

# E – Outlook

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*Editor's Note: In this issue, Jas. Adams discusses a recent Ninth Circuit en banc decision, Lands Council v. McNair, in which the court overrules previous precedent and limits its judicial role in reviewing an agency's resolution of competing science. The views expressed in this article are solely those of the author and not of any other person or entity.*

## EN BANC NINTH CIRCUIT DECISION CLARIFIES LIMITED ROLE OF COURTS IN REVIEWING FEDERAL AGENCY RESOLUTION OF COMPETING SCIENCE

In *Lands Council v. McNair*, No. 07-3500 (9<sup>th</sup> Cir July 2, 2008),<sup>1</sup> the court illustrates its willingness to limit its judicial role in reviewing how a federal agency has weighed competing claims of scientific opinion in the natural resource context. The Ninth Circuit Court of Appeals declares, *en banc*, that it is not a proper role for a federal appellate court “to act as a panel of scientists that instructs the Forest Service how to validate its hypotheses regarding wildlife viability, chooses among scientific studies in determining whether the Forest Service has complied with the underlying Forest Plan, and orders the agency to explain every possible scientific uncertainty.” The court observes that its previous environmental jurisprudence “has, at times, shifted away from the appropriate standard of review and could be read to suggest that this court should play such a role.”

This opinion will likely be helpful to federal agencies hoping to receive judicial deference when defending their use of scientific studies. It will not be particularly helpful to those seeking to

challenge federal agencies’ use of disputed scientific methodology and studies.

### **1. Procedural History**

In 2006, the Lands Council had filed this lawsuit in federal district court seeking to enjoin the United States Forest Service (USFS) from proceeding with its Mission Brush Project in the Idaho Panhandle National Forest (IPNF), because of the claimed adverse effect on forest habitat for several species, including the flammulated owl, which is designated as a sensitive species in the IPNF Forest Plan.

The challenged project involves selective logging of over 3800 forested acres in order to thin densely forested stands of Douglas-firs to achieve a more traditional, open forest structure. The project does not involve harvesting of allocated old-growth trees, but it would generate 23.5 million board feet of timber for sale.

The Land Council moved below for a preliminary injunction prohibiting the USFS from implementing the project. The district court denied the Land Council’s motion for a preliminary injunction. A three-judge panel of the Ninth Circuit reversed that denial and remanded for entry of a preliminary injunction. *See, Lands Council v. McNair*, 494 F3d 771 (9<sup>th</sup> Cir 2007).

The July 2, 2008, *en banc* opinion, authored by Judge Milan Smith, affirms the district court’s denial of the preliminary injunction, reverses the previous three-judge panel decision of the Ninth Circuit, and overrules previous Ninth Circuit precedents. The Ninth Circuit Court explains that it took this case *en banc* “to clarify some of our environmental jurisprudence.”

<sup>1</sup> A copy of the case can be retrieved at [http://www.ca9.uscourts.gov/ca9/newopinions.nsf/0E18FFA971562D518825747A006409F7/\\$file/0735000.pdf?openelement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/0E18FFA971562D518825747A006409F7/$file/0735000.pdf?openelement)

## 2. Substantive Claims

The Lands Council brought this lawsuit under the National Forest Management Act (NFMA), the National Environmental Policy Act (NEPA) and the Administrative Procedures Act (APA). The Lands Council contended that the USFS violated those statutes in three ways: (1) the USFS violated the NFMA by failing to demonstrate the reliability of the scientific methodology underlying its analysis of the project's effect on the flammulated owl and its habitat; (2) the USFS violated the NFMA by not maintaining at least ten percent old growth throughout the forest as required by Standard 10(b) of the IPNF Forest Plan; and (3) the USFS violated NEPA by not adequately addressing the uncertainty concerning its proposed silvicultural approach as a strategy to maintain species viability.

