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ENVIRONMENTAL LAW

NORTHCOAST ENVIRONMENTAL CENTER v. GLICKMAN

136 F.3d 660 (9th Cir. 1998)

I. INTRODUCTION

In *Northcoast Environmental Center v. Glickman*,[1] the United States Court of Appeals for the Ninth Circuit held that a less deferential standard of "reasonableness" applied to its review of legal questions that determined the applicability of the National Environmental Policy Act (NEPA).[2] Thus, when no facts are in dispute, an agency's decision not to prepare an Environmental Impact Statement (EIS) will be upheld unless it is unreasonable.[3] When facts are in dispute, however, the Supreme Court decision of *Marsh v. Oregon Natural Resources Council*,[4] which applied an "arbitrary and capricious" standard of review, controls.[5]

The Ninth Circuit also decided that district court had not abused its discretion by declining to follow an exception to the Administrative Procedure Act (APA),[6] which allows a judge to

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1. 136 F.3d 660 (9th Cir. 1998). The appeal from the United States District Court for the Northern District of California was argued and submitted on November 6, 1997 before Judge Harlington Wood, Jr., Judge Rymer, and Judge Tashima. The opinion, authored by Judge Wood, was filed on February 17, 1998.

2. *See* Northcoast Environmental Center v. Glickman, 136 F.3d 660, 667 (9th Cir. 1998). The heart of National Environmental Policy Act of 1969, 42 U.S.C. 4321 (1994), is the requirement found at 42 U.S.C. § 4332(2)(C), which states, "all agencies of the Federal Government shall ... (C) 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 by the responsible official...." 42 U.S.C. § 4332(2)(C) (1994).

3. *See Northcoast*, 136 F.3d at 666.

4. 490 U.S. 360 (1989).

5. *See* Marsh v. Oregon Natural Resources Council, 490 U.S. at 375-76

6. Administrative Procedure Act of 1964, Pub. L. No. 105-220, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.). Judicial review of agency action is

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look beyond the administrative record in an appeal.[7] The district court refused to look at documents outside the record based on a finding that they were unnecessary and cumulative.[8] The Ninth Circuit agreed even though Northcoast Environmental Center's documents fit within an exception to the APA.[9]

II. FACTS AND PROCEDURAL HISTORY

In 1987, the United States Department of Agriculture's Forest Service (Forest Service) and the United States Department of Interior's Bureau of Land Management (BLM) formed an Inter-Regional Coordinating Group.[10] This group studied Port-Orford Cedar (POC) trees, a valuable component of the northwestern California ecosystem, which had fallen victim to a deadly fungus.[11] The Forest Service developed a POC Action Plan to inventory, monitor, study, and manage the POC ecosystem, and to educate the public about that ecosystem.[12] The BLM developed Management Guidelines to supplement the Action Plan.[13] The Management Guidelines included management objectives, implementation strategies, specifications for equipment washing, lists of fungus control strategies and timber and service contract mitigation measures.[14] The Forest Service's Regional Foresters approved the POC Action Plan in June of 1988.[15]

Northcoast Environmental Center (NEC), a local conservation organization working to improve and preserve environ-

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generally limited to review of the administrative record. *Northcoast*, 136 F.3d at 665 (citing 5 U.S.C. § 706 (1998)).

7. *See Northcoast*, 136 F.3d at 665. The district court declined to admit exhibits that the Northcoast Environmental Center (NEC) had offered into evidence. *See id.*

8. *See id.*

9. *See id.*

10. *See* Northcoast Environmental Center v. Glickman, 136 F.3d 660, 663 (9th Cir. 1998).

11. *See id.*

12. *See id.*

13. *See id.* at 664.

