The National Park Service's Proposed Ban: A New Approach to Personal Watercraft Use in the National Parks

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THE NATIONAL PARK SERVICE'S PROPOSED BAN: A NEW APPROACH TO PERSONAL WATERCRAFT USE IN THE NATIONAL PARKS

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Personal watercraft, with their capacity for high speed and easy maneuverability, generate considerable safety and environmental concerns at the national, state, and local levels. These vessels, more commonly known as jet skis and waverunners, are currently present in thirty-two of the eighty-seven units of the National Park System that allow motorized boating. Responding to high accident rates as well as to harms caused to aquatic wildlife and vegetation by the vessels, the National Park Service proposed a general ban on personal watercraft within units of the National Park System. The proposed ban is the first comprehensive solution to personal watercraft use on the national level. It is expected to be finalized sometime in the year 2000. This Comment suggests that such a ban is both legal and desirable. It also suggests that exemptions from the ban should be granted on a very limited basis.

INTRODUCTION

Personal watercraft (PWC), more commonly known as jet skis and waverunners, are increasingly common sights at National Park System units (System units) which accommodate motorized boating.1 Considering that there are currently more than one million PWC in operation with estimated sales of 250,000 vessels a year, this increase is not surprising.2 Concurrent with the increase in PWC use in national parks is the rising number of visitors to System units, leading to inevitable

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conflicts over competing uses. In addition, environmentalists and members of the public continue to voice concerns about potentially severe safety and environmental problems caused by PWC. Among the most frequently cited environmental problems are damage to shallow-water aquatic vegetation, wildlife "flight" caused by noise emitted by the vehicles, and water pollution due to the discharge of oil and gas mixtures from PWC engines.

In response to these conflicts and concerns, the National Park Service (NPS)—the federal agency charged with managing the National Park System (System)—proposed a general ban on PWC use in System units on September 15, 1998. According to the proposed rule, PWC will be banned from most System units. In those units, NPS could only authorize PWC use on a unit-by-unit basis by passing special regulations which appear in the Federal Register. Thirteen System units would be permitted to forego this Federal Register rule-making and utilize more locally-based procedures to authorize PWC use. While the PWC industry and PWC users criticize the proposed rule as overprotective and beyond the authority of NPS, environmentalists and other members of the public applaud the agency's efforts.

As of the date of publication of this Comment, the proposed rule had not yet been finalized, but final approval is expected sometime in the year 2000.

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8 See id. at 49,313.

9 See id. An additional twelve units will be able to use the locally-based procedures for two years after the proposed rule is finalized. See id. The thirteen units discussed in the text are allowed to continue PWC use for two years following final rule publication. See id.


This Comment examines the legality and desirability of the NPS System-wide ban on PWC use. Section I outlines the management authority of NPS, including its balancing of competing visitor uses, its reconciliation of dual statutory mandates, and the interaction between the National Park Service Act of 1916 (Organic Act) and individual System units' enabling legislation. Section II provides a brief overview of PWC characteristics and their effects. Section III summarizes the current status of PWC law, primarily at the federal level. Section IV discusses the proposed rule in more detail by highlighting its text and NPS's stated reasoning for its provisions.

Section V suggests that the NPS System-wide ban is both legal and desirable because it is a reasonable statutory interpretation of the Organic Act. Section V also recommends that NPS use extreme caution in foregoing Federal Register rulemakings in the case of the thirteen exempted units in the proposed rule.

I. THE NATIONAL PARK SYSTEM

A. The National Park Service Act of 1916 and Subsequent Amendments

NPS manages the more than 370 System units, ranging from parks to recreation areas to seashores, that currently comprise the System.12 The System is the largest, most complex, and most specific system of government preserves in the world.13 In 1916, Congress passed the Organic Act and created NPS within the Department of the Interior to:

promote and regulate the use of the Federal areas known as national parks . . . by such means and measures as conform to the fundamental purpose of the said parks . . . which purpose is to conserve the scenery and the natural and historic objects and the wildlife therein to provide for the enjoyment

12 See National Park Service, Designation of National Park System Units (visited Jan. 2, 1999) <http://www.nps.gov/legacy/nomenclature.html> [hereinafter Designation]. There are numerous designations within the National Park System, many of which describe the use and/or purpose of a particular unit. See id. For example, a “national park” usually refers to large natural places having a wide variety of attributes, including historic assets, while a “national recreation area” may emphasize water-based recreation or function as an urban park that combines scarce open spaces with the preservation of significant historic resources to provide outdoor recreation for large numbers of people. See id.

of the same in such manner and by such means as will leave
them unimpaired for the enjoyment of future generations.\textsuperscript{14}

Historical accounts of the Organic Act point to a myriad of ex-
planations for the creation of NPS, including the desire on the part of
the railroad industry to preserve magnificent scenery along their
routes.\textsuperscript{15} The railroad industry intended the preservation to promote
tourism and to prevent haphazard development and other invasive
commercial uses that could discourage the American public from
traveling to these majestic areas.\textsuperscript{16} In addition to profit motives, the
possibility of using park units to teach the public about nature, geol-
yogy, fossils, or sedimentation also motivated the creation of NPS.\textsuperscript{17}
Regardless of the exact motivation for the System, rhetoric urging its
development painted national parks as the "nation's playgrounds" or
"nature's cathedrals," capable of instilling patriotism in the American
public.\textsuperscript{18}

