they relate to conditions on the ground. Drawing lines on a map, without more, does not constitute a site-specific analysis supporting a decision to invoke the narrow exceptions to the Roadless Rule. MFEIS Figures 13 and 14 only show where other agencies wish to log within protected roadless areas, not the values of those forest stands.¹⁸³

Further, while the MFEIS asserts that it includes new data concerning roadless areas, that alleged new data is not the kind of stand-specific data the Roadless Rule requires. The new data

indicate[s] which portions of Inventoried Roadless Areas would be most likely to receive potential mechanical timber harvest treatments, as opposed to other types of treatments (for example, prescribed burning, hand treatments, mastication). It was also clarified to indicate the number of acres of potential treatments within individual inventoried roadless areas that fall under various exceptions to the prohibition in the 2001 Roadless Area Conservation Rule on timber cutting, sale or removal, or that do not require an exception because they are not tree covered (for example mastication treatments in shrublands).¹⁸⁴

But none of this data relates to the values or characteristics of forest stands within the roadless areas to be chainsawed; only where the Forest Service intends to log the forest, the values of the forest apparently notwithstanding.¹⁸⁵

What little information the MFEIS provides is either so vague as to not meet Roadless Rule (or NEPA) standards, or suggests that the Forest Service will violate the Roadless Rule by logging a significant amount of large trees, not “generally small diameter timber.” For example, the

¹⁸⁰ See MFEIS at 111-171.

¹⁸¹ See *id.*

¹⁸² See MFEIS at 361-364 (Figures 63, 64, 65 and 66).

¹⁸³ See MFEIS at 67-68.

¹⁸⁴ MFEIS at 7; see also *id.* at 56 (same).

¹⁸⁵ See also MFEIS at 19 (MFEIS added verbiage to Chapter 3 “to indicate the number of acres of potential treatments within individual inventoried roadless areas that fall under various exceptions,” but not the values of the areas selected to be logged or why those acres meet the Roadless Rule’s criteria); see also *id.* at 54 (making similar statement).

MFEIS states that “[m]uch of the proposed treatment in inventoried roadless areas under exceptions 1.i and 1.ii is *expected* to involve the removal of non-sawtimber, *such as* removal of conifer encroachment in aspen stands to improve wildlife habitat and removal of understory ladder fuels to reduce the risk of high intensity crown fires.”¹⁸⁶ Qualifiers and imprecise terms such as “much,” “is expected,” “such as”) underscore that the Forest Service has little idea the character of stands within areas the agency has targeted for logging.

The MFEIS also discloses that much of the area where logging in roadless areas will be authorized could involve logging of large trees. The MFEIS states that “[a] large percentage (72 percent) of the area where timber cutting and removal using mechanical equipment could be used in inventoried roadless areas is in wildland-urban interface or county community-at-risk areas.”¹⁸⁷ The MFEIS then explains that old growth trees are most likely to be cut in the vast majority of roadless areas targeted for logging: within these WUI and “community-at-risk” areas.

In some instances, larger diameter trees (including dead and down trees) may need to be cut and removed to meet resource objectives (for example, fuels reduction). It is anticipated most of the proposed treatments in inventoried roadless areas involving the cutting of trees over seven inches in diameter at breast height would occur in the wildland-urban interface and county community-at-risk areas for fuels reduction, public health and safety, and protection of infrastructure.¹⁸⁸

Here, too, though, the MFEIS’s analysis is hobbled by vague assertions. How many “instances” of large tree logging is “some instances?” What factors will the Forest Service use to determine whether resource objectives require the cutting of large trees (which are less likely to worsen fire risk)? Given that “most” of the large tree logging will occur in areas where 72% of the roadless logging will occur, how can the Forest Service conclude that only “generally” small trees will be cut? The Forest Service’s lack of site-specific forest stand data makes it impossible for the agency to disclose the answers to these questions, so the agency cannot ensure that will comply with the Roadless Rule’s admonition that logging involve generally small diameter timber.¹⁸⁹

Finally, the MFEIS purports to define “small-diameter timber as trees less than seven inches in diameter at breast height (DBH). This corresponds to the Medicine Bow minimum utilization

¹⁸⁶ MFEIS at 353 (emphasis added); *id.* at 66 (same).

¹⁸⁷ MFEIS at 66.

¹⁸⁸ MFEIS at 353.

¹⁸⁹ The Forest Service may argue that it will gather the site-specific later, after the NEPA process is complete, relying on the “worksheet” discussed above to disclose when and where logging will occur in roadless forests. But waiting until *after* the agency’s decision to gather the necessary data violates NEPA. And the Forest Service decision on the LaVA project will authorize timber removal in up to 80,000 acres of forest, rendering the use of the worksheet a formality.

specification for sawtimber.”¹⁹⁰ The Forest Service does not explain this choice, nor is this number based on the very site-specific data that the agency demanded in adopting the Roadless Rule. The agency advised that “all such determinations of what constitutes ‘generally small diameter timber’ will consider how the cutting or removal of various size classes of trees would affect the potential for future development of the stand, and the characteristics and interrelationships of plant and animal communities associated with the site and the overall landscape.”¹⁹¹ The MFEIS provides none of this analysis. The 7-inch DBH standard was not developed with roadless area protection in mind, nor was it meant to cover all trees, given that the standard in the Forest Plan relates only to “conifer sawlogs.”¹⁹² It is also unclear why the Forest Service chose a commercial designation (sawlogs) as opposed to a standard related to the health of the forest. It is also arbitrary for the Forest Service to rely on a Forest Plan that is overdue for revision for such a determination. In sum, because the Forest Service’s choice of definition for “generally small diameter timber” is not based on a stand-specific analysis, it is arbitrary and capricious, and in violation of the Roadless Rule.

E. The Forest Service violated the Roadless Rule because it failed to ensure that logging will maintain or improve any of the roadless area characteristics.

The Forest Service may avail itself of the Roadless Rule’s exceptions barring timber removal within a roadless areas only if that logging “will maintain or improve one or more of the roadless area characteristics as defined in § 294.11.”¹⁹³ While the Forest Service contains some general statements about the benefits of logging, the agency repeatedly acknowledges that the proposal will degrade nearly every one of the nine roadless area characteristics, mandating that the agency cannot use the exceptions. Further, the supposed risk to ecosystem composition and structure from insects and disease or wildfire does not provide the agency a blank check to adversely affect the diversity of plant and animal communities or habitat for species dependent on large, undisturbed areas of land. The lack of site-specific forest stand data further renders arbitrary and capricious any alleged determination as to whether the agency ensured that the exception properly applied across each of the 25 roadless areas.

As an initial matter, neither the MFEIS nor any supporting document relied on by the Forest Service identifies the extent of each of the roadless area characteristics found in each of the 25 individual roadless areas for which the agency asserts it can undertake timber removal. Because the Forest Service collected no baseline data by individual IRA, it cannot make the determination that the Roadless Rule requires.

The MFEIS contains a few sentences addressing whether, overall, the proposed action would generally maintain or improve roadless area characteristics. For example, the MFEIS alleges that “[t]reatments in these areas would be designed to protect the nine characteristics that define

¹⁹⁰ MFEIS at 353.

¹⁹¹ 66 Fed. Reg. at 3257.

¹⁹² Medicine Bow National Forest Revised Land and Resource Management Plan (Dec. 2003) at 1-39.

¹⁹³ 36 C.F.R. § 294.13(b)(1).

inventoried roadless areas.”¹⁹⁴ This statement reinforces the conclusion that the Forest Service has not yet designed the logging treatments, and thus it cannot conclude that such not-yet-designed, unspecified treatments will meet the narrow limits of the exception.¹⁹⁵

Elsewhere the MFEIS demonstrates the importance of the lacking site-specific review, because the agency is not sure whether the project overall will maintain or restore roadless character will be positive or negative. In a summary of the project’s impacts, the MFEIS states:

Mechanical timber harvest, prescribed burning, or both could cause short-term soil compaction and displacement, introduction of weeds, short-term effects on water and air quality, and increases in unauthorized off-highway vehicle use. These activities could also cause loss of individuals, or populations of certain plant species and their localized habitat (including Rocky Mountain Region sensitive species). However, this is unlikely due to project design features which require portions of treatments in inventoried roadless areas to be eliminated or modified if they would negatively impact one or more roadless area characteristic Long-term benefits could result from integrated vegetation management actions.¹⁹⁶

Whether logging in IRAs would harm soils, introduce weeds, damage air and water quality, lead to off-road vehicle damage, and loss of sensitive species, and whether those harms could be mitigated by design features is highly dependent on site-specific factors including soil type, slope, aspect, etc. Because none of the information is in the MFEIS, it is impossible for the Forest Service to conclude that this project can comply with the Roadless Rule. Thus, approval of the project’s logging proposals in IRAs would be arbitrary and capricious.

The MFEIS’s general statements about the potential for overall impacts across the 25 roadless areas to each of the nine roadless characteristics supports the conclusion that any approval of logging within IRAs would violate the roadless rule.

High quality or undisturbed soil, water, and air.

¹⁹⁴ MFEIS at 352; *see also id.* at 106 (“Timber and fuels treatments in inventoried roadless areas ... would be designed to maintain or improve the nine roadless area characteristics.”).

¹⁹⁵ Nor can the Forest Service rely on the “Decision-Making Triggers” document to allege that any logging treatments designed at some future time will comply with the Roadless Rule. The “Triggers” document requires that the Forest Service prepare a roadless area review form, and that where the agency predicts that one or more roadless characteristics will be harmed by a treatment, the agency will “[e]liminate inventoried roadless area portion of treatment proposal or identify other means of achieving resource objectives that do not result in adverse impacts to inventoried roadless area characteristics.” *See* Forest Service, Modified Appendix A: Adaptive Implementation and Monitoring Framework, LaVA Project (Apr. 2020) at 55. This is little more than a promise to obey the law in the future, without providing for any public oversight, review, or the site-specific analysis that the Roadless Rule requires before a decision is made.

