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

RESPONDENT'S BRIEF IN OPPOSITION

SCOTT L. NELSON
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

MATT KENNA
Counsel of Record
PUBLIC INTEREST ENVTL. LAW
679 E. 2nd Ave., Suite 11B
Durango, CO 81301
(970) 385-6941
matt@kenna.net

JOHN MEYER
COTTONWOOD ENVTL. LAW
CENTER
P.O. Box 412
Bozeman, MT 59771
(406) 546-0149

Attorneys for Respondent

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QUESTIONS PRESENTED

1. Does the respondent have Article III standing to challenge the Forest Service's "Lynx Amendments"—forest plan amendments ostensibly designed to protect the threatened Canada lynx but alleged to be inadequate for the task—where the respondent's members submitted seven declarations that identify three specific timber management projects applying the Lynx Amendments (including one adjacent to a declarant's home), and the declarants showed how the timber projects harm their concrete aesthetic, conservation, and recreational interests?

2. Is respondent's procedural challenge to the Lynx Amendments ripe for judicial review when the Forest Service has approved site-specific projects implementing the Amendments?

3. 50 C.F.R. § 402.16, implementing Section 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, requires an agency to reinitiate consultation with the Fish and Wildlife Service over the effect on a threatened species of an action that previously underwent consultation when "new … critical habitat [is] designated that may be affected by the identified action." Was reinitiation of consultation on the Lynx Amendments required when 12 million acres of new critical habitat in the national forests were designated for the Canada lynx?

RULE 29.6 STATEMENT

Respondent Cottonwood Environmental Law Center does not have parent companies, subsidiaries, or affiliates that have issued shares to the public in the United States or abroad.

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INTRODUCTION

The U.S. Forest Service has asked this Court to review decisions of the District of Montana and the Ninth Circuit applying well-settled principles regarding standing and ripeness. Those factbound rulings do not merit further review because they follow this Court's precedents and present no disagreement among the circuits. The court of appeals' opinion was unanimous, and no judge on the entire Ninth Circuit requested a vote on whether to grant the Forest Service's petition for rehearing en banc.

The Forest Service also presents a merits issue concerning a regulation requiring agencies to reinitiate consultation with the Fish and Wildlife Service (FWS) on actions affecting threatened and endangered species when FWS designates new critical habitat for the species. 50 C.F.R. § 402.16. The issue does not warrant review because no other appellate court has ever interpreted this specific regulatory requirement differently.

Cottonwood brought this action to challenge the Forest Service's implementation of the "Lynx Amendments"—a uniform set of provisions in national forest plans ostensibly designed to protect a threatened U.S. population of Canada lynx. When the Forest Service promulgated the Lynx Amendments, it consulted with FWS over their effect on lynx in the northern Rocky Mountains, as required by the Endangered Species Act (ESA). At that time, FWS had improperly failed to designate any national forest lands in the northern Rocky Mountains as critical habitat for the lynx, and so FWS told the Forest Service that the Lynx Amendments would have no effect on critical habitat. Later, FWS designated

thousands of square miles of lynx critical habitat in the national forests, but the Forest Service failed to reinitiate consultation with FWS, as the governing regulation explicitly requires. Instead, the Forest Service proceeded to implement the Lynx Amendments without any changes from when the national forests included no critical lynx habitat.

When Cottonwood brought its procedural challenge to the Lynx Amendments based on the failure to reinitiate consultation, the Amendments were already being implemented in projects at specific sites threatening imminent injury to Cottonwood's members. Cottonwood submitted seven declarations from six of its members stating the dates they previously used project areas and the dates they intended to return to the project areas, and explaining how the projects' reliance on the Lynx Amendments caused harm to their aesthetic, conservation, recreational, and scientific interests in those specific locations.

The courts below highlighted harm to Cottonwood's concrete, on-the-ground interests before addressing the procedural violation that triggered its lawsuit. The courts correctly held that Cottonwood's detailed declarations satisfied the stringent standards articulated in *Summers v. Earth Island Institute*, 555 U.S. 488 (2009).

The Ninth Circuit's decision is congruent with longstanding precedent of this Court and the circuits, holding that a plaintiff can show standing to challenge programmatic action or inaction if it demonstrates a threat of injury tied to specific affected locations. The Forest Service's challenge to the lower courts' fact-specific application of this established

principle presents no issue requiring review and is meritless even as a claim of error.

The lower courts' findings that the action was ripe reflect the undisputed fact that the lawsuit was brought *after* site-specific projects were approved and being implemented. The Forest Service cites no precedent foreclosing ripeness under such circumstances.

The Forest Service's merits challenge to the decision below founders on the express terms of 50 C.F.R. § 402.16. That regulation provides that once an agency has consulted with FWS over the effect of an action on a species listed under the ESA, "[r]einitiation of formal consultation is required" if "discretionary Federal control over the action has been retained or is authorized by law" and "a new species is listed or critical habitat designated that may be affected by the identified action." Both of these criteria were satisfied here, and no court has held that reinitiation is not required under such circumstances. The Forest Service's attempt to evade the unambiguous regulatory language rests on case law addressing issues other than reinitiation of consultation. In particular, *Norton v. Southern Utah Wilderness Alliance* addressed an entirely different statute with no comparable regulatory language. 542 U.S. 55 (2004) ("*SUWA*").

REGULATION INVOLVED

The regulation at issue, 50 C.F.R. § 402.16, is not reproduced in the Forest Service's petition but is found in the appendix to this brief, at 1a.

STATEMENT

1. The Lynx Critical Habitat Designation—In 2000, FWS designated the "distinct population seg-

ment" of the Canada lynx in the contiguous United States as a threatened species under the ESA. 65 Fed. Reg. 16,052 (Mar. 24, 2000). FWS found that "the factor threatening lynx is the inadequacy of existing regulatory mechanisms, specifically the lack of guidance for conservation of lynx and lynx habitat in Federal land management plans …." *Id.* at 16,067. FWS repeated this finding several times in the notice designating the lynx. *See*, *e.g.*, *id.* at 16,082.

FWS was required to designate "critical habitat" for Canada lynx when it listed the species. 16 U.S.C. § 1533(a)(3). "Critical habitat" includes:

> the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with [the Act], on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection[.]