14. *See id.*

15. *See Northcoast*, 136 F.3d at 663. The opinion does not state whether and when the Management Guidelines were also approved.

mental quality in northwestern California,[16] disagreed with the approval of the POC Action Plan.[17] Initially, NEC filed a complaint with the Deputy Chief of the Forest Service, and the Deputy Chief denied it.[18] NEC then filed a complaint in the United States District Court for the Northern District of California seeking a temporary restraining order.[19] However, NEC voluntarily dismissed the action when the court denied its request.[20]

On January 5, 1995, after the Action Plan and Management Guidelines were completed, NEC, joined by various other environmental groups, sued the Secretaries of the Departments of Agriculture and Interior seeking declaratory and injunctive relief under the National Environmental Policy Act (NEPA).[21] Specifically, NEC sought to enjoin logging restrictions and road closings within POC groves until the Secretaries completed an EIS, as required by NEPA.[22]

Under NEPA, all federal agencies are required to prepare an EIS, a detailed statement of adverse environmental impacts, for every major federal action that significantly affects

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16. Biography of Northcoast Environmental Center, *available in* Westlaw, Business and Industry Information: Careers in the Law: Directories: Encyclopedia of Associations.

17. *See Northcoast*, 136 F.3d at 664. NEC disagreed with the approval of the POC Action Plan because it believed that the Forest Service should have prepared an Environmental Impact Statement before the Plan was approved. *See id.*

18. *See id.* at 663.

19. *See Northcoast*, 136 F.3d at 663. NEC appealed the approval to the Forest Service on August 18, 1988. *See id.* Almost a year later, the Regional Foresters responded with a letter to NEC. *See id.* The letter informally declared "the POC Action Plan did not require an EIS because the Plan did not provide for specific actions, but merely represented 'the beginning of a planning process.'" *Id.* On October 20, 1988, NEC was formally denied the appeal when the Deputy Chief of the Forest Service wrote, "'The action plan does not represent a specific proposal with the environmental consequences that can be meaningfully evaluated at this time.'" *Id.*

20. *See Northcoast*, 136 F.3d at 663. NEC dismissed the action on March 19, 1991. *See id.*

21. *See id.* at 664. NEC sought a declaration by the court stating that the Secretaries were required to prepare an Environmental Impact Statement for their Action and Management Plans. *See id.* at 662.

22. *See Northcoast*, 136 F.3d at 662. NEC stated that both projects were substantially similar to other "federal, interregional disease control and timber management" projects for which the Forest Service and BLM had prepared EISs and, therefore, the agencies should have prepared EISs for the current projects as well. *See id.* at 667.

the quality of the human environment.[23] The Government claimed that its Action Plan and Management Guidelines did not have significant enough effects to trigger the NEPA requirements.[24] On October 23, 1996, the district court agreed and granted the Government's motion for summary judgment and motion to strike NEC's exhibits.[25] NEC filed an appeal to the Ninth Circuit on November 4, 1996.[26]

III. THE COURT'S ANALYSIS

A. STANDARD OF REVIEW AND NEPA APPLICABILITY

The main issue before the Ninth Circuit was whether the inter-regional POC program, comprised of the Forest Services' Action Plan and the BLM's Management Guidelines, constituted a major federal action requiring a programmatic EIS.[27] The court first examined the standard of review for appeals from agency decisions.[28] While NEC argued that the court should select the same "reasonableness" standard as it applied in *Friends of the Earth v. Hintz*,[29] the Government contended that the "arbitrary and capricious standard" used by the Supreme Court in *Marsh* was the appropriate test.[30]

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23. *See* 42 U.S.C. § 4332(2)(C) (1994).

24. *See Northcoast*, 136 F.3d at 667. "In support, the Secretaries assert that these [projects] are merely 'research, development, and information-gathering tool[s] intended to lay the groundwork for later decision making.'" *Id.*

25. *See id.* at 664.

26. *See id.*

27. *See* Northcoast Environmental Center v. Glickman, 136 F.3d 660, 665 (9th Cir. 1998).

28. *See id.* at 666.

