No. 97-1938

In the Supreme Court of the United States

OCTOBER TERM, 1997

GREG D. BIAGI AND LISA BIAGI, PETITIONERS

v.

UNITED STATES FOREST SERVICE

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
LOIS J. SCHIFFER
Assistant Attorney General
M. ALICE THURSTON
SEAN H. DONAHUE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the Forest Service's refusal to allow petitioners to retain a gate on National Forest lands, which would prevent traffic on a National Forest System road from approaching within one mile of petitioners' property, is a federal "action" subject to the requirements of the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulations:

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1938

GREG D. BIAGI AND LISA BIAGI, PETITIONERS

v.

UNITED STATES FOREST SERVICE

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum of the court of appeals (Pet. App. A13-A14) and the opinion of the district court (Pet. App. A1-A12) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1998. The petition for a writ of certiorari was filed on June 1, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress has charged the Forest Service, an agency within the United States Department of Agriculture (USDA), with managing the National Forest System, which consists of 191 million acres of

federally owned lands. See, *e.g.*, 16 U.S.C. 1604(e); 58 Fed. Reg. 19,369 (1993). In connection with those responsibilities, the Forest Service processes applications for special use authorizations (commonly known as special use permits), which "allow[] occupancy, use, rights, or privileges of National Forest System land." 36 C.F.R. 251.51.

With exceptions not relevant here, Forest Service regulations provide:

> All uses of National Forest System lands, improvements, and resources * * * are designated "special uses." Before engaging in a special use, persons or entities must submit an application to an authorized officer and must obtain a special use authorization[.]

36 C.F.R. 251.50(a). The Forest Service may deny an application for a special use permit for a variety of reasons, including that "[t]he proposed use would be inconsistent or incompatible with the purpose(s) for which the lands are managed, or with other uses," or "would not be in the public interest." 36 C.F.R. 251.54(i)(1), (2). A special use authorization terminates "[w]hen, by its terms, a fixed or agreed upon condition, event, or time occurs," 36 C.F.R. 251.60(a)(2)(iv), or "at the discretion of the authorized officer for reasons in the public interest." 36 C.F.R. 251.60(b). Upon termination, the permittee is obligated to remove any improvements and to restore the site to the satisfaction of the Forest Service. 36 C.F.R. 251.60(j).

Forest Service regulations prohibit any person from: "Constructing, placing, or maintaining any kind of * * * structure, fence * * * or other improvement on National Forest System land * * *

without a special-use authorization," 36 C.F.R. 261.10(a); "[p]lacing a vehicle or other object in such a manner that it is an impediment or hazard to the safety or convenience of any person," 36 C.F.R. 261.10(f); or "[b]locking, restricting, or otherwise interfering with the use of a road, trail, or gate," 36 C.F.R. 261.12(d). Violations of those regulations are punishable by fine or imprisonment. 36 C.F.R. 261.1b. Forest Service officers may impound personal property placed without authorization on National Forest System lands, 36 C.F.R. 262.12(a), and may remove an "object which is an impediment or hazard to the safety, convenience, or comfort of other users of an area of the National Forest System." 36 C.F.R. 262.13.

2. The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* (1994 & Supp. II 1996), is a procedural statute intended to promote environmentally informed decision-making by federal agencies. See, *e.g.*, *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332 (1989); *Baltimore Gas & Elec. Co.* v. *Natural Resources Defense Council, Inc.*, 462 U.S. 87 (1983); *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978). Section 102(2)(C) requires "all agencies of the Federal Government" to "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement" (known as an environmental impact statement (EIS)) addressing, among other things, "the environmental impact of" and available "alternatives to" the proposed action. 42 U.S.C. 4332(2)(C) (1994 & Supp. II 1996). The Council on Environmental Quality (CEQ) has promulgated regulations to assist

agencies in implementing NEPA. 40 C.F.R. 1500 *et seq.* "CEQ's interpretation of NEPA is entitled to substantial deference." *Andrus* v. *Sierra Club*, 442 U.S. 347, 358 (1979).

