STATE OF NEW YORK SUPREME COURT
ESSEX COUNTY

LEWIS FAMILY FARM, INC.,

Plaintiff,

v.

NEW YORK STATE ADIRONDACK PARK AGENCY,

Defendant.

Index No. 000498-07
R.J.I. No. 15-1-2007-0153

ADIRONDACK PARK AGENCY'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS THE COMPLAINT

ANDREW M. CUOMO
Attorney General of the
State of New York
Attorney for Defendant
Adirondack Park Agency
The Capitol
Albany, New York 12224
Tel No. (518) 402-2724

Date: August 1, 2007

LISA M. BURIANEK
LORETTA SIMON
Assistant Attorneys General

of Counsel

TABLE OF CONTENTS

TABLE OF CONTENTS (Cont'd)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Cont'd)

TABLE OF AUTHORITIES (Cont'd)

PRELIMINARY STATEMENT

The New York State Adirondack Park Agency ("APA" or "Agency") submits this memorandum of law in support of its motion to (1) convert this declaratory judgment to a CPLR § 78 proceeding; (2) dismiss the complaint for lack of subject matter jurisdiction pursuant CPLR § 3211(2); (3) dismiss the complaint on the grounds that the case is not ripe for judicial review because the State defendant has not issued a final determination in its review of the plaintiff's application for a permit and therefore the Court lacks jurisdiction under CPLR Article § 7801(1); (4) dismiss the complaint for failure to state a cause of action pursuant to CPLR § 3211(7) because Agriculture and Markets Law § 305-a does not preclude the APA from requiring a permit for subdivision of land and construction of single family dwellings; and (5) reject plaintiff's request for injunctive relief for failure to establish the elements required for injunctive relief.

STATEMENT OF FACTS

The Lewis Family Farm ("Lewis Farm") is a property of approximately 1,111 acres located in the Adirondack Park, in the Town of Essex, in Essex County, New York. See Affidavit of Douglas Miller ("Miller Aff."), dated July 20, 2007, ¶¶ 5-6. The plaintiff placed three modular homes on the Lewis Farm in a

Resource Management Area of the Adirondack Park, on lands within the designated Boquet River Recreational River area, without an APA permit. See Miller Aff., ¶¶ 4, 10, 20, Exhibits F and H. Upon information and belief the houses are secured to foundations but not fully installed. See Miller Aff. ¶¶ 17, 20. The Act requires an APA permit for subdivisions and placement of single family dwellings in Resource Management areas within the Adirondack Park. See Executive Law § 809(2)(a).

In December 2005, at the invitation of S.B. "Sandy" Lewis, Agency staff visited the Lewis Farm and informed Mr. Lewis that an Agency permit was required prior to installation of single family dwellings. See Affidavit of John Banta ("Banta Aff."), dated July 23, 2007, ¶¶ 4-6. On or about March 14, 2007, Barbara Lewis, and S.B. Lewis submitted an application to the APA for a permit for the construction of three single family dwellings on the Lewis Family Farm ("Lewis Farm"). See Affidavit of John L. Quinn ("Quinn Aff."), dated July 23,2007, ¶ 4, Exhibit A. On or about March 15, 2005, the APA issued a Notice Of Incomplete Permit Application and Receipt of Application. See Quinn Aff., ¶ 5, Exhibit B.

Thereafter, before Agency approval was obtained, the plaintiff notified the Agency that construction had commenced on the foundations and septic systems for the homes. See Quinn Aff., ¶¶ 6-7. Upon further investigation, visits to the site and

discussions with plaintiff, the Agency concluded that a violation had occurred and sought to resolve the matter through a proposed settlement agreement and penalty. See Affirmation of Sarah Reynolds ("Reynolds Aff."), dated July 20, 2007, ¶¶ 23-28; see also Quinn Aff., ¶ 8. Plaintiff objected to paying a penalty, failed to enter into a settlement agreement, and on March 27, 2007, plaintiff installed three modular homes on the Lewis Farm in violation of the APA Act and the Rivers Act. See Reynolds Aff., ¶¶ 29-38; see also Banta Aff.,¶ 7; Miller Aff., ¶¶ 17, 20-21. Upon learning the homes were being installed, the APA immediately served a Cease and Desist Order on Barbara Lewis. See Miller Aff., ¶ 18-19, Exhibit G. Upon information and belief two homes were installed prior to the Cease and Desist Order and the third home was installed after the Order was served. See Miller Aff. ¶¶ 17-20. Thereafter, plaintiff brought this action.

STATUTORY FRAMEWORK

A. Adirondack Park Agency

In 1971, the New York State Legislature enacted the Adirondack Park Agency Act ("APA Act" or "the Act"), codified at Article 27 of the Executive Law, to protect the unique scenic, historic, ecological and natural resources within the Adirondacks. See L. 1971, c. 706; Executive Law § 801. The Legislature has described the six-million acre Adirondack Park as

containing "priceless resources" of "national and international significance." Executive Law § 801. The Act recognizes the State's obligation to ensure that "contemporary and future pressures on the park resources are provided for within a land use control framework which recognizes not only matters of local concern but also those of regional and state concern." Id. The Legislature crafted the statute specifically to combat the "unrelenting pressures for development being brought to bear on the area" in recognition of the difficulty encountered by local governments in exercising "their discretionary powers to create an effective land use and development control framework." Id.

B. The Land Use Plan

To further these goals, the Act created the Adirondack Park Agency and charged it with administering the Act, drafting necessary rules and regulations, and carrying out the purposes of the Act, including land use planning for both private and public land within the Park. Id. § 803. Among other things, the Legislature directed the APA to prepare an Adirondack Park Land Use and Development Plan ("Park Plan") to regulate land use and development on private lands within the Park. See L. 1971, c. 706; Executive Law § 805. In accordance with the Act, the APA prepared the plan and submitted it to the Legislature and Governor for review. Id. In 1973, the Legislature approved the

plan and - through a legislative amendment - expressly incorporated the plan into the Act. See L. 1973, c. 348; Executive Law § 805 (McKinney's 2005).

C. **Subdivision of Land and Construction of Single Family Dwellings Require an APA Permit**

The Park Plan categorizes the private lands according to six different land use classifications: industrial, hamlet, moderate intensity use, low intensity use, rural use, and resource management. Executive Law § 805(3)(c)-(h). In resource management areas (the land use classification that applies to the Lewis Farm Site), virtually all new land uses and development and all subdivisions of land require an APA permit before they may begin.[1] Executive Law §§ 809(2), 810(1).[2] Specifically, the Act defines all subdivisions of land as constituting "class A regional projects." See, e.g., Executive Law § 810(1)(e)(3)

---

[1]The 1973 Land Use Plan adopted by the Legislature placed the property owned by the Lewis Family Farm in a resource management area. See Reynolds Aff. ¶ 4; see also Miller Aff. ¶ 6, Exhibit B.

[2]The APA Act defines "Land use or development" as "any construction or other activity which materially changes the use or appearance of land or a structure or the intensity of use of land or a structure ...." See Executive Law § 802(28). "Subdivision of land" or "subdivision" is defined as "any division of land into two or more lots, parcels or sites whether adjoining or not, for the purpose of sale, lease, license or any form of separate ownership or occupancy...." See Executive Law § 802(63). All land use or development proposed for lots in a subdivision shall be subject to review as part of the subdivision. See 9 N.Y.C.R.R. § 573.4(d).

(defining "class A regional projects" for "resource management areas"). The Act further defines all single family dwellings in resource management areas as constituting "class B regional projects." See Executive Law § 810(2)(d)(1). Where there is no agency approved local land use program, the APA reviews both class A and class B regional projects. See Executive Law § 809(1). In order to approve a project the APA must determine that the project is consistent with the land use and development plan, is consistent with the overall intensity guideline for the specific land use area involved, and will not have an undue adverse impact on the natural, scenic, aesthetic, ecological, wildlife, historic, recreational or open space resources of the Adirondack Park. See Executive Law § 809(10)(a)-(e).

D. Enforcement of the APA Act

Executive Law §§ 813(1) and (2) empower the APA to commence an action for civil penalties and injunctive relief against "any person" who violates any provision of the Adirondack Park Agency Act, the Agency's implementing rules and regulations, or the terms of any Agency order or permit. In addition, Executive Law §§ 804(6),(9) and 813(3) further empower the APA to hold hearings, subpoena witnesses, and resolve violations of the APA Act and regulations. Such administrative authority includes the

power to determine in the first instance that a violation has occurred.

The Agency's regulations for administrative enforcement procedures are set forth at 9 N.Y.C.R.R. Part 581.[3] The Agency promulgated Part 581 to provide an orderly means of determining whether a violation has occurred and, if so, resolving such violation. The regulations authorize the agency to, among other things, issue cease and desist orders for apparent violations involving ongoing construction, land disturbance or subdivision. See 9 N.Y.C.R.R. § 581.3.

In addition, Executive Law § 813(2) authorizes this Court to issue an injunction requiring a violator "to correct or ameliorate the violation." Any person who violates the Act is liable for a civil penalty of up to $500 for each day that the violation continues. Executive Law § 813(1).

