No. 15-1387

In The Supreme Court of the United States

UNITED STATES FOREST SERVICE, ET AL.,

Petitioners,

v.

COTTONWOOD ENVIRONMENTAL LAW CENTER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMERICAN FOREST RESOURCE COUNCIL; PUBLIC LANDS COUNCIL; BLUERIBBON COALITION, INC.; MONTANA WOOD PRODUCTS ASSOCIATION; MONTANA LOGGING ASSOCIATION; FEDERAL FOREST RESOURCE COALITION; ASSOCIATED LOGGING CONTRACTORS, INC. – IDAHO; ASSOCIATED OREGON LOGGERS; WASHINGTON CONTRACT LOGGERS ASSN., INC.; CALIFORNIA FORESTRY ASSOCIATION; DOUGLAS TIMBER OPERATORS; AND INTERMOUNTAIN FOREST ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.3, the American Forest Resource Council, Public Lands Council, BlueRibbon Coalition, Inc., Montana Wood Products Association, Montana Logging Association, Federal Forest Resource Coalition, Associated Logging Contractors, Inc. – Idaho, Associated Oregon Loggers, Washington Contract Loggers Assn., Inc., California Forestry Association, Douglas Timber Operators, and Intermountain Forest Association respectfully submit this brief of *amici curiae* in support of Petitioners.

INTERESTS OF *AMICI CURIAE*[1]

Amici curiae are associations that represent forest products businesses, livestock ranchers, and recreation interests that depend on healthy federal forest and rangeland for their livelihoods, timber and forage supply, and recreational enjoyment.

The American Forest Resource Council, Montana Wood Products Association, Inc., Montana Logging

[1] The parties were given at least ten days notice of *amici*'s intention to file a brief pursuant to Rule 37.1. The petitioners and respondent have consented to the filing of this brief and the letters of consent are lodged with the Clerk. Pursuant to this Court's Rule 37.6, the *amici* submitting this brief and their counsel, hereby represent that no party to this case nor their counsel authored this brief in whole or in part, and that no person other than *amici* paid for or made a monetary contribution toward the preparation and submission of this brief.

Association, Federal Forest Resource Coalition, Associated Logging Contractors, Inc. – Idaho, California Forestry Association, Associated Oregon Loggers, Washington Contract Loggers Assn., Inc., California Forestry Association, Douglas Timber Operators, and Intermountain Forest Association (Forest Interests) are nonprofit corporations that represent the forest products industry throughout the West. Collectively, the Associations represent wood products manufacturers, timberland managers and owners, and logging contractors. The Forest Interests' members purchase the majority of timber from federal lands managed by the Forest Service and Bureau of Land Management (BLM).

The Forest Interests and their members are actively involved in the land managing agencies' programmatic land and resource management planning to support changes in the direction of the management of public lands including the Northwest Forest Plan, the Northern Rockies Lynx Amendment, the Western Oregon Plan Revisions, and the Sierra Framework amendments to forest plans in the Sierra Nevada. Representatives of *amici* serve on the National Advisory Committee for implementation of the National Forest System Land Management Planning Rule, http://www.fs.usda.gov/main/planningrule/committee. Many of the Forest Interests' members have been involved in the Endangered Species Act (ESA) consultation process for forest plans and federal timber sales that significantly delay forest management work needed to reduce fuel

loads, improve forest health, and protect members' nearby private forest.

The Public Lands Council and National Cattlemen's Beef Association (Ranching Interests) represent livestock ranchers who use and preserve public lands and their natural resources. Public land ranchers manage vast areas of public lands through Forest Service and BLM grazing leases, thereby acting as stewards for significant acreage of wildlife habitat. The ability to graze livestock on federal lands, including federal lands managed by the Forest Service and BLM, is vitally important to the Ranching Interests' members and the industries and businesses that provide goods and services to livestock ranchers.

The Ranching Interests actively participate in the Forest Service forest planning process and the BLM resource management planning process. They do not believe that completed management plans should be considered ongoing actions that require ESA consultation when a new species is listed or critical habitat is designated. Wide sweeping injunctions during the consultation for management plans indiscriminately harm livestock ranchers by limiting livestock turnout, forage utilization, or season of use without any consideration of the adverse impact on individual grazing allotments.