29. 800 F.2d 822 (9th Cir. 1986). In *Friends*, environmental groups filed a suit against the District Engineer of the Army Corps of Engineers for issuing a permit authorizing a logging company to discharge fill material into a wetland area. *See* Friends of the Earth v. Hintz, 800 F.2d at 826-827. The district court upheld the permit issuance and the Ninth Circuit affirmed. *See id.* at 828, 839. The Ninth Circuit also upheld the Corps' decision to not prepare an EIS based on its finding that "an agency's decision that a particular project does not require preparation of an EIS is to be upheld unless it is unreasonable." *Id.* at 836. Given the extensive administrative record and considerations taken, the court felt the Corps' decision was reasonable. *See id.* at 838.

30. *See Northcoast*, 136 F.3d at 666 (citing Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989)). In *Marsh*, a group of nonprofit organizations sued the

Ultimately, the Ninth Circuit held the "reasonableness" standard to be the proper standard of review.[31] In doing so, the court examined *Marsh* and the subsequent split in the circuits regarding *Marsh's* breadth.[32] In *Marsh*, a unanimous Supreme Court, held "that substantive NEPA decisions by an agency are reviewed under the arbitrary and capricious standard."[33] This standard of review examines whether the agency considered all the relevant factors, articulated a rational connection between the facts found and the choice made, and whether the agency committed a clear error of judgment.[34]

Subsequent circuit courts, however, have both limited and broadened *Marsh's* ruling.[35] The Eleventh Circuit read *Marsh* broadly, applying it to all agency actions involving NEPA.[36] The Eighth and Tenth Circuits, on the other hand, limited *Marsh* by determining that *Marsh* does not control when the threshold question is whether an EIS should have been prepared in the first instance.[37] Rather, these circuits held that the standard of review at the threshold stage should be "reasonableness."[38]

The Ninth Circuit followed the narrower approach.[39] In *Greenpeace Action v. Franklin*[40] and *Alaska Wilderness Recrea-*

Secretary of the Army Corps of Engineers to enjoin construction of a dam. *See* Marsh, 490 U.S. at 368. The organizations claimed the Corps violated NEPA by failing to prepare a supplemental EIS to review new information. *See id.* A unanimous Supreme Court, after referencing section 706(2)(A) of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A) (1998), held that a court would only set aside such an agency decision if it was arbitrary and capricious. *See* Marsh, 490 U.S. at 375. Section 706(2) of the APA provides "that a reviewing court shall (2) hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law...." 5 U.S.C. § 706(2)(A) (1998).

31. *See Northcoast*, 136 F.3d at 667.

32. *See id.*

33. *Id.* at 666 (citing *Marsh*, 490 U.S. 366-67 (1989)).

34. *See Northcoast*, 136 F.3d at 666 (citing California Trout v. Schaefer, 58 F.3d 469, 473 (9th Cir. 1995)).

35. *See Northcoast*, 136 F.3d at 666-67.

36. *See id.* at 667 (citing North Buckhead Civic Ass'n v. Skinner, 903 F.2d 1533, 1538 (11th Cir. 1990)).

37. *See Northcoast*, 136 F.3d at 666-67 (citing Goos v. I.C.C., 911 F.2d 1283, 1292 (8th Cir. 1990); Sierra Club v. Lujan, 949 F.2d 362, 367 (10th Cir. 1991)).

38. *See Northcoast*, 136 F.3d at 667.

39. *See id.*

tion & Tourism v. Morrison,[41] the Ninth Circuit separated the standard of review for factual issues from that for legal issues.[42] The court held that agency decisions regarding factual or technical matters, as in *Marsh*, are to be reviewed under the "arbitrary and capricious" standard, while legal issues are to be reviewed under the "reasonableness" standard.[43]

The court found that NEC's claim primarily concerned "legal issues ... based on undisputed historical facts."[44] Thus, it applied the "less deferential standard of reasonableness."[45] The court provided two underlying reasons for determining that the Government's decision not to prepare an EIS was reasonable. First, as the district court found, neither project was a final agency action.[46] The lack of finality not only made the court's review difficult, but made the determination of environmental