E. The Wild, Scenic, and Recreational River System Act and 9 NYCRR § 577

The Wild, Scenic, and Recreational River System Act (the "Rivers Act") was enacted pursuant to a legislative finding that "many rivers of the state, with their immediate environs, possess outstanding natural, scenic, historic, ecological and recreational values." ECL § 15-2701(1). The Rivers Act was enacted to implement a public policy "that certain selected

---

[3]The Legislature authorized the APA to adopt regulations necessary to administer the Act. Executive Law § 804(9).

rivers of the state which, with their immediate environs, possess the aforementioned characteristics, shall be preserved in free-flowing condition and that they and their immediate environs shall be protected for the benefit and enjoyment of present and future generations." ECL § 15-2701(3). Section 15-2705 of the Rivers Act states that "the functions, powers and duties encompassed by this section shall be vested in the Adirondack park agency as to any privately owned part of a river area within the Adirondack park as defined by law which may become part of this system." Section 15-2709(1) states that, within the Adirondack Park, the Adirondack Park Agency "shall make and enforce regulations necessary for the management, protection, and enhancement of and control of land use and development in the wild, scenic and recreational river areas."

Pursuant to 9 NYCRR § 577.4(a), "no person shall undertake a rivers project without first obtaining an agency permit." In recreational river areas, rivers projects include, inter alia, all subdivisions of land in Resource Management land use areas, all land uses and developments classified compatible uses by the Adirondack Park land use and development plan in Resource Management land use areas. 9 NYCRR § 577.5(c)(1). Pursuant to Section 805(3)(g)(4) of the Adirondack Park Agency Act, single family dwellings constitute compatible uses in Resource

Management land use areas. Section 15-2723 of the Rivers Act states in part:

> Any person who violates any provision of this title or any regulation or order issued pursuant to this act by the commissioner or the agency may be compelled to comply with or obey the same by injunction, mandamus or other appropriate remedy. In addition, any such person shall pay a civil penalty of not less than one hundred dollars or more than one thousand dollars for each day of such violation.

(Emphasis added.)

F. Agriculture and Markets Law

The purpose of the Agriculture and Markets Law is to protect the integrity of the food and agriculture industries within the State. Agriculture and Markets Law § 3. In 1971, the New York State Legislature established a new article within the Agriculture and Markets Law, entitled "Agricultural Districts," that included protection for farm operations within agricultural districts from local laws and ordinances that would unreasonably restrict or regulate farm structures or farming practices. See L. 1971, c. 479; Agriculture and Markets Law § 305-a. In 1997, the provision was amended to strengthen the protection of farming operations by expanding the scope of the section to cover both the enactment and administration of all local laws, ordinances, rules or regulations, and by requiring local governments to show that public health or safety is threatened in order to restrict

or regulate a farm operation. See L. 1997, c. 357; Legislative History for Laws of 1997, chapter 357.

ARGUMENT

POINT I

THIS DECLARATORY JUDGMENT SHOULD BE CONVERTED TO A CPLR ARTICLE 78 PROCEEDING

To the extent that plaintiff seeks relief in the nature of declaratory judgment against the defendant Agency, the action should be converted to an Article 78 proceeding. The amended complaint claims that the Agency has acted outside its jurisdiction (Amended Complaint ¶ 32), and thus is more properly brought as an Article 78 proceeding. See CPLR 7803(2); see also CPLR 5103(c); Sutherland v. Glennon, 224 A.D.2d 819 (3d Dep't, 1996); Matter of Russo v. Jorling, 214 A.D.2d 863 (3d Dep't), app. denied, 86 N.Y.2d 705 (1995). In addition, the APA Act specifies that the APA's actions will be reviewed in accordance with CPLR Article 78. See Executive Law § 818. Accordingly, the Court should convert the instant action to an Article 78 proceeding.

POINT II

THE COMPLAINT SHOULD BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION

This Court lacks subject matter jurisdiction because the APA has exclusive original jurisdiction over disputes arising from the regulation of land use and management in the Adirondack Park. The Legislature authorized the APA to use its discretion to review, approve, and issue permits for certain projects based on the agency's consideration of "pertinent factors" and relevant "criteria." See Executive Law § 809. The agency also has authority when approving a permit to impose "requirements and conditions" that will ensure a project is completed properly. See Executive Law § 809.

Although the Supreme Court is a court of general original jurisdiction, "... concurrent original jurisdiction is not necessarily conferred on the Supreme Court when the Legislature provides for the adjudication of regulatory disputes by an *administrative agency* within the executive branch as distinguished from a court within the judicial branch." See Sohn v. Calderon, 78 N.Y.2d 755, 766 (1991). In Sohn, the Court held that the Division of Housing and Community Renewal (DHCR) had exclusive original jurisdiction over rental law disputes and thus the Court dismissed the complaint for lack of subject matter jurisdiction. Sohn, 78 N.Y.2d 755, 769; see also Schulz v. State

of New York, 86 N.Y.2d 225 (1995) (Education Law § 2037 confers exclusive original jurisdiction regarding school disputes upon the Commissioner of Education). Sohn noted that since the Legislature provided for review of the agency's determinations through Article 78 proceedings, this gave "further support to the conclusion that the agency was intended to have exclusive original jurisdiction over these controversies." Id. at 767-768. Likewise, as indicated above, the APA Act specifies that the APA's actions will be reviewed in accordance with CPLR Article 78. See Executive Law § 818.

In Flacke v. Onondaga Landfill Sys., Inc., 69 N.Y.2d 355 (1987) the court, referring to a dispute involving the Department of Environmental Conservation (DEC), held:

> Notwithstanding the plenary jurisdiction of the Supreme Court under our constitution(NY Const, art VI § 7), the Supreme Court and the DEC do not have concurrent jurisdiction with respect to determining the conditions of closing down solid waste management facilities and thus the doctrine of primary jurisdiction is inapplicable. The licensing and regulation of solid waste management facilities is a legislative function delegated to the DEC by statute (ECL 27-0103)."

Flacke v. Onondaga Landfill Systems, Inc., Id. at 361.

The Legislature specifically created the APA to maintain, administer, and enforce the comprehensive and interdependent land use and development plan that was needed to regulate land use in

the Adirondack Park. Executive Law § 801. Just as the court in Flacke held that the DEC and the Supreme Court did not have concurrent jurisdiction because the Legislature delegated management of solid waste to the DEC, here the APA and the Supreme Court do not have concurrent jurisdiction because the Legislature has delegated responsibility to the APA for creating rules and regulations for managing and protecting lands in the Adirondack Park. Executive Law § 804.

POINT III

THE COMPLAINT SHOULD BE DISMISSED AS PREMATURE

The complaint should be dismissed because the Agency has made no final determination. The ripeness doctrine is intended to ensure that litigation is not brought prematurely, before the controversy is ready for judicial intervention. See Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967). This principle is recognized in CPLR § 7801(1), which provides that proceedings challenging the actions of government agencies may only be brought against "final" actions. Here, the Agency has not yet made a final determination on plaintiff's permit application, and the administrative process is not concluded. See Reynolds Aff., ¶ 39; see also Miller Aff., ¶ 12.

Plaintiff fails to recognize the basic administrative law principle that an agency action must be final before the

challenged action is ripe for judicial review. See Mtr. of Essex County v. Zagata, 91 N.Y.2d 447 (1998). In Mtr. of Essex County, the Court of Appeals stated that administrative actions, as a rule, are not final unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process.

91 N.Y.2d at 453. To determine whether agency action is final, said the Court, consideration must be given to the completeness of the administrative action and a pragmatic evaluation must be made of whether the decision maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury.

91 N.Y.2d at 453. The Court said:

> Thus, a determination will not be deemed final because it stands as the agency's last word on a discrete legal issue that arises during an administrative proceeding. *There must additionally be a finding that the injury purportedly inflicted by the agency may not be 'prevented or significantly ameliorated by further administrative action* or by steps available to the complaining party.' (Citations omitted.) *If further agency proceedings might render the disputed issue moot or academic, then the agency position cannot be considered 'definitive' or the injury 'actual' or 'concrete.'"* (Emphasis added).

91 N.Y.2d at 453, 454.

Here, there is no final administrative action ripe for review. The plaintiff submitted documents to the Agency to apply for a permit. See Quinn Aff., ¶ 4, Exhibit A. The Agency

reviewed the submission and determined that the application was incomplete and so notified the applicant. See Notice of Incomplete Application, Quinn Aff., ¶ 5, Exhibit B. Thereafter, the plaintiff informed the Agency that construction had commenced without a permit and the Agency referred the matter to its enforcement division. See Quinn Aff., ¶¶ 6-8. In violation of the APA Act, the plaintiff subsequently installed three modular homes on the Lewis Farm without a permit. See Miller Aff., ¶¶ 4, 15-17, 20, Exhibits F, H and I. The Agency served the plaintiff with a Cease and Desist Order to stop the unpermitted work. See Miller Aff., ¶¶ 16-19. Rather than proceed with the Agency's administrative process, the plaintiff knowingly violated the APA Act and filed this compliant in an attempt to bar the Agency from performing its statutory duty to enforce the Act. Plaintiff's actions in total disregard of the administrative authority of the APA should not be countenanced by this Court. Accordingly, because there is no final agency action, the complaint must be dismissed.