¹⁹⁶ MFEIS at 12.

The MFEIS indicates that logging within IRAs “would” harm soils within IRAs. “Where ground-disturbing activities are planned, compacted and displaced soil *would* occur.... Erosion *would* increase where vegetation is removed down to mineral soil and on steeper slopes.”¹⁹⁷ On the other hand, the MFEIS asserts that doing nothing “could” lead to soil damage due to the purported increased risk of wildfire: “There would be a greater risk of a large, high-severity wildfires than with the modified proposed action. This *could* adversely affect soil productivity by volatilizing nutrients, creating hydrophobic soils, increasing erosion, and burning ground cover and vegetation on large areas.”¹⁹⁸ This means the Forest Service concluded that logging would have certain harm from logging, compared to a *potential* harm to soils from taking no action. Therefore, at a general level, the Forest Service appears to conclude that logging in roadless areas would not definitively restore or maintain this roadless characteristic.

Sources of public drinking water

The MFEIS concludes that logging in roadless areas would damage the roadless characteristic of protecting sources of drinking water: “There would be short-term increased sedimentation and turbidity from proposed activities, but downstream effects would be diminished. The potential of contamination of drinking water from petroleum spills would be increased.”¹⁹⁹ The MFEIS concludes that “[s]ome watershed effects [of the LaVA project] are adverse, and some will be unavoidable.”²⁰⁰ Therefore, at a general level, the Forest Service concludes that logging in roadless areas would degrade this roadless characteristic.

Diversity of plant and animal communities

Similarly, the MFEIS concludes that that logging in roadless areas would damage the diversity of plant and animal communities in roadless areas.

The Forest Service asserts that the roadless areas proposed for logging harbor important and diverse plant communities. The MFEIS states that several of “[t]hese [IRAs] support a disproportionate number of rare plant species and uncommon vegetation communities in comparison to the adjacent roaded areas, and the abundance of rare plants and vegetation types increases the biodiversity of these inventoried roadless areas.”²⁰¹

But the Forest Service also admits that it does not have basic, site-specific, and necessary data about the nature of plant and animal communities within IRAs.

¹⁹⁷ MFEIS at 365 (emphasis added).

¹⁹⁸ MFEIS at 365 (emphasis added).

¹⁹⁹ MFEIS at 106; *id.* at 366.

²⁰⁰ MFEIS at 383.

²⁰¹ MFEIS at 367.

The vegetation in inventoried roadless areas *has not been adequately inventoried* to date. We *lack data* on vegetation communities, diversity, and rare plants.²⁰²

This is a most candid (and damaging) statement. The Forest Service cannot conclude it has met its obligations under the Roadless Rule to ensure that its actions in IRAs will “maintain or restore” conditions when the agency acknowledges it does not have the “adequate[]” data to make that decision. Few other admissions in the MFEIS so powerfully underscore the need for the agency to undertake site-specific analysis before it decides to approve the LaVA Project.²⁰³ Despite the lack of required data, the MFEIS concludes that the proposed action will likely degrade the roadless areas’ diversity of plant and animal communities, while the no action alternative will “maintain” those values. “The no-action alternative is not expected to affect sensitive plant species or habitats in the inventoried roadless areas,”²⁰⁴ nor is it “expected to affect the diversity of native vegetation in inventoried roadless areas.”²⁰⁵ Further, “it is expected security areas would be maintained with continuation of current vegetation management.”²⁰⁶

On the other hand, the MFEIS concludes that the proposed action could adversely affect diversity in a number of ways, including destroying rare plants and vegetation, and spreading invasive species, including through increased unauthorized motorized use.²⁰⁷

A long-term decrease in biodiversity would be possible if habitats conditions were altered for rare and specialist species that do not tolerate disturbance or human activities. This includes the introduction and spread of invasive plant species. There could be treatment in all wildlife habitat types present in roadless

²⁰² MFEIS at 367 (emphasis added).

²⁰³ The agency cannot conclude that its proposed action will comply with the Roadless Rule, nor can it purport to have taken a “hard look” at the impacts of roadless logging on vegetative communities, without the omitted inventories. Because this information is thus “essential to a reasoned choice among alternatives,” NEPA mandates that the Forest Service must obtain the data by undertaking the necessary site-specific vegetation inventories or explain why it cannot, pursuant to 40 C.F.R. § 1502.22. *See Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1244 n.5, 1249 (9th Cir. 1984) (“Section 1502.22 clearly contemplates original research if necessary;” “[a]s long as the information is ... ‘significant,’ or ‘essential,’ it must be provided when the costs are not exorbitant”); *Montgomery v. Ellis*, 364 F. Supp. 517, 528 (N.D. Ala. 1973) (“NEPA requires each agency to undertake the research needed adequately to expose environmental harms and, hence, to appraise available alternatives.”). Courts have set aside agency analysis for failure to comply with this NEPA provision. *See, e.g., Lands Council v. Powell*, 395 F.3d 1019, 1031-32 (9th Cir. 2005) (agency failure to disclose relevant shortcomings in model used for analysis violated NEPA); *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549-50 (8th Cir. 2003) (pursuant to 40 C.F.R. § 1502.22, agency was required to evaluate potential air quality impacts associated with increased availability and utilization of coal).

²⁰⁴ MFEIS at 369.

²⁰⁵ MFEIS at 367.

²⁰⁶ MFEIS at 369.

²⁰⁷ MFEIS at 367-68 (“Treatments advanced under the modified proposed action could adversely affect the diversity of native plants in treated units and other (unsurveyed) roadless areas in a number of ways,” and describing several).

areas; there would be limited treatment in wetland and riparian habitats since several design features for wetlands, moist soils, and water influence zones reduce vegetation management impacts in these areas.²⁰⁸

Further, the proposed action could result in the removal of all designated old growth stands from the Little Sandstone (570 acres), Bridger (301 acres), Pennock (2,685 acres), and Sheep Mountain (2,185 acres) IRAs.²⁰⁹

In sum, the Forest Service lacks basic, essential data about each of the 25 individual IRAs that preclude it from determining that the proposed action will comply with the Roadless Rule regarding the maintenance and restoration of the diversity of plant and animal communities, but what data the agency does have indicates that the proposed action will likely violate that Rule.

Habitat for threatened, endangered, proposed, candidate, and sensitive species and for those species dependent on large, undisturbed areas of land.

As with plant and animal communities, the MFEIS supports four conclusions regarding habitat for sensitive and imperiled species: (1) the IRAs in the project area harbor important resources; (2) the no action alternative will protect those values; (3) the Forest Service lacks significant site-specific data; and (4) what data the agency does have indicates that the proposed action could degrade those resources. Once again, implementing the proposed action would thus violate the Roadless Rule.

First, the Forest Service admits that IRAs “contain habitat for populations of multiple Rocky Mountain Region sensitive plant species.”²¹⁰ The MFEIS also notes that habitat for species including lynx and pine marten are found in IRAs.

Second, “[t]he no-action alternative is not expected to affect sensitive plant species or habitats in the inventoried roadless areas.”²¹¹ Further, “it is expected security areas would be maintained with continuation of current vegetation management.”²¹²

Third, the MFEIS admits that without knowing how and where treatments in IRAs will occur, the agency cannot understand the degree to which logging will degrade sensitive and imperiled species. “The LaVA Project *could* result in fewer security areas in roadless areas. The amount of security area removal *would depend on the location and type of treatment.*”²¹³ This admission once again highlights that the lack of site-specific data in the MFEIS makes it impossible for the Forest Service to conclude that the proposal will comply with the Roadless Rule.

²⁰⁸ MFEIS at 106.

²⁰⁹ MFEIS at 368.

²¹⁰ MFEIS at 368.

²¹¹ MFEIS at 369.

²¹² MFEIS at 369.

²¹³ MFEIS at 369 (emphasis added).

Fourth, rather than maintaining or restoring habitat for rare and sensitive species pursuant to the Roadless Rule, the Forest Service admits the potential for the proposed action to destroy those values. The MFEIS states that “[t]he project could adversely impact sensitive plant species habitat in the parts of the inventoried roadless areas proposed for treatment.”²¹⁴ Regarding sensitive plants, the MFEIS states:

Other habitats could be impacted by logging activities and subsequent ground disturbance, the transfer and spread of noxious weeds and cheatgrass by vehicles and fire, and increased access for unauthorized recreational activities. The lack of land management activities and the unroaded nature and difficult access in these areas has helped support sensitive plant species and habitat. *Introducing more human-caused disturbance in these areas could diminish or eliminate some sensitive plant populations.*²¹⁵

The MFEIS concludes that wildlife habitat could be similarly degraded: “In theory, all forest-plan-defined security areas could be removed” from four named IRAs, covering a 12,019 acre area.²¹⁶ The proposed action will damage and disturb habitat for both lynx (which “benefit[s] from large undisturbed areas”) and its prey.²¹⁷ The proposed action is likely to have “considerable” adverse impacts to marten habitat as well:

Some amount of marten habitat in roadless areas could be treated. Some or all of those treatments could result in those areas becoming unsuitable to marten use in the short (some intermediate harvests) to long term (stand initiation treatments). That total would be determined by on-site field surveys, but the amount could be considerable. For example, there could be as much as 35,000 acres of vegetation management in marten habitat across the 25 roadless areas. Some marten territories would be affected in areas where management effects do not often occur.²¹⁸

Once again, the Forest Service admits that it lacks site-specific information about treatments in roadless areas (because it cannot predict the amount of marten habitat rendered unsuitable without “on-site field surveys”), which the agency hasn’t bothered to conduct before proposing to approve this project. The Forest Service thus cannot comply with either the Roadless Rule or NEPA.

²¹⁴ MFEIS at 369.

²¹⁵ MFEIS at 369 (emphasis added).

²¹⁶ MFEIS at 369.