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40. 14 F.3d 1324 (9th Cir. 1992). In *Greenpeace*, the North Pacific Fishery Management Council issued its Fishery Management Plan and an EIS for the Gulf of Alaska pursuant to the Fisheries Conservation Management Act. *See* Greenpeace Action v. Franklin, 14 F.3d at 1327. The plan provided that the Council set annual harvest levels of various species. *See id.* Greenpeace objected to an increase in the annual harvest levels, claiming the increase would jeopardize a threatened species of sea lion. *See id.* at 1328-1329. The Ninth Circuit concluded that the objections turned on factual determinations rather than legal ones. *See id.* at 1331. Consequently, the court claimed that "arbitrary and capricious" was the appropriate standard of review for the agency's decision. *See id.*

41. 67 F.3d 723 (9th Cir. 1995). In *Alaska Wilderness*, environmentalists sued to enjoin the Forest Service from offering contracts for certain timber sales on the Tongass National Forest. *See* Alaska Wilderness Recreation & Tourism v. Morrison, 67 F.3d at 725. The environmentalists believed that the Forest Service should have supplemented three EISs after a certain contract for timber had been cancelled. *See id.* at 726, 728. The Ninth Circuit determined that the circumstances for requiring a supplemental EIS were purely legal and applied the "reasonableness" standard of review. *See id.* at 727.

42. *See Northcoast*, 136 F.3d at 667.

43. *See id.*

44. *Id.*

45. *Id.* at 667. Neither party objected to the underlying facts surrounding the case, that is, the components and objectives of both projects; therefore, there was no factual issue. *See id.* The legal issue was the proper classification of the projects as "major, Federal actions significantly affecting the quality of the human environment" requiring an EIS. 42 U.S.C. § 4332(2)(C) (1994).

46. *See Northcoast*, 136 F.3d at 668. Section 704 of the Administrative Procedure Act states that an "[a]gency action [is] made reviewable by statute and final agency action.... A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." 5 U.S.C. § 704 (1988).

consequences difficult for the Government as well.[47] Accordingly, because NEPA "does not require an agency to consider the environmental effects that speculative or hypothetical projects might have on a proposed project,"[48] a non-final agency action, such as the POC Action Plan and Management Guidelines, did not require the preparation of an EIS.[49]

Second, the court held that even if the projects were final, they would not require an EIS. NEPA requires an EIS "for 'every legislation and other major Federal actions significantly affecting the quality of the human environment.'"[50] Both projects "set forth guidelines and goals for POC research, management strategies and information sharing" as well as "POC preservation and timber sales."[51] Neither project had an actual or immediate effect on the POC ecosystem as they were primarily for research.[52] Therefore, the court concluded that the projects were not major federal actions.[53] Further, since neither project proposed a specific activity that directly impacted the physical environment, the projects failed to meet the last NEPA requirement: that the projects cause a significant impact on the quality of the human environment.[54] Thus, the court found the Government made a reasonable decision in not preparing an EIS.[55]

B. STRICKEN AGENCY DOCUMENTS

The court also resolved the minor issue of whether the district court erred in striking NEC exhibits.[56] While the general rule of section 706 of the Administrative Procedure Act limits judicial review of agency decisions to the administrative record,

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47. *See Northcoast*, 136 F.3d at 668.
48. *Id.* (citing Kleppe v. Sierra Club, 427 U.S. 390 (1976)).
49. *See Northcoast*, 136 F.3d at 668.
50. *Id.* (quoting National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C)).
51. *Northcoast*, 136 F.3d at 670.
52. *See id.* at 669-70.
53. *See id.* at 670.
54. *See id.*
55. *See id.*
56. *See* Northcoast Environmental Center v. Glickman, 136 F.3d 660, 665 (9th Cir. 1998).