16 U.S.C. § 1532(5)(A)(i).

FWS failed to designate critical habitat when it listed the lynx as threatened. After being ordered to conduct a "prompt rulemaking in order to designate lynx critical habitat," *Defenders of Wildlife v. Norton*, 239 F. Supp. 2d 9, 26 (D.D.C. 2002), *vacated in part as moot*, 89 F. App'x 273 (D.C. Cir. 2004), FWS on November 9, 2006, designated critical habitat for the lynx, but only in three national parks. 71 Fed. Reg. 66,008 (Nov. 9, 2006). The remainder of the lynx's habitat, which spans large portions of the lower-48 states' northern tier, was excluded from the designation, and FWS found that no Forest Service lands should be included in the designation. *Id.* at 66,010.

On July 20, 2007, FWS announced that it was reviewing the critical habitat designation for the lynx and other ESA determinations to investigate "questions … about the integrity of the scientific information used and whether the decisions made were consistent with appropriate legal standards." FWS, *U.S. Fish and Wildlife Service to Review 8 Endangered Species Decisions* (July 20, 2007), https://www.fws.gov/news/ShowNews.cfm?newsId=E54AFD13-CC75-4E83-9780C462E13BA6E2. On February 25, 2009, FWS determined that the three-park designation had been "improperly influenced by then-Deputy Assistant Secretary of the Interior Julie MacDonald." 74 Fed. Reg. 8,616, 8,618. FWS issued a revised critical habitat designation for the lynx that included 39,000 square miles of lands, including 12 million acres of 11 national forests in three states in the northern Rocky Mountains. *See id.* at 8,616.

2. The Forest Service's Lynx Amendments—The Forest Service develops, maintains, and revises "land and resource management plans" ("forest plans") for each national forest pursuant to the National Forest Management Act of 1976. Forest plans guide management action on the national forests. 16 U.S.C. § 1604(a). They set forth criteria determining whether various activities may take place in national forests, and, among other things, address protection of threatened and endangered species within the forests. Forest plans were in place for all national forests, including the ones at issue here, when the present controversy began.

After the lynx was listed as threatened—but before its revised critical habitat designation—the Forest Service adopted the Northern Rockies Lynx Management Direction ("Lynx Amendments"), a single

decision amending plans for 18 national forests in the northern Rocky Mountains, intended to address harms to lynx. Pet. 5.

Section 7 of the ESA and its implementing regulations require that when a federal agency takes an action potentially affecting a listed species, the agency must initiate "consultation" with FWS to ensure that its actions do not jeopardize the continued existence of a threatened or endangered species or destroy or "adversely modify" its critical habitat. 16 U.S.C. § 1536; 50 C.F.R. Part 402. Consultation results in a "biological opinion" determining whether the action is likely to result in jeopardy of extinction to the species, or in destruction or adverse modification to its critical habitat, and if so specifying any required "reasonable and prudent alternatives." 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(3). Following initial consultation, the agency must "reinitiate" consultation if it retains "discretionary Federal involvement or control over the action" and one of four other conditions is met, including "if a new species is listed or critical habitat designated that may be affected by the identified action." 50 C.F.R. § 402.16.

The Forest Service consulted with FWS over the effects of the Lynx Amendments on critical habitat, which at that time only included three national parks. Pet. 5–6. FWS issued its final biological opinion on March 17, 2007, and concluded that "[n]o critical habitat has been designated for this species on Federal lands within [the national forests], therefore none will be affected." ER 217.[1]

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[1] "ER __" and "SER __" refer to the Excerpts of Record and Supplemental Excerpts of Record in the court of appeals.

When FWS issued its new critical habitat designation in 2009, including thousands of square miles in national forests subject to the Lynx Amendments, the Forest Service did not reinitiate consultation over the Lynx Amendments' effects on the newly designated critical habitat. Pet. 6. The agency continued to approve timber management projects in critical habitat areas governed by the Lynx Amendments, including the Bozeman Municipal Watershed Project ("BMW," also referred to as "Hyalite"), the East Boulder Project, and the Colt Summit Project. *See* Pet. App. 78a–89a; SER 12–18. The Section 7 consultations for these individual projects concluded that they would not result in adverse modification of critical habitat *because they were in compliance with the Lynx Amendments*. *See, e.g.*, ER 137–38.

3. The Litigation—After approval of these projects, Cottonwood filed suit over the Forest Service's failure to consult with FWS over the Lynx Amendments' effects on the newly designated critical habitat. Appreciating that lynx were listed because of the lack of broad-scale conservation measures in forest plans, Cottonwood's action challenged the failure to consult on a programmatic level rather than seeking review limited to specific projects. Still, Cottonwood submitted standing declarations identifying particular sites where the Lynx Amendments were being implemented, demonstrated injury to its members resulting from the activities at those sites, and sought an order not only requiring the Forest Service to consult, but also enjoining the implementation of projects under the Amendments. Cottonwood submitted seven declarations from six of its members showing that they regularly used the tracts of land within the BMW, East Boulder, and Colt Summit Projects

and explaining how the projects would cause them concrete recreational and aesthetic injuries. Pet. App. 78a–89a, SER 4–35.[2] One declarant lives adjacent to the BMW Project. SER 12–13.

The district court held that Cottonwood had standing because its declarants established that they faced a "risk of harm [that] is actual and imminent because specific projects guided in part by the Lynx Amendment are being implemented in areas they use and plan to return to." Pet. App. 54a. The court held that "for the purpose of establishing standing to challenge a programmatic regulation, plaintiffs can allege injury that relies on that regulation without asserting a separate claim against the project." *Id.* at 47a. The court noted that this view was consistent with *Summers*, 555 U.S. at 495, because in that case, "[i]t was the lack of a concrete application that threatened imminent harm to the plaintiffs' interests, not the lack of an independent, project-specific claim, that ultimately impaired the plaintiff's standing to challenge the regulations." Pet. App. 47a–48a. Here, Cottonwood's declarations demonstrated the concrete application of the Amendments and resulting imminent harm that were absent in *Summers*.

On the merits, the district court concluded that the designation of critical habitat triggered the requirement that the agency reinitiate consultation over the Lynx Amendments under 50 C.F.R. § 402.16. Pet. App. 70a–72a. The court therefore held that "[t]he Forest Service must now reinitiate consul-

[2] The government only includes three declarations in its appendices; the others are in Cottonwood's Supplemental Excerpts of Record in the court of appeals.

tation in order to determine that the Amendment is 'not likely to … result in the destruction or adverse modification of' designated critical habitat ….'" *Id.* at 72a (quoting 16 U.S.C. § 1536(a)(2)). While ordering the Forest Service to reinitiate consultation, however, the court did not issue either a broad injunction against any implementation of the existing plan or an injunction against the specific projects identified by the plaintiffs, because it found that Cottonwood had not met the burden of showing irreparable harm. Pet. App. 77a.