In what would be the beginning of an ongoing debate about
whether the fundamental purpose of national parks was "preserva-
tion" or "use," Franklin Lane, Secretary of the Interior in 1918, inter-
preted the Organic Act's language as charging NPS with a dual man-
date.\textsuperscript{19} Under that mandate, NPS was to maintain the national parks
in an "absolutely" unimpaired form for future generations while si-
multaneously providing the public with opportunities to enjoy the
parks through individual pursuits.\textsuperscript{20}

Congress authorized NPS to fulfill its dual mandate through rules
and regulations promulgated by the Secretary of the Interior.\textsuperscript{21} NPS's

\textsuperscript{14} 16 U.S.C. § 1 (1994). Prior to the successful passage of the Organic Act in 1916,
Congress struggled for six years to establish some type of bureau to efficiently administer
the eleven national parks then in existence and to enable the American public to expe-
rience their natural wonders. See Winks, supra note 13, at 585–87. The preamble cited in the
text (written by landscape architect Frederick Law Olmsted, Jr.) and the remaining two
and a half pages of the Organic Act were the result of the 64th Congress's decision to
sketch the System in very general terms. See id. at 595–96. This approach avoided previous
pitfalls of failed national park legislation, such as disagreements about whether a fee
should be charged to Americans entering units in automobiles. See id. at 595.

\textsuperscript{15} See Richard West Sellars, Preserving Nature in the National Parks: A His-
tory 9–10 (1997).

\textsuperscript{16} See id.

\textsuperscript{17} See Winks, supra note 13, at 596.

\textsuperscript{18} See id. at 585–87 (quoting President William Howard Taft's 1912 comments on the
importance of national parks).

\textsuperscript{19} See Ann E. Lane, Scenic Air Tours Over Our National Parks: Exploitation of Our National

\textsuperscript{20} See id.

authority includes establishing regulations “concerning boating and other activities on or relating to waters located within areas of the National Park System.” The nature of NPS rules and regulations varies: some are very broad and apply System-wide, while others are very specific and pertain only to particular System units.

Since 1916, two series of Organic Act amendments extended the discussion about the management role of NPS. The first series of amendments was included in the General Authorities Act of 1970. The amendments declared that, although individual park units were distinct in character, they were “united ... into one national park system as cumulative expressions of a single national heritage; [and] that ... these areas derive increased national dignity and recognition of their superb environmental quality through their inclusion jointly with each other in one national park system.” The amendments also directed that, except for statutes specifying treatment for particular park units, laws pertaining to park administration should be consistently applied to all units throughout the System. A System unit’s designation as a park, monument, or recreation area was irrelevant.

Legislative history accompanying the amendments acknowledged that the concept of national parks had broadened from natural and scientific areas to include battlegrounds and historic locations, as well as outdoor recreational areas. Recognizing that the new and expanded park uses could pose threats to the natural resources of the System units, Congress proclaimed NPS’s objective to be conserving and protecting the parks for the edification and enjoyment of the American public. Congress emphasized that despite the diversity of the System, all laws relating to its management should be applied uniformly.

Courts and commentators characterize the 1970 amendments as a disapproval of NPS management policies that, at the time,

22 *Id.* § 1a-2(h).
23 See Shaw, *supra* note 3, at 800.
24 See *id*.
26 See 16 U.S.C. § 1a-1.
27 *Id*.
28 See *id*., § 1c.
29 See *id*.
31 See *id*. at 3785–87.
32 See *id*. 

divided park administration into three management categories—natural, historical, and recreational—with policies contingent upon the nature of the areas and their historical uses.53

In 1978, Congress again amended the Organic Act and discussed how NPS was to best achieve its underlying goals.54 These amendments provided in part that "the authorization of activities shall be construed and the protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the National Park System."55 The amendments also included what is widely known today as the "exceptions clause," a declaration that System units not be managed in derogation of the values and purposes for which they were established "except as may have been or shall be directly and specifically provided by Congress."56

Congress passed this series of amendments as a rider to the Redwood National Park Expansion Act, declaring that the promotion and regulation of the System must be consistent with the Organic Act, and that management of areas within the System should not compromise their resource values unless specifically provided by Congress.57 This declaration, in turn, led Congress to conclude that the Secretary of the Interior was to afford the highest standard of protection and care to the lands within Redwood National Park.58 More broadly, the United States Senate directed that "the Secretary has an absolute duty, which is not to be compromised, to fulfill the mandate of the 1916 Act [and] to take whatever actions and seek whatever relief as will safeguard the units of the National Park System."59

Accompanying the House Report was the favorable report of the Department of the Interior: a report in which then-Secretary of the

53 See, e.g., Michigan United Conservation Clubs v. Lujan, 949 F.2d 202, 204–05 (6th Cir. 1991) (noting that NPS was rethinking categorical management policies in light of 1970 amendments); Michael A. Mantell & Philip C. Metzger, Managing National Park System Resources: A Handbook on Legal Duties, Opportunities, and Tools 13–14 (Michael A. Mantell ed., 1990). The 1970 congressional amendments eventually led NPS to discontinue its categorical management policies and to conclude that the System should be administered as an integrated whole unless provided otherwise by a System unit's enabling legislation. See Mantell & Metzger, supra, at 13–14.


