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RE: Litigation over personal watercraft at Gulf Islands National Seashore

Dear Dave,

At the Sea Grant meeting in Jekyll Island this April you asked if I could find out the arguments put forth by the parties in the litigation over the National Park Service's regulation of personal watercraft (e.g., Jet Skis, Sea-Doos) in areas the Service administers, including Gulf Islands National Seashore. This letter contains the results of my research. It is intended to be for informational purposes only, and should not be considered formal legal advice.

Background

In November 1997, the environmental advocacy group Bluewater Network (Bluewater) sent a letter to the National Park Service urging the Service to ban the use of personal watercraft (PWC) in national park areas because of noise, air and water pollution, public safety, and adverse ecological impacts. In September 1998, the Park Service issued a proposed PWC rule.

A comment period followed, and the Park Service issued the final rule on March 21, 2000. The final rule prohibits PWC use in Park Service areas unless the Service determines "that PWC use is appropriate for a specific area based on that area's enabling legislation, resources, values, other visitor uses, and overall management objectives." The Park Service provided two means by which PWC use could be approved. The first method, available only to ten specific park areas, was a locally-based and relatively streamlined process called park superintendent's compendium. The second method, which applied to all other Park Service areas (including Gulf Islands), was more formal and included publication in the Federal Register and a public comment period.

The final rule also provided for a two-year "grace period" (until April 22, 2002) during which PWC use could continue - subject to appropriate restrictions, if necessary - at twenty-one Park Service units, including Gulf Islands, based on then-current PWC use and the criteria quoted above. The grace period sparked the first round of litigation.

The first lawsuit - *Bluewater Network v. Stanton*

On August 31, 2000, Bluewater sued the Park Service and the Department of the Interior in federal court on two counts. Bluewater asserted that the Park Service violated the National Park

Service Organic Act (Organic Act) and the Administrative Procedure Act (APA) when it issued a final rule allowing (1) PWC use to continue in twenty-one areas for two years while banning it elsewhere in the park system, and (2) PWC use to continue in ten of those areas without any opportunity for notice-and-comment rulemaking.

The APA allows citizens, including groups like Bluewater, to sue to have administrative agency action "held unlawful and set aside" if the action is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The action at issue here is the issuance of the final rule. The "law" at issue is the Organic Act.

The Organic Act created the Park Service and governs its administration of the park system. The Park Service's core statutory mission is to manage park areas in keeping with their "fundamental purpose," which is "to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." The Park Service authority to authorize activities like PWC use "shall not be exercised in derogation of the values and purposes for which these various areas have been established." Park Service policy in 2000 was to "not allow a recreational activity in a park or in certain locations within a park if it would involve or result in…unacceptable impacts on visitor enjoyment due to interference or conflict with other visitor use activities[,]…unacceptable impacts on park resources[, or] unacceptable levels of danger to the welfare or safety of the public, including participants." Bluewater claimed that the Park Service's issuance of the final rule violated these provisions of the Organic Act and the Service's management policy.

Bluewater and the Park Service settled the case in April 2001, with the Service agreeing to make certain changes to the final rule. The rule stayed essentially the same, with the general prohibition on PWC use intact, but (1) the grace period was extended by five months for eight park units and (2) in the ten units where PWC use could be authorized by compendium under the original rule, notice-and-comment rulemaking would now be required.

Two pro-PWC groups, the Personal Watercraft Industry Association and the American Watercraft Association (collectively, "industry groups") moved to intervene to object to the settlement agreement, but their motion was denied because the group did not have a legally protected interest that was threatened by the agreement.

After the settlement the Park Service directed the directors of the twenty-one "grace period" park areas to evaluate PWC use based on the criteria in the final rule. Jerry Eubanks, Superintendent of Gulf Islands, issued his evaluation on October 17, 2001. He found that

> PWC use poses considerable threats to estuarine flora and fauna, pollutes waters essential to estuarine and marine health, poses unacceptable risk of injury to operators and bystanders, and conflicts with the majority of other longstanding uses of the Seashore. Their use is not compatible with the goals and objectives for the management of Gulf Islands National Seashore. PWC use has been determined

> to pose an unacceptable threat to park resources and values and to adversely affect the experience of other park visitors.

Based on the evaluation he concluded that PWC use was inappropriate at Gulf Islands, so the ban would go into effect on April 22, 2002. As of March 2002 it appeared that none of the grace period park areas would be implementing a special regulation to allow PWC use to continue.

The second lawsuit - *Roberts v. Mainella*

On March 28, 2002 the industry groups filed a motion in federal court to enjoin the enforcement of the final rule. The industry groups' primary allegations were that the Park Service (1) violated the APA by arbitrarily and capriciously regulating PWC differently than "other watercraft with like technical features, sound, speed and maneuverability" like motorboats, and (2) violated the National Environmental Policy Act (NEPA) by promulgating the final rule without conducting an environmental assessment. The court denied the injunction.