4. The Court of Appeals' Decision

a. Standing—The court of appeals affirmed the district court's ruling on standing. The court began with the proposition that "[t]o establish Article III standing, 'a plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" Pet. App. 8a (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000)). The court further emphasized that where, as here, a plaintiff challenges a government action based on a procedural violation, the plaintiff has standing only "where the violation is connected to a concrete injury." *Id.* at 12a n.7 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 & n.8 (1992) ("*Defenders*")).

The court analyzed the multiple declarations submitted by Cottonwood and determined that they demonstrated the requisite concrete injury. As the court explained, "Cottonwood's declarations establish

that its members extensively utilize specific National Forests where the Lynx Amendments apply and demonstrate their date-certain plans to visit the forests for the express purpose of viewing, enjoying, and studying Canada lynx." *Id.* at 10a. More than that, the declarations "state that Cottonwood's members engage in lynx-related recreation *within specific project areas that have applied, or will apply, the management direction in the Lynx Amendments*." *Id.* at 11a (emphasis added). Moreover, "Cottonwood's members assert that the Forest Service's failure to reinitiate consultation will cause aesthetic, recreational, scientific, and spiritual injury, *in the specific forests and project areas* covered by the Lynx Amendments." *Id.* (emphasis added).

The court contrasted Cottonwood's showing with the affidavit found insufficient by this Court in *Summers*. There, the affiant had referred only generally to unnamed projects in the Allegheny National Forest that might be affected by the challenged procedural violation, and had asserted no "firm intention to visit their locations, saying only that [he] 'wants to' go there." *Summers*, 555 U.S. at 496. "Such 'some day' intentions," this Court held, did not "support a finding of … 'actual or imminent' injury," but only showed "a chance, but … hardly a likelihood, that [the affiant's] wanderings w[ould] bring him to a parcel about to be affected by a project unlawfully subject to the regulations." *Id.* at 495. In "clear contrast," the declarations here stated that the declarants regularly used specific project areas affected by the Lynx Amendments and had definite plans to do so again in the near future. Pet. App. 11a. "Unlike [the] affidavit in *Summers*, these declarations sufficiently establish 'a geographic nexus between the in-

dividual asserting the claim and the location suffering an environmental impact.'" *Id.* (quoting *W. Watersheds Proj. v. Kraayenbrink*, 632 F.3d 472, 485 (9th Cir.), *cert. denied sub nom. Pub. Lands Council v. W. Watersheds Proj.*, 132 S. Ct. 366 (2011)).

The court held that these injuries supported Cottonwood's challenge to the procedural violation affecting the Lynx Amendments as a whole (as opposed to a suit challenging only specific projects) because the project approvals were based "largely on the Lynx Amendments and the corresponding 2007 [biological opinion]" finding no effect on lynx critical habitat. Pet. App. 14a. "Thus, even though individual projects may trigger additional Section 7 scrutiny, that scrutiny is dependent, in large part, on the Lynx Amendments and the 2007 [biological opinion] that were completed before critical habitat was designated on National Forest land." *Id.*

Accordingly, there was a sufficient causal relationship between the procedural violation alleged and the concrete injuries demonstrated at the site-specific level. *See id.* at 16a. Moreover, Cottonwood was not required to show that the outcome with respect to specific projects would necessarily be different if consultation occurred, because "where a procedural violation is at issue, a plaintiff need not 'meet[] all the normal standards for redressability and immediacy.'" *Id.* at 15a (quoting *Defenders*, 504 U.S. at 572 n.7, and citing *In re Endangered Species Act Section 4 Deadline Litig.*, 704 F.3d 972, 977 (D.C. Cir. 2013)). In such cases, it suffices to show a violation of "a procedural requirement the disregard of which could impair a separate concrete interest …." *Id.* at 12a n.7 (quoting *Defenders*, 504 U.S. at 572).

b. Ripeness—The court of appeals held that Cottonwood's claim was ripe, rejecting the government's argument that only the three projects themselves were the proper object of suit. The court applied the long-established principle that ripeness requires consideration of whether delaying review would cause hardship to the plaintiff, whether immediate review would interfere with ongoing administrative action, and whether review would benefit from further factual development. *Id.* at 17a (citing *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998)). The court found that review would involve no interference with further administrative action because the Forest Service's procedural failure to engage in consultation on the effects of the Lynx Amendments was final and not subject to revision, *id.* at 18a, 19a; that further factual development was unnecessary to resolve the claim of a procedural violation, the merits of which would not be affected by the specifics of the Lynx Amendment's application to particular sites, *id.* at 18a-19a; and that deferring review would impose a hardship upon Cottonwood "*because the Forest Service is actively applying the Lynx Amendments at the project-specific level.*" *Id.* at 18a (emphasis added).

c. Merits—On the merits, the court of appeals affirmed the district court's holding that the reinitiation regulation's unambiguous language required the Forest Service to reinitiate consultation. The court emphasized that, under the regulation, an agency must reinitiate consultation "[i]f a new species is listed or critical habitat designated that may be affected by the identified action," as long as "discretionary Federal involvement or control over the action has been retained or is authorized by law." *Id.* at 22a (quoting 50 C.F.R. § 402.16). The court noted

that "[t]he 2009 revised critical habitat designation clearly meets" the triggering criterion of a designation of new habitat that may be affected, *id*. at 22a–23a, and thus the "determinative question" was whether the Forest Service retained or was authorized by law to exercise discretion over the Lynx Amendments. *Id*. The court found such retention of discretion because "the Forest Service retains exclusive 'control,' 50 C.F.R. § 402.16, over its own Forest Plans throughout their implementation." *Id*.

The court rejected the Forest Service's argument that it need not reinitiate consultation because the promulgation of the Lynx Amendments was a completed action. *Id*. at 22a–23a & n.12. The Forest Service relied on this Court's decision in *SUWA* that an agency need not prepare a supplemental environmental impact statement under the National Environmental Policy Act (NEPA) unless "there remains 'major Federal actio[n]' to occur." 542 U.S. at 73, and thus has no obligation to supplement NEPA analysis on a completed land use plan.