POINT IV

THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CAUSE OF ACTION BECAUSE AGRICULTURE AND MARKETS LAW § 305-A APPLIES TO LOCAL LAWS, NOT THE APA ACT

Plaintiff relies on Agriculture and Markets Law § 305-a to shield it from its failure to obtain permits from the APA prior to subdividing their land and constructing three homes in a Resource Management Area. Plaintiff's reliance is misplaced. The APA is a state entity created by the Legislature to protect the state's interests in the resources of the Adirondack Park. See Executive Law § 801. Agriculture & Markets Law § 305-a provides protection for farm operations within agricultural districts from local laws and ordinances that unreasonably restrict or regulate farm operations. The APA is not a local government under the Agricultural and Markets § 305-a, and plaintiff is not entitled to an exemption from APA permit requirements.

Plaintiff's reliance on Town of Lysander v. Hafner, (96 N.Y.2d 558 (2001)) to support its failure to obtain permits from the APA is misplaced. See Plaintiff's Amended Memorandum of Law, dated July 3, 2007 at 8-9. Town of Lysander involved a local zoning ordinance, which effectively prohibited mobile homes for housing migrant workers on a farm. Lysander, 96 N.Y.2d at 561. The Court gave deference to the Agriculture and Markets'

Commissioner who determined that the local zoning code, by prohibiting the use of certain mobile homes for farm labor housing, unreasonably restricted the farming operations which were protected by Agriculture and Markets Law § 305-a. Id. at 564. The Court of Appeals' holding in Town of Lysander does not apply to the APA because Agriculture and Markets Law § 305-a clearly applies only to restrictive local laws, not state laws:

> 1. Policy of local governments. a. Local governments, when exercising their powers to enact and administer comprehensive plans and local laws, ordinances, rules, or regulations, shall exercise these powers in such a manner as may realize the policy and goals set forth in this article, and shall not unreasonably restrict or regulate farm operations within agricultural districts in contravention of the purposes of this article unless it can be shown that the public health or safety is threatened.

Agricultural and Markets Law § 305-a.

The Lewis Farm is required to comply with the permitting requirements of the APA Act. The APA is a "superagency" that exceeds the scope of local government. See, Hunt Brothers, Inc. v. Glennon, 81 N.Y.2d 906, 909 (1993); see also Long v. Adirondack Park Agency, 76 N.Y.2d 416 (1990) (APA is charged with an awesome responsibility and it has formidable powers to carry out its task). Hunt Brothers is instructive because, as in the case at hand, it involved the enforcement of the APA Act and another state statute. In Hunt Brothers, Inc., the APA

determined that a sand and gravel mine operation was required to obtain an APA permit in addition to the permit issued by the Department of Environmental Conservation pursuant to the Mined Land Reclamation Law ("MLRL"). Hunt Brothers, Inc., 81 N.Y.2d at 908. Despite statutory language that the MLRL would supersede all other state and local laws, the court held that the supersession clause did "not deprive the [APA] of all jurisdiction to regulate" in areas unrelated to the actual mining operations. Id. at 909; see also Wambat Realty Corp. v. State, 41 N.Y.2d 490, 494 (1977) (the APA is free to regulate in areas that affect both state and local concerns because the APA serves a "supervening State concern transcending local interests"); Black Brook v. State, 41 N.Y.2d 486 (1977) (local government zoning and land planning is subordinate to the APA).

Agriculture and Markets Law § 305-a does not supercede the APA Act requirement for Lewis Farm to obtain a permit for its modular homes and subdivision of land in the Adirondack Park. Just as the APA Act and the MLRL in Hunt Brothers, Inc. were implemented simultaneously to regulate mining lands located in the Adirondack Park, the APA and the Agriculture and Markets Law operate in tandem to regulate agricultural lands located within the Adirondack Park. The APA, as noted in Wambat Realty Corp., is a state entity that addresses state-wide concerns. Moreover, guidance published by the State Department of Agriculture and

Markets states that a requirement to apply for a permit is generally not an unreasonable regulation under § 305-a. See Guidelines for Review of Local Laws Affecting Farm Worker Housing (2003); see also Town of Beekman v. Sherman, 213 A.D.2d 627 (2d Dep't 1995) (Agriculture and Markets Law § 305-a does not exempt a farm from any and all zoning regulations, only unreasonable regulations). In summary, Agriculture and Markets Law § 305-a does not supercede the APA Act, and plaintiff's complaint should be dismissed.

POINT V

PLAINTIFF HAS FAILED TO ESTABLISH THE ELEMENTS REQUIRED FOR INJUNCTIVE RELIEF PURSUANT TO CPLR 6301

The traditional elements required for preliminary injunctive relief pursuant to CPLR § 6301 are: (1) a likelihood of success on the merits; (2) irreparable injury absent a preliminary injunction; (3) the balancing of the equities in the applicant's favor. Doe v. Axelrod, 73 N.Y.2d 748 (1988), W.T. Grant Co. v. Srogi, 52 N.Y.2d 496, 517 (1981). Plaintiff must demonstrate all three elements of the test to qualify for the relief. Here, plaintiff meets none of the elements.

First, the plaintiff has failed to show a likelihood of success on the merits, as the Agency has submitted affidavits and documentary evidence that plaintiff constructed three single

family dwellings in a Resource Management Area within the Designated Boquet River Recreational Area of the Adirondack Park without a permit in violation of the APA Act and the Rivers Act. See Reynolds Aff., ¶¶ 7,10, 18,26, 39; see also Miller Aff., ¶¶ 4, 7, 9, 10, 12, 17, 20-21, Exhibits C, E, F, H, I. There can be no question that defendant's actions violate the APA Act and the Rivers Act and regulations promulgated thereunder, thus there is a strong likelihood that the APA will prevail in this matter. In addition, as discussed above, plaintiff's argument that Section 305-a of Agricultural and Markets Law applies to the APA is flatly erroneous: the restriction applies to local laws, not state statutes.

Regarding the second element for injunctive relief, plaintiff's argument that the Lewis Farm has suffered and continues to suffer irreparable harm (see Complaint ¶ 27) is unavailing because plaintiff's alleged harm is entirely self created. Plaintiff chose to act without completing the permit process with the Agency. Plaintiff knew as early as December 2005 of the APA's permit requirements (see Banta Aff., ¶ 4), but waited until March 2007 to submit an application to construct the single family homes. (See Quinn Aff., ¶ 4, Exhibit A). Having contracted for their installation plaintiff chose to proceed without a permit. See Miller Aff., ¶ 4, 17, 20-21, Exhibits F, H, I. Only after plaintiff was served a Cease and Desist Order

by the APA, plaintiff claimed that the APA lacked jurisdiction. Plaintiff's attempt to bar the APA from performing its lawful duties is improper because estoppel is not a remedy available to preclude a governmental entity from discharging its statutory duties. See Parkview Assoc. v. City of N.Y., 71 N.Y.2d 274, 279 (1988) (City is not estopped from revoking portion of building permit in dispute over height of building). Here the court should reject the plaintiff's request for injunctive relief precluding the enforcement of state statutes. New York courts have not looked favorably on the granting of injunctive relief during the pendency of an administrative process. See Uniformed Firefighters Assoc. of Greater New York v. City of New York et. al. 79 N.Y.2d 236 (1992) (court denied request for injunctive relief and dismissed complaint during pendency of administrative proceeding).

Finally, in balancing the equities, it is axiomatic that courts must not only weigh the public interest, but must attach "paramount importance" to it. Delaware County Bd. of Supervisors v. New York State Dept. of Health, 81 A.D.2d 968, 970 (3d Dep't 1981). Courts have long recognized the importance of preserving the natural environment. "We have held time and again that the public interest in preserving nature and avoiding irreparable environmental injury outweighs economic concerns." See The Lands Council v. McNair, No. 07-35000, Slip Op. at 7790 (9th Cir. July

2, 2007) (see attached addendum). It is in the public interest that development along the State's recreational rivers protect the environment and preserve them for future generations. See ECL § 15-2701. The APA's statutory responsibilities to ensure protection of the Adirondack Park, and the public interest in protecting the integrity of the park, outweigh any equitable arguments that plaintiff presents.

Plaintiff's request for preliminary relief should be rejected for failure to meet the three prong test pursuant to CPLR § 6301. The preliminary relief requested by the plaintiff is particularly inappropriate in light of the fact that the plaintiff knew of the requirement for a permit and, in flagrant disregard of the law, constructed three single family dwellings in the Adirondack Park without obtaining a permit.

CONCLUSION

For all of the foregoing reasons, the complaint should be dismissed.

Dated: August 1, 2007

Respectfully submitted,

ANDREW M. CUOMO
Attorney General of the
State of New York
Attorney for Defendant
Adirondack Park Agency
New York State Department
of Law

By: _____
Loretta Simon
Assistant Attorney General
The Capitol
Albany, New York 12224
Tel No. (518) 402-2724

LISA M. BURIANEK
LORETTA SIMON
Assistant Attorneys General

of Counsel

ADDENDUM

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE LANDS COUNCIL; WILD WEST INSTITUTE,
Plaintiffs-Appellants,

v.

