No. 12-623

In The Supreme Court of the United States

UNITED STATES FOREST SERVICE, ET AL.,

Petitioners,

v.

PACIFIC RIVERS COUNCIL, ET AL.,

Respondents.

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

BRIEF *AMICI CURIAE* OF AMERICAN FOREST RESOURCE COUNCIL, FEDERAL FOREST RESOURCE COALITION, SIERRA PACIFIC INDUSTRIES, INTERMOUNTAIN FOREST ASSOCIATION, BLACK HILLS FOREST RESOURCE ASSOCIATION, COLORADO TIMBER INDUSTRY ASSOCIATION, AND MONTANA WOOD PRODUCTS ASSOCIATION IN SUPPORT OF PETITIONERS

SCOTT W. HORNGREN
Counsel of Record
AMERICAN FOREST RESOURCE COUNCIL
5100 SW Macadam
Suite 350
Portland, OR 97239
(503) 222-9505
shorngren@amforest.org

Attorney for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

AMICI CURIAE BRIEF IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.3, the American Forest Resource Council, Federal Forest Resource Coalition, Sierra Pacific Industries, Intermountain Forest Association, Black Hills Forest Resource Association, Colorado Timber Industry Association, and Montana Wood Products Association respectfully submit this *amici curiae* brief, in support of Petitioner.

INTERESTS OF *AMICI CURIAE*[1]

Amici Curiae are trade associations that represent forest products businesses and private forest landowners that depend, in part, on the federal forests for their livelihoods and timber supply. *Amici* also have a strong interest in halting the declining health of federal forests to reduce the risks of insects and wildfire spreading to adjoining private forest land.

[1] The parties were given at least ten days notice of *amici*'s intention to file a brief. The petitioner has consented to the filing of this brief and respondents have filed a letter of blanket consent to filing *amicus* briefs and letters 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.

The American Forest Resource Council (AFRC) represents the forest products industry throughout Oregon, Washington, Idaho, Montana, and California. In states where AFRC members are located, they purchase the majority of timber from federal lands managed by the U.S. Department of Agriculture, Forest Service. AFRC's mission is to create a favorable operating climate for the forest products industry, ensure a reliable timber supply from public and private lands, and promote sustainable management of forests by improving federal laws, regulations, policies, and decisions regarding access to, and management of, forest lands. AFRC and its members have been actively involved in efforts of the Forest Service and Bureau of Land Management (BLM) in preparing programmatic environmental impact statements (EISs) under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 *et seq.*, to support changes in the direction of the management of public lands. These programmatic EISs include the Northwest Forest Plan, the Western Oregon Plan Revisions, regulations governing forest planning and management of roadless areas, and the 2001 and 2004 Sierra Framework amendments to forest plans in the Sierra Nevada.

The Federal Forest Resource Coalition, Inc. (FFRC) is a national coalition consisting of small and large companies and regional trade associations throughout the country whose members manufacture wood products, paper, and renewable energy from federal timber resources. Coalition members employ

over 350,000 workers in over 650 mills, with payroll in excess of $19 billion. FFRC wants to ensure sustainable management of federal lands to produce timber, pulpwood, and biomass and for prompt management to protect federal forests from insects, disease, and wildfire.

Sierra Pacific Industries is a third-generation family-owned forest products company based in Anderson, California. The company owns and manages nearly 1.9 million acres of timberland in California and Washington, and is the second largest lumber producer in the United States. Much of Sierra Pacific's timberland in California is adjacent to or intermingled with national forest land. Consequently, the company is extremely concerned with the Forest Service's ability to effectively and promptly manage the national forests in the Sierra Nevada to maintain forest health to prevent the spread of insects, disease, and wildfire. Sierra Pacific Industries operates mills throughout California that depend on national forest timber sales for a significant portion of their raw material needs.