The court of appeals pointed out that the Forest Service's argument "ignores a key difference between NEPA and the regulations governing reinitiation of consultation under the ESA." Pet. App. 21a–22a. While NEPA imposes obligations on an agency undertaking a major federal action, the ESA reinitiation regulation requires reinitiation of consultation as long as the agency retains discretion over an action it has taken. *Id*. at 22a. Thus, "[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." *Id*.

d. Relief and Rehearing—Finally, the court of appeals (over one judge's dissent) affirmed the district court on Cottonwood's cross-appeal challenging the district court's refusal to enjoin projects that "may affect" newly designated critical habitat while consultation proceeds. Pet. App. 27a–35a. The court held that prior Ninth Circuit precedent presuming irreparable harm from ESA violations and requiring broad injunctive relief was no longer good law in light of this Court's more recent decisions. *Id.* at 29a–32a (citing, *inter alia*, *Winter v. NRDC*, 555 U.S. 7 (2008), and *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010)). The court allowed Cottonwood to return to district court to show "irreparable injury to justify relief" in "specific projects." *Id.* at 32a–35a.

The Forest Service filed a petition for rehearing *en banc* on the grounds contained in its petition for certiorari, but no member of the court asked for a vote on the petition. Pet. App. 1a. Cottonwood filed a limited petition for panel rehearing regarding some language used in the panel's decision about injunctive relief, but it was also denied. *Id.* Cottonwood has not cross-petitioned on the injunctive relief issue.

REASONS FOR DENYING THE WRIT

I. The Forest Service has not identified any standing issue that merits review.

A. The court of appeals correctly required Cottonwood to show concrete injury attributable to the procedural violation.

1. The premise of the Forest Service's first question presented is that Cottonwood "cannot identify any member who has or will suffer a concrete injury as a result" of the challenged action, Pet. I, and it repeatedly asserts that the court of appeals disregard-

ed *Summers*'s holding that a plaintiff claiming a procedural violation must show an injury to a concrete interest protected by the procedure. *See*, *e.g.*, Pet. 14, 19. The Forest Service's arguments ignore the court of appeals' holding that Cottonwood had shown the concrete, site-specific injuries required by *Summers*—a holding amply supported by the record.

The court of appeals made it abundantly clear that it understood and respected *Summers*'s holding that a plaintiff alleging a procedural violation must demonstrate a concrete impact on interests protected by the required procedures. The court emphasized that the plaintiff was required to show a "concrete and particularized" injury, Pet. App. 9a, and that in a case involving a procedural violation, the plaintiff must show that "the violation is connected to a concrete injury." *Id.* at 12a n.7. The court reviewed Cottonwood's standing declarations in detail before concluding that "[t]he declarations connect" the "procedural injury stemming from the Forest Service's decision not to reinitiate consultation on the Lynx Amendments" with "*imminent harm in specific forests and project areas*." *Id.* at 13a (emphasis added).

Specifically, Cottonwood submitted seven declarations from six of its members detailing concrete recreational and aesthetic injuries in three specific timber project areas containing newly designated lynx critical habitat—injuries attributable to the failure to reinitiate consultation. Pet. App. 78a–89a. These projects were the Colt Summit, East Boulder, and BMW Projects. *Id.* at 87a ¶3, 79a ¶4; SER 17–18. One declarant owns land adjacent to the BMW Project (SER 12–13), while others use the Colt Summit and East Boulder areas on a continuing and ongoing basis and specify the dates when they plan to return to the pro-

ject areas. Pet. App. 88a ¶6, 79a–80a ¶5. The government's assertion that the declarations merely "speculate that unidentified projects may adversely affect lynx and lynx critical habitat," (Pet. 15.) and that "respondent failed to" "identif[y] a project they alleged would harm their recreational interest" (Pet. 18) is incorrect. Rather, as the court of appeals concluded, the declarations aver "that the Forest Service's failure to reinitiate consultation will cause aesthetic, recreational, scientific, and spiritual injury, *in the specific forests and project areas covered by the Lynx Amendments*." Pet. App. 11a (emphasis added).

2. By contrast, as the court of appeals explained in painstaking detail, the *Summers* plaintiffs failed to identify any "application of the invalidated regulations that threatens imminent and concrete harm to the interests of their members." *Summers*, 555 U.S. at 495. The sole affiant considered in *Summers* only "assert[ed] that he ha[d] visited many national forests and plan[ned] to visit several unnamed national forests in the future," but "fail[ed] to allege that *any* particular timber sale or other project claimed to be unlawfully subject to the regulations will impede [his] specific and concrete plan[s] … to enjoy the National Forests." *Id.* Cottonwood learned the lesson of *Summers* and did not make a similar mistake.

Nor do the circumstances here raise the "same standing issue" as *Pacific Rivers Council v. U.S. Forest Service*, 689 F. 3d 1012 (9th Cir. 2012), in which this Court granted certiorari, 133 S. Ct. 1582, before vacating the decision below as moot, 133 S. Ct. 2843 (2013). Pet. 21. There, the plaintiff's single declarant did not identify or allege plans to visit any particular project area affected by the challenged forest plan, but instead asserted that he engaged in recreation

throughout the Sierra Nevada Range. 689 F.3d at 1022. Cottonwood's members, by contrast, were able to identify injuries at specific project sites undertaken pursuant to the Lynx Amendments, and the court of appeals' decision that those declarations suffice fits squarely with *Summers* and other precedent of this Court.

3. The Forest Service nonetheless contends that the court of appeals' decision, in conflict with *Summers*, requires only a "relationship" between Cottonwood's members and "a geographical area governed by a programmatic plan," rather than a showing of injury traceable to the challenged procedural violation. Pet. 16. The Forest Service bases this complaint on the court's statement that the plaintiffs need not show that the "failure to reinitiate consultation on the Lynx Amendments would lead to different, injurious results at the project-specific level." Pet. App. 15a; *see* Pet. 17.

That statement did not, as the Forest Service implies, relieve the plaintiffs of their burden of showing concrete injury attributable to the challenged violation under the injury-in-fact prong of standing. Rather, the court's statement merely applied the long-established principle under the redressability prong that a plaintiff alleging a procedural violation can establish standing without showing that correcting the violation will necessarily lead to a different substantive result. As this Court has recognized, plaintiffs claiming a procedural injury need not "'meet[] all the normal standards for redressability and immediacy.'" *Summers*, 555 U.S. at 496 (quoting *Defenders*, 504 U.S. at 572 n.7).