55 Id.

56 Id.


58 See id.

Interior Andrus supported the Organic Act amendment. Secretary Andrus reasoned that it was necessary to further define the duties of the Secretary of the Interior and the limitations in the administration of the System, and underscored that these duties and limitations must be consistent with the "high purposes" established in the 1916 Organic Act. There appears to be a general consensus that the 1978 amendment was intended to strengthen the Secretary of the Interior's ability to protect national park resources.

B. Park Unit Enabling Legislation

A natural, historical, or recreational area becomes a unit of the National Park System by an act of Congress, more commonly known as enabling legislation, or by presidential proclamation through an executive order. Typical enabling legislation explains the purpose of a particular System unit, sets forth the boundaries of a System unit, and dictates any other operating conditions that may apply to it. As part of its statement of purpose, certain uses may be specified, including a provision allowing the continuation of preexisting uses (e.g. hunting or waterskiing). In the case of recreation areas, NPS and System unit superintendents may allow a wider range of activities, such as winter or water sports, depending on the location and nature of the System unit.

As provided in both the 1970 and 1978 amendments to the Organic Act, NPS must manage each System unit in accordance with its enabling legislation. The enabling legislation—as an example of a direct and specific mandate from Congress—is the only acceptable circumstance under which NPS can activate the exceptions clause and derogate the high public value and integrity of the System.

Following are some excerpts from System unit enabling legislation particularly relevant to this Comment. In establishing Padre Island National Seashore, Congress named its goal as saving and pre-

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40 See H.R. REP. No. 95-581, at 33.
41 See id.
42 See e.g., MANTELL & METZGER, supra note 33, at 15; Winks, supra note 13, at 578–79.
44 See MANTELL & METZGER, supra note 33, at 16; Criteria for Parklands, supra note 43.
45 See MANTELL & METZGER, supra note 33, at 16; Criteria for Parklands, supra note 43.
46 See MANTELL & METZGER, supra note 33, at 16; Criteria for Parklands, supra note 43.
48 See id.
serving—for purposes of public recreation, benefit, and inspiration—a portion of undeveloped and diminishing seashore. 49 After describing its boundaries, the Interior Secretary’s power to acquire property within the System unit, and other administrative responsibilities, Congress also provided that NPS should manage Padre Island in light of the Organic Act’s mandate. 50 However, the System unit’s enabling legislation qualified NPS’s adherence to the mandate when it stated that “authority otherwise available to the Secretary for the conservation and management of natural resources may be utilized to the extent . . . [that] such authority will further the purposes of sections [of this enabling legislation].” 51 There is no explicit authorization for preexisting uses in the legislation. 52

The System unit enabling legislation for Bighorn Canyon National Recreation Area followed a similar format. 53 In addition to providing for public outdoor recreation use and enjoyment, Bighorn was established for the preservation of the scenic, scientific, and historic features contributing to the enjoyment of the waters. 54 More specifically, it authorized the Crow Indian Tribe to develop and operate water-based recreational facilities, including landing ramps, boat-houses, and fishing facilities. 55

Finally, the System unit enabling legislation for Amistad National Recreation Area also reflected a dual mandate of public outdoor recreation use and enjoyment on the one hand, and protection of scenic, scientific, and cultural resources on the other. 56 Like Padre Island, the enabling legislation also directed NPS to administer the System unit in a manner consistent with the Organic Act’s dual mandate. 57 The Secretary of the Interior may also utilize statutory authority to protect natural and cultural resources. 58 Hunting and fishing are permitted in Amistad. 59

49 See id. § 459d.
50 See id. §§ 459d, d-1, d-4.
51 Id. § 459d-4.
53 See id. § 460t.
54 See id.
55 See id. § 460t-1(c).
56 See id. § 460fff(a).
58 See id. § 460fff-1(a).
59 See id. § 460fff-1(d)(1).
C. Judicial Interpretations

1. The Scope of NPS's Authority to Regulate

Although the 1916 Organic Act expressly delegated rulemaking authority to NPS, it is otherwise silent about how the agency should implement the Act's preservation and use mandates.\(^{60}\) In reviewing NPS regulations, courts generally afford the agency broad discretion in management decisions, analyzing rules to ensure that they are not arbitrary, capricious, or manifestly contrary to the statute.\(^{61}\) This deferential review has led courts to uphold restrictions on, and allowances for, visitor uses in the System so long as the decision has a rational basis in the Organic Act and accompanying legislative histories, System unit enabling legislation, and/or appropriate regulations.\(^{62}\)

In addressing challenges to NPS's interpretation of the Organic Act, courts generally apply the two-part analysis developed in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*.\(^{63}\) First, a reviewing court employs traditional tools of statutory construction to examine whether Congress has unambiguously addressed the issue in question.\(^{64}\) If it has, effect must be given to Congress's clear intent.\(^{65}\) If Congress has not addressed the issue or is ambiguous about its intent, a court must defer to the agency's expertise so long as the agency's interpretation is based on a permissible construction of the statute.\(^{66}\) There may be more than one permissible construction of a statutory mandate.\(^{67}\)

Courts have relied upon this two-part analysis to uphold a "closed-unless-designated-open" approach to off-road bicycling in Sys-

\(^{60}\) See id. § 3 (providing that "the Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service."); Bicycle Trails Council v. Babbitt, 82 F.3d 1445, 1451 (9th Cir. 1996).