3. Petitioners own a ranch located wholly within the boundaries of the Mendocino National Forest in northern California. The sole access road is Forest Service Road 20N01E, which winds through the National Forest for about two miles, past several public campsites, and terminates at petitioners' property line. See Pet. App. A2; Excerpts of Record (ER) Tab 33, at 69. Forest Service Road 20N01E itself, and all of the land through which it passes, are federal property under the administration of the Forest Service. *Ibid.*

In 1981, Floyd Elliott, the preceding owner of petitioners' ranch, obtained a special use permit authorizing him to install a gate across Forest Service Road 20N01E, at a point approximately one mile from his property line, for the purpose of barring public vehicular access (but not pedestrian and other forms of public access) to the one-mile segment of the Forest Service road. Pet. App. A2; ER Tab 33, at 65-73. The special use permit contained conditions providing that it would expire on December 31, 1992, unless revoked, at the discretion of the Forest Service, before that date. ER Tab 33, at 65-67. The permit was "not transfer[]able" and was to terminate "[i]f the ownership of the property is changed by subdivision[,] sale, transfer, foreclosure, or any other means." ER Tab 33, at 67.

In 1989, petitioner Greg Biagi purchased the ranch. ER Tab 3, at 3. In June 1990, the Forest Service informed Biagi that the special use permit issued to Elliott was "not transferable" and that he would need

to apply for a new special use permit to maintain the road segment and keep the gate in place. ER Tab 33, at 63. On July 28, 1990, Biagi submitted an application for a special use permit for the continued use of Forest Service Road 20N01E and retention of the gate. ER Tab 33, at 60-61.

On September 17, 1990, District Ranger Gilbert Easter sent petitioner Greg Biagi a letter acknowledging receipt of his special use permit application. ER Tab 33, at 58-59. In April 1994, District Ranger Blaine Baker informed Biagi that his application for a special use permit appeared to be complete. ER Tab 33, at 32. On December 27, 1995, Biagi wrote to Congressman Frank Riggs complaining about not yet having received a special use permit. ER Tab 33, at 19-21. In response to a resulting inquiry, the Chief of the Forest Service explained that it had been inappropriate for the agency ever to have permitted a gate "on national forest land over one mile from the property boundary," and that "[t]here is no reason or justification for retaining the gate in its current location." ER Tab 33, at 12.

On March 7, 1996, Carl Tompkins, Acting Director for Lands and Real Estate Management of the Forest Service's Pacific Southwest Region, informed Greg Biagi that there was "no resource or legal justification to retain the gate in the current location" and that "the existing gate should be removed and relocated on private land at the property boundary between private and National Forest land." ER Tab 33, at 10. Tompkins warned that the Forest Service would remove the gate after 90 days if Biagi did not remove it before then. *Ibid.* See also ER Tab 33, at 1, 7.

4. Petitioners filed this lawsuit on the eve of the Forest Service's 90-day deadline for removing the gate. They alleged that the imminent removal of the gate violated NEPA, CEQ regulations, and the Administrative Procedure Act (APA), 5 U.S.C. 706, because the agency had not prepared an environmental assessment (see 40 C.F.R. 1508.9) or an environmental impact statement. ER Tab 1, at 11-15. On August 14, 1996, the district court entered a preliminary injunction barring the Forest Service from removing the gate. ER Tab 31, at 14-15. On August 25, 1997, the district court dissolved the preliminary injunction and granted the Forest Service's motion for summary judgment. Pet. App. A1-A12.

The district court concluded that the Forest Service's "refusal to issue a special use permit to plaintiffs does not constitute major federal action." Pet. App. A11. It surveyed decisions identifying "major" federal action and observed that most of the cases involved "actions much broader in scope than" the Forest Service's decision here to remove a gate from a "*one-mile segment* of road" that plaintiffs themselves "currently use on a regular basis." *Id.* at A9, A10. The court held that "the denial of a special use permit by defendant here cannot, as a matter of law, constitute the type of 'major Federal action' contemplated by NEPA." *Id.* at A11. "To so rule," the court reasoned, "would be to vest entitlements in private individuals occupying national forest land, and cripple defendant in its ability to manage the nation's forests." *Ibid.* Because the district court concluded that the Forest Service's decision to deny a permit for the gate was not a "major" federal action—a conclusion sufficient to establish that "NEPA is not implicated"—the court did not reach the question

"whether such action constitutes major federal action significantly affecting the human environment." *Ibid.*

In a memorandum decision, the court of appeals affirmed. Pet. App. A13-A14. The court ruled that "[n]o federal action occurred here to trigger the requirements of [NEPA]." *Id.* at A14. The court explained that neither the expiration of the Elliott special use permit, nor the denial of petitioner's application for a special use permit, nor "the removal of the unpermitted gate," was subject to NEPA's requirements. *Ibid.* It also noted that "NEPA regulations expressly exclude 'civil or criminal enforcement actions.'" *Ibid.* (quoting 40 C.F.R. 1508.18(a)).