The BlueRibbon Coalition (BRC) is a national recreation organization that promotes responsible recreation use of public lands and encourages individual

environmental stewardship. BRC members use motorized and nonmotorized means, including off-highway vehicles, horses, mountain bikes, and hiking to access Forest Service and other public lands throughout the United States. BRC members engage in group activities, education, and collaboration among recreationists. BRC has a long-standing interest in the protection of natural resources on national forests from destruction by fire and insects, and regularly works with land managers to provide recreation opportunities, maintain and expand recreation trails, and promote forest and range health to enhance the recreation experience.

Amici have an essential interest in the reversal of the Ninth Circuit's interpretation of agency action under the ESA, which treats completed forest plans as perpetually in process. Under the Ninth Circuit rule, the Forest Service and BLM must reinitiate consultation under Section 7 of the ESA whenever new information is related to previously approved Forest Service land and resource management plans or BLM resource management plans (forest plans or RMPs). *Cottonwood Envtl. Council v. Forest Service*, 789 F.3d 1075 (9th Cir. 2015), App. 3a-35a; *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994), *cert. denied*, 514 U.S. 1082 (1995).

As a result of these Ninth Circuit decisions, the Forest Service and BLM missions have been frequently frustrated by the need to continually revisit forest plans and expend time and resources on reinitiated consultation on a previously approved, on the shelf, management plan. This expansive interpretation of

"action" and resultant requirement for reinitiation is especially frustrating for those who work with the agencies, given that subsequent specific projects implemented pursuant to the plan must *also* undergo Section 7 consultation. This redundant review prevents the Forest Service and BLM from efficiently accomplishing forest and range health and restoration projects and enhance recreation. It also harms *amici* by disrupting implementation of timber sales, approved grazing leases, and travel management plans and delays the development of new projects. The Ninth Circuit's interpretation of "action" under the ESA was effectively overruled by *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004) (*SUWA*), and directly conflicts with the reasoned interpretation of Section 7 by the Tenth Circuit in *Forest Guardians v. Forsgren*, 478 F.3d 1149 (10th Cir. 2007). For these reasons, *amici* urge the Court to grant the petition to clarify that approved forest plans are not continuing action under Section 7 of the ESA that require reinitiation of consultation.

STATEMENT

Section 7(a)(2) of the ESA requires that agencies consult with the Fish and Wildlife Service (FWS) and/or the National Marine Fisheries Service (NMFS) to "insure that any action authorized, funded, or carried out by such agency [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 which is determined . . . to be critical." 16 U.S.C. § 1536(a)(2). The joint regulations used by the FWS and NMFS define action as "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States." 50 C.F.R. § 402.02. Under *Cottonwood* and its predecessor, *Pacific Rivers*, the Ninth Circuit has interpreted "action" to not only include the Forest Service's decision to adopt, amend, and revise a forest plan, but also to include the plans as they exist long after their adoption, amendment, or revisions as they are sitting on the shelf. App. 22a-24a (finding that reinitiation of consultation is required for forest plans because "there is 'discretionary federal involvement or control' over the completed action" and the Forest Service "retains a continuing ability . . . to control forest management projects."); *Pacific Rivers*, 30 F.3d at 1053 (holding that because LRMPs (land and resource management plans) are programmatic documents which set guidelines for resource management they constitute "ongoing agency action" requiring consultation under Section 7). Consequently, in the Ninth Circuit, approved LRMPs can be continually challenged on the basis of any new information related to ESA listed species or designated critical habitat, and plaintiffs need not wait for any actual project before bringing a lawsuit. As one commentator put it, the Ninth Circuit's interpretation of Section 7 "threw open the doors for procedural litigation at the programmatic level." Root, *Limiting the Scope of Reinitiation: Reforming Section 7 of the Endangered Species Act*, 10 Geo. Mason L. Rev. 1035, 1046 (2002).