\(^{61}\) See 5 U.S.C. § 706(2)(A) (1994). Since the Organic Act does not provide for or prohibit judicial review, the Administrative Procedure Act governs standards of reviewability. See id.

\(^{62}\) See Bicycle Trails Council, 82 F.3d at 1451.


\(^{65}\) See id.

\(^{66}\) See id.

\(^{67}\) See Bicycle Trails Council, 82 F.3d at 1452.
tem units. It was also used to reject a challenge to NPS's decision to prohibit hunting and trapping in the System except where specifically contemplated by Congress. In both contexts, reviewing courts relied on the language of the Organic Act and its amendments as well as legislative histories to arrive at their conclusions.

One issue that is embedded in most challenges to NPS's statutory interpretations in the context of prohibiting or allowing visitor activities is the perceived conflict between the Organic Act's "preservation" and "use" mandates. Generally, it appears that the "preservation" mandate is deemed superior to the "use" mandate. Again, the language of the Organic Act, its amendments, and legislative histories, as well as the interaction between the Organic Act and subsequent unit enabling legislation, are all relied upon to draw this conclusion. Such a finding provides a solid foundation on which courts then base, at least in part, approval of NPS restrictions upon visitor uses.

Despite this consensus, however, some courts appear to be reluctant to elevate the "preservation" mandate above the "use" mandate. Rather, courts seem to inquire whether the proposed prohibition (or allowance) is a reasonable accommodation of conflicting mandates.

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68 See id. at 1453–54. The challenged regulation read, in part: "use of a bicycle is prohibited. . . . Routes may only be designated for bicycle use based on a written determination that such use is consistent with the protection of the park area's natural, scenic and aesthetic values, safety considerations and management objectives and will not disturb wildlife or park resources." 36 C.F.R. § 4.30 (1998).


70 See Bicycle Trails Council, 82 F.3d at 1452–54 (reasoning the Organic Act and the 1970 and 1978 amendments clearly intended that NPS manage all System areas uniformly with the fundamental goal as resource protection, or, alternatively, even if Congress was ambiguous about off-road bicycling, reasonable statutory interpretation permitted a prohibition); Potter, 628 F. Supp. at 909–10 (citing Congress's failure to explicitly allow hunting and trapping in the Organic Act, but stating that if particular System unit enabling legislation expressly authorized it, NPS could permissibly interpret the Organic Act as prohibiting hunting and trapping generally).

71 See, e.g., Bicycle Trails Council, 82 F.3d at 1452; Potter, 628 F. Supp. at 909–10; Southern Utah Wilderness Alliance v. Dabney, 7 F. Supp. 2d 1205, 1211 (D. Utah 1998).

72 See, e.g., Bicycle Trails Council, 82 F.3d at 1452; Potter, 628 F. Supp. at 909–10.

73 See, e.g., Bicycle Trails Council, 82 F.3d at 1452–53 (citing language and legislative history of 1970 and 1978 amendments to reason safeguarding the integrity and resource values of the System is NPS' overarching management concern); Potter, 628 F. Supp. at 909–10 (highlighting Organic Act's referencing a single purpose—conservation—in support of general ban on hunting and trapping).

74 See, e.g., Bicycle Trails Council, 82 F.3d at 1452–53; Potter, 628 F. Supp. at 909–10.

75 See, e.g., Wilderness Pub. Rights Fund v. Kleppe, 608 F.2d 1250, 1254 (9th Cir. 1979); Southern Utah Wilderness Alliance, 7 F. Supp. 2d at 1211–12.

76 See Kleppe, 608 F.2d at 1254 (stating that where several administrative solutions exist for a problem, courts will uphold any one with a rational basis); Southern Utah Wilderness
An accommodation is reasonable unless a statute or legislative history indicates it is not one Congress would have sanctioned. Also relevant to a balancing of the two mandates are the nature and extent of actual or potential damage to a System unit's natural resources and NPS's efforts to mitigate such damage. This approach has led courts, for example, to uphold NPS decisions allowing snowmobiling and off-road vehicles in particular System units, despite System-wide bans, because actual or potential damage was minimal and temporary.

Two other closely-related issues that are often discussed by courts in deciding whether NPS's actions are arbitrary and capricious are the sufficiency of the administrative record and/or the adequacy of the agency explanation. Although deferential to agency decisions under the arbitrary and capricious standard, the agency decision will be held invalid if the agency has offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. Essentially, the evidence in the administrative record needs to provide a rational foundation upon which NPS may base its action.