ARGUMENT

1. Petitioners contend (Pet. 10-13) that the court of appeals erred in failing to require the Forest Service to engage in a NEPA analysis before directing petitioners to remove an unauthorized gate from National Forest System lands. Petitioners are mistaken. As the court of appeals correctly explained, the Forest Service's demand that petitioners remove the unpermitted gate is not an "action" for purposes of Section 102(2)(C) of NEPA, 42 U.S.C. 4332(2)(C) (1994 & Supp. II 1996). The court of appeals' decision does not conflict with any decision of this Court or another court of appeals.

NEPA applies when an agency undertakes (or authorizes another party to undertake) some project or activity that may have significant environmental impacts. See *Sierra Club* v. *Hodel*, 848 F. 2d 1068, 1090-1091 (10th Cir. 1988) (agency's decision to allow road construction on federal lands subject to NEPA); *Foundation for N. Am. Wild Sheep* v. *USDA*, 681

F.2d 1172, 1178 (9th Cir. 1982) (grant of special use permit to reopen road through sensitive habitat required preparation of EIS); *Puerto Rico Conservation Found.* v. *Larson*, 797 F. Supp. 1066, 1070-1071 (D.P.R. 1992) (federal agencies' decision to reconstruct and reopen road required EIS); *Bunch* v. *Hodel* 642 F. Supp. 363, 365 (W.D. Tenn. 1985) (federal acquiescence in State's proposed drawdown of water in lake required EIS).

The NEPA predicate of a federally undertaken, approved, or authorized project or activity is absent here. The Forest Service authorized petitioners' predecessor, Floyd Elliott, to install the gate through a special use permit that terminated, according to its express terms, when petitioners purchased the property in 1989. Neither the expiration of the Elliott special use permit nor the Forest Service's refusal to issue a new permit is federal "action" within the meaning of NEPA. Neither event involves the type of affirmative federal "action" that Congress sought to subject to environmental impact analysis. Indeed, petitioners do not cite—and we are unaware of—any judicial decision holding that an agency's refusal to issue a permit is federal "action" for purposes of NEPA.

CEQ's regulations reinforce the common sense conclusion that the Forest Service's denial of an application for a permit is not a "Federal action" for purposes of NEPA. The CEQ's regulations provide that "[a]ctions" encompass "new and continuing activities, including projects and programs entirely or partly *financed*, *assisted*, *conducted*, *regulated*, or *approved* by federal agencies." 40 C.F.R. 1508.18(a) (emphasis added). "Federal actions" typically consist of the promulgation of "official policy" through regu-

lations, "[a]doption of formal plans" and "programs," as well as the "[a]pproval of specific projects, such as construction or management activities located in a defined geographic area." 40 C.F.R. 1508.18(b). "Projects include actions *approved by permit or other regulatory decision* as well as federal and federally assisted activities." *Ibid.* (emphasis added). But a federal agency's *rejection* of a non-federal party's request for a permit, or other request for an exemption from general regulatory prohibitions, is not an "action" for purposes of NEPA.

The Forest Service's contemplated removal of the unauthorized gate (if petitioner Greg Biagi does not do so first) likewise is not subject to NEPA's environmental analysis requirements. Forest Service regulations make it unlawful to maintain any structure on National Forest System lands without a special use permit and expressly authorize the agency to remove any such structure. 36 C.F.R. 261.10(a) and (f) 261.12(d), 262.12(a), 262.13. As the court of appeals correctly noted (Pet. App. A14), the Forest Service's planned removal of the gate is simply an exercise of the agency's law enforcement authority under those provisions.

"[J]udicial or administrative civil or criminal enforcement actions" are not "actions" subject to NEPA. 40 C.F.R. 1508.18(a). A contrary rule would allow violators to use NEPA as a means of delaying and obstructing agencies' ability to enforce the law against them. Not surprisingly, few litigants have raised NEPA objections to law enforcement activities, and none has done so successfully. See *United States* v. *Glenn-Colusa Irrigation Dist.*, 788 F. Supp. 1126, 1135 (E.D. Cal. 1992); *Calipatria Land Co.* v. *Lujan*, 793 F. Supp. 241, 245-246 (S.D. Cal. 1990);

United States v. *Rainbow Family*, 695 F. Supp. 314, 324 (E.D. Tex. 1988).