²¹⁷ See MFEIS at 107; *id.* at 370 (reaching similar conclusion); Wildlife Biological Assessment Report, Landscape Vegetation Analysis (Feb. 2, 2020) at 59-60 (concluding proposed action will result in incidental take of lynx and will reduce habitat for lynx prey).

²¹⁸ MFEIS at 370. See also *id.* at 107 (reaching same conclusion).

Primitive, semi-primitive nonmotorized, and semi-primitive motorized classes of dispersed recreation

The MFEIS contends that both the action and no action alternatives could harm dispersed recreation, demonstrating that the Forest Service cannot ensure that the proposed action's logging in IRAs will maintain or restore this roadless characteristic.

The MFEIS asserts that without the logging in the proposed action, recreational users will be threatened by falling beetle-killed trees.²¹⁹ At the same time, the Forest Service contends that because logging in IRAs is “unlikely” under the no action alternative, “negative impacts to roadless area characteristics [concerning recreation] are not expected.”²²⁰

Under the proposed action, on the other hand, “[p]rojected vegetation treatments over the next 15 years could change the natural appearance of some areas until they regenerate,”²²¹ which will take years or decades, degrading the recreational experience for that time period. Logging in IRAs may also “interfere with visitors’ sense of solitude in these areas.”²²² Even if the impact is small, it means that the Forest Service would be arbitrary and capricious to conclude that the project would “maintain or restore” this value.

Reference landscapes

The Forest Service cannot conclude that tree removal in IRAs will “maintain or restore” referenced landscapes because it predicts harm to such landscapes from logging. While “[p]rescribed fire may have a beneficial effect by restoring fire to landscapes,”²²³ the MFEIS concludes that:

The sites in the inventoried roadless areas where trees are cut and removed may no longer serve as (smaller-scale) reference landscape over the short term—1 to 7 years. As the forested vegetation regenerates over the mid-term (7 to 30 years) and long term (30 to 150 years) within the inventoried roadless areas, their value as reference landscapes would increase.²²⁴

The MFEIS thus predicts impacts to some reference landscapes will last longer than a human lifetime. It cannot therefore conclude that the proposed action will either maintain or restore this characteristic.

Natural appearing landscapes with high scenic quality

²¹⁹ MFEIS at 337.

²²⁰ MFEIS at 338 (discussing recreation impacts)

²²¹ MFEIS at 371.

²²² MFEIS at 382.

²²³ MFEIS at 107.

²²⁴ MFEIS at 372.

The MFEIS similarly predicts damage to naturally appearing landscapes that could last years or decades. “Short-term to mid-length impacts [are] expected to scenery from artificial forest patterns, and increased edges, [caused by logging] but the area would recover as new trees and understory regenerate.”²²⁵ “Implementation of the modified proposed action would change the landscape character by altering vegetation patterns and creating more edges associated with landings.”²²⁶ While logging will thus undermine the maintenance or restoration of natural landscapes, the no action alternative would likely maintain this characteristic. Under the no action alternative, the MFEIS predicts that “[i]t is unlikely there would be human-caused changes to scenery or the existing scenic condition of the 25 inventoried roadless areas other than effects of continued fire suppression.”²²⁷

Traditional cultural properties and sacred sites

The MFEIS contains contradictory assertions concerning the potential for the proposed action to maintain or restore traditional cultural properties. The MFEIS questionably asserts at one point that “[t]here are no [such] sites in the project area.”²²⁸ The Forest Service also contends that wildfire and falling trees, more likely under the no action alternative, are more damaging to cultural sites than logging and prescribed fire under the proposed action, apparently because at least sites will be inventoried before they are potentially destroyed by logging.²²⁹ Still, the agency admits that under the proposed action, “[t]here is potential for indirect effects from the projects to significant cultural resources. Indirect effects can result from changed visitor use patterns and improved access that brings more visitors, resulting in the deterioration or loss of the site.”²³⁰

Again, without the site-specific review required by both the Roadless Rule and NEPA, the Forest Service cannot conclude that logging in 25 individual IRAs will maintain or restore cultural properties and sacred sites.

Other locally identified unique characteristics

The MFEIS contains no evidence that the proposed action will “maintain or restore” locally identified unique characteristics, and evidence that the proposal will degrade those characteristics, in violation of the Roadless Rule.

The MFEIS admits that the “no-action alternative would not affect characteristic, interesting, and unique habitats and ecosystems in the inventoried roadless areas.”²³¹ However, the

²²⁵ MFEIS at 107.

²²⁶ MFEIS at 373.

²²⁷ MFEIS at 373.

²²⁸ MFEIS at 107.

²²⁹ MFEIS at 346.

²³⁰ Forest Service, Medicine Bow Landscape Vegetation Analysis (LaVA) Project Heritage Resource Specialists Report (Apr. 27, 2018) at 10 (in Forest Service project files).

²³¹ MFEIS at 375.

“modified proposed action may decrease the quantity or quality of botanical forest products in the roadless areas,”²³² thus failing to maintain this roadless characteristic as the Roadless Rule mandates.

Further, “[l]ong-term adverse impacts could be expected” under the proposed action “if unique, high-elevation forested types are harvested, such as sky-island forests in Libby Flats Inventoried Roadless Area.”²³³ While the MFEIS alleges damage to sky islands forests and similar forest types “is highly unlikely” because the agency could implement “project design features which require portions of treatments in inventoried roadless areas to be eliminated or modified if they would negatively impact one or more roadless area characteristic,”²³⁴ this is a circular argument. The Forest Service is contending that there will be no damage to sky-island forests in violation of the Roadless Rule because it promises to comply with the Roadless Rule. And yet the Forest Service proposes to approve LaVA Project, authorizing logging in these very roadless areas, *without* the stand-specific analysis NEPA and the Roadless Rule require. This “kick the can down the road” approach violates both laws.

F. The Forest Service fails to demonstrate that any logging will “improve threatened, endangered, proposed, or sensitive species habitat.”

To avail itself of exceptions to the Roadless Rule’s prohibition on timber removal, the Forest Service must demonstrate not only that the proposed action will log generally small diameter timber and will maintain or restore roadless characteristics. It must also meet the requirements of individual exceptions, one of which is that timber removal will “improve threatened, endangered, proposed, or sensitive species habitat.”²³⁵

Tables and crude maps in the MFEIS and project record indicate that the Forest Service proposes to remove timber on 10,164 acres pursuant to this exception, relying on Wyoming Game and Fish Department identification of Colorado River Cutthroat Trout and boreal toad habitat.²³⁶ However, *nothing* in the MFEIS or the related aquatics report concludes that the proposed action will “improve” habitat for these species; instead the Forest Service’s analysis shows the timber removal will damage that habitat. The Roadless Rule thus prohibits the use of this exception on this habitat, and the Forest Service must drop timber removal in these habitats immediately.

²³² MFEIS at 375

²³³ MFEIS at 107. *See also id.* at 375 (under the proposed action, “the sky-island forests of Libby Flats Inventoried Roadless Area may be treated which could alter forest structure, old growth characteristics, and landscape pattern.”).

²³⁴ MFEIS at 107.

²³⁵ 36 C.F.R. § 294.13(b)(1)(i).

²³⁶ MFEIS at 354-360. *See also id.* at 66 (“LaVA cooperating agencies submitted inventoried roadless area proposals to the Forest Service to improve terrestrial and aquatic species habitat and to protect Wyoming State Trust Lands, private and State lands, communities at risk, and municipal water supplies. Medicine Bow National Forest staff submitted proposals to protect critical infrastructure, including fences and ditches.”).

The MFEIS concludes that while the no action alternative will have “no impact” on either boreal toad or cutthroat trout, that the proposed action “could result in impacts” to both species.²³⁷ The MFEIS further explains that mastication treatments, which may occur in IRAs, “could directly affect amphibians by destroying hibernacula or through direct mortality.”²³⁸ The Forest Service’s “Aquatics Report” confirms the potential for the proposed action to harm both boreal toad and cutthroat trout:

“Environmental effects on sensitive species [from the proposed action] may result in impacts to boreal toad ... and Colorado River cutthroat trout individuals.”²³⁹

“Boreal toads may be vulnerable to impacts of timber harvest.”²⁴⁰

“Mastication is used to establish fire breaks. This method has the potential to directly affect amphibians by destroying hibernacula or through direct mortality.”²⁴¹

Thus despite the Roadless Rule’s command that timber removal in IRAs, to meet this exception, must “improve threatened, endangered, proposed, or sensitive species habitat,” the Forest Service has provided no evidence or argument that the treatments ostensibly mapped for cutthroat trout and boreal will “improve” habitat for such species, and much evidence that directly contradicts that purpose. Because such treatments would violate the Roadless Rule, they cannot be approved as part of the proposed action.

G. The Forest Service fails to demonstrate that any logging will “maintain or restore the characteristics of ecosystem composition and structure.”

A second exception permits timber removal from IRAs “[t]o maintain or restore the characteristics of ecosystem composition and structure, such as to reduce the risk of uncharacteristic wildfire effects, within the range of variability that would be expected to occur under natural disturbance regimes of the current climatic period.”²⁴² The Forest Service’s evidence to support the use of this exception for the LaVA Project is nonexistent at worst, and weak at best.

The MFEIS identifies 65,178 acres that the agency proposes to treat pursuant this exception.²⁴³ In this table, the MFEIS briefly identified a number of rationales for invoking the exception, including “Infrastructure” and inholding and boundary “protection;” “Wyoming Game and Fish

²³⁷ MFEIS at 102; *see also id.* at 10 (summarizing impacts, discussing none from the no action alternative, but stating that modified proposed action “[m]ay result in impacts to ... Colorado River cutthroat ... and boreal toad individuals”).

²³⁸ MFEIS at 261.

²³⁹ Final Supplemental Aquatics Report, Medicine Bow LaVA Project (Apr. 2019) at un-numbered PDF page 6 (in Forest Service project files).

²⁴⁰ *Id.* at un-numbered PDF page 40.

²⁴¹ *Id.* at un-numbered PDF page 27.

²⁴² 36 C.F.R. § 294.13(b)(1)(ii).