Intermountain Forest Association (IFA) develops and implements solution-oriented policies intended to provide a positive climate for forest management as well as a stable and sustainable supply of timber from public and private forestlands. IFA has members in Wyoming, Colorado, Montana, and South Dakota. IFA has a firm commitment to environmental responsibility and accountability, advancements in manufacturing technology and forestry science, and the

business principles that have helped forest products businesses survive and prosper in the intermountain west for a century. IFA has been deeply involved in the process to develop a programmatic EIS designed to combat the spread of mountain pine beetle destroying forests on the Black Hills National Forest. Mountain Pine Beetle Response Project, available at http://www.fs.fed.us/nepa/fs-usda-pop.php/?project=36775.

The Black Hills Forest Resource Association (BHFRA) represents forest products manufacturers, forestry and timber harvest professionals, and concerned citizens in the Black Hills of South Dakota and Wyoming. The mission of BHFRA is to ensure the perpetual coexistence of healthy ecosystems and healthy forest resource economies in the Black Hills for current and future generations. BHFRA has also been significantly involved in the programmatic EIS process for mountain pine beetle on the Black Hills National Forest.

The Colorado Timber Industry Association (CTIA) represents Colorado's forest products companies and advocates for scientific, sustainable forest management. CTIA has a keen interest in Forest Service use of programmatic EISs. CTIA has commented on programmatic environmental impact statements prepared to support the Colorado roadless rule and the Southern Rockies Lynx amendment to forest plans for national forests in Colorado.

The Montana Wood Products Association, Inc. (MWPA) promotes healthy forests and healthy

communities through management of Montana's forests. MWPA's membership includes companies and individuals involved in all facets of Montana's wood products industry. They produce value-added products through manufacturing and provide over 7,500 direct jobs for Montana families. About 60 percent of Montana's forest land base is owned by the federal government much of which affects the health of, and is intermingled with, MWPA member's private timberland. MWPA has been involved in many agency programmatic EIS efforts including those for grizzly bear management and for forest plans.

Amici have a great interest in the law governing preparation of programmatic EISs for federal land management because agencies consider these programmatic statements a prerequisite for later site-specific environmental analysis which is where the actual decisions and approvals are made to supply timber from federal lands to support businesses and jobs, and manage the forests so they are not a source of insects, disease, and wildfire that spread to private lands. When a programmatic statement is ruled invalid, it has a large disruptive effect on agency land management, since the programmatic statements often cover a large geographic area such as an entire national forest or a multistate region. The invalidation of a programmatic statement can postpone subsequent environmental analysis on desperately needed forest health and timber supply projects for years while the programmatic EISs are re-written.

SUMMARY OF THE ARGUMENT

This Court should grant the petition for certiorari, because it raises a significant question about an extremely important tool that federal agencies use to make management decisions for public lands. Although programmatic EISs are not commonly prepared, both the Forest Service and the BLM use programmatic EISs, with a single EIS often covering millions of acres, to assist preparation of later site-specific projects. By dictating that environmental effects must be considered at the earliest possible time in a programmatic EIS, the Ninth Circuit once again treads on the discretion of the land management agency about what information to use in assessing environmental effects and when that assessment is most helpful to decision-making.

The Ninth Circuit decision conflicts with this Court's precedent that an agency is not required to conjure environmental effects by gazing into a crystal ball. The decision also establishes a greater obligation to consider environmental effects at the programmatic level where details of future actions are unknown than is imposed by NEPA for projects at the site-specific level where details are known.

The court should also review this case because it involves management of forestland in the Sierra Nevada that is extremely vulnerable to resource damage from wildfire like other federal forests throughout the West. The decision indirectly affects millions of acres held by private landowners adjacent

to national forests that must contend with the mismanagement of the adjoining national forests and the subsequent spread of insects, disease, and wildfire.

ARGUMENT

Although *amici* support the petition for writ of certiorari on all issues, this brief is limited to the NEPA issue raised by Petitioners.

I. The Court Should Grant the Petition for Writ of Certiorari Because the Ninth Circuit Decision will Make it Harder for Federal Agencies to Make Programmatic Land Management Decisions Throughout the West.