RANOTTA MCNAIR, Forest Supervisor for the Idaho Panhandle National Forests; UNITED STATES FOREST SERVICE,
Defendants-Appellees,

BOUNDARY COUNTY; CITY OF BONNERS FERRY; CITY OF MOYIE SPRINGS; EVERHART LOGGING, INC.; REGEHR LOGGING, INC.,
Defendants-Intervenors-Appellees.

No. 07-35000
D.C. No.
CV-06-00425-EJL
OPINION

Appeal from the United States District Court
for the District of Idaho
Edward J. Lodge, District Judge, Presiding

Argued and Submitted
April 17, 2007—San Francisco, California

Filed July 2, 2007

Before: Warren J. Ferguson, Stephen Reinhardt, and Milan D. Smith, Jr., Circuit Judges.

Opinion by Judge Ferguson;
Concurrence by Judge Milan D. Smith, Jr.;
Concurrence by Judge Ferguson

COUNSEL

Karen Lindholdt, University Legal Assistance, Spokane, Washington, for the plaintiffs-appellants.

Thomas W. Swegle, United States Department of Justice, Environment & Natural Resources Division, Washington, D.C., for the defendants-appellees.

Scott W. Horngren, Haglund, Kelley, Horngren, Jones, and Wilder LLP, Portland, Oregon, for the intervenors-appellees.

OPINION

FERGUSON, Circuit Judge:

The Lands Council and the Wild West Institute (collectively, "Lands Council") appeal the district court's denial of their motion for a preliminary injunction to halt the Mission Brush Project ("Project"). Under the Project, the United States Forest Service ("Forest Service" or "Service") plans to allow the selective logging of 3,829 acres of forest in the Idaho Panhandle National Forests ("IPNF") for the purpose of restoring portions of the forest to historic conditions. Lands Council alleges that the Project violates the Administrative Procedure Act (APA), 5 U.S.C. § 706 *et seq.*, the National Forest Management Act (NFMA), 16 U.S.C. § 1600 *et seq.*, the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, and Standard 10(b) of the IPNF Forest Plan. The district court held that Lands Council was unlikely to prevail on its claims and that the balance of hardships favored the Forest Service. We reverse.

FACTUAL BACKGROUND

The Mission Brush Area

The Project assessment area is in the Bonners Ferry Ranger District in the northern portion of the IPNF. The area is home to abundant plant and animal species, including grizzly bears, Canada lynx, and flammulated owls. Due to decades of unsustainable forestry practices, however, the area has deviated significantly from its historical composition and structure, which consisted of open ponderosa pine and Douglas-fir stands. For decades, logging companies cut down these old growth trees and, along with the Forest Service, suppressed the frequent, low-intensity fires that formerly contributed to the cyclical process of healthy forest ecology. As a result, much of the historic forest conditions have been replaced by dense, crowded stands of younger Douglas-firs and other mid-

and late-successional species. These overcrowded forests, dominated by shade-tolerant trees, can lead to insect infestations, diseases, and stand-replacing fires. According to the Forest Service, "the densely stocked stands we see today are causing a general health and vigor decline in all tree species." U.S. Forest Serv., Mission Brush Supplemental Final Environmental Impact Statement 3-15 (2006) [hereinafter SFEIS].

The Mission Brush Project

The Project would perform silvicultural treatments and commercial logging on 3,829 acres of forest, including restoration cutting within 277 acres of old growth stands, with the goal of trending the forest toward historic conditions. The Forest Service has divided the Project into three commercial timber sales, the Brushy Mission Sale, the Haller Down Sale, and the Mission Fly By Sale, comprising in total 23.5 million board feet of timber. The first two sales have been sold to private timber companies, but there were no bids on the third. The Service's contracting officer has stated that he does not intend to award the Mission Fly By Sale until this litigation concludes, although logging under the Brushy Mission and Haller Down sales began several months ago.

PROCEDURAL HISTORY

In June 2004, the Forest Service released the Mission Brush Final Environmental Impact Statement ("EIS") and the Record of Decision, which adopted the Project. Lands Council, along with several other environmental groups, appealed to the Regional Forester, who upheld the Project in August 2004 but ordered the preparation of a supplemental EIS in light of our decision in *Lands Council v. Powell* (*Lands Council I*), 379 F.3d 738 (9th Cir. 2004), *amended by* 395 F.3d 1019 (2005).[1] In April 2006, the Forest Service released its

[1] *Lands Council I* involved a different project in a different area of the IPNF. 395 F.3d 1019.

Supplemental Final EIS ("SFEIS") and Record of Decision ("ROD"). Lands Council filed an administrative appeal, which the Forest Service denied in July 2006.

In October 2006, Lands Council filed suit challenging the Project in the U.S. District Court for the District of Idaho. Lands Council filed a motion for a temporary restraining order and preliminary injunction to halt the Project. The district court denied the motion on December 18, 2006, and Lands Council timely appealed.

DISCUSSION

I. Preliminary Injunction Standard

We review a district court's denial of a preliminary injunction for an abuse of discretion. *Earth Island Inst. v. U.S. Forest Serv.* (*Earth Island Inst. II*), 442 F.3d 1147, 1156 (9th Cir. 2006). A district court abuses its discretion if it "base[s] its decision on an erroneous legal standard or clearly erroneous findings of fact." *Id.*

A preliminary injunction should issue when the plaintiff shows "either: (1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply in [the plaintiff's] favor." *Lands Council v. Martin* (*Lands Council II*), 479 F.3d 636, 639 (9th Cir. 2007) (quoting *Clear Channel Outdoor Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003)). These two alternatives are "extremes of a single continuum" in which "the greater the relative hardship to the party seeking the preliminary injunction, the less probability of success must be shown." *Clear Channel Outdoor Inc.*, 340 F.3d at 813 (internal punctuation and quotation omitted).

II. Likelihood of Success on the Merits

National Forest Management Act

NFMA requires the Forest Service to develop a forest plan for each unit of the National Forest System. 16 U.S.C. § 1604(a). These plans must include provisions for public participation, while adopting "a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences." § 1604(b), (d). Once a forest plan is developed, subsequent agency actions must be consistent with the plan. § 1604(i).

[1] In addition to these procedural components, NFMA imposes substantive requirements on the Forest Service. In particular, "the forest plan must comply with substantive requirements of the Forest Act designed to ensure continued diversity of plant and animal communities and the continued viability of wildlife in the forest." *Idaho Sporting Cong. v. Rittenhouse*, 305 F.3d 957, 961 (9th Cir. 2002) (citing 16 U.S.C. § 1604(g)(3)(B)). The Forest Service must also "demonstrate the reliability of its scientific methodology." *Ecology Ctr. v. Austin*, 430 F.3d 1057, 1064 (9th Cir. 2005). A reliable scientific methodology is one that the Forest Service has "verified with observation" and "on the ground analysis." *Lands Council I*, 395 F.3d at 1035. The Forest Service may not rely on a methodology that "is predicated on an unverified hypothesis." *Ecology Ctr.*, 430 F.3d at 1064.

[2] The Forest Service has not proven the reliability of its scientific methodology with regard to wildlife habitat restoration in the Mission Brush Project. In particular, the Service has failed to demonstrate that the Project will not harm the flammulated owl, the northern goshawk, the fisher, and the western toad, all of whom the Forest Service has designated as "sensitive species" whose viability is of special concern. *See Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 556 n.2 (9th Cir. 2000) (explaining "sensitive species" designa-

tion). As in *Ecology Center*, the Forest Service is relying on the "unverified hypothesis" that "treating old-growth forest is beneficial to dependent species." *Ecology Ctr.*, 430 F.3d at 1064.

In *Ecology Center*, the Forest Service, as part of another project, sought to engage in rehabilitative treatment of old growth stands "to correct uncharacteristic forest development resulting from years of fire suppression." *Id.* at 1063. We concluded that the Forest Service did "not offer proof that the proposed treatment benefits—or at least does not harm—old-growth dependent species." *Id.* We held that the Forest Service's methodology was unreliable since it had not been verified, and that the treatments therefore violated NFMA. *Id.* at 1063-64.

The Forest Service argues that the present case is distinguishable from *Ecology Center* because the Service has provided sufficient scientific data on the effects of the Project on wildlife habitat. None of the documents it cites, however, demonstrates the reliability of the Forest Service's hypothesis that restoration treatment will benefit dependent species.