²⁴³ MFEIS at 354-360, Table 193.

Department (WGFD) Mule Deer Initiative (MDI) area;” and “WGFD aspen enhancement;” “Cheyenne Board of Public Utilities (BOPU) catchment protection.”²⁴⁴ But the MFEIS contains no discussion at all of the mule deer initiative, of BOPU catchment protection, or why logging of small trees might be needed in the areas chosen by outside entities to “maintain or restore the characteristics of ecosystem composition and structure ...” as the Roadless Rule.

Further, the MFEIS does not explain why logging is necessary at boundaries or near inholdings because of a “risk of uncharacteristic wildfire effects,” when wildfires and beetle kill are endemic to forests in the Rocky Mountain West. As noted above, the Forest Service nowhere explains why it is adopting the State of Wyoming’s arbitrary half-mile buffer to permit logging all across numerous IRAs, with no stand-specific review, a proposal which appears to have no basis in science.²⁴⁵ And while the Medicine Bow Forest Plan identifies a half-mile area adjacent to identified community as the appropriate location for management prescriptions under prescription 7.1 (Residential/Forest Interface), the Forest Plan further states that “[a]ppropriate treatment boundaries” in such areas “will be identified at the project level *based on site-specific conditions such as topography, vegetation conditions, and fuel loadings.*”²⁴⁶ The LaVA Project MFEIS has failed to identify any of these site-specific factors, in violation of the Forest Plan’s direction.

The Forest Service’s own analysis demonstrates that forest stands within the IRAs do not need treatment to, *inter alia*, maintain or restore the characteristics of ecosystem composition and structure, enhance forest and rangeland resiliency to future insect and disease infestations, provide for the protection of infrastructure and restoration of wildlife habitat, and/or mitigate hazardous fuel loading. Under the no-action alternative, “[f]orested habitats and forested vegetation communities in this analysis are adapted to fire (Romme et al. 2007), and wildfire could have beneficial or adverse effects on diversity, depending on factors such as soil burn severity and post-fire invasive species invasion.”²⁴⁷ As noted above in section 9, the Forest Service fails to consider best available science and new science showing recognizing the profound effects of historical and contemporary logging of forests on fire severity and frequency.²⁴⁸ The agency also fails to consider studies that show resisting wildfire through fire suppression and fuels management is inadequate, and instead policies promoting adaptive resilience to wildfire are needed.²⁴⁹ These studies confirm that simply treating more area may not help to achieve long-term fire and land management goals if wildland fire cannot be safely managed.²⁵⁰ And the Forest Service ignores a 2018 study that found during MPB outbreaks,

²⁴⁴ *Id.*

²⁴⁵ See *supra* at Guardians’ et al. Objection pages 68-69.

²⁴⁶ Medicine Bow National Forest Plan, Chapter 2 (2003), at 2-69 (emphasis added).

²⁴⁷ MFEIS at 367.

²⁴⁸ Lindenmayer et al. (2020) Recent Australian wildfires made worse by logging and associated forest management (Attachment 11).

²⁴⁹ See Schoennagel et al. (2017) Adapt to more wildfire in western North American forests as climate changes (Attachment 8).

²⁵⁰ See Barnett (2016) Beyond Fuel Treatment Effectiveness: Characterizing Interactions between Fire and Treatments in the US (Attachment 9); Treatment-wildfire scale (2019) Wildfires RARELY encounter forest fuel treatments in West (Attachment 10).

beetle choice may result in strong selection for trees with greater resistance to attack, and therefore retaining survivors after outbreaks (as opposed to logging them) to act as primary seed sources could promote adaptation for the forest.²⁵¹

Because the Forest Service fails to demonstrate that logging in 65,000 acres of IRAs will “maintain or restore the characteristics of ecosystem composition and structure,” the proposed action violates the Roadless Rule. Because the Forest Service fails to provide forest stand and site-specific analysis of impacts, the proposed action violates the Roadless Rule and NEPA.

H. The Forest Service’s analysis of impacts to IRAs precludes meaningful public comment, and is inconsistent with general agency practices.

The characteristics worksheet and the Region 2 review form could be sufficient, if these forms contained the information they call for. But because the characteristics worksheet and the Region 2 review form are blank, and will not be completed until prior to implementation, the public lacks the information necessary to understand whether and how roadless area characteristics will be maintained. As a result the public is unable to provide meaningful review. Failure to disclose necessary information to allow for meaningful and informed public review violates NEPA. What’s more, the Forest Service’s approach here runs contrary to how the agency uses these forms to assess the impacts of other site-specific projects within Region 2. For example, for a 2019 project within the Puma Hills CRA on the South Park Ranger District of the Pike and San Isabel National Forests, the Forest Service completed the roadless area characteristics worksheet with site-specific information and details, assessing potential effects to each of the roadless area characteristics.²⁵²

16. Failure to consider a reasonable range of alternatives, and improperly eliminates reasonable alternatives.

NEPA requires that agencies analyze a range of reasonable alternatives.²⁵³ “Under NEPA’s applicable regulations, a federal agency’s EIS must ‘[r]igorously explore and objectively evaluate all reasonable alternatives [to a proposed action], and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.’”²⁵⁴ An agency’s consideration of alternatives becomes meaningless if the agency arbitrarily constrains the range of alternatives considered and fails to consider alternatives that avoid the adverse effects of the proposed action, frustrating NEPA’s goal of protecting the environment.²⁵⁵ In

²⁵¹ See Six, D.L., Vergobbit C. and Cutter M. (2018) Are Survivors Different? Genetic-Based Selection of Trees by Mountain Pine Beetle During a Climate Change-Driven Outbreak in a High-Elevation Pine Forest, *Front. Plant Sci.* 9:993, doi: 10.3389/fpls.2018.00993 (Attachment 1 to WildEarth Guardians’ DEIS comments).

²⁵² See Attachment 13.

²⁵³ 42 U.S.C. § 4332(2)(C) & (E).

²⁵⁴ See *Alaska Conservation Council v. Fed. Highway Admin.*, 649 F.3d 1050, 1056 (9th Cir. 2011) (quoting 40 C.F.R. § 1502.14(a)).

²⁵⁵ See *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1123 (9th Cir. 2002); *Cal v. Block*, 690 F.2d 753, 765-69 (9th Cir. 1982),

other words, “agencies may not define the objectives of a proposed action so narrowly as to preclude a reasonable consideration of alternatives.”²⁵⁶ For that reason, courts have repeatedly set aside agency NEPA analysis where agencies ignore middle-ground alternatives, or took only an all-or-nothing approach by analyzing only the action and no action alternative.²⁵⁷ Courts “have repeatedly recognized that if the agency fails to consider a viable or reasonable alternative, the EIS is inadequate.”²⁵⁸

Courts hold that an alternative may not be disregarded merely because it does not offer a complete solution to the problem.²⁵⁹ Even if additional alternatives would not fully achieve the project’s purpose and need, NEPA “does not permit the agency to eliminate from discussion or consideration a whole range of alternatives, merely because they would achieve only some of the purposes of a multipurpose project.”²⁶⁰ If a different action alternative “would only partly meet the goals of the project, this may allow the decision maker to conclude that meeting part of the goal with less environmental impact may be worth the tradeoff with a preferred alternative that has greater environmental impact.”²⁶¹

Analysis of HFRA projects must study, develop and describe the proposed agency action, the no action alternative, and an additional action alternative if one is proposed during scoping or the collaborative process and it meets the purpose and need of the project.²⁶²

Here, the Forest Service took the very all-or-nothing approach that courts have repeatedly found to violate NEPA, comparing only the do-nothing alternative (no action) and the agency’s proposed action. It is inconceivable that the only reasonable solution to addressing the incredibly broad purpose the agency identifies – “to respond to changed forest vegetation conditions caused by the bark beetle epidemics on the Medicine Bow

²⁵⁶ *High Country Conservation Advocates v. United States Forest Serv.*, 951 F.3d 1217, 1223 (10th Cir. 2020).

²⁵⁷ *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1039 (9th Cir. 2008) (EIS for management plan should have included alternatives that reduced user levels on river); *Oregon Natural Desert Ass’n v. Bureau of Land Management*, 625 F.3d 1092, 1123-24 (9th Cir. 2008) (agency should have considered alternatives that closed more than 0.77% of planning area to ORV use); *NRDC v. U.S. Forest Service*, 421 F.3d 797, 814 (9th Cir. 2005) (agency should have considered alternatives that allocated less than 50% of roadless areas in planning area to land use designations allowing development); *Block*, 690 F.2d at 768-69 (agency should have considered alternative allocating more than one-third of roadless areas to wilderness management); *Ctr. for Biological Diversity v. Bureau of Land Management*, 746 F. Supp. 2d 1055, 1087-89 (N.D.Cal. 2009) (agency should have considered alternatives that closed some portion of existing road network in planning area); *accord N.M. ex rel. Richardson v. Bureau of Land Management*, 565 F.3d 683, 709-11 (10th Cir. 2009) (EIS for management plan should have considered alternative closing planning area to future oil and gas leasing); *see also* Council on Environmental Quality (“CEQ”), Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations, 46 Fed. Reg. 18026, 18027 (Mar. 17, 1981) (explaining that “[a]n appropriate series of alternatives might include dedicating 10, 30, 50, 70, 90, or 100 percent of the Forest to wilderness”).

²⁵⁸ *Se. Alaska Conservation Council*, 649 F.3d at 1056. *See also High Country Conservation Advocates*, 951 F.3d at 1223 (“The existence of a viable but unexamined alternative renders an environmental impact statement inadequate.”) (citation omitted).

²⁵⁹ *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 836 (D.C. Cir. 1972).

²⁶⁰ *Town of Matthews v. U.S. Dep’t. of Transp.*, 527 F. Supp. 1055 (W.D. N.C. 1981).

²⁶¹ *North Buckhead Civic Ass’n v. Skinner*, 903 F.2d 1533, 1542 (11th Cir. 1990).