NEPA is to public land management decisions, what the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 *et seq*., is to drug approval decisions. NEPA is a vitally important statute governing the procedures for every land management decision made by the Forest Service and BLM. Some considered NEPA the "Magna Carta" of environmental law. Lazarus, *Judging Environmental Law*, 18 Tul. Envtl. L.J. 201, 209 (2004). Thus, a Ninth Circuit Court of Appeals decision fundamentally misinterpreting NEPA, has far-reaching implications for the more than 400 million acres of public land within the Circuit, nearly two thirds of the federal land in the United States. *See Federal Land Ownership: Overview and Data,* Cong. Res. Serv. Rep. R42346 (2012),

available at http://www.fas.org/sgp/crs/misc/R42346.pdf.

The Ninth Circuit's decision misinterpreting NEPA that compels analysis of environmental effects "as soon as it is reasonably possible" in a programmatic land management EIS even though there will be subsequent NEPA analysis if ever a site-specific project is proposed, improperly forces the agency to speculate about environmental effects. App. 28a. Collecting detailed information at the programmatic stage is tremendously time-consuming and costly. An agency should have the discretion to either conduct certain facets of environmental analysis at the programmatic level or at the site-specific level when details of a particular project become available. As this Court emphasized in reviewing a programmatic EIS analyzing the development of nuclear power when individual nuclear plants had yet to be sited and licensed, "[o]f course, just as the Commission has discretion to evaluate generically aspects of the environmental impact of the fuel cycle, it has discretion to have other aspects of the issue decided in individual licensing decisions." *Baltimore Gas and Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 106 n.19 (1983). The Ninth Circuit ruling prevents an agency from deferring environmental analysis until later site-specific projects are developed, where the analysis of effects of a concrete proposal, involving specific environmental resources in a given area, is often less costly, more practical, and more meaningful.

The invalidation of a programmatic EIS delays projects that are not developed until after the programmatic EIS is completed. This can set back for years the timber sales needed to support local economies and to improve forest health to prevent catastrophic wildfire, the principal purpose of the Sierra Nevada Forest Plan Amendment (Framework). *See* 2004 Framework Record of Decision at 3 ("This decision adopts an integrated strategy for vegetation management that is aggressive enough to reduce the risk of wildfire to communities in the urban-wildland interface while modifying fire behavior over the broader landscape. With the careful placement of thinning projects, we can make significant progress in reducing the threat of catastrophic fires to wildlife and watersheds."), available at http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fsbdev3_046095.pdf. Wildfires are on the increase, and 2012 was one of the worst wildfire seasons on record. Climate Central, *The Age of Western Wildfires* (2012), available at http://www.climatecentral.org/wgts/wildfires/Wildfires2012.pdf. This Court should clarify the NEPA requirements governing preparation of a programmatic EIS which is also an issue of great importance in the management of federal natural resources because a programmatic EIS consumes vast agency resources, costs millions of dollars, and spans several years. *See* USDA Forest Service, *The Process Predicament* at 5, 23-24, 32 (2002), available at http://www.fs.fed.us/projects/documents/Process-Predicament.pdf.

II. The National Environmental Policy Act Does Not Compel the Forest Service to Be a Prognosticator Gazing into a Crystal Ball to Divine Future Environmental Effects at the Programmatic Stage of Decisionmaking.

While this Court has cautioned that NEPA does not require an agency to guess about the future, the Ninth Circuit interpretation requires agencies to speculate about future environmental effects in a programmatic EIS. This Court has emphasized that "NEPA does not require a crystal ball inquiry", *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.,* 435 U.S. 519, 534 (1978) (internal quotation marks omitted) (citing *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 837 (D.C. App. 1972)). In contrast to the crystal ball inquiry eschewed by this Court, the Ninth Circuit concludes "reasonable . . . speculation" is required because it is "implicit" in NEPA. *See* App. 29a, (quoting *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1246 n.9 (9th Cir. 1984) quoting *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973)).[2]

---

[2] The District of Columbia Court of Appeals expressed "serious[ ] doubt that the relevant reasoning in *Scientists' Institute* survives the Supreme Court's *Kleppe* decision [*Kleppe v. Sierra Club*, 427 U.S. 390 (1976)]." *National Wildlife Federation v. Federal Energy Regulatory Commission*, 912 F.2d 1471, 1478 (D.C. App. 1990).