The court of appeals' statement that Cottonwood "is not required to establish what a Section 7 consultation would reveal, or what standards would be set, if the Forest Service were to reinitiate consultation," Pet. App. 15a, straightforwardly applies this familiar principle. That statement squares exactly with this Court's acknowledgment in *Summers* that a plaintiff need not show that, if the required procedure were provided, it would be "successful in persuading the Forest Service to avoid impairment of its concrete interests." 555 U.S. at 497.[3]

The court of appeals' redressability analysis in no way derogated from the requirement of a concrete injury fairly traceable to the procedural violation. *See* Pet. 17. Rather, the Ninth Circuit examined and dismissed as "not persuasive" the Forest Service's argument that "no injury resulted from the failure to reinitiate consultation on the Lynx Amendments." Pet. App. 13a. The court of appeals cited the government's continued reliance on the Lynx Amendments, and the initial, flawed consultation, to approve projects in areas that Cottonwood's members use and enjoy on an ongoing basis. *See id.* at 14a.

4. The Forest Service also appears to suggest that *Summers* held that a plaintiff who is injured by the implementation of a programmatic agency action at a particular site has standing only to challenge the

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[3] The D.C. Circuit has likewise explained that the relaxed redressability requirement in procedural-rights cases "relieves the plaintiff of the need to demonstrate that (1) the agency action would have been different but for the procedural violation, and (2) court-ordered compliance with the procedure would alter the final result." *In re Endangered Species Act*, 704 F.3d at 977 (internal quotation marks and alterations omitted).

site-specific action rather than the broader action. *See* Pet. 14 ("Because the plaintiffs [in *Summers*] did not challenge any project that had caused or imminently would cause them concrete harm, the Court found no standing to assert their claimed procedural right."). That is not what *Summers* held.

Summers held that the plaintiffs lacked standing because they had not *identified* an application of the challenged regulation that threatened them with imminent injury. 555 U.S. at 495–97. *Summers* acknowledged that if they had identified such an application, they would have established standing for their facial procedural challenge. *See id.* at 494 ("[R]espondents can demonstrate standing only if application of the regulations by the Government will affect them in the manner described above.").

If, as the government now argues, *Summers* foreclosed standing for any procedural challenge to a regulation or other programmatic action above the site-specific level, the Court would have said so rather than delve into the specificity of the affidavit, which could not have then made a difference. Neither *Summers* nor any precedent cited by the Forest Service holds that a plaintiff who identifies a particular concrete injury resulting from a broader agency action lacks standing to challenge the illegality of the procedures that led to that action.

5. "[D]etermining 'injury' for Article III standing purposes is a fact-specific inquiry." *Defenders*, 504 U.S. at 606. Setting aside the Forest Service's various misreadings of *Summers* and the opinion below, the standing issue in this case raises nothing more than a fact-specific issue about the correctness of the lower courts' analysis of Cottonwood's particular

averments. Cottonwood has shown that applications of the Lynx Amendments cause harm to Canada lynx habitat, and therefore the interests of Cottonwood's members, on specific parcels of land detailed in their declarations. According to the 2000 rule that listed lynx, "the single factor threatening the contiguous [population] of lynx" is the "National Forest Land and Resource Plans and BLM [Bureau of Land Management] Land Use Plans." 65 Fed. Reg. at 16,082. "The lack of protection for lynx in these Plans render them inadequate to protect the species." *Id.* at 16,052. If forest plans can themselves threaten the very existence of lynx, their application can certainly cause injury-in-fact to Cottonwood's interests in using lynx habitat.

B. There is no arguable circuit conflict.

The Forest Service claims that the court of appeals' standing decision conflicts with decisions of the Sixth, Seventh, and D.C. Circuits. *See* Pet. 17-20. No conflict exists. Courts applying the same principles to different facts simply reached different outcomes.

1. In *Heartwood, Inc. v. Agpaoa*, 628 F.3d 261 (6th Cir. 2010), the court found that plaintiffs lacked standing to challenge a project involving 5,000 acres of logging scattered through an area of 25,000 acres. Only one of the plaintiffs' two standing declarations even mentioned use of the project area, and it said only that the declarant had visited "countless areas" that would be affected and that she "look[ed] forward to exploring the … project area" (without saying whether she meant the 25,000-acre project area or the smaller areas within it that would be subject to logging). *Id.* at 267. The court found that the declaration did not identify with any specificity which part

of this "immense tract of territory" the declarant used. *Id.* at 268 (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990) ("*NWF*")). In light of the fact that the government had given the plaintiffs maps showing the precise parts of the 25,000 acres that would be logged, *see id.*, the court concluded that the declaration's lack of specificity made it inadequate to demonstrate "*concrete and particularized* harm from the Forest Service's implementation of the Project under the Plan." *Id.* at 267.

Agpaoa does not conflict with the decision below. Citing a previous Sixth Circuit precedent, *Center for Biological Diversity v. Lueckel,* 417 F.3d 532, 537 (6th Cir. 2005), *Agpaoa* held that environmental plaintiffs "must show that actual, site-specific activities are diminishing or threaten[ing] to diminish their members' enjoyment" of affected locations. 628 F.3d at 628. That is exactly the principle applied by the court of appeals in this case. *See* Pet. App. 11a. *Agpaoa* found a lack of standing because the declarant failed to specify which part of the 25,000 acres potentially affected by the project she used, finding that this acreage qualified as an "unspecified portion[] of an immense tract of territory" under *NWF*, 497 U.S. at 889, (1990). *Id.* at 267-68. However, here, for instance, the court of appeals noted that the East Boulder Project only affected 872 acres. Pet. App. 13a n.8. This is hardly the "immense tract of territory" that concerned the Court in *NWF*, or even the 25,000 acres in *Agpaoa*. And here, where one declarant lives next to one of the projects (SER 12–13), standing is clearly shown. "[U]nder our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing …." *Defenders*, 504 U.S. at 572 n.7.