²⁶² 16 U.S.C. § 6514(c).

National Forest” – is the one the Medicine Bow National Forest happened to fall upon, and the no other proposal could “respond” to that changed condition.

In fact, Guardians suggested several alternatives that would meet the stated purposes and needs, including:

- (1) a genuine forest health proposal that would decommission system roads and promote regeneration, consistent with subpart A of the Travel Management Rule;
- (2) an alternative that requires no road construction or reconstruction (system or temporary roads); and
- (3) an alternative that excluded vegetation treatments in IRAs.²⁶³

The Forest Service states it analyzed four different alternatives, but eliminated all of them from study.²⁶⁴ The Forest Service’s elimination of *all* of these alternatives, despite the fact that each meets at least part of the stated purposes and needs (and not detracting from the remaining purposes and needs) violates NEPA and HFRA. The Forest Service appears to rely on the false assumption that each alternative must meet all of the stated purposes and needs for the project.

While the Forest Service removed the proposed 10 miles of system road construction, it kept the proposed action to build approximately 600 miles of temporary roads explaining it is necessary to achieve the purpose and need of the LaVA project. Given the Forest Service response dismissing our call to include identifying the minimum road system and unneeded roads in the project’s purpose and need, it is no surprise the agency failed to even consider the proposal to include an alternative that would decommission roads. The Forest Service asserts, “[n]o alternatives that fully met the purpose and need for the project were proposed during scoping, the collaborative process ... or the 45-day formal comment period for the draft environmental impact statement.”²⁶⁵ But the agency contradicts itself and undercuts this reasoning where the responsible official explained last year that “I further reduced the risk of permanent adverse effects by including specific actions to rehabilitate, decommission, and maintain roads to reduce the connection of disturbed areas to stream channels.”²⁶⁶ This demonstrates an alternative that includes decommissioning system roads and promoting regeneration would be viable. The lack of consideration violates NEPA.

Further, the proposed alternative of eliminating logging treatments within IRAs would not only meet the project’s purpose and need, at least in part, it would ensure the protection of the Medicine Bow’s precious roadless resources. This would implement NEPA’s purpose of putting

²⁶³ Guardians’ Scoping at 9, DEIS comments at 5.

²⁶⁴ MFEIS at 97-99.

²⁶⁵ MFEIS at 6. *See also id.* at 57 (“No alternatives that fully met the purpose and need for the project were proposed during scoping or the collaborative process”).

²⁶⁶ DROD (Apr. 2019) at 36. Note that the Forest Service removed this sentence from the reissued DROD, without providing a rational basis for doing so, possibly in an attempt to undercut this argument. *See* Reissued DROD at 37.

in sharp relief the trade-offs among alternatives (roadless protection v. logging). It would meet the purpose and need by allowing temporary road construction and treatment across about 620,000 acres of the 850,00-acre project area outside IRAs – about than 73% of the project area.²⁶⁷ To provide another comparison, the proposed action “authoriz[e] vegetation management activities on up to 360,000 acres of National Forest System lands,”²⁶⁸ while the IRA protection alternative would allow such activities of nearly 240,000 acres – roughly two-thirds of the acreage of the proposed action.²⁶⁹ The IRA protection alternative is thus exactly the kind of “middle ground” alternative NEPA and the courts have repeatedly required federal agencies, including the Forest Service, to consider, especially when agencies are, as here, considering what is in effect a programmatic proposal on the scale of a forest plan.

The Forest Service’s rationales for dismissing the IRA protection is arbitrary and capricious. The MFEIS states:

This alternative was eliminated from the detailed study because it does not meet the purpose and need of the project, particularly as related to needs of LaVA cooperating agencies. Specifically, excluding inventoried roadless areas from the proposed action would forgo opportunities to enhance forest and rangeland resiliency to future insect and disease infestations, provide for the protection of infrastructure and restoration of wildlife habitat, and mitigate hazardous fuel loading on roughly 27 percent (230,240 acres) of the LaVA analysis area.

Removing such a large land base from the proposed action would not allow a landscape-scale analysis of, and response to, changed forest vegetation conditions presented by insect and disease epidemics, which is the primary purpose of the project.²⁷⁰

The Forest Service here appears to base its refusal to consider the IRA protection alternative on the grounds that it would permit the agency to fulfill the purpose and need of the project on “only” about *three-quarters of the landscape* that it proposes to treat. The Forest Service does not explain why achieving three-fourths of its treatment goals while protecting 100% of its IRAs is not a reasonable trade-off. It is particularly reasonable given that the MFEIS predicts damage to many roadless characteristics from tree removal on tens of thousands of acres under the proposed action. This is precisely the kind of “development vs. roadless protection” trade-off that the Tenth Circuit Court of Appeals held that the Forest Service must undertake to comply with NEPA in *High Country Conservation Advocates v. United States Forest Service*.²⁷¹

²⁶⁷ The MFEIS identifies the project area as 850,000 acres. MFEIS at 30. IRAs proposed for treatment in the area total about 123,000; areas proposed for logging in IRAs total less than 80,000 acres. *Id.* at 352, 353.

²⁶⁸ MFEIS at 30.

²⁶⁹ An alternative barring only mechanical timber removal in IRAs would permit treatment on about 280,000 acres, or 77% of the area identified in the proposed action.

²⁷⁰ MFEIS at 98.

²⁷¹ 951 F.3d 1217 (10th Cir. 2020) (vacating coal mine exception to Colorado Roadless Rule for failure to consider alternative that protected a unique roadless area that represented a middle ground alternative).

The Forest Service rationale that the IRA protection alternative would “not allow a landscape-scale ... response to changed forest conditions” is also without merit. The MFEIS does not explain why this is so given that non-IRA lands represent about 620,000 acres – an area of nearly 1,000 square miles, and twice the size of Grand Teton National Park - of the 850,000-acre project area. One thousand square miles surely appears to be landscape scale. Further, looking at where treatments would actually occur, the IRA protection alternative would allow treatments on 240,000 of 360,000 acres, again a relatively huge area, many times larger than the usual proposed treatment under a project level proposal. Again, it appears that the Forest Service fixed on a predetermined number of acres to treat, and only that amount would meet the proposed action, precisely the type of analysis that courts have repeatedly overturned because it cuts the heart out of the alternatives analysis.

17. Failure to articulate the proposed action with sufficient detail or information to allow for meaningful, informed public comment.

“NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.”²⁷² NEPA was intended to ensure that agencies “consider environmentally significant impacts of a proposed action, and, in so doing, let the public know that the agency’s decisionmaking process includes environmental concerns.”²⁷³ A Forest Service proposal is subject to NEPA when, *inter alia*, “the effects can be meaningfully evaluated (see 40 CFR 1508.23).”²⁷⁴ Here, the FEIS does not contain sufficient information to foster informed agency decision-making or informed public participation.

We commented on the lack of detail in the proposed action, noting the Forest Service leaves many of the crucial details to future implementation.²⁷⁵ In response, the agency explains the FEIS provided further description of the modified proposed action “. . . to describe primary and secondary treatment objectives within different treatment opportunity areas.”²⁷⁶ This response fails to address the systemic flaw with using a condition-based analysis and waiting until after a formal decision to specify specific actions within each of these treatment opportunity areas. In other words, project-level NEPA requires the proposed action to include enough detail to allow for public input *before* the responsible officials makes a decision. This includes treatment locations and methods with quantifiable measures such as the number of acres proposed for prescribed burning or shelterwood harvest, as well as the length and location of temporary roads and skids trails, and details about the system roads that will be used (i.e., used, opened, and/or reconstructed for log truck hauling). Absent this level of detail the public cannot provide meaningful, informed comment.

²⁷² 40 C.F.R. § 1500.1(b).

²⁷³ *Utahns for Better Transp. v. United States Dep’t of Transp.*, 305 F.3d 1152, 1162 (10th Cir. 2002).

²⁷⁴ 36 C.F.R. § 220.4(a)(1).

²⁷⁵ Guardians’ DEIS comments at 2.

²⁷⁶ FEIS Appendix B at 10. The agency’s response to comments did not change with publication of the MFEIS.

Further, the Forest Service provides conflicting descriptions of the proposed action. The draft decision explains it is “authorizing individual vegetation management treatments on up to 360,000 acres of National Forest System lands, including in some inventoried roadless areas, within the Sierra Madre and Snowy Range Mountain Ranges of the Medicine Bow National Forest.”²⁷⁷ Yet the draft decision also states there are a total 613,107 acres when describing the authorization of vegetation treatments across all treatment opportunity areas.²⁷⁸ This statement also conflicts with the analysis assumption that, “[n]o more than 360,000 acres would be treated over the life of the LaVA Project; treatments would occur only in the pre-established treatment opportunity areas.”²⁷⁹ The Forest Service needs to resolve this apparent conflicting description, but such clarification will not address the fundamental flaw of the condition-based analysis as we explained.

18. Failure to take the required “hard look” at direct, indirect, and cumulative impacts.

NEPA regulations require federal agencies to discuss the direct, indirect, and cumulative effects of their action on the environment.²⁸⁰ The EIS should provide a clear basis for choice among alternatives.²⁸¹ WildEarth Guardians’ 2019 objection detailed how by failing to consider and analyze direct, indirect, and cumulative impacts, the Forest Service failed to comply with NEPA.²⁸² We incorporate those arguments by reference here and request that the Forest Service respond to each one.

Lack of baseline information

While the FEIS includes expanded background descriptions and baseline information for some specific resources, overall the necessary information required to meet NEPA’s hard look requirements is deferred until the field verification phase in the Framework, well after the close of all NEPA processes and formal public involvement.²⁸³ This is especially problematic when analyzing specific resource conditions and the potential environmental consequences under each alternative action. As just one example, in order to analyze potential changes to water quality, the MFEIS should have included current water quality data and monitoring information. This information is important to guide management decisions and serve as baseline data for future monitoring and evaluation of potential influence on downstream water quality. In addition, given the proposed construction of approximately 600 miles of temporary roads and the use of an undisclosed number of system roads, the FEIS should have provided baseline information about current levels of road-related sedimentation. However, the MFEIS (like the FEIS) fails to provide this baseline information.