there are exceptions.[57] A court's review may extend outside the administrative record: "(1) if necessary to determine 'whether the agency has considered all relevant factors and has explained its decision,' (2) 'when the agency has relied on documents not in the record,' or (3) 'when supplementing the record is necessary to explain technical terms or complex subject matter,' and (4) 'when the plaintiffs make a showing of agency bad faith.'"[58] While NEC pointed to the second exception, the Ninth Circuit noted that since the administrative record was small, "it certainly would have been proper for the district court to consider Plaintiffs' exhibits."[59] The court agreed, nonetheless, with the district court's rationale for striking the exhibits.[60] The Ninth Circuit held that the district court did not abuse its discretion by striking "cumulative and unnecessary documents outside the administrative record," even though it would have been proper to consider them.[61]

IV. IMPLICATIONS OF DECISION

In the Ninth Circuit, the determination as to which standard of review applies depends on whether the underlying issue is characterized as either legal or factual. Legal issues, such as whether an EIS is required, receive a "reasonableness" standard of review. Factual disputes, such as a finding of no significant impact, are reviewed under the "arbitrary and capricious" standard. However, since the opinions in *Greenpeace*, *Alaska Wilderness*, and *Northcoast* do not clearly distinguish a legal from a factual issue, the question of which standard to apply remains unclear.

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57. *See id.*

58. *Id.* (quoting Southwest Center for Biological Diversity v. U.S. Forest Service, 100 F.3d 1443, 1450 (9th Cir. 1996)).

59. *Northcoast*, 136 F.3d at 665.

60. *See id.* The district court believed it was statutorily limited to a review of the administrative record, but that, in addition, admitting the exhibits would have been cumulative. *See id.*

61. *Id.*

In *Northcoast*, the court stated that it assumed the issue was legal since no facts were in dispute.[62] Thus, perhaps one indication of the difference between factual and legal issues is whether the parties dispute the underlying facts.[63] However, this classification method fails to address instances where a legal issue exists whose underlying facts are also in dispute. The resolution of this question remains for future courts.

However, regardless of the theoretical application of the "reasonableness" standard to legal disputes or the "arbitrary and capricious" standard to factual disputes, the practical difference between what is "reasonable" and what is "arbitrary and capricious" may not be that substantial. As the Supreme Court noted in *Marsh*, its decision "[does] not require a substantial reworking of long established NEPA law" since several circuit courts had already recognized that the "difference between the 'arbitrary and capricious' and 'reasonableness' standards is not of great pragmatic consequence."[64]

In this case, although the Ninth Circuit applied the "reasonableness" standard of review, it is questionable whether an application of the "arbitrary and capricious" standard would have caused a different result. The court applied the "reasonableness" standard based on its finding of a legal dispute. Rather than evaluate the EA itself, however, the court relied upon and deferred to the agency's determination that the projects were merely for research and had no effect upon the envi-

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62. *See* Northcoast Environmental Center v. Glickman, 136 F.3d at 667 (9th Cir. 1998).

63. In *Hells Canyon Preservation Council v. Jacoby*, 9 F. Supp. 2d 1216 (D. Or. 1998), which relied on the *Northcoast* decision, the court decided that the issue was factual and therefore used the "arbitrary and capricious" standard. *See id.* at 1232. In *Hells Canyon*, the plaintiffs challenged an agency's classification of a project as a categorical exclusion to NEPA. *See id.* at 1235. The classification was based on factual determinations by the agency's experts, thus triggering the "arbitrary and capricious" standard. *See id.*

64. Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 377 n.23 (1989). For example, in Manasota-88, Inc. v. Thomas, 799 F.2d 687 (11th Cir. 1986), the court said, "[a]s a practical matter, ... the differences between the 'reasonableness' and 'arbitrary and capricious' standards of review are often difficult to discern." *Id.* at 692 n.8. Likewise, in River Road Alliance, Inc. v. Corps of Engineers of United States Army, 764 F.2d 445 (7th Cir. 1985), the court ststed, "[w]e are not sure how much if any practical difference there is between 'abuse of discretion' and 'unreasonable.'" *Id.* at 449.

ronment. Under the "reasonableness" standard, a court is presumed to be less deferential, and yet the court deferred to the agency in this case. Thus, the court's decision actually weakened the distinction between the "reasonableness" and the "arbitrary and capricious" standards.

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