2. The Forest Service's assertion that *Pollack v. U.S. Department of Justice*, 577 F.3d 736 (7th Cir. 2009), *cert. denied*, 559 U.S. 1006 (2010), evidences a conflict between the Seventh and Ninth Circuits is inexplicable. There, the plaintiffs challenged a shooting range that discharged lead bullets into a small portion of Lake Michigan. The plaintiffs' standing declarants used, and drank water from, distant, up-current parts of the lake not affected by the discharges. *Id.* at 738, 741–42. The court held that the declarations did not show concrete injury because the "pollution affects one discrete area while [the] plaintiff intends to visit a different discrete area." *Id.* at 742. That result suggests no conflict with the decision below, where Cottonwood's declarations showed that the declarants use timber project areas directly affected by the Lynx Amendments.

The Forest Service asserts that "[t]he Seventh Circuit has also held, in conflict with the court of appeals' decision below, that 'the denial of a procedural right, unconnected to a plaintiff's concrete harm, is not enough to convey standing.'" Pet. 18 (quoting *Bensman* v. *U.S. Forest Serv.*, 408 F.3d 945, 952 (2005) (quoting *Heartwood, Inc.* v. *U.S. Forest Serv.*, 230 F.3d 947, 952 (7th Cir. 2000))). But that is exactly the rule the court of appeals applied in this case. *See* Pet. App. 12a n.7. And in *Heartwood*, the Seventh Circuit specifically held that environmental plaintiffs had standing to raise a procedural challenge to a broad agency action (promulgation of a policy categorically excluding certain timber sales from NEPA analysis) because projects implementing it would diminish their use and enjoyment of particular forest lands. *See* 230 F.3d at 951; *see also Rhodes v. Johnson*, 153 F.3d 785, 787 (7th Cir. 1998).

Other Seventh Circuit decisions likewise demonstrate that that court agrees with the court of appeals' decision here that plaintiffs can establish standing by showing that they make use of the site of a project or immediately adjacent areas. *See*, *e.g.*, *Am. Bottom Conservancy v. U.S. Army Corps of Eng'rs*, 650 F.3d 652, 657 (7th Cir. 2011); *Sierra Club v. Franklin Cty. Power of Ill., LLC*, 546 F.3d 918, 925–26 (7th Cir. 2008).

3. There is no conflict with *National Ass'n of Home Builders v. EPA*, 667 F.3d 6 (D.C. Cir. 2011). As the government notes, the plaintiff there had no standing because its "member 'face[d] only the *possibility* of regulation'" because the subject watercourse had not yet been given a protective classification that might harm the member's business interests. Pet. 19 (quoting 667 F.3d at 13, emphasis in opinion). Here, projects specified by the declarants had *already* been approved, posing the imminent risk of injury that was lacking in *Home Builders*.

In fact, the D.C. Circuit follows the same approach as the Ninth Circuit, under which plaintiffs have standing to raise a procedural challenge to an agency action at the programmatic level if they show a likelihood of imminent injury to their interests in using specific locations that will be affected by the program for commercial or recreational purposes. *E.g.*, *Ctr. for Sustainable Economy v. Jewell*, 779 F.3d 588, 596 (D.C. Cir. 2015).

II. The government's ripeness argument that plaintiffs may only challenge specific actions implementing a programmatic action does not merit review.

A. The Forest Service purports to rely on what it calls the "rule of general applicability" that "a plaintiff may not invoke the APA to seek judicial review of an agency regulation … unless and until it is applied in a concrete way." Pet. 25–26. It invokes this Court's statement in *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 58 (1993), that "a controversy concerning a regulation is not ordinarily ripe for review under the [APA] until the regulation has been applied to the claimant's situation by some concrete action." And it asserts that courts would "benefit by deferring consideration of any programmatic challenges to the Lynx Amendments, whether on ESA or other grounds, until the Forest Service applies them to a specific project in a concrete way." Pet. 25.

Even if the "rule of general applicability" is as unqualified as the Forest Service suggests, it does not call into question the ripeness of *this case*, because it is undisputed that the Forest *has applied* the Lynx Amendments in a concrete way by approving the specific projects that were cited in Cottonwood's standing declarations. As this Court has emphasized, "ripeness is peculiarly a question of *timing*." *Regional Rail Reorg. Act Cases*, 419 U.S. 102, 140 (1974) (emphasis added). This action's timing is proper because, as the court of appeals noted, "the Forest Service is actively applying the Lynx Amendments at the project-specific level." Pet. App. 18a.

The line of D.C. Circuit cases the Forest Service cites to suggest a conflict among the circuits under-

scores this point. In *Center for Biological Diversity v. Department of Interior* ("*CBD*"), the D.C. Circuit held that, when challenging a multi-stage leasing program, plaintiffs had to *wait* until a site-specific project was approved before mounting certain programmatic NEPA and ESA procedural challenges. 563 F.3d 466, 480 (D.C. Cir. 2009). *CBD* did *not* hold that those challenges must be limited to particular sites to become ripe. *Id*. Moreover, in contrast to *CBD*, 563 F.3d at 482, the court here found that the Forest Service's approval of the Lynx Amendments will affect critical habitat in ways that cannot be redressed by review of site-specific decisions.

In later cases applying *CBD*, the D.C. Circuit has made clear that once a specific lease is approved, procedural challenges at the programmatic level become ripe and may be entertained by the courts: plaintiffs "merely have to wait" to bring such challenges. *Ctr. for Sustainable Economy*, 779 F.3d at 600; *WildEarth Guardians v. Jewell*, 738 F.3d 298, 304 n.2 (D.C. Cir. 2013) (challenge to EIS "ripened" once leases issued).

The D.C. Circuit cases concerning multi-stage leasing reflect the principle that when a challenge to an agency action at the programmatic level should await some site-specific application of the action, the challenge becomes ripe once the site-specific application occurs. *See*, *e.g.*, *In re Polar Bear Endangered Species Act Listing & Section 4(d) Rule Litig.*, 720 F.3d 354, 359 (D.C. Cir. 2013). Under D.C. Circuit precedent, as well as that of the Ninth Circuit, the undisputed fact that the challenged action here has been implemented at the site-specific level makes the case ripe. There is no circuit division on this point.