### a. Scientific methodology

With regard to the first claim, the Lands Council specifically contended that the USFS violated the NFMA by not verifying its prediction regarding the effect of its silvicultural approach on old-growth species' habitat with observation or on-the-ground analysis. The Lands Council relied on the Ninth Circuit's previous decision in *Ecology Center Inc. v. Austin*, 430 F3d 1057 (9<sup>th</sup> Cir 2005), which held that the USFS must demonstrate the reliability of its scientific methodology or its underlying hypotheses (e.g., that silviculturally treating old-growth forest is beneficial to dependent species) with on-the-ground analysis in the location of the proposed action.

The court in the *en banc* decision expressly overrules *Ecology Center*, on the basis of three key "errors" the court indicates it made in that case: (1) an overbroad reading of *Lands Council v. Powell (Lands Council I)*, 379 F3d 738 (9<sup>th</sup> Cir 2004), (2) the creation of a requirement "not found in any relevant statute or regulation," and (3) that decision's defiance of "well-established law concerning the deference we owe to agencies and their methodological choices."

With respect to the first of the self-identified errors, the court holds that *Lands Council I* was

limited to the circumstances of that case and does not impose a categorical requirement of on-the-ground analysis or observation for soil analysis, or any other type of analysis.

As to the second error, the court holds that although the NFMA requires the USFS to provide for species diversity and the IPNF Forest Plan requires the USFS to manage habitat so as to prevent further declines in species populations that could lead to listing under the Endangered Species Act (ESA), neither the NFMA nor the IPNF Forest Plan specify precisely how the USFS must demonstrate that its site-specific plans adequately provide for wildlife viability. Hence, the USFS has latitude to decide how best to demonstrate that its plans will provide for wildlife viability, and the court will defer to the USFS as to what evidence is necessary to support wildlife viability analyses.

As to the third error, the court indicates that any less deference to the agency would ignore the arbitrary and capricious standard of review under the APA. The court notes that *Ecology Center* illustrates the pitfalls of assessing the quality and detail of on-site analyses and making "fine-grained judgments" of their worth. That is not the court's proper role, says the court; rather, its proper role is simply to ensure that the USFS made no clear error of judgment that would render its action arbitrary and capricious.

Such an approach, explains the court, respects the precedents that require the court to defer to an agency's predictive judgments in areas involving a high level of technical expertise or within an agency's field of discretion and expertise. Moreover, that approach reflects that court is not free to impose on the agency its own notion of which procedures are best or most likely to further public good. The court states: "Thus, as non-scientists, we decline to impose bright-line rules on the Forest Service regarding particular means that it must take in every case to show us that it has met the NFMA's requirements."

Hence, on the scientific methodology issue, the court concludes that the USFS had adequately supported its conclusions about the impact of the project on flammulated owl habitat with studies the USFS deemed reliable. Those studies,

coupled with the USFS's reasonable assumption that enhancing the amount of flammulated owl habitat in the long term would maintain the flammulated owl population, were sufficient for the court to reach the conclusion that the USFS had not acted arbitrarily and capriciously.

The court again approves, on the basis of the record before it, the Forest Service's use of the amount of suitable habitat for a species as proxy for the viability of that species. The court notes that to the extent it suggested otherwise in *Idaho Sporting Congress v. Thomas*, 137 F3d 1146 (9th Cir 1998) whenever there is an appreciable habitat disturbance, *Thomas* is also overruled. The court explains that a planned disturbance to a habitat does not preclude the Forest Service from using the habitat as a proxy approach to establish a species' viability when the disturbance does not reduce the suitable habitat so as to threaten the species' viability.

The court cautions, however, that when the USFS uses habitat as a proxy for viability, it must describe the quantity and quality of habitat necessary to sustain viability and explain its methodology for measuring the habitat. In this case, the USFS had detailed its methodology for determining the amount of suitable habitat.

The court does note that while some on-the-ground analysis had been conducted concerning whether the flammulated owl was using the monitored area, even though that was not *per se* required, the record was relatively sparse "and approaches the limits of our deference." But the court also states that it would broadly construe the requirement to preserve habitat to protect species viability to mean that the USFS could do so if it maintained a sufficient amount of suitable habitat, even if its actions will disturb some suitable habitat.

In the context of the motion for preliminary injunction, the court holds that the district court did not abuse its discretion in deciding that the Lands Council would not likely succeed on this aspect of its NFMA claim.