²⁷⁷ DROD at 3.

²⁷⁸ *Id.* at 6, 7.

²⁷⁹ FEIS at 140.

²⁸⁰ 40 C.F.R. §§ 1502.16, 1508.7, 1508.8, 1508.25(c)(3), 1508.27(b)(7).

²⁸¹ *Id.* § 1502.14.

²⁸² See Guardians’ 2019 Objection at 10-25.

²⁸³ Rissued DROD at 24; Draft ROD at 14.

Lack of site-specific information about the project or its impacts

The MFEIS fails to include site-specific information about the project and its impacts, and reliance on a future, post-decision framework with no future NEPA is insufficient to cure those remaining flaws. NEPA requires site-specific analysis before government agencies make project-level decisions, and the Forest Service's preference for "flexible management" does not alleviate its duty to comply with the law. Relying on the post-decision Framework is not sufficient, nor did the addition of "augmented" information in the FEIS cure this defect.²⁸⁴

As several examples, the MFEIS does not disclose specific locations where logging will occur or the type of harvesting methods that will be used in those locations. It does not disclose the location of where up to 600 miles of temporary road construction will occur.²⁸⁵ Because it relies on a post-decision framework to determine site-specific information, the MFEIS does not adequately address the direct, indirect, or cumulative impacts of the project in violation of NEPA.

The vegetation treatment activities and associated road use (including truck hauling on both existing system forest roads as well as new temporary roads) will have foreseeable negative impacts to, *inter alia*, wildlife, wildlife habitat, and water quality. Disclosure of the actual location of the specific treatment sites and corresponding forest roads required to complete the treatment activities is necessary to understand the scope of those foreseeable negative impacts. This is especially problematic for showing consideration of indirect and cumulative impacts for a project decision that authorizes numerous, undefined treatments over the next 15 years.

For example, there may be numerous vegetation treatment projects within close vicinity and overlapping in time within one or neighboring Canada lynx LAUs.²⁸⁶ Any overlap in geography or timing will result in dramatically different direct, indirect, and cumulative impacts to lynx and its habitat as well as any water resources within that area. The Forest Service concludes the project is likely to adversely affect Canada lynx.²⁸⁷ The final ROD will authorize vegetation

²⁸⁴ MFEIS Appendix B at 11, (asserting "[t]he framework was designed to allow flexible management at a landscape-scale...").

²⁸⁵ See *Ohio Forestry Ass'n v. Sierra Club*, 118 S. Ct. 1665 (1998) (distinguishing a Forest Plan decision from a project level decision ripe for review by explaining that "Before the Forest Service can permit the logging, it must: (a) propose a specific area in which logging will take place and the harvesting methods to be used, . . . (b) ensure that the project is consistent with the plan, 16 U.S.C. § 1604(i); 36 CFR § 219.10(e) (1997); (c) provide those affected by proposed logging notice and an opportunity to be heard, . . . (d) conduct an environmental analysis pursuant to the National Environmental Policy Act of 1969 (NEPA), . . . to evaluate the effects of the specific project and to contemplate alternatives, . . . and (e) subsequently make a final decision to permit logging").

²⁸⁶ The vagueness and amorphous nature of this hypothetical exemplifies why and how the lack of site-specific details make it close to impossible for the public to meaningfully comment on or object to the Forest Service's project at this point.

²⁸⁷ See Biological Assessment (Feb. 2020) at 4 ("The LaVA project "may affect," and is "likely to adversely affect" Canada lynx).

treatments and associated road use for the next 15 years, which is an irretrievable commitment of the Forest Service's resources. Because environmental impacts are reasonably foreseeable, and the final ROD makes an irretrievable commitment of resources, site-specific analysis is required in this EIS. Omission of these details is a violation of NEPA.

Failure to address controversy

We commented about the inherent controversy arising from a substantial dispute about the effects of the proposed action due to a lack of baseline information, the reliance on faulty assumptions to ignore many direct, indirect, and cumulative impacts, and failure to consider the best available science that refutes those assumptions.²⁸⁸ The Forest Service failed to adequately address these comments, and as such the controversy remains.

Wildlife, wildlife habitat, and habitat connectivity

We are particularly concerned about the Forest Service's failure to analyze impacts to wildlife, its associated habitat, and wildlife connectivity. We are concerned about impacts to lynx, lynx critical habitat, and LAU linkage corridors, as well as Preble's meadow jumping mouse, endangered Wyoming toad, threatened piping plover, endangered least tern, endangered whooping crane, endangered pallid sturgeon, endangered bonytail chub, endangered Colorado pikeminnow, endangered humpback chub, endangered razorback sucker, and threatened yellow-billed cuckoo. The biological assessment improperly concludes the project will have no effect on Preble's meadow jumping mouse, endangered Wyoming toad, threatened piping plover, endangered least tern, endangered whooping crane, endangered pallid sturgeon, endangered bonytail chub, endangered Colorado pikeminnow, endangered humpback chub, endangered razorback sucker, and threatened yellow-billed cuckoo. Because the Forest Service fails to provide site-specific information about the location, timing, and extent of vegetation treatments and roads (system and temporary), the public is not able to discern how those actions relate to wildlife or its habitat, and are precluded from meaningful analysis on these impacts. Best available science shows that these actions will have harmful impacts to wildlife and wildlife habitat, regardless of the location. Overall, the MFEIS fails to adequately analyze the potential environmental consequences to wildlife species, wildlife habitats, and especially wildlife habitat connectivity.

The Forest Service explains, "[t]he primary objective of treatments in these areas would be to provide quality forage, cover, breeding habitat, and solitude for a variety of wildlife species and to improve wildlife habitat in general."²⁸⁹ What follows is a series of tables listing wildlife species in each accounting unit and the resulting habitat quality and quantity from the proposed action described as "high, medium, low, negligible change or n/a."²⁹⁰ Such generalized analysis cannot support the Forest Service determinations in the MFEIS for wildlife

²⁸⁸ Guardians' DEIS comments at 7.

²⁸⁹ MFEIS at 227.

²⁹⁰ *Id.* at 230-249.

of management concern.²⁹¹ The biological evaluation unreasonably determines the project will benefit bighorn sheep and other species of concern, ignoring the harmful impacts of building temporary roads and log truck hauling on system and temporary roads for the next 15 years.

Canada lynx

The analysis in the MFEIS for lynx is inadequate under NEPA. Because it fails to disclose the site-specific details, including location, about treatments or temporary road construction, the Forest Service fails to provide sufficient information to make a meaningful assessment of the impacts to lynx, lynx habitat, and linkage areas. As noted elsewhere, the agency does not attempt a worst-case scenario analysis. The analysis in the MFEIS and biological assessment fail to disclose and analyze the direct, indirect, and cumulative impacts of the action and its alternative on lynx winter habitat, lynx linkage areas, and lynx denning habitat. The analysis in the MFEIS and biological assessment fail to quantify the cumulative effects of other activities within and near the project area on lynx habitat, lynx winter habitat, lynx linkage areas, and lynx denning habitat. The analysis in the MFEIS and biological assessment fail to quantify the amount of lynx winter habitat, lynx linkage areas, and lynx denning habitat that will be removed or degraded by the proposed action and its alternatives.

Preble's meadow jumping mouse

The Forest Service's reliance on project design criteria to conclude that yet-to-be identified or determined logging activities will have no effect to Preble's meadow jumping mouse is arbitrary and capricious. The project design criteria direct the Forest Service to avoid actions within the mouse's habitat, but there is no documentation showing where the mouse's suitable habitat exists in relation to treatment opportunity areas and the forest roads (system and temporary) that would be necessary to access those areas.²⁹² Without this information the public is unable to meaningfully comment as to the impacts to the mouse, including direct, indirect, and cumulative (downstream flow) impacts from upstream logging and log truck hauling on forest roads. There is also no monitoring questions or triggers in the Framework to check for compliance with this project design criteria during project implementation. How the project design criteria are applied in specific instances is necessary to understanding and assessing the extent to which the project will affect Preble's meadow jumping mouse.

Because application of the specific project design features will occur later in time, once the agency has gathered site-specific information including existing conditions, only then will the Forest Service be able to determine the effects of the specific treatment project on wildlife

²⁹¹ *Id.* at 248-49, Table 159.

²⁹² See Modified Appendix A at 61 (providing a single design criteria that "[n]o treatment will occur in suitable habitat for the Preble's jumping mouse" and noting 614 acres of suitable habitat occurs along the Laramie River at 7,800 feet elevation, but failing to show how that location relates to the treatment opportunities identified elsewhere in the record).

species and their habitat. That point will come well after the close of the NEPA and this objection process.

Water quality

Guardians' 2019 objection noted that the Forest Service fails to disclose or analyze potential sedimentation from road construction, reconstruction, and use. We incorporate by reference that objection and its discussion of sedimentation. The failure of using a condition-based analysis for site-specific actions is that their consequences cannot be disclosed. The analysis method utilized in the MFEIS fails to adequately estimate potential road-related sedimentation or the resulting effects to aquatic habitats. This violates NEPA's hard-look mandate.

Soils, Risk of Landslides

The Forest Service failed to provide an assessment of landslide risks in the project area and how the proposed action would affect such risk. The Forest Service states that "[d]evelopment of site-specific projects has not occurred at this time within the LaVA analysis area. At this scale, it is only possible to discuss soils in a broad context, acknowledging there are erosion possibilities and mass wasting hazards within each accounting unit."²⁹³ This exemplifies the limitations of a condition-based analysis in supporting a site-specific project NEPA review. Failure to take a hard look at landslide risks violates NEPA.