In 2000, the distinct population segment of Canada lynx in the contiguous United States was added to the list of threatened species under the ESA. 65 Fed. Reg. 16052 (March 24, 2000). Lynx critical habitat was designated in 2006. 71 Fed. Reg. 66008 (Nov. 9, 2006). In 2007, the Forest Service developed the Northern Rockies Lynx Amendment (Lynx Amendment) which programmatically amended 18 forest plans to incorporate standards for conservation of the lynx. The Forest Service completed Section 7 consultation on the amendments. App. 5a-6a. The FWS issued a biological opinion concluding the amendment would not jeopardize the continued existence of Canada lynx. App. 6a. In 2009, the FWS extended critical habitat protections to additional lands in Idaho, Montana, and Wyoming that were occupied by lynx, and within 11 national forests governed by the Lynx Amendment. 74 Fed. Reg. 8616 (Feb. 25, 2009).

Cottonwood brought suit challenging the Forest Service's failure to reinitiate consultation for previously completed forest plans on 11 national forests subject to the Lynx Amendment after the revised designation of lynx critical habitat. App. 42a-77a. The substantive issue presented in the petition (Question 3) is whether the mere existence of a completed forest plan without any further affirmative act constitutes agency action under Section 7(a)(2) of the ESA.[2] The resolution of this action involves millions of acres of critical

[2] *Amici* take no position on the Forest Service's standing and ripeness arguments in support of the Petition.

habitat and thousands of timber and grazing projects and warrants the Court's review.

REASONS FOR GRANTING THE PETITION

The Court should grant the petition for writ of certiorari for several reasons. First, the Ninth Circuit's interpretation that previously approved programmatic forest plans as ongoing "agency action" requiring reinitiation of Section 7(a)(2) consultation directly conflicts with the Tenth Circuit. Second, the multiple consultations for an approved programmatic plan is a redundant process consuming limited agency resources as consultation already occurs during plan implementation for any site-specific project that may affect listed species and consultation is more meaningful at the project level when the contours of a project are known. Third, the Ninth Circuit has concluded that under ESA Section 7(d) project implementation must stop while consultation is ongoing, which delays and disrupts needed forest and range restoration work that provides related forest health, fuel reduction, and recreation and economic benefits. Finally, the Ninth Circuit decision conflicts with this Court's opinion in *SUWA*.

A. The Writ Should Be Granted To Resolve the Split in the Circuits Over Whether a Previously Approved Management Plan Is Agency Action Requiring ESA Consultation.

The *Cottonwood* decision creates a split in the Circuits over the proper interpretation of "action" under the ESA after *SUWA*. Canada lynx are a listed species in both the Ninth and Tenth Circuits. 65 Fed. Reg. 16085 (March 24, 2000). Many other listed species also overlap both the Circuits including the grizzly bear and the Mexican spotted owl. Grizzly bear (http://ecos.fws.gov/tess_public/profile/speciesProfile?spcode=A001); Mexican spotted owl (http://ecos.fws.gov/tess_public/profile/speciesProfile?spcode=B074). In *Forest Guardians v. Forsgren*, 478 F.3d 1149 (10th Cir. 2007), plaintiffs challenged the Forest Service's failure to reinitiate consultation on two LRMPs after Canada lynx were listed as a threatened distinct population segment under the ESA. In dismissing the action, the Tenth Circuit explained its difference with the Ninth Circuit:

> Contrary to *Pacific Rivers*, our analysis makes painfully apparent that "standards," "guidelines," "policies," "criteria," "land designations," and the like appearing within a LRMP do not constitute "action" requiring consultation under § 7(a)(2) of the ESA. A contrary view would be the equivalent of saying that agency regulations constitute ongoing action because such regulations continually affect what goes on in the forest. Of course, the very definition of "action" in § 402.02 tells us that the "*promulgation* of regulations," not the

> regulations themselves, constitutes "action." 50 C.F.R. § 402.02 (emphasis added). We have no quarrel with the proposition that LRMPs may have "an ongoing and long-lasting effect" on the forest. That's the very purpose of a LRMP – to guide management decisions regarding the use of forest resources and to establish to a substantial degree what is permitted to occur within the forest. But this does not alter our conclusion that the entirety of LRMPs do not constitute § 7 "action." Instead, "activities or programs . . . authorized, funded, or carried out," by the Forest Service are the "action" of which § 7(a)(2) speaks. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.02. A LRMP simply does not fit within this definition.