In practice, courts seem reluctant to strike down NPS's record or explanation as unsatisfactory. For example, despite both a Fish and Wildlife Service biological opinion that concluded that snowmobiling was not by itself harmful to wildlife and enabling legislation that permitted the activity, anecdotal evidence was enough to support NPS's decision to prohibit snowmobiling in a particular System unit. In another decision, a court found that NPS's reference to "public safety, resource protection, and the avoidance of visitor conflicts" was an

Alliance, 7 F. Supp. 2d at 1211 (stating that any reasonable accommodation of conflicting mandates is permissible).

77 See Southern Utah Wilderness Alliance, 7 F. Supp. 2d at 1211.

78 See Voyageurs Region Nat'l Park Ass'n v. Lujan, 966 F.2d 424, 427 (8th Cir. 1992) (finding snowmobile use within a corridor of a national park acceptable because of evidence that snowmobiling would not permanently change area); Southern Utah Wilderness Alliance, 7 F. Supp. 2d at 1211–12 (allowing off-road vehicles in part of System units where unique resources would not be severely or permanently impaired).

79 See Voyageurs Region Nat'l Park Ass'n, 966 F.2d at 427; Southern Utah Wilderness Alliance, 7 F. Supp. 2d at 1211–12.

80 See Mausolf v. Babbitt, 125 F.3d 661, 669–70 (8th Cir. 1997); Bicycle Trails Council v. Babbitt, 82 F.3d 1445, 1455–56 (9th Cir. 1996).


82 See id.

83 See id. at 669–70; Bicycle Trails Council, 82 F.3d at 1455–56.

84 See Mausolf, 125 F.3d at 669–70.
adequate explanation of the agency's decision to ban off-road bicycling throughout the System.85

2. The Scope of the Exceptions Clause

One of the principal ways NPS's broad authority to regulate can be harnessed is if a System unit's enabling legislation specifically provides for, or prohibits, a particular use.86 Such a provision fulfills the directive in Section One of the Organic Act that the System shall not be managed in "derogation of the values and purposes for which these various areas have been established, except as may have been or shall be directly and specifically provided by Congress."87 Although there is unquestioning adherence to a congressional mandate calling for a particular use, courts continue to grapple with questions of how narrow a congressional mandate must be to fall within the exceptions clause and how to handle the situation of conflicting mandates within enabling legislation.88

Relevant case law seems to indicate that the exceptions clause is only triggered if enabling legislation explicitly authorizes a particular activity or pertinent legislative history mentions it.89 Courts appear to reject arguments that an activity in question is a subset of a previously authorized activity.90 Similarly, if enabling legislation other than the legislation in question has explicitly authorized an activity, the exceptions clause does not apply.91 One of the strongest examples of this reasoning is Michigan United Conservation Clubs v. Lujan, a Sixth Circuit case which rejected the claim that enabling legislation of two national lakeshores which explicitly permitted hunting also implicitly permitted trapping.92

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85 See Bicycle Trails Council, 82 F.3d at 1456; infra notes 148–50 and accompanying text (discussing adequacy of the National Oceanic and Atmospheric Administration's concise and general statement explaining its PWC ban in a marine sanctuary).
87 Id.
89 See Michigan United Conservation Clubs, 949 F.2d at 207–08.
90 See id.
91 See id. at 208.
92 See 949 F.2d at 203–04. Trapping, like hunting, is prohibited generally in all units of the National Park System. See 36 C.F.R. § 2.2(b) (1998). In this case, the court relied on National Rifle Ass'n v. Potter, a case cited throughout this Comment, to deny that trapping is a subset of hunting, reasoning that because Congress has generally provided for trapping
Statutory language appears to be the key when analyzing enabling legislation that cites multiple purposes.\textsuperscript{93} If enabling legislation discusses preserving a System unit’s scenic and scientific natural resources while simultaneously maintaining that the unit be used for recreational opportunities, such dual mandates appear to limit reliance on the exceptions clause.\textsuperscript{94} Also preventing the complete derogation of resource values in favor of recreational pursuits is a direction in System unit enabling legislation to administer the unit in a manner consistent with Section One of the Organic Act and, impliedly, its focus on resource protection.\textsuperscript{95}

The Ninth Circuit case of Bicycle Trails Council v. Babbitt illustrates these principles of construction.\textsuperscript{96} In addition to deciding whether a general ban on off-road bicycling was reasonable, the Ninth Circuit also addressed whether NPS’s proposed off-road bicycle trail plan in the Golden Gate National Recreation Area (GGNRA) was reasonable.\textsuperscript{97} The court found that the plan was reasonable and rejected the plaintiff’s contention that bicyclists were not given priority as required by enabling legislation.\textsuperscript{98} While acknowledging that recreational issues were the predominant concern of NPS and GGNRA officials, language in GGNRA enabling legislation, which called for preserving the area as much as possible in its natural setting, prevented a complete derogation of any interest other than recreational use.\textsuperscript{99} In addition, the GGNRA Act provided that NPS should administer the area in accordance with Section One of the Organic Act and its emphasis on natural resource protection.\textsuperscript{100}

D. NPS Management Policies

NPS Management Policies function as the agency’s internal guidelines for administrative decisions.\textsuperscript{101} In addition to covering such

\textsuperscript{93} See Bicycle Trails Council, 82 F.3d at 1461 (citing language of unit enabling legislation to reach conclusion).