Heritage resources

The Forest Service attempts to rely on its 2009 programmatic agreement with the state of Wyoming that allows it to forgo identification and evaluation of cultural resources "when analyzing large land areas where discrete vegetation management activities are not specifically defined," but at the same time continues to propose this decision fits as a *site-specific project level* action subject to 36 C.F.R. Part 218.²⁹⁴ The Forest Service cannot have it both ways. If, as we have suggested elsewhere, the Forest Service revises its characterization of this MFEIS to be a *programmatic* EIS and expressly commits to future, site-specific EAs that will tier to this EIS, then we agree that reliance on the 2009 programmatic agreement to forgo a more in-depth analysis of cultural resources at this time may be appropriate. However, as proposed, the Forest Service is attempting to authorize specific projects today, with the promise that it will analyze the impact of those projects on heritage resources - outside of the public eye - at some point in the future. This is insufficient under NEPA.

Roads

The MFEIS lacks sufficient analysis regarding the direct, indirect, and cumulative impacts of

²⁹³ MFEIS Appendix B at 107-108.

²⁹⁴ MFEIS Appendix B at 78-79.

this project that will result from use of the forest road system and temporary roads, violating NEPA. This includes the indirect impacts like noise, pollution, and disruption from truck traffic. In particular, the Forest Service appears to ignore direct harmful impacts from log truck hauling on the existing forest system roads and up to 600 miles of temporary forest roads. Concerns with the forest roads proposed under the LaVA Project and the flawed analysis in the Transportation Report is detailed above.

Invasive species

Roads increase the spread of non-native invasive plant species, leading to significant ecological impacts. The Forest Service improperly relies on design features to avoid discussing or disclosing these impacts.

Unroaded areas, including IRAs

The Forest Service fails to acknowledge, disclose or consider many impacts to unroaded areas, including IRAs. As explained more fully elsewhere, the FEIS fails to provide the necessary site-specific analysis of specific treatments to each of the nine roadless characteristics because, as the FEIS notes, none have been proposed. As such, the Forest Service fails to consider or disclose direct, indirect and cumulative effects on unroaded areas.

Climate change

A robust climate change analysis is especially important in the context of roads since changing climate conditions intensifies their associated impacts. WildEarth Guardians submitted comments urging the Forest Service to consider and disclose how climate change will impact the activities proposed herein, and to disclose and analyze the cumulative impacts of the project and climate change on the landscape. Specifically, Guardians raised concerns about how changes in weather patterns due to climate change may exacerbate the impacts from the Forest Service's existing road system, 600 miles of new temporary roads, and log truck hauling on those roads over the next 15 years. We identified direct, indirect, and cumulative impacts from climate change to the project area that the Forest Service failed to consider in its assessment of climate change and cumulative impacts. The Forest Service failed to adequately respond to these comments. It also failed to discuss the impacts of the proposed 600 miles of temporary roads, use of system roads, and extensive amounts of logging including clear cutting in the context of climate change.

Cumulative impacts

The Forest Service largely skips an analysis of cumulative impacts, instead relying on future adaptive implementation and monitoring rather than conduct a robust analysis required under NEPA.

19. Not a logical outgrowth.

The Forest Service made major changes between the draft and final EIS, and then again with the MFEIS, precluding our opportunity to provide meaningful comments on several issues. The MFEIS provides a summary of changes, noted at the start of this objection.

When an agency relies on supplementary evidence without a showing of prejudice by an interested party, the procedural requirements of the Administrative Procedure Act are satisfied without further opportunity for comment, provided that the agency's response constitutes a "logical outgrowth" of what was initially proposed.²⁹⁵ Here, however, the Forest Service performed several classic "bait-and-switch" moves by substituting at the last moment one set of data and analysis where previously there had been none, as shown by the examples cited at the start of this objection letter. The Forest Service thereby deprived the public of the notice and opportunity to comment guaranteed by NEPA. Because our comments and 2019 objection demonstrated major concerns about topics for which the analysis was supplemented after the close of notice and comment, and for some items after the start of the second round of objection, we were prejudiced by the Forest Service's process here.

As just one example, Guardians' scoping and DEIS comments focused heavily on the transportation system impacts, the details of which were only provided (in limited fashion) in the FEIS and its associated specialist reports, well after the notice and comment period. During this second round of objection, the final Transportation Report was uploaded to the project website on May 5, 2020, well after the short 30-day objection period was well underway, and just six days before the end of the objection period. Indeed, we believe that because system and temporary roads are a major aspect of the project and will be used for log truck hauling for 15 to 20 years, this topic deserves even more attention in the analysis than was provided at the eleventh hour in the MFEIS and delayed final specialist report. Providing a full disclosure of the best available science and details regarding the road system will inform an analysis of the direct, indirect and cumulative impacts to all other forest resources, including water quality, wildlife, and wildlife habitat. As another example, the Forest Service added the Heritage Specialist Report on May 8, 2020, only three days before the objection deadline.

20. Improperly makes final decision before analyzing impacts.

NEPA "requires federal agencies . . . to analyze environmental consequences before initiating actions that potentially affect the environment."²⁹⁶ The Forest Service's own NEPA regulations direct it to "coordinate and integrate NEPA review and relevant environmental documents with agency decisionmaking by (1) Completing the environmental document review before making a decision on the proposal; (2) Considering environmental documents, public and agency comments . . . , and agency responses to those comments; (3) including environmental

²⁹⁵ See *Solite Corp. v. EPA*, 952 F.2d 473 (D.C. Cir. 1991); *Environmental Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005).

²⁹⁶ *Utah Env't Cong. v. Bosworth*, 443 F.3d 732, 735-36 (10th Cir. 2006).

document(s) before rendering a decision on the proposal; and (5) Making a decision encompassed within the range of alternatives analyzed in the environmental documents.”²⁹⁷

Here, the Forest Service violated its own regulations implementing NEPA by deferring much of its environmental review - including gathering of necessary information from field surveys, consideration of site-specific details, and assessment of impacts - until after this final decision. The Forest Service improperly postponed the requisite environmental analysis until it picks the specific sites for treatment under the project.

21. Inadequate mitigation.

The Forest Service improperly relies on project design features to forego the requisite NEPA analysis throughout the MFEIS, and fails to provide sufficient evidence of their effectiveness.²⁹⁸ The agency over-relies on design features, especially in regards to the construction of approximately 600 miles of temporary roads under the proposed action. The project design features lack the necessary specificity to ensure their effectiveness. As just one example, in regards to mitigating harmful effects to hydrology and wet areas, the design features states, “restrict temporary roads, landings, or main skid trails as recommended by project resource specialists and approved by the line office.”²⁹⁹ This does not explain what restrictions will be put in place per those recommendations, if they are specific to only construction or actual use, and the MFEIS fails to provide adequate discussion or evidence that the recommendations will effectively protect water resources and riparian habitats. The lack of specificity contributes to the inherent flaw of relying on a condition-based analysis to support unknown, future site-specific actions. This violates NEPA’s hard look and mitigation mandates.

22. Faulty adaptive management and monitoring.

The Forest Service relies too heavily on its adaptive management framework and fails to include the measures, triggers, and feedback verifications necessary to ensure changes will be implemented - not just considered - based on new information or more detailed information that is expected in the future.³⁰⁰ The changes set forth in the MFEIS and Appendix A do not resolve the concerns set forth in Guardians’ comments or previous objection. The Forest Service’s adaptive implementation and monitoring framework is woefully inadequate. Given the Forest Service’s reliance on the implementation and Monitoring Framework and Appendix A to avoid analyzing impacts and site-specific details at this stage, the faulty adaptive management plan, including inadequate monitoring plans, is even more problematic, and violates NEPA.

²⁹⁷ 36 C.F.R. § 220.4(c).

²⁹⁸ See also Guardians’ 2019 Objection at 28-29.

²⁹⁹ Reissued DROD Appendix A at 58 (see (DF-HWA-2)).

³⁰⁰ See Guardians’ 2019 Objection at 29-32.

23. Failure to demonstrate compliance with NFMA.

NFMA requires that “[r]esource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans.”³⁰¹ Here the Forest Service fails to demonstrate that the project is consistent with the 2003 Medicine Bow Forest Plan.³⁰² The Forest Service listed each applicable forest plan component, asserts that (future) application of the Framework would ensure forest plan compliance, and that deviations from plan guidelines are permissible thereby precluding the need for any forest plan amendments. Reliance on future application of the Framework fails to demonstrate compliance with the 2003 Medicine Bow, in violation of NFMA. The Forest Service also improperly relies on future, yet-to-be determined application of project design features to ensure compliance with the Forest Plan.

As just one example, the Forest Service fails to demonstrate the project will comply with the Southern Rockies Lynx Amendment (SRLA) objectives, standards, and guidelines that have been incorporated into the Medicine Bow Forest Plan. Connectivity standard ALL S1 states “. . . vegetation management projects must maintain habitat connectivity in an LAU and/or linkage areas.” Without providing detail or explaining how, the Forest Service states that proposed actions will not preclude movement of lynx to other LAUs or within an LAU.

24. Failure to comply with the CWA.

The Forest Service has an independent duty to demonstrate compliance with the CWA, including Wyoming’s state water quality standards.³⁰³ We are concerned about harmful impacts to 303(d)-listed waters and the lack of sufficient information to demonstrate the project will not cause or contribute to a violation of Wyoming’s state water quality standards. We are concerned about the foreseeable harmful impacts that will result from logging and prescribed burns on up to 350,000 acres, log hauling and use of the forest system roads to conduct these activities for the next 15 to 20 years, and the construction and additional log hauling on up to 600 miles of temporary roads. EPA’s Region 8 also submitted extensive comments identifying concerns about the reasonably foreseeable harmful impacts to water quality that will result from this project.

The Forest Service improperly relies on project design features to ensure compliance with the CWA. As currently written, the Framework in Appendix A is insufficient to ensure compliance with the CWA. To the extent that the Forest Service claims design features will minimize or mitigate most adverse effects to water quality or riparian areas at the site-specific or localized scale and prevent adverse effects from creating permanent damage and at such a level as to be irreversible, that conclusion is not supported by the best available science, and is arbitrary and capricious. Best available science in our comments, prior objection, and this objection show

³⁰¹ 16 U.S.C. § 1604(i).