Id. at 1159.

Management of LRMPs occurs at the programmatic and project level. *Id.* at 1154. The project level is where "implementation of the LRMP occurs" and before implementation can occur, the "Forest Service must conduct an analysis and evaluation of such project or action to assure compliance with not only the LRMP but also with applicable laws and regulations." *Id.* (citation omitted). The Tenth Circuit found that "[n]othing . . . suggests that LRMPs, once approved, amended, or revised, constitute on-going, self-implementing action under §7(a)(2)." *Id.* This analysis correctly notes, that absent the "*approval* of proposed projects and activities" which are consistent with the LRMP, the LRMPs do not independently affect action on the forests. *Id.* at 1155. Instead, the LRMPs are

"more akin to 'road maps' on which the Forest Service relies to chart various courses of action," *id.*, and the court held that a "LRMP considered in isolation simply is not an ongoing, self-implementing document." *Id.* at 1158.

It is important to resolve this Circuit split because the Ninth Circuit is continuing down the path of an over-expansive reading of agency action that compels non-legally required consultation under the ESA.

B. Certiorari Should Be Granted Since Unnecessary or Duplicative Consultation Is a Strain on Agency Resources that Could Be Better Devoted to Project Level Forest, Range, and Recreation Improvements.

Certiorari should be granted so that federal agencies can use their limited resources more effectively to implement desperately needed range and forest health and fuel reduction projects throughout the Ninth Circuit. The concern about the drain on agency resources from the time-consuming and expensive ESA consultation process has been well documented. *See* Gov't Accountability Office (GAO), Endangered Species Act: *More Federal Management Attention Is Needed to Improve the Consultation Process*, GAO-04-93 at 4-5 (2004), http://www.gao.gov/assets/250/241766.pdf. The GAO found that "[t]he consultation workload for [] agencies in the northwestern United States has increased dramatically since the late 1990s, largely as a result of the many species added to the list of species

protected under the Endangered Species Act." *Id.* at 9; *see* U.S.D.A. Forest Service, *The Process Predicament, How Statutory Regulatory and Administrative Factors Affect National Forest Management* at 24 (2000), http://www.fs.fed.us/projects/documents/Process-Predicament.pdf.

Renewed plan-level consultation duplicates consultation for site-specific projects, creating an analytic burden that does not further the purposes of the ESA. For example, duplicative forest-wide consultation can delay fuel reduction projects in northern spotted owl habitat where "more fuels treatments are needed in east-side forests to preclude large-scale losses of habitat to stand-replacing wildfires." U.S. Fish and Wildlife Service, *Revised Recovery Plan for the Northern Spotted Owl* A-14 (2011).

As explained below, consultation has delayed much needed project level work to improve the condition of forest and rangeland that provide timber for forest products, forage for livestock production, and a pleasing recreational setting. The health of forest and rangeland has deteriorated, and the number and size of fires have increased on public lands throughout the West causing range, timber, and recreation resources to be damaged for years if not decades. Firefighting costs in Fiscal Year 2015 consumed 52% of the agency's budget compared to 16% of their budget in Fiscal Year 1995. U.S. Dept. of Agric., *The Rising Cost of Wildfire Operations: Effects on the Forest Service's Non-Fire Work* at 2-4 (Aug. 2015), http://www.fs.fed.us/sites/default/files/2015-Fire-Budget-Report.pdf; *see GAO, Wildfire*

Suppression Funding Transfers Cause Project Cancellations and Delays, Strained Relationships, and Management Disruptions, GAO-04-612 (2004). Consultation further consumes the agency's budget which is already strained after being diverted to fight wildfires.

