No. 98-1467

In the Supreme Court of the United States

MALHEUR LUMBER COMPANY, ET AL., PETITIONERS

v.

BLUE MOUNTAINS BIODIVERSITY PROJECT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
LOIS J. SCHIFFER
Assistant Attorney General
MICHAEL K. MARTIN
ROBERT L. KLARQUIST
ELLEN J. DURKEE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that an Environmental Assessment prepared by the Forest Service was deficient because it failed to analyze the likely cumulative effects of the proposed action in combination with other reasonably foreseeable actions in the same vicinity.

2. Whether the court of appeals improperly required the Forest Service, in preparing its Environmental Assessment, to include a level of detail in excess of that called for by the National Environmental Policy Act and implementing regulations.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Florida Power & Light Co. v. *Lorion*, 470 U.S. 729 (1985)	7
Foundation on Econ. Trends v. *Heckler*, 756 F.2d 143 (D.C. Cir. 1985)	8
Fritiofson v. *Alexander*, 772 F.2d 1225 (5th Cir. 1985)	8
Jones v. *Gordon*, 792 F.2d 821 (9th Cir. 1986)	8
Kleppe v. *Sierra Club*, 427 U.S. 390 (1976)	6, 7
National Audubon Soc'y v. *Hoffman*, 132 F.3d 7 (2d Cir. 1997)	8
Steamboaters v. *FERC*, 759 F.2d 1382 (9th Cir. 1985)	8

Statute and regulations:

National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*	2
42 U.S.C. 4332(2)(C)	2
40 C.F.R.:	
Sections 1500.1 *et seq.*	2
Section 1501.4(b)	2
Section 1508.7	6
Section 1508.9	2
Section 1508.9(a)(1)	2
Section 1508.13	2
Section 1508.25(a)(2)	6
Section 1508.27(b)(7)	6

Miscellaneous: Page

43 Fed. Reg. 55,990 (1978) 7

In the Supreme Court of the United States

No. 98-1467

MALHEUR LUMBER COMPANY, ET AL., PETITIONERS

v.

BLUE MOUNTAINS BIODIVERSITY PROJECT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A20) is reported at 161 F.3d 1208. The opinion of the district court (Pet. App. A21-A98) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 2, 1998. The petition for a writ of certiorari was filed on March 2, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a challenge to fire-salvage timber harvests and revegetation efforts, collectively known as

the Big Tower Salvage and Revegetation Project (Big Tower Project), in the Umatilla National Forest in eastern Oregon. The district court upheld the Forest Service's decision approving the Big Tower Project. Pet. App. A21-A98. The court of appeals reversed and remanded with instructions that the agency prepare an Environmental Impact Statement. *Id.* at A1-A20.

1. The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, requires a federal agency to prepare an Environmental Impact Statement (EIS) if the agency proposes to undertake a "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). In many instances, to determine whether a proposed action would have a significant environmental impact, the agency prepares an analysis known as an Environmental Assessment. 40 C.F.R. 1501.4(b), 1508.9.[1] The Environmental Assessment is expected to be a brief and concise document containing sufficient evidence and analysis for the agency to determine whether to prepare an EIS or to issue a finding of no significant impact. 40 C.F.R. 1501.4(b), 1508.9(a)(1), 1508.13.

2. In August 1996, a wildfire known as the Tower Fire swept through approximately 51,000 acres of the Umatilla National Forest. By September 1996, the Forest Service had completed a report on the burned area. The report was based on specialty reports evaluating the fire's impact on various forest resources, including vegetation, recreation, fish, and wildlife, and it recommended emergency actions. Pet. App. A23-A25.

---

[1] The Council on Environmental Quality, which was created by NEPA, has issued regulations governing compliance with that statute. 40 C.F.R. 1500.1 *et seq.*

In late 1996, the Forest Service developed a forest-wide recovery strategy addressing numerous fires, including the Tower Fire, that had occurred in the Forest during that year. Pet. App. A25. In 1997, the Forest Service developed a second strategy that focused on three major fires, including the Tower Fire, that had occurred in the North Fork John Day District. *Id.* at A29. Those strategies identified five potential logging projects in the North Fork John Day watershed, including the Big Tower Project that is at issue in this appeal. See *id.* at A5, A25.