#### **b. Compliance with old growth standard in forest plan**

Lands Council contended that the USFS was not currently meeting the 10% old growth requirement and that the project would not meet that standard either, based on the Land Council's own report. The USFS had relied on two independent monitoring tools to support its contention that currently the forest contained 12% old growth. Also, a USFS expert had found the Land Council's report to be not credible.

The court recites that when specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if a court might find contrary views more persuasive, were the dispute to be resolved as an original matter. Hence, the court concludes that the USFS did not act arbitrarily and capriciously in relying on its own data and discounting the alternative evidence offered by the Lands Council.

Because the project does not involve harvest of old-growth trees, the court concludes that the project itself does not violate the 10% old growth standard. And although the court acknowledges that old growth could be reduced by fire and disease, because the current old growth exceeds 10%, the court finds it unnecessary to determine whether the USFS has an obligation to preserve mature, not-as-yet-old-growth trees to maintain that standard in the future.

Hence, in the context of the preliminary injunction motion, the court holds that the district court did not abuse its discretion in concluding that the Lands Council was not likely to succeed on this aspect of its NFMA claim relating to the old growth standard.

#### **c. NEPA and uncertainty**

The court acknowledges that some of its previous cases had faulted the USFS for not addressing uncertainties in an environmental impact statement (EIS). Further, the court reaffirms that the USFS must respond to comments by outside parties that raise "significant scientific uncertainties."

But the court observes that none of NEPA's statutory provisions or regulations requires the USFS to affirmatively present *every* uncertainty in an EIS. The court states that "to the extent our case law suggests that a NEPA violation occurs every time the Forest Service does not affirmatively address and uncertainty in the EIS, we have erred." Were it otherwise, the court says, NEPA would impose an onerous requirement that every uncertainty be presented, "given that experts in every scientific field routinely disagree."

Hence, the court indicates that the USFS does not have the burden to anticipate questions that are not necessary to its analysis, or to respond to uncertainties that are not reasonably supported by any scientific authority.

The Lands Council had contended in this case that the project violates NEPA because the Supplemental FEIS failed to include a full discussion of the scientific uncertainty surrounding its strategy for maintaining species viability. The Lands Council cited to two scientific papers in support of the proposition that the project's strategy is controversial. But, in its review of those papers, the court concludes that "on the whole" those reports actually support the project's proposed silvicultural approach.

The court also rejects the contention that the Supplemental FEIS failed to cite adequate evidence that the project will improve old-growth habitat and did not adequately examine adverse impacts of logging within old-growth stands. The court notes that the USFS acknowledged possible short-term adverse impacts in the immediate vicinity of harvest units for the flammulated owl but that the USFS' habitat suitability model showed that its actions would not decrease suitable habitat in the short term and would enhance it in the long-term.

The court reiterates that it was allowing the USFS to use habitat as a proxy for species viability, and that the USFS had explained its methodology for the habitat suitability analysis. That is all that NEPA requires in this context, the court explains, because "NEPA does not require us to decide

whether an EIS is based on the best scientific methodology available."

Because the court finds that the USFS took the requisite "hard look" at the environmental impacts of the project, it holds that the district court did not abuse its discretion in concluding that the Lands Council was unlikely to succeed on its NEPA claim.

Finally, on the preliminary injunction motion, the court finds that the balance of harms would not necessarily tip in favor of the Lands Council if the project goes forward. The court states that the balance of harms analysis is not to be abandoned simply because environmental injury is potentially involved. The court declines to adopt a rule that any potential environmental injury automatically merits an injunction, and it finds significant the economic impacts on the timber companies that had purchased sales, as well as the public interest in the reduction of risk of catastrophic fire, insect infestation and disease, according to the USFS.

On the basis of the foregoing analysis, the court in its *en banc* decision holds that the district court did not abuse its discretion in denying the request for a preliminary injunction.

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If you would like to contribute or have comments, please contact the E-OutLook Editor, Hong Huynh at [hong.huynh@millernash.com](mailto:hong.huynh@millernash.com) or (503) 205-2485.