B. More broadly, the Forest Service's ripeness arguments overlook that, as the court below properly recognized, ripeness doctrine embodies a flexible balancing involving considerations of finality of agency action and fitness of issues for review; hardship to the parties of deferring review and the impact of immediate review on the agency; and whether review would benefit from further factual development. *Ohio Forestry*, 523 U.S. at 733; Pet. App. 17a. The Forest Service's proposed rule that, regardless of the nature of the challenge, an environmental plaintiff may only obtain review of actions applying rules at the site-specific level is fundamentally incompatible with the ripeness inquiry. It is likely for just that reason that, as the *Summers* dissenters pointed out, this Court did not adopt the Forest Service's ripeness argument when it was made in that case. 555 U.S. at 510 (Breyer, J., dissenting).

Ohio Forestry itself illustrates that application of the ripeness doctrine depends not only on the type of action at issue, but also the nature of the challenge. In *Ohio Forestry,* the Court analyzed a challenge to a forest plan and held that the *substantive* challenges at issue there were unripe for the reasons stated by the Forest Service. Pet. 22–23 (citing 523 U.S. at 733). At the same time, however, the Court stated that a person may "complain of [a procedural] failure at the time the failure takes place, for the claim can never get riper." 523 U.S. at 737. The government fails to recognize that crucial distinction.

Ohio Forestry's recognition that procedural challenges may often be ripe earlier than substantive ones represents a particular application of the general principle that challenges raising purely legal issues are likely to be ripe earlier than claims that

cannot be resolved without consideration of the application of an agency rule or policy to specific circumstances. The circuits broadly agree on that principle. *See*, *e.g.*, *Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301, 1308 (11th Cir. 2009); *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 440 F.3d 459, 464–65 (D.C. Cir. 2006); *Ciba-Geigy Corp. v. Sidamon-Eristoff*, 3 F.3d 40, 47 (2d Cir. 1993).

The circuits likewise agree with *Ohio Forestry*'s statements about the application of this principle to an agency's procedural violations in promulgating a rule or policy or in taking some other programmatic action. *See*, *e.g.*, *Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F.3d 18, 32–33 (1st Cir. 2007); *Ouachita Watch League v. Jacobs*, 463 F.3d 1163, 1174 (11th Cir. 2006); *Sierra Club v. U.S. Army Corps of Eng'rs*, 446 F.3d 808, 815–16 (8th Cir. 2006); *Sierra Club v. Dep't of Energy*, 287 F.3d 1256, 1263–65 (10th Cir. 2002); *Heartwood*, 230 F.3d at 952–53. The D.C. Circuit's decisions are not to the contrary. That court agrees that procedural violations are often ripe when they occur, but in the special context of multi-tiered leasing programs, the court takes the view that certain procedural violations may not occur until a lease is issued, because complete environmental analysis is not required until that time. *See CBD,* 563 F.3d at 481–82; *see also Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 49–51 (D.C. Cir. 1999). By contrast, here, plan-level analysis is legally required and is critical because it controls the results of later analyses and thus directly affects listed species.

In this case, the court of appeals recognized and followed *Ohio Forestry*'s holding that purely legal procedural challenges present different ripeness considerations than fact-dependent substantive ones.

Pet. App. 17a–18a ("The Forest Service's arguments rest on the false premise that Cottonwood is pursuing a substantive ESA claim."). As the court correctly found, the procedural failure to consult on the Lynx Amendments was "complete" because the agency would not be reconsidering it, and the "factual development necessary to adjudicate the case" was likewise complete as no further facts were required to determine whether the agency's failure to reinitiate consultation was unlawful. *Id.* And it found under the hardship prong of *Ohio Forestry* that "because the Forest Service is actively applying the Lynx Amendments at the project-specific level, delayed review would cause hardship to Cottonwood and its members." Pet. App. 18a. The Forest Service contests the correctness of this application of ripeness principles to the specifics of this case, but it points to no disagreement among the courts requiring resolution by this Court.

III. The Forest Service's argument that the Ninth Circuit erred in following the plain language of the reinitiation regulation does not merit review.

The Forest Service contends that only a new agency action can trigger reinitiation of consultation, even if new critical habitat is designated. Pet. 30–31. The controlling regulation, however, states that "[r]einitiation of formal consultation is required … where discretionary Federal involvement or control over the action has been retained or is authorized by law" and one of four other criteria is present:

> (a) If the amount or extent of taking specified in the incidental take statement is exceeded;

> (b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
>
> (c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or
>
> (d) *If a new species is listed or critical habitat designated that may be affected by the identified action.*

50 C.F.R. § 402.16 (emphasis added). The regulation plainly applies to completed actions that were subject to initial consultation, as long as the agency retains discretionary involvement or control over them. Of course, reinitiation may *also* be required when an agency takes further action, but that circumstance is addressed in only one if the regulation's four subsections—subsection (c).

The government claims that the court of appeals' reading of the regulation conflicts with this Court's holding in *SUWA*. *See* Pet. 29. As the court of appeals explained, that case involved NEPA, not the ESA and its unique reinitiation regulation. While "major federal action" under NEPA and "agency action" under the ESA may be similar in certain respects, no one disputes that there was an agency action here that was subject to an initial consultation, and over which consultation occurred. *See* Pet. 31. The only question concerns the circumstances under which the agency has to *reinitiate* consultation over that action. In that respect there is a great distance between the requirements of NEPA and the ESA.

In *SUWA*, the Court held that an agency was not required to supplement NEPA review of a land use plan when new information arose after the plan's adoption. 542 U.S. at 72–73. The Court held that the plan was not "*ongoing* 'major Federal action' that could require supplementation." *Id.* at 73 (emphasis added). Unlike supplementation under NEPA, the predicate for reinitiation of consultation under the ESA regulation is not whether action is "ongoing," but whether the agency retains discretion over the original action on which it consulted. Thus, as the court of appeals held, *SUWA* is not controlling because "[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." Pet. 22a.

The court of appeals' reasoning tracks the explanation of the regulation by FWS—the agency that administers the ESA and promulgated the regulation. The explanation states that "in the case of a Federal action, reinitiation would not be required if the action was completed *and* no further Federal discretionary control or involvement remained." 48 Fed. Reg. 29,990, 29,997 (1983) (emphasis added); *see also* 50 C.F.R. § 402.03 ("Section 7 and the requirements of this part apply to *all* actions in which there is discretionary Federal involvement or control.") (emphasis added). The Forest Service acknowledges that it has discretion to amend the Lynx Amendments and forest plans generally, but attempts to repackage its argument that it must take new action to trigger reinitiation by asserting that it has no "discretionary involvement or control over the completed action that is the amendment of multiple forest plans." Pet. 30. As the court of appeals recognized, however, the sali-

ent question is whether the agency has control over the implementation of its plans and discretion to amend them, *see* Pet. App. 24a–25a, not whether the agency has actually done so. The Forest Service points to no disagreement among the courts over the Ninth Circuit's more straightforward reading.