The Big Tower Project involves three timber sales totaling approximately 4200 acres. Pet. App. A5, A34. The Project also involves construction of temporary roads to provide access to the sites, tree planting on the 4200-acre area once the trees are harvested, planting of trees on an additional 4500 acres, and reconstruction of seven miles of a permanent road. *Id.* at A34-A35. The particular area for salvage harvest was selected because it contained the largest volume of high-value Ponderosa Pine saw timber and because the chances of natural regeneration were poor due to the loss of mature seed trees. *Id.* at A35. The environmental effects of the Big Tower Project were evaluated through a project-specific Environmental Assessment, which concluded with a finding of no significant impact. *Id.* at A6, A35-A36; see also *id.* at A35-A50 (district court opinion details contents of Environmental Assessment).

3. The plaintiffs in this case (respondents in this Court) are the Blue Mountains Biodiversity Project and three other environmental organizations. Pet. App. A4. After bringing an unsuccessful administrative challenge to the Big Tower Project, the plaintiffs filed suit in federal district court, alleging that the Forest Service's

approval of the Project violated NEPA and other environmental laws. *Id.* at A22-A23. Petitioners, which are timber companies and a timber trade association, intervened as defendants. On cross-motions for summary judgment, the district court entered judgment for the defendants. See *id.* at A21-A98. The court held, *inter alia*, that the Forest Service's approval of the Big Tower Project complied with NEPA and regulations promulgated thereunder. See *id.* at A53-A62.

4. Plaintiffs appealed and sought an emergency injunction pending appeal. The district court (Pet. App. A101-A103) and the court of appeals (*id.* at A104-A105) denied emergency injunctive relief. Logging began on the sales in August 1998, and by the date of oral argument in the court of appeals more than 80% of the trees in the Big Tower Project had been felled and removed. *Id.* at A7. Immediately after oral argument, however, the court of appeals entered an order granting the plaintiffs' motion for an injunction pending appeal. *Id.* at A106-A107. The order stated that an opinion reversing the judgment of the district court would follow. *Id.* at A107.[2]

Approximately one month later, the court of appeals issued an opinion reversing the judgment of the district court on the NEPA claims. Pet. App. A1-A20. The court found that the Environmental Assessment "fails to persuade that no significant impacts would result

---

[2] The Forest Service and timber company defendants were ordered to halt all logging, road-building, and other ground-disturbing activities within the Tower Fire area until further order of the court. Pet. App. A106-A107. On the defendants' motion, the court clarified its order, stating that it did not prohibit road maintenance, erosion-prevention measures, and hunting or recreational activities. *Id.* at A108-A109. As further clarified, the court's order prohibited the hauling of downed logs. *Id.* at A110-A111.

from the Big Tower project." *Id.* at A12. The court faulted the Environmental Assessment for failing to document the estimated impact from sediment that would result from logging and road-building and for inadequately discussing mitigation measures. *Id.* at A8-A15. The court of appeals further held that the Environmental Assessment was deficient because it failed to evaluate the cumulative impacts of the Big Tower sales combined with other salvage sales proposed for the Tower Fire area, all of which were developed in the coordinated fire recovery strategy. *Id.* at A16-A19. The court of appeals remanded the case to the district court "with instructions that the Forest Service prepare an EIS." *Id.* at A4.[3]

ARGUMENT

Although we believe that the court of appeals erred in its choice of remedy in this case, we do not believe that the court's decision raises a significant question of law warranting this Court's review. The petition for a writ of certiorari should be denied.

1. Petitioners challenge (Pet. 7-10) the court of appeals' holding that the Forest Service had failed adequately to consider the cumulative impacts of the Big Tower Project in combination with other planned

---

[3] The court ordered that the existing injunction, as clarified (see note 2, *supra*), would remain in full force and effect until the Forest Service had satisfied its NEPA obligations. The Forest Service subsequently filed an unopposed motion to modify the injunction to allow planting of seedlings and seed ground cover, and removal of "decked" logs, *i.e.*, stacked fallen logs lying adjacent to roads. In an order dated March 23, 1999, the court of appeals clarified that its order does not prohibit planting of trees or seed cover. See 3/23/99 Order 2. The court indicated that the district court could entertain a motion with respect to the removal of the log decks. *Ibid.*

logging activities. Petitioners construe the court of appeals' opinion to "require[] that the Forest Service propose all conceivable actions in a vast area burned by a wildfire in the same environmental document." Pet. 7. In our view, petitioners considerably overstate the breadth of the court of appeals' holding. The court did not require federal agencies to generate comprehensive NEPA documents covering every "conceivable" activity in a particular geographic area. Rather, the court in conducting its cumulative impacts analysis drew heavily upon the facts of this case. The court explained that

> all of the proposed sales were reasonably foreseeable. They were developed as part of a comprehensive forest recovery strategy. In fact, all five sales were disclosed by name to a coalition of logging companies, along with estimated sale quantities and timelines even before the Big Tower [Environmental Assessment] was completed.