\textsuperscript{94} See id.

\textsuperscript{95} See id.

\textsuperscript{96} See id.

\textsuperscript{97} See id. at 1457-58.

\textsuperscript{98} See Bicycle Trails Council, 82 F.3d at 1459–61.

\textsuperscript{99} See id. at 1461.

\textsuperscript{100} See id.

\textsuperscript{101} See Shaw, supra note 3, at 800. There is some controversy over whether the NPS Management Policies have the force of law. See id. (noting cases in which the court has
specific topics as land management, natural resource management, and visitor use, the policies outline three broad principles articulated by then-Secretary of the Interior Franklin K. Lane to the first director of NPS. The three principles provide: (1) the national parks must be maintained in absolutely unimpaired form for the use of future generations as well as those of our own time; (2) the national parks must be set apart for the use, observation, health, and pleasure of the people; and (3) the national interest must dictate all decisions affecting public or private enterprise in the parks.

In the “Introduction” to these policies, NPS addresses the tension between Congress’s mandate to conserve resources while also providing for visitor enjoyment. Despite this conflicting mandate, NPS permits park superintendents, if and when there is a reasonable basis to believe a resource is or will become impaired, to temporarily close a specific area or otherwise place limitations on public use.

In the situation of recreational areas, NPS manages System units so as to protect park resources, provide for public enjoyment, promote public safety, and minimize conflicts with other visitor activities. NPS seeks consistency in recreation management policies and procedures, to the extent practicable, while still acknowledging that differences in individual park enabling legislation may mean that an activity entirely appropriate for one location may be inappropriate if conducted in another location. Unless a use is mandated by statute, NPS will not allow a recreational activity in a System unit if it has an unacceptable impact on System unit resources or natural processes, if it is inconsistent with the System unit’s enabling legislation or proclamation, or if it results in a derogation of the values or purposes for which the System unit was established.

appeared to decide both ways). None of the cases surveyed for this Comment explicitly address this issue, but several of them do cite NPS Management Policies. See, e.g., Michigan United Conservation Clubs v. Lujan, 949 F.2d 202, 204–05 (6th Cir. 1991).


103 See id.

104 See id.

105 See id.


107 See id.

108 See id.
II. THE CHARACTERISTICS AND EFFECTS OF PERSONAL WATERCRAFT

PWC are a type of recreational boat commonly known as jet skis or waverunners.\textsuperscript{109} PWC are powered by two-cycle gasoline engines and in-board motors, and are less than sixteen feet in length.\textsuperscript{110} They feature both sit-down and stand-up styles and include one-, two-, and three-person models.\textsuperscript{111} The PWC industry is the fastest growing segment of marine business and represented thirty-six percent of all new powerboat sales in 1997.\textsuperscript{112} The United States Coast Guard estimates that more than one million PWC were in operation during the 1997 boating season.\textsuperscript{113} Between 1987 and 1997, PWC annual sales increased from 29,000 vessels to more than 176,000 vessels.\textsuperscript{114} According to industry statistics, most PWC owners are male, in their early forties, and previous owners of powerboats.\textsuperscript{115}

One of the biggest concerns about PWC use shared by government agencies, the boating industry, and members of the general public is the PWC safety record. A recent study conducted by the National Transportation Safety Board determined that the number of PWC fatalities more than tripled between 1993 and 1997.\textsuperscript{116} In addition, the leading cause of death in PWC accidents is blunt force trauma; in other recreational boating accidents the leading cause of death is drowning.\textsuperscript{117} According to United States Coast Guard (USCG) reports, PWC account for eleven percent of all watercraft registered in the United States, but are involved in thirty-five percent of all boating accidents.\textsuperscript{118}

Also of concern to the public and environmental groups alike, is the destruction PWC cause to water, aquatic vegetation, and wildlife.

\textsuperscript{109} See The Personal Watercraft Story (visited Jan. 2, 1999) <http://www.pwia.org/Abo_PWC.htm> [hereinafter Personal Watercraft Story]. There are five companies active in the PWC market: Kawasaki, Yamaha, Bombardier Recreational Products, Arctic Cat, and Polaris. See id. Arctic Cat and Polaris are also known as "giants" in the snowmobiling industry. See id.

\textsuperscript{110} See id.

\textsuperscript{111} See id.

\textsuperscript{112} See Elliott Almond, Making Waves, SEATTLE TIMES, July 23, 1998, at C1; Personal Watercraft Story, supra note 109.

\textsuperscript{113} See Personal Watercraft Story, supra note 109.

\textsuperscript{114} See id.

\textsuperscript{115} See id.

\textsuperscript{116} See NATIONAL TRANSP. SAFETY Bd., NTSB/SS-98/01, PERSONAL WATERCRAFT SAFETY V (1998). In 1993, there were twenty-six PWC fatalities, and in 1997 there were eighty-three PWC fatalities. See id.

\textsuperscript{117} See id.