The Forest Service relies primarily on the Dawson Ridge Study, Dawson Ridge Flammulated Owl Habitat Monitoring (2006) [hereinafter Dawson Ridge Study], the only study it has conducted since our decision in *Ecology Center*. The Dawson Ridge Study monitored a "relatively small area" of flammulated owl habitat: five 1/5 acre plots in an area totaling only eighteen acres. *Id.* at 2-3. The researchers received a single response in the 2006 survey. *Id.* at 1. Based on this solitary hoot, and the fact that the area had been logged in 2000 and underburned in 2002, the report concluded that "owls are using the area after harvest." *Id.* at 3. The report admitted that it was "inappropriate" to conclude that the treatments had improved owl habitat, but found it "encouraging" that an owl response had been received in the area. *Id.* Such responses, it

concluded, "imply" that the harvesting practices "are at least *maintaining* suitable habitat." *Id.*

[3] This report is insufficient to meet the requirements of *Ecology Center*. *See* 430 F.3d at 1063 (single report of observation of bird species in formerly-treated old growth stand was insufficient to prove reliability of scientific methodology). Lands Council rightly points out that the Dawson Ridge Study made no ultimate conclusion about one of the underlying hypotheses of the Project: "that treating old-growth forest is beneficial to dependent species." *Ecology Ctr.*, 430 F.3d at 1064. The study also says nothing about whether such treatment can create suitable habitat that dependent species will actually use. Its conclusion that such treatment could maintain habitat is circumspect at best. By its own statement, there is merely an "encouraging" "impl[ication]." Dawson Ridge Study at 3. This is hardly sufficient to justify "grant[ing] [the Forest Service] the license to continue treating old-growth forests while excusing it from ever having to verify that such treatment is not harmful." *Ecology Ctr.*, 430 F.3d at 1064.[2]

[4] The other studies fall even shorter of meeting the *Ecology Center* standards. In none of those studies was any observation made of the actual dependent species in order to determine whether the species will use the habitat if the Forest Service engages in the process it proposes. *Compare* R. Richard Howie and Ralph Ritcey, *Distribution, Habitat Selection, and Densities of Flammulated Owls in British Columbia*, USDA Forest Serv. General Technical Report RM-142 (1987) (twenty-year-old study from Canadian forest) *with Lands Council I*, 395 F.3d at 1034, 1035, 1031 (holding that Forest Service methodology was unreliable because it did not "walk

[2]The Forest Service argues that continued monitoring pursuant to the ROD will confirm the reliability of its methodology. While ongoing monitoring is certainly a good idea, this "authorize first, verify later" approach was roundly rejected in *Ecology Center* as inconsistent with both NFMA and NEPA. 430 F.3d at 1071.

. . . the land," it relied on a "model with no on-site inspection," and its data was "stale"). Other documents relied on by the Forest Service are not studies at all, but rather position papers and "conservation plans." *See, e.g.*, Montana Partners in Flight, Montana Bird Conservation Plan (2000); Idaho Partners in Flight, Idaho Bird Conservation Plan (2000). These documents are not "on the ground analysis"[3] sufficient to prove the reliability of the Project's methodology. *Lands Council I*, 395 F.3d at 1035.[3]

[5] Accordingly, the Forest Service has not demonstrated the reliability of its methodology. We conclude that Lands Council was, therefore, likely to succeed on its NFMA claim.

National Environmental Policy Act

[6] NEPA requires federal agencies to take a "hard look" at the potential environmental impacts of their actions. *Idaho Sporting Cong.*, 305 F.3d at 963. An agency must prepare a detailed EIS for each action "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). The EIS must "provide full and fair discussion of significant environmental impacts" so as to "inform decisionmakers and the public of the reasonable alternatives which would avoid or

[3]Intervenors contend that "the proxy on proxy method" of using changes to old growth habitat to assess environmental effects on wildlife is a reliable methodology. However, we have never held that manufacturing wildlife habitat through invasive commercial harvesting allows the Forest Service to assume that such habitat will subsequently be occupied by the species at issue. Rather, the proxy on proxy method permits the Service to assume only that "*maintaining* the acreage of habitat necessary for survival would in fact assure a species' survival." *Envtl. Prot. Info. Ctr. (EPIC) v. U.S. Forest Serv.*, 451 F.3d 1005, 1017 (9th Cir. 2006) (emphasis added); *see also Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1250 (9th Cir. 2005) ("Our case law permits the Forest Service to meet the wildlife species viability requirements by *preserving* habitat . . . .") (emphasis added); *Ecology Ctr.*, 430 F.3d at 1064 (distinguishing between "maintaining . . . old-growth habitat" and "altering the composition of old-growth habitat through an invasive process").

minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1. The EIS must "be supported by evidence that the agency has made the necessary environmental analyses," *id.*, and must "address in [a] meaningful way the various uncertainties surrounding the scientific evidence." *Ecology Ctr.*, 430 F.3d at 1065 (quoting *Seattle Audubon Soc'y v. Espy*, 998 F.2d 699, 704 (9th Cir. 1993)).

Lands Council contends that the Project violates NEPA because the Forest Service failed to include a full discussion of the scientific uncertainty surrounding its strategy for improving wildlife habitat. For the reasons already stated, *supra* at 7784-85, we agree. As in *Ecology Center*, "[t]he EIS . . . treats the prediction that treatment will benefit old-growth dependent species as a fact instead of an untested and debated hypothesis." *Id.*

[7] In responding to the public comment that the Service had "failed to [c]ite any evidence that its managing for old growth habitat strategy will improve old growth species habitat over the short-term or long-term," the SFEIS does not address the scientific uncertainty described above, nor does it cite the sources now relied on by the Forest Service. SFEIS at F-3. The SFEIS cites only sources discussing the historical conditions of the forest, the role of fire in the forest's ecology, and the health of old growth trees following treatment. *Id.* There is no discussion of the uncertainties regarding *wildlife* and their use of these habitats following treatment. *Id.* In fact, the SFEIS's direct and indirect effects analysis simply "*assumes* that active management through regeneration and selective tree cutting can help restore natural processes in an ecological system." SFEIS at 4-68 (emphasis added).

[8] For these reasons, Lands Council was likely to succeed on its NEPA claim.

IPNF Plan Standard 10(b)

[9] NFMA requires the Forest Service to comply with the forest management plan for each national forest. 16 U.S.C.

§ 1604(i). Standard 10(b) of the IPNF Forest Plan requires the Forest Service to maintain at least ten percent old growth throughout the forest. IPNF Forest Plan Standard 10(b).

Lands Council contends that the IPNF is not currently meeting the ten percent requirement and that the Forest Service therefore must address how cutting mature, future old-growth trees will affect its future compliance with Standard 10(b). Lands Council bases its contention on its own report, which concluded that seventy percent of designated old growth stands did not actually meet the Forest Service's own standards for old growth. Ellen Picken, The Lands Council, Lost Forests: An Investigative Report on the Old-Growth of North Idaho (2005).

The Forest Service disagrees with these results. In determining the percentage of old growth in the IPNF, the Service has used two independent monitoring tools, each of which concluded that approximately twelve percent of the forest met old growth criteria. Arthur C. Zack, Review of Old Growth Assessments for the Idaho Panhandle National Forest 6 (2006) (referencing the Forest Inventory Analysis data, finding 11.8 percent old growth, and the IPNF stand map, finding 12.1 percent old growth). The Forest Service's expert, Dr. Arthur Zack, specifically considered and evaluated Lands Council's report, but disagreed with its methodology and conclusions.

[10] Where an agency is presented with conflicting data, it "must have discretion to rely on the reasonable opinions of its own qualified experts." *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989). Accordingly, "[a]t this stage, the record does not allow us to conclude that the Forest Service acted arbitrar[il]y and capriciously in relying on its own data and discounting the alternative evidence offered by the [p]laintiffs." *Earth Island Inst. v. U.S. Forest Serv.* (*Earth Island Inst. I*), 351 F.3d 1291, 1302 (9th Cir. 2003). The Service explained the differences between its findings and those

of Lands Council, and it "is entitled to use the data it collected." *Id.*[4]

[11] Accordingly, the district court properly concluded that Lands Council was not likely to succeed on the merits of its Standard 10(b) claim.

III. Balance of Hardships

[12] Because Lands Council has demonstrated a strong probability of success on the merits of its NFMA and NEPA claims, "it need only show the possibility of irreparable injury if preliminary relief is not granted, and that the balance of hardships tips in its favor." *Earth Island Inst. II*, 442 F.3d at 1177 (internal punctuation omitted). "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987). In addition to balancing the hardships to the parties, we must also consider the public interest. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1125 (9th Cir. 2002).

[13] The Project, if not enjoined, would allow treatment of 2,326 acres of capable flammulated owl habitat and 202 acres of suitable flammulated owl habitat, the latter of which is more than half of the owls' 364 current suitable habitat acres within the Project area. The Project would treat 2,503 acres of capable northern goshawk habitat and 561 acres of suitable northern goshawk habitat. It would convert 255 acres of suitable goshawk habitat to unsuitable habitat and would prevent

[4]Lands Council may nevertheless revisit this issue on the merits before the district court should further development on remand be appropriate. *Infra* at 7791; *see Earth Island Inst. I*, 351 F.3d at 1302 ("We note, however, that if Plaintiffs are able to convince the district court that the agency unreasonably relied upon inaccurate data, they may be able to succeed on the merits of this claim.").

757 acres of capable goshawk habitat from becoming suitable. The Project would also treat 1,839 acres of capable fisher habitat and 449 acres of suitable fisher habitat.

On the other side of the balance are the potential environmental harms to the forest caused by delaying the Project, as well as the potential economic harms to the local community from enjoining logging.

[14] As to the risk to the forest of delaying the project, the permanent and certain harm of violating the environmental laws outweighs the speculative harm that might result from a failure to engage in a statutorily prohibited activity. That determination was made by Congress when it enacted the statutes which prohibit the type of activity in which the Forest Service wishes to engage unless and until the Service complies with those statutes.