Pet. App. A17; see also 40 C.F.R. 1508.7, 1508.27(b) (7) (both quoted at Pet. App. A16); 40 C.F.R. 1508.25(a) (2).

Kleppe v. *Sierra Club*, 427 U.S. 390 (1976), does not compel a contrary result. The Court in *Kleppe* held that an EIS is not required until an agency proposes an action, and that "the mere 'contemplation' of certain action is not sufficient to require an impact statement." *Id.* at 404. The Court explained that "[a] court has no authority to depart from the statutory language and, by a balancing of court-devised factors, determine a point during the germination process of a potential proposal at which an impact statement *should be prepared*." *Id.* at 406. In the present case, however, the Big Tower Project had unquestionably been proposed at the time this suit was filed. The question is not whether an

Environmental Assessment of the Big Tower Project was required at all, but whether the Forest Service in preparing that document was obligated to consider the likely cumulative impacts of other timber harvesting activities that formed part of a comprehensive forest recovery strategy. *Kleppe* does not resolve that issue. Furthermore, the Court's decision in *Kleppe* was issued in 1976, some two years before the Council on Environmental Quality issued its initial regulations to implement NEPA. 43 Fed. Reg. 55,990 (1978).[4]

2. The court of appeals erred in its choice of remedy. Upon finding the Forest Service's NEPA analysis inadequate, the proper course was for the court to remand the case to the agency to redetermine the significance of the proposal in light of the cumulative impacts of the Big Tower Project with the other projects that were part of the same recovery strategy. See, *e.g.*, *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985) (where a reviewing court concludes that an agency's analysis is defective, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation"). Instead, the court of appeals effectively arrogated the significance determination to itself, remanding the case

---

[4] Moreover, the court of appeals' analysis of the "cumulative impacts" issue was one of two independent bases on which the court held the Environmental Assessment to be deficient. The court also held that the Forest Service had failed adequately to consider the potential environmental consequences of the Big Tower Project standing alone. Pet. App. A8-A15; see *id.* at A12 ("The Big Tower [Environmental Assessment] simply fails to persuade that no significant impacts would result from the Big Tower project."). For the reasons stated at pages 8-9, *infra*, that fact-specific holding does not warrant this Court's review.

"with instructions that the Forest Service prepare an EIS." Pet. App. A4; see also *id.* at A20.

Petitioners have not sought review of that aspect of the court of appeals' decision, however, and the remedial issue is not fairly included within the questions presented in the petition. In any event, the remedial question is not the subject of any widespread disagreement among the courts of appeals. In other cases, the Ninth Circuit has recognized that the proper remedy in this circumstance is to remand to the agency to redetermine whether an EIS should be prepared. See, *e.g.*, *Jones* v. *Gordon*, 792 F.2d 821, 829 (1986); *Steamboaters* v. *FERC*, 759 F.2d 1382, 1394 (1985). Other courts of appeals have reached the same conclusion. See, *e.g.*, *National Audubon Soc'y* v. *Hoffman*, 132 F.3d 7, 18-19 (2d Cir. 1997); *Fritiofson* v. *Alexander*, 772 F.2d 1225, 1248 (5th Cir. 1985); *Foundation on Econ. Trends* v. *Heckler*, 756 F.2d 143, 154-155 (D.C. Cir. 1985).

3. Petitioners argue (Pet. 10) that the court of appeals required an unwarranted level of detail to be contained in an Environmental Assessment, and that this Court's review is needed to clarify the proper scope of such a document. Contrary to petitioners' apparent assumption, we do not believe that the court of appeals purported to issue any broad pronouncement concerning the content or degree of detail required for an adequate Environmental Assessment. Thus, while we agree with petitioners (see Pet. 5, 12-13) that Environmental Assessments are expected to be more concise than Environmental Impact Statements, we do not understand the court of appeals' opinion to question that principle. Rather, the court of appeals' scrutiny of the Big Tower Project Environmental Assessment

involved a fact-specific analysis that does not warrant this Court's review.

4. Petitioners contend (Pet. 6-7) that post-wildfire environmental analysis presents issues of great public importance. While we agree generally with that assessment, we do not believe that the court of appeals' decision in this case will significantly affect the Forest Service's ability to respond quickly and effectively to such emergencies.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
MICHAEL K. MARTIN
ROBERT L. KLARQUIST
ELLEN J. DURKEE
Attorneys

MAY 1999