Not only is unnecessary and redundant consultation a concern to federal agencies over hindering their ability to marshal limited resources for restoration work to prevent catastrophic wildfire, but it is of great concern to *amici*. There are millions of acres of federal land in the western United States classified as the highest risk for fire, http://www.arcgis.com/home/item.html?id=fc0ccb504be142b59eb16a7ef44669a3. Yet limited budgets and consultation delay the very restoration projects that can address the excessive fuels and fire threat. U.S. Dept. of Agric., *The Rising Cost of Wildfire Operations: Effects on the Forest Service's Non-Fire Work* at 2 (Aug. 2015), http://www.fs.fed.us/sites/default/files/2015-Fire-Budget-Report.pdf. Consultation and fire funding also divert funds for recreation improvements. For example, the Forest Service reports that "[d]eclining budgets and increased recreation use have been limiting the Deschutes National Forest's ability to maintain recreation opportunities, facilities, and roads that local business owners, visitors, and community members depend upon." U.S. Dept. of Agric., *Fire Funding Impacts*, http://www.fs.fed.us/sites/default/files/fire-funding-impacts-oregon.pdf.

C. Certiorari Should Be Granted Because Consultation Over an RMP Can Disrupt and Delay a Large Number of Existing, Previously Approved Projects.

Certiorari should also be granted because previously approved projects may be delayed under Section 7(d) while consultation is being completed. Section 7(d) provides that "after initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section." 16 U.S.C. § 1536(d).

In *Pacific Rivers*, hundreds of ongoing timber sales, road construction, and road maintenance contracts on the Wallowa-Whitman and Umatilla National Forests in Oregon were suspended under Section 7(d) pending consultation regarding the forest plans and listing of the Snake River chinook salmon. *Pacific Rivers Council*, 30 F.3d at 1056-57; *Pacific Rivers Council v. Thomas*, Civ. No. 92-1322-MA, 1994 WL 908600 at *6 (D. Or. Oct. 20, 1994). In yet another *Pacific Rivers* case, all ongoing and new timber harvest, grazing, mining, and road construction activities were enjoined based on Section 7(d) until completion of consultation on five forest plans in Idaho. *Pacific Rivers Council v. Thomas*, 873 F.Supp. 365 (D. Idaho 1995).

And the timber sale program in Arizona was suspended over consultation involving the Mexican spotted owl forest plans in that state. *Silver v. Babbitt*, 924 F.Supp. 976, 988-89 (D. Ariz. 1995) (citing Section 7(d) as the basis for broad halt to projects pending completion of forest plan consultation). The disruption of projects while ESA consultation is ongoing in some cases has led to litigation from federal contractors over damages associated with the delay. *See Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 819 (Fed. Cir. 2010), *cert. denied*, 562 U.S. 1178 (2011).

Most recently, the Bozeman Municipal Watershed and East Boulder projects on the Gallatin National Forest in Montana were delayed because of the *Cottonwood* decision. *Alliance for the Wild Rockies v. Krueger*, 950 F.Supp.2d 1196, 1207 (D. Mont. 2013). These projects are enjoined despite the fact that consultation was completed for the individual projects. *Id.* The district judge held that without reinitiation of consultation for the forest plan, it is "irrelevant that the biological opinions for the Bozeman Municipal Watershed Project and the East Boulder Project found that neither project will adversely modify lynx critical habitat." App. 52a. Submission of the *Alliance for Wild Rockies* appeal is vacated so the injunction of fuel reduction projects in the insect infestation municipal watershed providing "the most heavily used recreation area on the Gallatin National Forest" and the drinking water supply for 39,000 people will be delayed. *Alliance for the Wild Rockies v. Christensen*, No. 14-35069

(9th Cir.), Dkt. 16 at 1 (describing drinking water supply), Dkt. 55 (order vacating submission of case pending disposition of petition for writ of certiorari in this case); http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5341008.pdf at 5-6 (describing recreation use).