[15] The potential economic hardships, however, are more troubling. According to Intervenors, enjoining the project will force the timber companies that purchased the sales to lay off some or all of their workers. One of the companies employs fifteen people and the other employs twenty-two. The Project area is located in Boundary County, which has one of Idaho's highest unemployment rates and an average wage that is below the national average. Since 2003, the county has lost two major employers (accounting for 400 jobs), including a Louisiana Pacific mill. These concerns implicate the public interest.

[16] While balancing environmental harms and economic harms is not easy, it is not unprecedented. We have held time and again that the public interest in preserving nature and avoiding irreparable environmental injury outweighs economic concerns. *Earth Island Inst. II*, 442 F.3d at 1177; *Earth Island Inst. I*, 351 F.3d at 1308-09; *National Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 738 (9th Cir. 2001); *see also Sierra Nev. Forest Prot. Campaign v. Tippin*, No. 06-

00351, 2006 WL 2583036, at *21 (E.D. Cal. August 16, 2006) ("The environment is a vital constituent public interest that must be recognized and protected by federal law even in the face of adverse economic consequences.").

Accordingly, Lands Council demonstrated a threat of irreparable injury sufficient to warrant granting the preliminary injunction.

CONCLUSION

[17] Lands Council demonstrated a probability of success on the merits and a possibility of irreparable injury. Lands Council further showed that the balance of hardships and the public interest favored granting the preliminary injunction. For these reasons, we reverse the district court and remand for entry of a preliminary injunction of the contested portions of the Mission Brush Project.

To the extent that either party believes that any further factual development is required and appropriate in light of this opinion, the district court may engage in such further factual determinations, including by way of trial, as it deems proper.

The mandate shall issue forthwith.

REVERSED and REMANDED.

MILAN D. SMITH, JR., Circuit Judge, specially concurring:

Ecology Center v. Austin, 430 F.3d 1057 (9th Cir. 2005) is binding law in this circuit and dictates the outcome of this case. *See Gen. Constr. Co. v. Castro*, 401 F.3d 963, 975 (9th Cir. 2005) ("[W]e are bound by decisions of prior panels unless an en banc decision, Supreme Court decision or subsequent legislation undermines those decisions."). However, I

write a separate concurrence in this case because, like Judge Margaret McKeown, I believe that *Ecology Center* was wrongly decided. *See Ecology Ctr.*, 430 F.3d at 1071-78 (McKeown, dissenting). Following *Ecology Center* in this instant matter, compounds already serious errors of federal law because "the majority's extension of *Lands Council v. Powell*, 379 F.3d 738 (9th Cir. 2004), *amended by* 395 F.3d 1019, 1024 (9th Cir. 2005), [to *Ecology Center*] represents an unprecedented incursion into the administrative process and ratchets up the scrutiny we apply to the scientific and administrative judgments of the Forest Service. . . . [T]he majority has, in effect, displaced 'arbitrary and capricious' review for a more demanding standard." *Id.* at 1072.

In *Lands Council v. Powell (Lands Council I)*, 379 F.3d 738 (9th Cir. 2004), *amended by* 395 F.3d 1019 (9th Cir. 2005), the court reviewed the Forest Service's approval of a timber harvest as part of a watershed restoration project in the Idaho Panhandle National Forest (IPNF). 395 F.3d at 1024. The project was "designed to improve the aquatic, vegetative, and wildlife habitat in the Project area." *Id.* at 1025. The Lands Council challenged the project's compliance with the National Forest Management Act (NFMA) because the project was allegedly inconsistent with the IPNF Forest Plan, and because it questioned the reliability of the Forest Service's scientific methodology underlying its analysis of disturbed soil conditions. *Id.* at 1032-34. The Forest Service did not take soil samples from the activity area, but instead relied on samples from other areas in the Forest and aerial photographs to determine the quality of the soil in the project area. *Id.*

Even though our rules provided that the Forest Service was entitled to deference for its technical expertise, the *Lands Council I* court rejected the Forest Service's choice of scientific methodology because it was based entirely on a spreadsheet model with no on-site inspection or verification. *Id.* at 1035. The court explained that "[u]nder the circumstances of this case, the Forest Service's basic scientific methodology, to

be reliable, required that the hypothesis and prediction of the model be verified with observation. The predictions of the model . . . were not verified with on the ground analysis." *Id.* Thus, the court held that the "Forest Service's reliance on the spreadsheet models, unaccompanied by on-site spot verification of the model's predictions, violated NFMA." *Id.* As Judge McKeown observed, *Lands Council I* made "compliance with NFMA and NEPA a moving target." *Id.* at 1073.

Ecology Center was erroneously decided, in part, because the majority applied the court's criticism of the Forest Service's soil analysis in *Lands Council I* to its review of the Forest Service's soil quality analysis conducted as part of the Lolo National Forest Post Burn Project. The *Ecology Center* majority's reliance on *Lands Council I* is faulty because the *Lands Council I* court's determination that "on-site spot verification" was required for soil analysis was in direct response to the specific record and circumstances of that case. As Judge McKeown explained, "there is no legal basis to conclude that the NFMA requires an on-site analysis where there is a reasonable scientific basis to uphold the legitimacy of modeling. NFMA does not impose this substantive requirement, and it cannot be derived from the procedural parameters of NEPA." *Ecology Ctr.*, 430 F.3d at 1073.

Furthermore, the *Ecology Center* majority's application of *Lands Council I* is also erroneous because the Forest Service did conduct on-site analysis in the activity area of the Lolo National Forest. Even if the majority had been correct in reading *Lands Council I* to require on-site analysis in every case, the Forest Service complied with this requirement.[1] In fact, there are specific reports indicating that soil analysis was conducted in the activity area. Nevertheless, the majority rejected these reports on the grounds that they were "too few and of poor quality." *Id.* It complained that "[t]he record provides little information that enables us to assess the reliability or significance of these reports; for example, we do not know the qualifications of the person conducting the field review, the

methodology utilized, or whether the field observations confirmed or contradicted the Service's estimates." *Id.* at 1070. Judge McKeown observed that "[f]rom this judgment, we are left to conclude that not only does the court of appeals set bright-line rules, such as requiring an on-site, walk the territory inspection, but it also assesses the detail and quality of that analysis-even in the absence of contrary scientific evidence in the record." *Id.* at 1073. She also noted that "*Lands Council* [*I*] does not direct us to assess the sufficiency of the Forest Service's on-site soil quality analysis beyond the traditional arbitrary and capricious standard; it only asks us to verify that there is such an on-site sampling." *Id.* at 1075.

Additionally, "the [*Ecology Center*] majority generalizes the 'unverified hypothesis' principle articulated in *Lands Council* [*I*] beyond the soil analysis to other scientific findings made by the Forest Service. In so doing, the majority demonstrates the dangers of extending a reference-abstracted from a single technically detailed, fact-specific decision-to unrelated factual contexts." *Id.* at 1076. For example, the majority applied *Lands Council I* to find that the Forest Service's conclusion that treating old-growth forest is beneficial to dependent species is predicated on an unverified hypothesis. *Id.* at 1064. The majority criticized the Forest Service for not taking the time to test its theory that thinning of old-growth stands via commercial logging and prescribed burning would improve, or at least not harm, old-growth dependent species. *Id.*

Judge McKeown concluded that "[a]pparently we no longer simply determine whether the Forest Service's methodology involves a 'hard look' through the use of 'hard data,' but now are called upon to make fine-grained judgments of its worth." *Id.* at 1077. This is in direct contradiction to basic administrative law principles— "we reverse agency decisions only if they are arbitrary and capricious." *Id.* "This standard of review does not direct us to literally dig in the dirt (or soil, as it were), get our fingernails dirty and flyspeck the agency's

analysis." *Id.* Finally, "[t]he majority's rationale cannot be reconciled with our case law requiring '[d]eference to an agency's technical expertise and experience,' particularly 'with respect to questions involving engineering and scientific matters.' " *Id.* (quoting *United States v. Alpine Land & Reservoir Co.*, 887 F.2d 207, 213 (9th Cir. 1989)).

I believe that our reasoning and holding in the instant matter perpetuates the majority's faulty reasoning in *Ecology Center*. Had the majority in *Ecology Center* not erroneously stretched the court's reasoning and analysis in *Lands Council I*, we might have upheld the district court's decision in this case because of our obligation to defer to the scientific expertise of the Forest Service and to overrule only determinations that are "arbitrary and capricious."