The government argues that "[t]he Ninth Circuit's decision directly conflicts with the Tenth Circuit's decision in *Forest Guardians v. Forsgren*, 478 F.3d 1149 (2007)." Pet. 32. But *Forest Guardians* did not address whether the agency was required to *reinitiate* consultation on a forest plan, and so did not consider (or even cite) the reinitiation regulation, let alone inquire into whether the agency retained sufficient discretion to require reinitiation. *Forest Guardians* held that the Forest Service was not required to initiate ESA consultation on two existing forest plans in the *first instance*. 478 F.3d at 1151. The Tenth Circuit stated that "[t]he act of approving, amending, or revising a [forest plan] constitutes 'action' under § 7(a)(2) of the ESA," but that forest plans are not "ongoing, self-implementing action under §7(a)(2)." *Id*. at 1154. Whether this holding is correct is not at issue here. Regardless, under the *reinitiation* regulation, the retention of agency authority over its action, combined with the designation of new critical habitat, is the trigger, not a new or ongoing affirmative agency action. 50 C.F.R. § 402.16(d).

IV. The Forest Service's policy arguments demonstrate no need for review.

The government's argument that allowing lawsuits by injured plaintiffs to enforce the reinitiation regulation "has the potential to cripple the Forest Service and BLM's land management functions," Pet.

20, ignores that the Forest Service and other agencies routinely engage in ESA consultation, and reinitiation of consultation, over management plans. *See, e.g.*, 80 Fed. Reg. 42,087 (July 16, 2015) (National Marine Fisheries Service "has reinitiated consultation under the [ESA] on the effects to listed Pacific salmon species from implementation of the Pacific Coast Groundfish Fishery Management Plan.").[4] Requiring reinitiation of consultation on such plans in the very specific circumstances where the regulation requires it threatens no broad impairment of the government's ability to implement its plans.

The Forest Service consulted over the Lynx Amendments before FWS corrected its flawed critical habitat designation. If consultation itself is not excessively burdensome, it is difficult to understand why the agency would be burdened by reinitiating it when a change as significant as the one here undermines the entire premise of a prior consultation. No doubt agencies prefer to lessen their workload wherever possible, but they will not be "crippled" by reinitiating consultations over management plans—especially given that, as this case demonstrates, it is not necessarily the case that ongoing activities will be enjoined pending consultation. And given that FWS stated that "[s]pecific management recommendations for areas designated as critical habitat are most appropriately addressed in subsequent recovery and management plans," 74 Fed. Reg. at 8,623, a

[4] *See also* http://www.blm.gov/or/plans/rmpswesternoregon/consultation.php (describing BLM's ESA consultation over the Western Oregon resource management plan). Many such examples are available.

new consultation to ensure the Amendments appropriately address critical habitat reflects exactly the procedure that the agency with expertise recommends.

The Forest Service's policy arguments ring particularly hollow because the reinitiation requirement is the product of agency rulemaking. The executive branch is uniquely situated to ensure that its own interests are considered when it promulgates a regulation, and compliance with regulations it promulgates is thus extremely unlikely to "cripple" executive branch functions. Agencies know well how to modify regulatory requirements that present unanticipated difficulties, but the government has not seen fit to change the reinitiation regulation in the over 30 years since its promulgation, despite a long history of judicial enforcement. *See*, *e.g.*, *Forest Guardians v. Johanns*, 450 F.3d 455 (9th Cir. 2006); *Sierra Club v. Marsh*, 816 F.2d 1376 (9th Cir. 1987).

Moreover, the proposition that consultation requirements are enforceable at the programmatic level has long been recognized, with no apparent ill effects on agencies. *See Silver v. Babbitt*, 924 F. Supp. 976, 981 (D. Ariz. 1995) (requiring consultation over forest plans "for all national forests in the Southwest Region"); *Strahan v. Roughead*, 910 F. Supp. 2d 358 (D. Mass. 2012) (refusing to dismiss case to require programmatic consultation over Navy's operations in the habitat of four whale species); *Am. Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027, 1035–35 (D.C. Cir. 2008) (rejecting FCC's reasons for refusing to consult over tower-approval regulations).

Amici argue that the agencies' resources would be better devoted only to consultations over site-specific

action. AFRC Br. 11. But FWS has found precisely the opposite for the lynx. The reason for FWS's finding that the lynx population in the lower 48 states is threatened with extinction was "the inadequacy of existing regulatory mechanisms, specifically the lack of guidance for conservation of lynx in National Forest Land and Resource Plans …." 65 Fed. Reg. at 16,082. "Until Plans adequately address risks such as those identified in the [federal Lynx Conservation Assessment and Strategy]"—including timber harvest and fire suppression activities—"the lack of Plan guidance for conservation of lynx … is a significant threat" to the lynx. *Id*. Further, the FWS Biological Opinion issued during the initial consultation (which excluded the 12 million acres of critical habitat now designated) concluded that "landscape level direction [is] necessary for the survival and recovery of lynx in the northern Rockies ecosystem." ER 212. Plan-level consultation is much more essential to preserve and recover the lynx and the critical habitat it needs for survival than piecemeal, project-level consultation alone (which is ultimately based on plan-level guidance).

Over 12 million acres of new critical habitat in the national forests was designated after the original consultation on the Lynx Amendments was complete. It makes perfect sense that the Forest Service must reinitiate consultation on the Lynx Amendments.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

SCOTT L. NELSON
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

MATT KENNA
Counsel of Record
PUBLIC INTEREST ENVTL. LAW
69 E. 2nd Ave., Suite 11B
Durango, CO 81301
(970) 385-6941
matt@kenna.net

JOHN MEYER
COTTONWOOD ENVTL. LAW CENTER
P.O. Box 412
Bozeman, MT 59771
(406) 546-0149

Attorneys for Respondent

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APPENDIX

REGULATION INVOLVED

50 C.F.R. § 402.16

Reinitiation of formal consultation.

Reinitiation of formal consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and:

(a) If the amount or extent of taking specified in the incidental take statement is exceeded;

(b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;

(c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or

(d) If a new species is listed or critical habitat designated that may be affected by the identified action.