\textsuperscript{118} See Almond, supra note 112.
PWC two-stroke engines not only pollute water and air by discharging twenty to forty percent of consumed fuel into their environs, but also emit a loud noise that disturbs fish, wildlife, and other recreationists.\(^{119}\) In addition, the shallow-draft design of PWC enables the vessels to operate in water less than one foot deep, allowing PWC to sweep close enough to shore to disrupt bird and wildlife habitats.\(^{120}\) Operation in shallow water may also stir up the water’s floor, causing cloudiness and limiting light penetration and oxygen needed by fish and bird populations.\(^{121}\) Shallow water PWC use also threatens sea grass.\(^{122}\)

**III. THE CURRENT STATUS OF PERSONAL WATERCRAFT LAW**

**A. Federal Law**

Turning from PWC characteristics and effects to the current law governing the vessels, PWC are regulated by USCG as Class A vessels.\(^{123}\) Under this classification, which also applies to motorboats in general, USCG sets forth uniform minimum requirements such as life preserver and fire extinguisher equipment standards.\(^{124}\) In the Organic Act, Congress qualified NPS’s ability to regulate the waters within the System by directing that “any regulations adopted pursuant to this subsection shall be complementary to, and not in derogation of, the authority of the United States Coast Guard to regulate the use of waters subject to the jurisdiction of the United States.”\(^{125}\)

Legislative history accompanying the amendment extending NPS’s authority to water indicates that the purpose of NPS’s regula-

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\(^{122}\) See id. The Personal Watercraft Industry Association disputes and downplays possible damage to seagrasses, marine mammals, fish, and other aquatic life. See PWIA: Environmental Protection (visited Jan. 2, 1999) <http://www.pwia.org/Env_PWCI.htm>. The Association maintains that PWC will lose power if operated in areas containing vegetation and sediment, as these materials will be drawn into the jet pumps powering the vessels. See id.


\(^{124}\) See id. at §§ 24.10–17, 25.25, 25.30.

tory power in this sphere was to protect natural, wildlife, cultural, and historical resources in light of significant increases in recreational boating.\footnote{126 See H.R. REP. No. 94–1569, 13 (1976), reprinted in 1976 U.S.C.C.A.N. 4290, 4298–99.} The legislative history also illustrates that USCG, while agreeing that NPS should have some authority to regulate water, wanted to retain ultimate authority over issues such as boat design, safety and numbering, and vessel documentation and inspection requirements.\footnote{127 See id. at 24.}

Although the proposed ban on PWC marks the first time NPS has addressed PWC use System-wide, the agency or individual System unit superintendents banned or severely restricted the use of these motorized vehicles in at least seven System units prior to the rulemaking.\footnote{128 See NATIONAL PARK SERV., U.S. DEP’T OF THE INTERIOR, NATIONAL PARK SERVICE ANNOUNCES PROPOSED RULE FOR PERSONAL WATERCRAFT USE IN PARKS (Sept. 15, 1998). PWC have been banned at the following units: Yellowstone National Park, Canyonlands National Park, Everglades National Park, Glacier National Park, Ozark National Scenic Riverways, and Golden Gate National Recreation Area. See id.; U.S. DEP’T OF THE INTERIOR, THE GOLDEN GATE NATIONAL RECREATION AREA TO PROHIBIT USE OF JET SKIS (PERSONAL WATERCRAFT) IN PARK WATERS EFFECTIVE NOVEMBER 1 (Oct. 28, 1998).} For example, NPS banned PWC use in Everglades National Park because activities such as waterskiing and the use of PWC were incompatible with preserving serenity and other “wilderness” qualities.\footnote{129 See Everglades National Park Special Regulations, 59 Fed. Reg. 58,781, 58,782 (1994). The ban was promulgated under 36 C.F.R. section 1.5, which authorizes closures and public use limits based on a determination that action is necessary for “the maintenance of public health and safety, protection of environmental or scenic values, protection of natural or cultural resources, . . . [or] implementation of management responsibilities.” See 36 C.F.R. § 1.5 (1998).} Such activities, NPS reasoned, undercut the unit’s purpose of protecting a unique natural system.\footnote{130 See id.}

NPS also banned PWC use on Lake Crescent located in Olympic National Park in Washington State.\footnote{131 See National Park Service, Appendix A: Administrative Record Detailing the NPS Decision to Ban the Use of Personal Watercraft on Lake Crescent Olympic National Park, Washington (visited Jan. 1, 1999) <http://www.nps.gov/htdocs4/olym/lceis/lca.html> [hereinafter NPS Appendix A].} Although NPS acknowledged that current PWC use was low (but increasing), it based its decision on conflicts with other visitor uses caused by the crafts, including their frequent proximity to boats and the shoreline and the noise emitted by their engines.\footnote{132 See id.} NPS interpreted this type of by-product as a direct contravention of the unit’s purpose as set forth in the Olympic Na-
tional Park Master Plan. The Plan portrayed the unit as providing "special peace and renewal of the human spirit that undeveloped, unspoiled land can offer. . . ."\(^\text{134}\)