First, in examining the adequacy of the Forest Service's scientific data concerning the effects of the Project on wildlife habitat, we would not be bound by the requirement that the Forest Service's hypothesis and prediction must be "verified with observation" and "on the ground analysis." *Lands Council I*, 395 F.3d at 1035. As Judge McKeown explained, the court in *Lands Council I* concluded that under the record and circumstances in *that case* the "Forest Service's reliance on the spreadsheet models, unaccompanied by on-site spot verification of the model's predictions, violated NFMA." *Ecology Ctr.*, 430 F.3d at 1073 (quoting *Lands Council I*, 395 F.3d at 1035). There is no indication in the text of the *Lands Council I* opinion that the court sought to create an on-site analysis verification requirement for all soil quality analyses, and there is even less support for the proposition that the on-site verification requirement should be extended to "all scientific hypotheses adopted by the Forest Service regardless of context." *Id.* at 1076. Thus, but for *Ecology Center*'s on-site verification requirement, we would have at least been able to consider the Forest Service's documentary support for its hypothesis that restoration treatment will benefit dependent species. As it stands, we summarily dismiss the Forest Ser-

vice's reliance on the R. Richard Howie and Ralph Ritcey study entitled *Distribution, Habitat Selection, and Densities of Flammulated Owls in British Columbia* simply because it is a survey of the flammulated owls' habitat in British Columbia. Op. at 7785-86. Although the Howie and Ritcey study admittedly does not conclude that logging improves flammulated owl habitat, it does document a flammulated owl presence within logged old-growth stands. We also would have been able to examine the Montana Partners in Flight, Montana Bird Conservation Plan, Idaho Partners in Flight, and Idaho Bird Conservation Plan. Again, even though none of these reports unequivocally state that logging will improve flammulated owl habitat, they do demonstrate that flammulated owls can inhabit selectively-logged stands. Ultimately, we might not have changed our conclusion that the "Forest Service has not proven the reliability of its scientific methodology with regard to wildlife habitat restoration in the Mission Brush Project," but it should have been based on the content of the reports themselves—not the mere fact that they did not constitute "on the ground analysis." Op. at 7783-86.

Even if one assumes, *arguendo*, that *Ecology Center* did not err in adopting the *Lands Council I*'s "verified with observation" and "on the ground analysis" requirement or in applying it to all of the Forest Service's scientific hypotheses, *Lands Council I* certainly did not empower the majority in *Ecology Center* "to assess the detail and quality of," *Ecology Center*, 430 F.3d at 1073, the Forest Service's analysis and to "make fine-grained judgments of its worth," *Id.* at 1078. Just as Judge McKeown believes that the majority should have held that the Forest Service's soil analysis was in compliance with *Lands Council I* because it was on-site analysis and challenges the appropriateness of the majority's criticism of the soil evaluators' qualifications, I question whether, without *Ecology Center*, we would be able to scrutinize how many owl hoots were heard in the Dawson Ridge Study. Op. at 7784-85. The Forest Service already considered this report and determined that there is sufficient support for its hypothe-

sis that treating old-growth forest will maintain habitat and benefit dependent species. Judge McKeown captures my concern with her statement that "[i]n faulting the Forest Service's soil quality and concluding that old-growth forest will not be impaired, the majority changes our posture of review to one where we sit at the table with Forest Service scientists and second-guess the minutiae of the decision making process." *Ecology Ctr.*, 430 F.3d at 1072. Similarly, by counting owl hoots, we are abandoning our role as reviewers under an "arbitrary and capricious" standard and supplanting the Forest Service as decision makers. If we do not grant the Forest Service appropriate deference in areas of scientific expertise, we defeat the purpose of permitting the Forest Service to make administrative decisions in the first place, and we intrude into areas far beyond our competence.

Finally, not only is *Ecology Center* problematic from an administrative law perspective, but the injunction commanded in that case continues the pattern by some courts in this circuit of issuing injunctions based upon misconstructions of federal law that frustrate the careful legal balance struck by the democratic branches of our government between important environmental protections and carefully regulated logging within our national forests. It is not presently, and has never been, the policy of our national government under any administration to ban all logging in all of our national forests, and yet, cases like *Ecology Center* make it virtually impossible for logging to occur under any conditions because the Forest Service can never satisfy the constantly moving legal targets created by our circuit, sometimes out of whole cloth.

When federal law truly forbids logging in a particular area, we have appropriately held that "the public interest in preserving nature and avoiding irreparable environmental injury outweighs economic concerns," Op. at 7790 (citing *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1177 (9th Cir. 2006); *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1308-09; *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241

F.3d 722, 738 (9th Cir. 2001); *see also Sierra Nev. Forest Prot. Campaign v. Tippin*, No. 06-00351, 2006 WL 2583036, at *21 (E.D. Cal. August 16, 2006)), but, as noted, I do not believe that the majority in *Ecology Center* correctly construed applicable federal law. When we misconstrue federal law and compound the effects of that misconstruction by affirming or requiring the issuance of a blunderbuss injunction banning all logging in a particular area instead of using a finely crafted legal scalpel based upon correct legal interpretations, we needlessly create great hardship in the lives of many people, harm the economic interests of our country, and foster disrespect for our courts. We must remember that an injunction is an equitable remedy that "must be narrowly tailored to give *only* the relief to which plaintiffs are entitled." *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 558 (9th Cir. 1990) (emphasis added). An injunction should "remedy only the specific harms shown by the plaintiffs, rather than to enjoin all possible breaches of the law," *Price v. City of Stockton*, 390 F.3d 1105, 1117 (9th Cir. 2004) (internal quotation marks omitted), and it "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs," *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

Although I readily acknowledge that injunctions are sometimes required and appropriate in interdicting certain violations of federal law (and especially environmental law), in my view the pattern of some courts within our circuit to occasionally hand down over-broad injunctions based upon incorrect constructions of federal law has substantially contributed to (even though it is not entirely responsible for) the decimation of the logging industry in the Pacific Northwest in the last two decades and the commensurate growth of logging in our neighbor to the north. Scholars with far more time available than I have can trace the case-by-case results on a region-by-region basis, but the following governmental statistical data are illustrative of the damage suffered, at least part of which,

in my opinion, is properly attributable to the effects of improperly granted or over-broad federal court injunctions.

In Oregon, which has traditionally been one of the country's leading producers of wood and paper products, timber harvests on federal lands decreased by more than 89% between 1988 and 1998. Krista M. Gebert, et al., U.S. Dept. of Agric., *Utilization of Oregon's Timber Harvest and Associated Direct Economic Effects, 1998* 2 (2002). The number of primary lumber mills in Oregon went from 360 in 1988 to 200 in 1998, and overall log consumption was cut nearly in half. *Id.*

Similar effects were felt throughout the Pacific Northwest. In the area covered by the Northwest Forest Plan, which encompasses northwest California as well as the western portions of Oregon and Washington, 30,000 direct lumber industry jobs were lost between 1990 and 2000. 1 Susan Charnley, et al., U.S. Dept. of Agric., *Socioeconomic Monitoring Results* 13 (2006). The communities closest to the forest lands have been hit the hardest. The Department of Agriculture reports that 40% of the communities within five miles of federal forests in this region suffered decreases in socioeconomic well-being during this period. *Id.* at 12. Although logging was a vital source of economic stability in these communities during the 1970s and 1980s, it "had become minor or negligible" in much of this area by 2003. *Id.* at 15.

Furthermore, in my view there is a correlation between sometimes over-broad court injunctions halting the flow of lumber and the dramatic decrease of employment in logging communities throughout the Pacific Northwest. For example in Quilcene, Washington, the number of people working in the national forest dropped by 59% between 1993 and 2003. 3 Susan Charnley, et al., U.S. Dept. of Agric., *Socioeconomic Monitoring Results* 127, 131 (2006). Also, in the Mid-Klamath region in northern California, where logging went from providing 30% of the area's jobs in 1990 to only 4% in

2000, the economic impact was devastating. *Id.* "Many mill workers, loggers, and F[orest] S[ervice] employees moved away in search of work elsewhere, taking their families with them. As a consequence, housing prices dropped, stores and service centers that supported these workers shut down, and school enrollment declined precipitously. . . . Not only did the community lose its economic base, but it also lost productive people who were hard-working and contributed much to the community." *Id.* at 131.

The effects of the severe decline in logging at least partially brought about by sweeping federal court injunctions incorrectly applying federal law are apparent on a national scale as well. From 1965 to 1988, lumber exports from the United States enjoyed steady growth. James L. Howard, U.S. Dept. of Agric., *U.S. Timber Production, Trade, Consumption, and Price Statistics 1965 to 1999* 4 (2001). After 1988, the Department of Agriculture reports that lumber exports suddenly spiraled downward at the same time that lumber imports reached unprecedented highs. *Id.* at 52. In 1988, before our circuit began to aggressively issue extremely broad injunctions against the logging industry, lumber exports peaked at 4.5 billion board feet and the United States imported 13.8 billion board feet. *Id.* By 1999, lumber exports had plummeted to just 2.5 billion board feet while imports soared to 19.9 billion board feet. *Id.*

Judge Ferguson asserts a contrary view in his concurrence. He cites as authority for that view a 2003 tome by Messrs. Derrick Jensen and George Draffan entitled *Strangely Like War: The Global Assault on Forests*, which attributes the decline of logging in the Northwest almost entirely to corporate consolidation and cost-cutting within the timber industry. Every citizen has the constitutional right to express his or her views on any subject and have the value of what he or she says, and any works cited, evaluated by the hearer or reader, but, in my view, writers who say extreme things should not be surprised that many of the things they say will be heavily

discounted because of that very extremism. According to *Wikipedia*, "Jensen is often labeled an 'anarcho-primitivist,' who is quoted as saying in his book *A Language Older Than Words* that "[e]very morning when I awake I ask myself whether I should write or blow up a dam. I tell myself I should keep writing, though I'm not sure that's right." Wikipedia, http://en.wikipedia.org/wiki/Derrick_Jensen. Mr. Draffan is described by Aric McBay in an interview published in *In the Wake* as a "forest activist, public interest investigator and corporate muckracker." Aric McBay, *An Interview with George Draffan*, IN THE WAKE, *available at* http://www.inthewake.org/draffan1.html. He is a frequent contributor to Endgame.org and the compiler of *Activist Research Manual* published in January 1999 by the Public Information Network. I respectfully suggest that the views of persons who, for example, fantasize about blowing up dams (a form of eco-terrorism and criminal act that potentially threatens the lives and property of thousands of people) deserve a healthy skepticism because they are so skewed and are so far from the mainstream of knowledgeable discourse.