NEPA requires federal agencies to study the potential environmental effects of actions that will "significantly affect[ ] the quality of the human environment." There are categorical exclusions from the NEPA process for Park Service actions that will not have a significant adverse impact. The Park Service relied on the exclusions when it elected not to perform NEPA analysis for the PWC ban. There is an exception to the exclusions, however, for "extraordinary circumstances in which a normally excluded action may have a significant environmental effect." The industry groups argued that the Service did not adequately explain its decision to rely on the exclusions, and that the exception to the exclusion should apply. The gist of the industry groups' argument was that banning PWC from Park Service areas would simply force PWC users to go elsewhere, with potentially adverse environmental consequences; thus, the Service should have performed NEPA analysis. In its order denying the injunction the court rejected the industry groups' claim as "complete speculation" unsupported by any evidence, and noted that the evidence that was presented indicated that the ban would be good for the environment.

In their APA claim, the industry groups contended that there was no rational basis for the Park Service to ban PWCs while allowing motorboats, because many motorboats have the same characteristics that make PWCs objectionable (speed, noise, maneuverability, pollution), while recent improvements in technology have diminished some of those characteristics in PWCs. The court allowed that such may be the case, but noted that the industry groups offered no evidence of the proportion of newer to older PWCs in use or the percentage of motorboats that have the objectionable characteristics. The court declared that it was not arbitrary for the Park Service to attack the problem piecemeal by banning PWCs but not motorboats, especially in light of the Service's considered responses to comments on that topic during the public comment period.

The industry groups additionally argued that they and their members would suffer irreparable injury (a requirement for an injunction, which is considered an extreme measure) if they were forced out of park areas because (1) they would have to ride their PWCs among larger vessels, endangering themselves; (2) they would be deprived of the unique pleasures of the national park

environment; and (3) the member manufacturers would lose sales. Rejecting these alleged injuries, the court observed that (1) PWC users are responsible for choosing where they operate their PWCs; (2) PWC users could still use park areas, just not on their PWCs; and (3) in general there is no legally cognizable claim for loss of sales resulting from government regulation like this.

The injunction having been denied, the ban on PWC use at Gulf Islands and other park areas went into effect as scheduled on April 23, 2002.

As you know, the story does not end there. In 2003 a mandate came down from the Department of the Interior that NEPA analysis be undertaken in individual areas (including Gulf Islands) to determine whether PWC use should be allowed by special regulation, despite the earlier determination by the various park superintendents that PWC use was inappropriate in park service areas (including Gulf Islands). In my opinion this mandate represents a major shift in the balance between conservation values and recreation values. I have been unable to locate any documents explaining the change in policy. I should note, however, that the Secretary of Interior has broad rulemaking discretion within notoriously malleable statutory limits, which somewhat schizophrenically mandate almost absolute conservation while simultaneously allowing recreational use.

In March of this year, the Park Service issued an environmental assessment (EA) of PWC use at Gulf Islands. The EA considers the impacts of PWCs on, among other things, water quality, air quality, soundscapes, wildlife, wildlife habitat, shoreline vegetation, cultural resources, socioeconomics, and visitor use and experience.

The EA sets out three alternatives: (1) continuing the ban, (2) "Alternative A," which would reinstate usage as it was before the ban; and (3) "Alternative B," which is similar to Alternative A but with additional restrictions. The Park Service considers Alternative B the environmentally preferred alternative, because "it would best fulfill park responsibilities as trustee of this sensitive habitat; ensure safe and healthy, productive, and aesthetically and culturally pleasing surroundings; and attain a wider range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences."

The Park Service took comments on the EA until May 18. The next step will be for the Service to determine whether Alternative B will "significantly affect" the environment. If the Service determines it will, then the Service must prepare a detailed environmental impact statement (EIS) to guide it in deciding whether to commence rulemaking to implement Alternative B. The EIS process requires considerable agency effort and expenditure and provides for substantial public involvement. If the Service determines that Alternative B will not significantly affect the environment, then it will issue a finding of no significant impact (FONSI) and proceed with the rulemaking process with no further NEPA analysis. Either way, you can probably count on further controversy and litigation. PWC use on public waters is a very contentious issue, as you may have gathered.

I hope this information is useful to you. This is a fascinating issue and I would be happy to do

more research on any aspect of it, or on any other topic. Thank you for bringing your question to the Legal Program.

Sincerely,

Josh Clemons
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Mississippi-Alabama Sea Grant Legal Program

cc: LaDon Swann, Mississippi-Alabama Sea Grant Consortium
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