A crystal ball inquiry, especially at the programmatic level, is not required for good reason. It is often not until site-specific projects crystalize where, when, and how a project will occur that the Forest Service can assess the impacts even though the programmatic EIS may establish procedures for analysis and certain management standards and guidelines. As the Forest Service explained in the 2004 Sierra Framework EIS, for the aquatic resource on which fish depend, the Forest Service will "[c]onduct project-specific cumulative watershed effects analysis following Regional procedures or other appropriate scientific methodology to meet NEPA requirements." 2004 Framework FEIS at 345, available at http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5350050.pdf. The EIS further cites project level analysis as one of the most important ways to reduce risks to aquatic resources. *Id.* at 97. Following the programmatic EIS, "project-level analysis of environmental effects would be required" regarding riparian areas, aquatic habitat, and water quality. *Id.* at 210. The Framework's assessment of in-stream wood needs for fish and the "assessment of these effects is difficult at the bioregional scale due to extreme variability in the condition of RCAs [riparian conservation areas] and the relative importance of CWD [coarse woody debris] in maintaining stream channel structure and function. Consequently, landscape and project-level analysis will be used to assess these effects in detail based on stream width, tree heights, distances from streams, slope steepness, and other relevant factors." *Id.* at 212. NEPA should not compel an agency to

assess all environmental effects in a programmatic document involving 11.5 million acres and 61 fish species where the site-specific location of future projects and their particular design is not yet known. App. 2a, 4a.

The Forest Service is not the only land managing agency that concludes it is an exercise in speculation to assess certain environmental effects in a programmatic land management plan when the programmatic plan does not approve specific projects. For example, in the BLM plan for the Western Oregon Plan Revisions, the BLM explained:

> No effects on listed species or critical habitat would take place until future actions are undertaken in accordance with the plans, and additional project-level planning and decision-making would be required before such actions could proceed. Because no specific on-the-ground activity would actually be proposed in the revised RMPs [Resource Management Plans], there is not enough information about the timing, size, location, and design of future actions to identify or authorize a specific level of incidental take in a biological opinion under Section 7(a)(2) of the ESA [Endangered Species Act] for the plans. As future actions would be proposed that would be planned in accord with the approved RMPs, those actions would undergo project-level consultation.

Final Environmental Impact Statement for the Revision of the Resource Management Plans of the

Western Oregon Bureau of Land Management at I-19, available at http://www.blm.gov/or/plans/wopr/final_eis/files/Volume_1/Vol_I_Chpt_1.pdf. However, a district court found BLM's management plan revisions invalid based on a Pacific Rivers Council's suit that Section 7 ESA consultation could not be delayed until the site-specific project stage. BLM conceded the claim based on Ninth Circuit law that requires consultation at the programmatic stage even though the individual projects are not yet defined. *Pacific Rivers Council v. Shepard*, No. 3:11-442-HU, 2011 WL 7562961 (D. Or. Sep. 29, 2011), r*eport and recommendation adopted as modified*, 2012 WL 950032 (D. Or. March 30, 2012).

The Ninth Circuit's "as soon as it can reasonably be done" requirement conflicts with the NEPA principle that it is not a violation to defer environmental analysis of a project's effects until the time that it is certain that a project will occur, particularly given scarce agency funding and resources. The Ninth Circuit decision imposes a greater burden for a programmatic EIS where site-specific environmental effects are unknown than for an analysis of the environmental effects of known site-specific projects. Under the Council on Environmental Quality regulations implementing NEPA, an agency has to consider the environmental effects of projects together in a single EIS when actions are connected if they –

> (i) Automatically trigger other actions which may require environmental impact statements.