2. Petitioners further argue (Pet. 14-16) that this Court should grant certiorari to address the question whether the term "major" in Section 102(2)(A) of NEPA, 42 U.S.C. 4332((2)(A) (1994 & Supp. II 1996), operates as an independent basis on which an agency may decline to prepare an EIS. There is no reason, however, for this Court to address that question. The district court ruled that, even if the Forest Service's demand that petitioners remove the gate is an "action," it is not a "major" action. Pet. App. A9. The court of appeals, however, did not rely on that rationale, holding instead that "[n]o federal *action* occurred here to trigger the requirements of [NEPA]." Pet. App. A14 (emphasis added). Accordingly, this case presents no occasion to take up the question of statutory construction identified by petitioners.

3. Petitioners also contend that the courts of appeals are "split" concerning the standard of review for an agency's "threshold determination" as to whether NEPA applies. See Pet. 17 (alleging conflict between *North Buckhead Civic Ass'n* v. *Skinner*, 903 F.2d 1533, 1538 (11th Cir. 1990), and, *inter alia*, *Northcoast Environmental Center* v. *Glickman*, 136 F.3d 660, 666-667 (9th Cir. 1998)). Petitioners are mistaken with respect to both the existence and the importance of the purported conflict.

This Court held in *Marsh* v. *Oregon Natural Resources Council*, 490 U.S. 360 (1989), that an agency's decision whether to prepare a supplemental environmental impact statement in response to new environmental information is subject to judicial review under the APA's "arbitrary and capricious" standard, 5 U.S.C. 706(2)(A). See 490 U.S. at 376-377. The Court

observed that that question presents a "classic example of a factual dispute the resolution of which implicates substantial agency expertise." 490 U.S. at 376. Following the rationale of *Marsh*, the Ninth Circuit and other courts of appeals have uniformly held that other kinds of factual determinations under NEPA, such as findings that a proposed action will not have a significant impact on the environment so that no EIS need be prepared, are subject to arbitrary and capricious review. See *Greenpeace Action* v. *Franklin*, 14 F.3d 1324, 1331 (9th Cir. 1992). See also, *e.g.*, *Sierra Club* v. *U.S. Forest Service*, 46 F.3d 835, 840 (8th Cir. 1995); *Sabine River Auth.* v. *U.S. Dep't of Interior*, 951 F.2d 669, 678-679 (5th Cir.), cert. denied, 506 U.S. 823 (1992); *Sierra Club* v. *Lujan*, 949 F.2d 362, 367-368 (10th Cir. 1991); *North Buckhead Civic Ass'n* v. *Skinner*, 903 F.2d 1533, 1538 (11th Cir. 1990).

The Eighth and Ninth Circuits have concluded that *Marsh*'s rationale does not apply, however, to agency determinations on "threshold question[s] of NEPA applicability." See *Northcoast Envtl. Ctr.*, 136 F.3d at 666-667; *Goos* v. *ICC*, 911 F.2d 1283, 1292 (8th Cir. 1990). Those courts have reasoned that such "threshold" questions are "primarily legal" in nature and therefore should be reviewed under a test of "reasonableness." See *Northcoast Envtl. Ctr.*, 136 F.3d at 666-667; *Goos*, 911 F.2d at 1292. The other courts of appeals have not addressed that distinction. For example, the Eleventh Circuit's decision in *North Buckhead*, cited by petitioners (Pet. 17), involved a challenge to the adequacy of an environmental impact statement, see 903 F.2d at 1538-1545, which presents the type of fact-intensive issue that the courts have uniformly held comes within the rationale of *Marsh*. Indeed, the Ninth Circuit has cited *North Buckhead*

with approval for the proposition that agency findings of no significant impact under NEPA are subject to "arbitrary and capricious" review. See *Greenpeace Action*, 14 F.3d at 1331. Because the Eleventh Circuit has not addressed whether the "arbitrary and capricious" standard applies to "threshold" NEPA determinations, the split of authority asserted by petitioners does not exist.

The issue also does not appear to have much practical importance. As this Court observed in *Marsh*, "the difference between the 'arbitrary and capricious' and 'reasonableness' standards is not of great pragmatic consequence." 490 U.S. at 377 n.23. See also *Sabine River Auth.*, 951 F.2d at 678 n.2. Neither the district court nor the court of appeals discussed the issue, and the choice of the standard of review would not have altered the outcome in this case. The Ninth Circuit regards its "reasonableness" standard of review for "threshold" determinations of NEPA applicability as "less deferential" than the arbitrary or capricious standard, see *Northcoast Entl. Ctr.*, 136 F.3d at 667. The court of appeals presumably applied that less deferential standard here and nevertheless upheld the Forest Service's view that NEPA was inapplicable.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
M. ALICE THURSTON
SEAN H. DONAHUE
Attorneys

AUGUST 1998