Overbroad injunctions that depart from traditional equitable principles have been the norm in the Ninth Circuit and have required the Supreme Court to remind the Circuit that "it is not enough for a court considering a request for injunctive relief to ask whether there is a good reason why an injunction should *not* issue; rather, a court must determine why an injunction *should* issue under the traditional four-factor test." *Monsanto v. Geertson Seed Farms*, 561 U.S. 139, 158 (2010) (emphasis in original); *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008). Although a forest-wide injunction was not entered here, the danger of permitting challenges to pre-existing programmatic forest plans characterized as agency action, invites a court to halt the offending "agency action." Criticizing the decision in *Pacific Rivers*, 30 F.3d at 1056-57, the Ninth Circuit concluded that there can no longer be a presumption of irreparable injury for a procedural violation of the ESA. App. 32a. However, the court suggested that with the loss of such presumption it will not place an "onerous" burden on environmental plaintiffs, undercutting the Circuit's acceptance of the *Winter/Monsanto* prohibition on presuming irreparable harm. App. 32a.

D. The Writ Should Be Granted Because *Cottonwood* Limits the Applicability of the Court's *SUWA* Decision in the Ninth Circuit.

This Court's interpretation of the nature of a resource management plan and interpretation of "major Federal action" under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4331 et seq., in *SUWA* supports a similar interpretation of "action" under the ESA which should be applied in the Ninth Circuit. *SUWA* involved a NEPA challenge to the BLM's resource management plans (RMPs) for parts of Utah in light of new information regarding increased off-road vehicle use. *SUWA*, 542 U.S. at 61. Plaintiffs argued that BLM violated NEPA by failing to supplement its RMPs with additional environmental analysis in light of significant new circumstances or information. *Id*. at 72-73. This Court noted that "although the '*approval* of a land use plan' is a 'major Federal action' requiring an EIS, that action is completed when the plan is approved." *Id.* at 73 (emphasis in original) (citation omitted). The Court held that for previously approved RMPs "[t]here is no ongoing major federal action that could require supplementation (though BLM is required to perform additional NEPA analyses if a plan is *amended* or *revised*)." *Id*. (emphasis added). *SUWA*'s effect was to clearly articulate that "actions" constitute discrete, affirmative occurrences, and that definition necessarily does not include the mere existence of an LRMP after its adoption.

SUWA's interpretation of "major Federal action" in the NEPA context, is applicable to the ESA definition of "action" in the context of an approved plan because the Court's holding was predicated on the completed nature of the RMP. This understanding of "action" is further reinforced by the explanation that "BLM *is* required to perform additional NEPA analyses if a plan is amended or revised," or in other words, when it performs other discrete, affirmative acts directly addressing the contents of the RMP. *Id.* at 73. (emphasis in original). After *SUWA*, a management plan, once promulgated and standing alone, is not agency action until additional affirmative changes or revisions to the plan occur.

BLM's land use planning at issue in *SUWA* is strikingly similar to the Forest Service's development and implementation of its LRMPs. This Court noted that the RMPs were designed to "guide and control future management actions . . . land use plan[s] [are] not ordinarily the medium for affirmative decisions that implement the agency's 'projections.'" *Id.* at 69 (citations omitted). Similarly, the National Forest Management Act of 1976, 16 U.S.C. §§ 1600 et seq., also involves a two-stage planning process where direct implementation of the LRMP occurs at a second stage, when individual site-specific projects are proposed and assessed. *Inland Empire Pub. Lands Council v. U.S. Forest Serv.*, 88 F.3d 754, 757 (9th Cir. 1996). The parallel structures of these planning processes dictate that LRMPs should be viewed similarly; absent revision or amendment, "there is no ongoing 'major Federal

action.'" *SUWA*, 542 U.S. at 73. *SUWA* then, effectively stands for the proposition that where a land use plan like an LRMP does not include "affirmative decisions that implement the agency's projections," no specific action exists which can be challenged. *Id.* at 69.

Neither the ESA nor NEPA provide statutory definitions for "action" or "major Federal action" but both provide administrative definitions. Both regulatory definitions illustrate examples of "action" using words that denote discrete, completed acts. *Compare* 40 C.F.R. § 1508.18 ("*adoption* of programs . . . [and] *approval* of specific projects") (emphasis added) with 50 C.F.R. § 402.02 ("activities or programs of any kind *authorized*, *funded*, or *carried out*, in whole or in part . . . [including] the *promulgation* of regulations [and] . . . the *granting* of licenses . . . [or] permits").[3] Most tellingly, the definitions refer to the "promulgation of regulations" and the "adoption of formal plans," as opposed to the plans and regulations themselves.