As federal judges, we have a weighty responsibility to properly construe and apply federal environmental laws in order to protect our national parks and endangered species from undisciplined and unregulated timber harvesting, but we may not properly ignore the well-established standards that govern our own role in reviewing the laws and regulations enacted by the representative branches of our government and the agencies empowered to implement those laws.

Because I respectfully contend that it was wrongly decided, I would (if the occasion arises) reverse the majority's holding in *Ecology Center*, which would likely change the result in this case. However, because I am legally bound by *Ecology Center*, I reluctantly join my colleagues in reversing the lower court.

FERGUSON, Circuit Judge, concurring, in which Judge Reinhardt also concurs:

I write separately to respond to Judge Smith's special concurrence.

At the outset, I disagree with Judge Smith that *Ecology Center* was wrongly decided. I see little controversy in holding that an agency's failure to confirm its hypotheses in a project area is arbitrary and capricious. I also note that the Supreme Court denied certiorari in that case. *Mineral County v. Ecology Ctr.*, 127 S. Ct. 931 (2007).

More importantly, however, I take issue with the part of his special concurrence that, with no evidence whatsoever, assigns to the courts of our circuit culpability for the status of the timber industry and impugns the last several decades of our circuit's environmental law jurisprudence. Judge Smith takes the plain fact that district courts in our circuit have enjoined logging projects in the past, adds the claim that the timber industry is declining, and asserts a causal relation between the two. In doing so, Judge Smith commits a textbook logical fallacy: *post hoc, ergo propter hoc* (after this, therefore because of this). *See, e.g.*, Robert J. Gula, *Nonsense: A Handbook of Logical Fallacies* 95 (2002). The mere fact that there has been a "severe decline in logging" does not mean that it has been "brought about by sweeping federal court injunctions." Judge Smith cites no evidence for this claim.

Judge Smith's two premises, first, that there has been something amiss in the issuance of injunctions, and, second, that the timber industry has declined as a result, are entirely erroneous.

First, Judge Smith provides little evidence for his contention that district courts have issued injunctions that are "blunderbuss," "over-broad," "sweeping," or "aggressive." Judge

Smith discusses no particular injunctions, aside from that in *Ecology Center*, yet he nevertheless asserts that we have "aggressively issue[d] extremely broad injunctions against the logging industry." Judge Smith contends that there is a "pattern by some courts in this circuit of issuing injunctions based upon misconstructions of federal law that frustrate the careful legal balance struck by the democratic branches of our government."

Respect for "the democratic branches of our government," however, requires that courts enjoin conduct that violates the environmental laws passed by Congress. A pattern of injunctions means that there has been a pattern of illegal conduct, not that there is something wrong with the courts' handling of environmental cases. In *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1177-78 (9th Cir. 2006), our colleague Judge William Fletcher "noticed a disturbing trend in the [Forest Service's] recent timber-harvesting and timber-sale activities" and suggested that the Forest Service has "been more interested in harvesting timber than in complying with our environmental laws." *See id.* (citing numerous recent cases in which federal courts have reversed or enjoined Forest Service timber sales). District courts must not shy away from enjoining illegal activity by administrative agencies. The fact that we have upheld or required such injunctions in the past, and will continue to do so in the future, is required by, not contrary to, our role as an appellate court. The frequency of injunctions is evidence of the frequency of unlawful agency actions, nothing more and nothing less.

Second, Judge Smith's assertion that such injunctions are substantially responsible for "the decimation of the logging industry in the Pacific Northwest" is unsupported. As with many sectors of our economy, it is the practices of the timber industry itself that have caused massive unemployment, not the practices of those who would check its unhindered "progress." Derrick Jensen and George Draffan rightly argue that debates about forest protection should never have been posi-

tioned as "jobs versus owls," but rather "jobs versus automation, mergers, and downsizing." Derrick Jensen & George Draffan, *Strangely Like War: The Global Assault on Forests* 51 (2003). They explain the impact of industry practices on employment as follows:

> As companies continue to merge in order to reduce industry overcapacity and boost market share, they shed jobs. In the 1970s and 1980s, the number of paper mills in the United States decreased by 21 percent, but the average output per mill increased by 90 percent. Paper production in that period increased by 42 percent, while employment in the industry decreased by 6 percent. The amount of timber cut increased 55 percent, while the number of logging and milling jobs decreased by 10 percent, or 24,000 jobs. In just one decade (1987-1997), employment in pulp mills decreased by 2,900 jobs, and employment in paper mills decreased by 12,100 jobs. Output per employee in the U.S. paper industry has increased fourfold in the last fifty years. The wave of consolidation in the pulp and paper industry that began in the late 1990s is expected to cost another 50,000 jobs.

Id. at 50-51 (citing Miller Freeman, Inc., *Pulp & Paper 1998 North American Factbook* 71, 72, 76 (1998), Maureen Smith, *The U.S. Paper Industry and Sustainable Production* 40, 43, 72 (1997), and Michael Jaffe, *Industry Surveys: Paper & Forest Products* 4 (1998)).[1] We can see such impacts in this very

[1]Judge Smith's *ad hominem* attack against Jensen and Draffan does not address the merits upon which the authors base their contentions. Regardless of how one feels about these two individuals, their argument quoted herein is a quantitative analysis, citing other studies. It has nothing to do with blowing up dams. Furthermore, I do not think politically engaged individuals are disqualified from contributing to the analysis of an issue. It is certainly not our role to determine who we think is or is not in the political "mainstream" and to credit their research accordingly.

case: much of the economic decline near Boundary County, Idaho was caused by the 2003 decision of Louisiana-Pacific, a leading manufacturer of building products, to close its mill in Bonners Ferry. That closure, which left 130 workers unemployed, resulted from the decision of the corporation, not an injunction from our courts.

Contrary to Judge Smith's suggestion, it appears that too much logging, rather than not enough, has caused the economic decline in Boundary County. A spokesperson for Riley Creek Lumber Company, the company that bought the mill site from Louisiana-Pacific, explained why the mill would not reopen: "There's not enough raw material to support a mill operation at Bonners Ferry."[2] A Louisiana-Pacific spokesperson also explained the closure, stating, "In the lumber business, we continue to see an *oversupply* situation, with historic low prices."[3] By depleting the "raw materials" and depressing the price of lumber through oversupply, the industry has put people out of work.

I have the utmost sympathy for those left unemployed by these recent trends, but I cannot accept Judge Smith's assertion that the judiciary, rather than the industry, is primarily to blame.[4]

---

[2]Dan Hansen, *Bonners Ferry Mill Won't Reopen*, Spokesman Rev. (Spokane, WA), July 23, 2003, at A8.

[3]Becky Kramer, *Timber Town May Buy Two L-P Sawmills*, Spokesman Rev. (Spokane, WA), May 30, 2003, at A1 (emphasis added).

[4]Notably, while low-income workers have been laid-off, the world's largest paper companies have provided multi-million dollar pay packages to their CEOs. Louisiana-Pacific's CEO received a ten-percent salary increase and a package worth $3.6 million in 2006. Louisiana-Pacific, *Notice of Annual Meeting of Stockholders* 21, 25 (2007), *available at* http://library.corporate-ir.net/library/73/730/73030/items/237173/2006%20proxy.pdf. International Paper's CEO received a package worth $13.7 million in 2006. International Paper, *Notice of Annual Meeting of Shareholders* 50 (2007), *available at* http://www.internationalpaper.com/PDF/PDFs_for_Our_Company/2007_Proxy_Statement.pdf.

Weyerhaeuser's CEO received a package worth $4 million in 2006. Weyerhaeuser, *Notice of 2007 Annual Meeting of Shareholders and Proxy Statement* 27 (2007), *available at* http://library.corporate-ir.net/library/92/922/92287/items/235323/WY2007ProxyStatement.pdf. Georgia-Pacific's former CEO received a $92 million package when the multi-billion dollar Koch Industries acquired Georgia-Pacific in 2005 to become the largest privately owned company in the United States. Emily Thornton, *Fat Merger Payouts For CEOs*, Bus. Wk., Dec. 12, 2005, at 34; *Koch Industries Inc.: Acquisition of Georgia-Pacific For $13.2 Billion Is Completed*, Wall St. J., Dec. 24, 2005, at B2.

FILINGS

STAMPED 8/29/07 INDEXED DD ORDERS/JUD ____

COURT COPY ✓ VERIFIED ____ READ ____

CA BOOK ✓ SCANNED SB VERIFIED ____

____ ____ ____

____ ____ ____

____ ____ ____