> (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.
>
> (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

40 C.F.R. § 1508.25(a)(1).

By contrast, when one project might reasonably be completed without the existence of the other, the two projects have independent utility and are not "connected" for NEPA's purposes. Likewise, the timing of the analysis of cumulative effects of two projects does not have to be included in the first project and may be deferred until the later project is approved. *Kleppe*, 427 U.S. at 410 n.20 (NEPA "does not require an agency to consider the possible environmental impacts of less imminent actions when preparing the impact statement on proposed actions."). Refreshingly, the Ninth Circuit recognizes that there is no duty to consider the environmental impacts of projects that have independent utility together in a single EIS. *Pacific Coast Federation of Fishermen's Associations v. Blank*, 693 F.3d 1084, 1097-99 (9th Cir. 2012). It should not be the law under NEPA that the Forest Service is obligated to consider the effects in a programmatic EIS of yet to be identified site-specific projects while the environmental effects of known site-specific projects with independent utility do not have to be considered collectively in the same EIS.

III. The Court Should Grant the Petition for Writ of Certiorari to Clearly Direct That the Ninth Circuit Cannot Impose Substantive or Procedural Requirements Not Found in NEPA.

The Ninth Circuit's decision compelling analysis of environmental effects "as soon as it is reasonably possible" conflicts with this Court's precedent that "the only procedural requirements imposed by NEPA are those stated in the plain language of the Act," *Vermont Yankee*, 435 U.S. at 548 (quoting *Kleppe*, 420 U.S. at 405-06), and that NEPA imposes no substantive requirements upon an agency. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352-53 (1989). This is not the first time that the Ninth Circuit has created NEPA requirements out of thin air. In *Robertson*, this Court rejected the Ninth Circuit interpretation of NEPA that required agencies to prepare a mitigation plan as part of the NEPA process:

> There is a fundamental distinction, however, between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other . . . it would be inconsistent with NEPA's reliance on procedural mechanisms – as opposed to substantive, result-based standards – to demand the presence of a

> fully developed plan that will mitigate environmental harm before an agency can act.

Id.

The Ninth Circuit's conclusion that NEPA requires the Forest Service at the programmatic stage to engage in "reasonable . . . speculation" because it is "implicit in NEPA," App. 29a, ignores this Court's caution against "judicial speculation-made-law – divining what Congress would have wanted if it had thought of the situation before the court." *Morrison v. Nat. Australia Bank Ltd.,* ___ U.S. ___, 130 S.Ct. 2869, 2881 (2010). It should be for the Forest Service and not the courts to choose the best means to assess certain environmental effects, particularly in the complex area of staged land management decision making involving a programmatic EIS and later EISs or EAs for site-specific projects. *See Baltimore Gas and Elec. Co.*, 462 U.S. at 92 (explaining that courts "lack the authority to impose 'hybrid' procedures greater than those contemplated by the governing statutes.") (citation omitted); *Kleppe*, 427 U.S. at 406 ("A court has no authority to depart from the statutory language and [apply] a balancing of court-devised factors . . . Such an assertion of judicial authority would leave the agencies uncertain as to their procedural duties under NEPA, would invite judicial involvement in the day-to-day decisionmaking process of the agencies, and would invite litigation."). Ironically, Pacific Rivers Council will ask this Court to excuse their lack of specificity in alleging standing while at the same time demanding specific details

from the Forest Service that depend in large part on actions to be taken in the future on a site-specific level.

CONCLUSION

Amici respectfully urge the Court to grant the petition for writ of certiorari to review and reverse the Ninth Circuit's decision to ensure that agencies have the flexibility to choose the stage at which detailed environmental analysis for specific resources is most meaningful.

Respectfully submitted,

SCOTT W. HORNGREN
AMERICAN FOREST
RESOURCE COUNCIL
5100 SW Macadam
Suite 350
Portland, OR 97239
(503) 222-9505
shorngren@amforest.org

Attorney for Amici Curiae

December, 2012