[3] The pervasive use of discrete actions in the definitions' examples supports the proposition that after LRMPs are promulgated, they do not represent agency action in and of themselves. *Cf. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987). In *Gwaltney*, the Court grappled with the Clean Water Act's (CWA) jurisdictional requirement that permits citizens to bring suit against any person "alleged to be in violation" of the Act. *Id.* at 57. In determining that the CWA's citizen suit provisions applied prospectively, and not to wholly past actions, the Court noted that "[o]ne of the most striking indicia of the prospective orientation of the citizen suit is the pervasive use of the present tense throughout § 505." *Id.* at 59. Similarly, it is clear from the pervasive use of discrete, affirmative decisions in illustrating what constitutes an "action," that an LRMP once approved is no longer an action.

40 C.F.R. § 1508.18; 50 C.F.R. § 402.02. These provisions are strikingly similar and necessitate a similar interpretation.

Since under *SUWA* any approved RMP is not an "action" under NEPA requiring renewed NEPA analysis, the RMP is also not an "action" requiring reinitiation of consultation under the ESA. The lower court, however, citing *Pacific Rivers*, noted that the Ninth Circuit has "repeatedly held that the ESA's use of the term 'agency' action is to be construed broadly" and that "the distinction in their wording demonstrates that the NEPA requirement for an EIS is 'more exclusive' than the requirement under Section 7." App. 66a-67a (citing *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1024 (9th Cir. 2012) (*en banc*)). But the *SUWA* Court's analysis was not predicated on the presence of the word "major," but rather was concerned with when an agency's "action" was rightly subject to further NEPA analysis. Therefore, *SUWA*'s holding that a land use plan standing alone does not constitute action is clearly applicable under the ESA. This is especially true when any ground disturbing project that may affect a species or its critical habitat will itself be subject to Section 7 consultation based on site specific knowledge of the location and intensity of the action.

The Ninth Circuit's attempt to distinguish *SUWA* is strained. It held that "[u]nlike the supplementation of environmental review at issue in *SUWA*, an agency's responsibility to reinitiate consultation does not terminate when the underlying action is complete." App. 22a. But the Ninth Circuit ignored the plain language

of the regulations, which state that reinitiation is only required if "discretionary Federal involvement or control over *the action* has been retained. . . ." 50 C.F.R. § 402.16 (emphasis added).

As a matter of logic, an agency no longer has control over an action that it has completed. "Agency discretion presumes that an agency can exercise 'judgment' in connection with a particular action." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 668 (2007). Thus, Section 7 applies to actions "which remain to be authorized, funded, or carried out. . . ." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 186 n. 32 (1978). Once an action is complete, there is no longer any judgment that can guide its implementation. Instead, any modifications to the subject of the action, such as a significant amendment or revision of a forest plan, would be a new action.

After insufficiently distinguishing *SUWA*, the Ninth Circuit then blurs the difference between plans and projects – a distinction which this Court has previously determined to be essential. *See Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 729, 734 (1998). The Ninth Circuit found that agencies remain "involved" in forest plans under § 402.16 because they make "additional decisions" at the "site-specific level" to implement the plans. App. 24a. Further, the Ninth Circuit relied on the Forest Service's "continuing ability" to "control forest management *projects*. . . ." *Id.* (emphasis added) (quoting *Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995)). Certainly, there is no dispute that additional site-specific decisions will be

necessary to implement forest management projects and that those projects, if not complete at a time when new critical habitat designation is made within their boundaries, would be subject to the requirement to re-initiate consultation. However, the Ninth Circuit's reliance on project authority to impose requirements at the plan level is a misreading of the regulations and conflicts with *SUWA*.

CONCLUSION

Amici urge the Court to grant the petition for writ of certiorari and reverse the Ninth Circuit holding that approved forest plans and RMPs are agency action requiring Section 7 ESA consultation.

Respectfully submitted,

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