³⁰² See Guardians’ 2019 Objection at 35-37.

³⁰³ 33 U.S.C. § 1323(a).

that temporary and system roads cause significant adverse impacts to National Forest resources. The Forest Service improperly ignores this science in its analysis.

Of the subwatersheds within the project area that were analyzed, 54 are already classified as functioning at risk, while 16 are classified as functioning properly. Five stream segments in the project area are impaired or threatened due to heavy metals. The Forest Service fails to disclose if any stream segments in the project area are listed on the 303(d) list of impaired waters for other contaminants, including turbidity. The analysis fails to assess whether the project could exacerbate the subwatersheds already classified as functioning at risk. And the Framework in Appendix A does not address 303(d) impaired waters.

Forest road networks are typically the largest source of sediment to streams on USFS lands. The proposal to construct up to 600 miles of temporary roads is particularly egregious. Even EPA noted that it “is one of the larger road construction proposals we have seen in a NEPA document.” Given the large geographic scope and long time period of this project, there is a heightened need for the Forest Service to demonstrate its actions will comply with the CWA. This project would include harvest of up to 1,534 acres in wetlands, 534 temporary road-stream crossings, 0.8 miles of temporary road construction *through wetlands*, up to 12 miles of temporary road construction in the water influence zone, and up to 16,874 acres of harvest in the water influence zone. At this point, it appears the Forest Service has failed to coordinate with the U.S. Army Corps of Engineers to determine the applicability of CWA Section 404 permit requirements for these actions that will involve the discharge of dredge or fill into waters of the U.S. This is a perfect example of where a future, site-specific NEPA analysis (EA or EIS) that tiers to this analysis will be appropriate.

25. Failure to demonstrate compliance with the ESA.

Under the ESA the Forest Service has an independent legal duty to “insure that any [agency action] is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species.”³⁰⁴

Threatened Canada lynx, endangered Wyoming toad, threatened piping plover, endangered least tern, endangered whooping crane, endangered pallid sturgeon, endangered bonytail chub, endangered Colorado pikeminnow, endangered humpback chub, endangered razorback sucker, and threatened yellow-billed cuckoo all exist within the project area. Best available science demonstrates that these species will be negatively impacted by the proposed vegetation treatments, associated forest road use by trucks hauling logs, and temporary road construction and use for truck hauling.

The agency’s claims that it has demonstrated compliance with the ESA are unfounded. Best available science demonstrates that the ESA-listed species in the project area will be harmed by

³⁰⁴ 16 U.S.C. § 1536(a)(2).

the logging and truck hauling on forest roads over the next 15 years. The Forest Service's conclusion that yet-to-be identified or determined logging activities will comply with the ESA based on various project design criteria, the application of which will be determined at the implementation stage, is unreasonable, without basis, and arbitrary and capricious. The Forest Service's biological assessment does not comply with the ESA because, *inter alia*, it fails to consider relevant and key factors, mischaracterizes or ignores best available science,³⁰⁵ and relies on improper assumptions.

The Forest Service concludes in its MFEIS that the project may affect and is likely to adversely affect Canada lynx. The Forest Service states that formal consultation was completed with the Fish and Wildlife Service on June 10, 2019, when FWS concurred with the "may affect" and "is likely to adversely affect" determination.³⁰⁶ There is no mention of a Biological Opinion or any other documentation of the FWS's June 2019 determination, and none is included on the project website. Instead, there is a December 20, 2019 concurrence letter from FWS (which also references the June 2019 consultation) that is limited to the three areas of modification the Forest Service requested to be amended to the June 2019 consultation.³⁰⁷ The Biological Opinion or other consultation documentation has not been made available for review during public notice, comment, or objection periods. The public is unable to review, understand, or consider the Fish and Wildlife Service's expert opinion about how the project will harm lynx and its habitat. This precludes meaningful public comment on the project. The Forest Service has failed to demonstrate compliance with the ESA. Further, the Forest Service revised biological assessment is dated February 2020, after the date of the FWS consultation and after the FWS completed its biological opinion in June 2019 and after the FWS's concurrence letter related to specific changes in December 2019. We do not understand how the FWS's biological opinion or concurrence letter can be based, as it is, on a biological assessment that was completed months after consultation from FWS.³⁰⁸

SUGGESTED RESOLUTIONS

Resolving each of our points of objection will require the Forest Service to appropriately comply with NEPA by vacating its proposed decision and issuing a revised Draft EIS that expands the project's purpose and need as we directed in previous comments, provides sufficient opportunity for meaningful public comment, includes a full discussion of all of the information and evidence in each specialist report, uses the best available science, specifies proposed treatments and their location, and specifies the location of temporary road construction and use of system roads. Such a revised DEIS will require a new biological assessment and biological

³⁰⁵ The biological assessment claims the best available science was used for its analysis, citing to the 2008 FEIS for the SRLA, 2008 Biological Opinion for the SRLA, 2009 SRLA Implementation Guide, 1999 Lynx Science Report, and revised 2013 LCAS. This ignores a great wealth of more recent scientific information regarding the status of lynx and impacts of vegetation management projects to lynx and its critical habitat. See, e.g., Guardians' DEIS comments at 17-20.

³⁰⁶ MFEIS at 388.

³⁰⁷ See Dec. 20, 2019 U.S. Fish and Wildlife Service letter to Russell M. Bacon, Forest Supervisor.

³⁰⁸ See, e.g., *id.* at 20-22 (repeatedly discussing "the Project biological assessment").

evaluation to incorporate site-specific information, address flaws, and demonstrate how the project will comply with the 2003 Medicine Bow Forest Plan. A revised DEIS will also analyze in detail an alternative that precludes logging in old growth stands, IRAs, and does not propose clearcutting. A revised DEIS must also ensure compliance with the Roadless Rule and the ESA. The Forest Service must also appropriately demonstrate HFRA compliance, including maximizing old growth and large tree retention, as well as including additional alternatives.

The Forest Service should abandon the proposed clear cuts, which have proved scientifically contentious, fiscally irresponsible, and ecologically destructive. The Forest Service should also eliminate aspects of the project that propose logging in old growth IRAs. Instead, the agency should focus on actions that will restore the forest and watersheds, and that will benefit future resilient forests, ecological subsistence, hunting and fishing, scenic, and recreational values.

Ultimately, we urge the Forest Service to abandon the condition-based analysis approach that lacks sufficient detail to provide for meaningful public comment. Absent producing a revised DEIS, we urge the Forest Service to instead recognize the LaVA Project MFEIS is a programmatic EIS, and accordingly commit to conducting the requisite site-specific NEPA analysis for individual treatment projects so as to allow for meaningful public comment at the point when site-specific information is available.

CONCLUSION

The undersigned respectfully request to meet with the reviewing officer to discuss the concerns and suggested resolutions outlined above. Should you have any questions, please do not hesitate to contact us.



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ATTACHMENTS

Included below is a list of 21 attachments that we reference in our objection letter. These documents should become part of the administrative record.

Attachment 1: Brodribb, T.J., et al. (2020), Hanging by a thread? Forests and drought, *Science* 368 (6488): 261-266, DOI: 10.1126/science.aat7631.

Attachment 2: Gray, E., (2019) Satellite Data Record Shows Climate Change's Impact on Fires.

Attachment 3: Sullivan, B.K. (2020) Climate Adaptation: Warmest Oceans on Record Adds to Hurricanes, Wildfire Risks.

Attachment 4: Krajick, K. (2020) Climate-Driven Megadrought Is Emerging in Western U.S., Says Study.

Attachment 5: Hart, S.J. and D.L. Preston (2020) Fire weather drives daily area burned and observations of fire behavior in mountain pine beetle affected landscapes.

Attachment 6: Domke, G.M. et al. (2020) Greenhouse gas emissions and removals from forest land, woodlands, and urban trees in the United States, 1990-2018, Resource Update FS-227, U.S. Department of Agriculture, Forest Service, Northern Research Station, <https://doi.org/10.2737/FS-RU-227>.

Attachment 7: WildEarth Guardians. (2020) The Environmental Consequences of Forest Roads and Achieving a Sustainable Road System.

Attachment 8: Schoennagel et al. (2017) Adapt to more wildfire in western North American forests as climate changes.

Attachment 9: Barnett (2016) Beyond Fuel Treatment Effectiveness: Characterizing Interactions between Fire and Treatments in the US.

Attachment 10: Treatment-wildfire scale (2019) Wildfires RARELY encounter forest fuel treatments in West.

Attachment 11: Lindenmayer et al. (2020) Recent Australian wildfires made worse by logging and associated forest management.

Attachment 12: April 3, 2020 U.S. Forest Service, Washington Office, COVID-19 Pandemic New Comment or Objection Filing Period Guidance to Regional Foresters.

Attachment 13: Sept. 17, 2019 WORKSHEET – Roadless Area Characteristics, Puma Hills CRA.

Attachment 14: May 8, 2020 email correspondence with Forest Supervisor Bacon.

Attachment 15: Email of M. Martin, Medicine Bow-Routt NF to T. Schillie, Rocky Mountain Region (June 24, 2017).

Attachment 16: Email of C. Wehrli, Rocky Mountain Region to M. Martin, Medicine Bow-Routt NF (Dec. 7, 2018).

Attachment 17: Forest Service, Worksheet – Roadless Area Characteristics.

Attachment 18: Forest Service, Rocky Mountain Region, Roadless Project Evaluation Form.

Attachment 19: Forest Service, Roadless Map Packet (Feb. 2019).

Attachment 20: Letter of G. Engelskirger, Wyoming State Forestry Division to M. Martin, Medicine Bow National Forest (Apr. 21, 2017).

Attachment 21: Camille Stevens-Rumann et al (Feb. 2018), Evidence for declining forest resilience to wildfires under climate change, Ecology Letters.