Adverse environmental impacts also motivated the ban.\(^\text{135}\) PWC use displaced Lake Crescent wildlife, such as river otters and other waterfowl, and threatened shoreline vegetation.\(^\text{136}\) Additionally, NPS cited the discharge of non-combusted oil into the waters of Lake Crescent.\(^\text{137}\)

To date, there has been only one reported case involving a federal agency and a PWC ban. In *Personal Watercraft Industry Ass’n v. Department of Commerce*, the D.C. Circuit confirmed an administrative agency's authority to limit the use of PWC.\(^\text{138}\) The National Oceanic and Atmospheric Administration (NOAA), under authority granted to it by the Secretary of Commerce, promulgated regulations limiting the operation of PWC to four designated zones in the Monterey Bay National Marine Sanctuary (Sanctuary).\(^\text{139}\) The regulation did not restrict the use of other types of vessels used in the Sanctuary.\(^\text{140}\) The plaintiff, an organization representing PWC manufacturers and distributors, challenged the regulation as arbitrary and capricious, alleging it was based on inadequate evidence and that there was no basis for regulating PWC but not other vessels.\(^\text{141}\)

The court rejected this challenge, primarily focusing on NOAA's ability to single-out PWC for different treatment.\(^\text{142}\) It found that NOAA could treat PWC differently because agencies can confront problems one step at a time so long as the treatment is reasonable.\(^\text{143}\) In this case, according to the court, it was reasonable to ban PWC from all but fourteen of the 4000 square nautical miles encompassing the Sanctuary because the craft interfered with the public's recreational safety and enjoyment of the Sanctuary and threatened its flora.
and fauna.\textsuperscript{144} This interference undercut the concept of a sanctuary that encompassed the elements of serenity, peace, and tranquility.\textsuperscript{145}

The \textit{Personal Watercraft} court went on to reason that the distinction NOAA drew between PWC and other vessels was acceptable because of the differences in size and maneuverability of PWC.\textsuperscript{146} The smaller size and greater maneuverability of PWC allowed them to operate closer to shore, in areas of high concentrations of kelp forests, marine mammals, and sea birds which larger, slower crafts could not enter.\textsuperscript{147}

Finally, the D.C. Circuit also rejected the challenger's claim that NOAA did not satisfactorily explain its actions.\textsuperscript{148} The court reasoned that NOAA fulfilled the requirement under the Administrative Procedures Act\textsuperscript{149} to provide a "concise general statement" of the regulation's "basis and purpose" when it highlighted the destruction caused only by PWC and its intention to protect natural resources.\textsuperscript{150}

\section*{B. State and Local Law}

Currently, at least thirty-four states have implemented or are contemplating some type of legislation or regulation specific to PWC use.\textsuperscript{151} Many of these laws impose minimum age, education, and training requirements, as well as wake-jumping and area use restrictions, speed limits, and limitations on night use or required adult supervision.\textsuperscript{152} In addition, some counties and cities have also begun to regulate PWC use along their shorelines.\textsuperscript{153}

\begin{footnotesize}
\textsuperscript{144} See \textit{id.} at 545 (noting the disturbance to sea otters, harbor seals, and the Sanctuary's kelp forests caused by PWC.)
\textsuperscript{145} See \textit{id.}
\textsuperscript{146} See \textit{id.}
\textsuperscript{147} See \textit{id.}
\textsuperscript{148} See \textit{Personal Watercraft Indus. Ass'n, 48 F.3d at 545.}
\textsuperscript{149} See 5 U.S.C. \textsection 553(c) (1994); \textit{Personal Watercraft Indus. Ass'n, 48 F.3d at 545.}
\textsuperscript{150} See 5 U.S.C. \textsection 553(c); \textit{Personal Watercraft Indus. Ass'n, 48 F.3d at 545.}
\textsuperscript{152} See \textit{id.}
\textsuperscript{153} See, e.g., Sward \& Doyle, \textit{supra} note 10 (citing San Francisco Board of Supervisors-imposed ban on jet skis within 1200 feet of the city's shoreline). Increased PWC regulation on state and local levels has resulted in a number of lawsuits questioning the regulatory scope of states, counties, and/or cities in the PWC context. See \textit{generally} Buckley v. City of Redding, 66 F.3d 188 (9th Cir. 1995); Kaneohe Bay Cruises, Inc. v. Hirata, 861 P.2d 1 (Haw. 1993).
IV. THE NPS PROPOSED BAN ON PERSONAL WATERCRAFT

A. Text of the Proposed Rule

On September 15, 1998, NPS announced a System-wide ban on PWC. In its proposed rule, it defines PWC in part as

a vessel, usually less than 16 feet in length, which uses an in-board, internal combustion engine powering a water jet pump as its primary source of propulsion. The vessel is intended to be operated by a person or persons sitting, standing or kneeling on the vessel, rather than within the confines of the hull.

The proposed rule mandates that the use of PWC is allowed only in designated areas within the System.

Generally, designation of areas allowing PWC use requires the promulgation of a special regulation. However, thirteen units may forego this procedure and authorize PWC use under the procedures of 36 C.F.R. sections 1.5 and 1.7. For the thirteen specified units, the provisions of the proposed rule do not apply until two years after a final regulation is issued. NPS also provides a two-year grace period for an additional twelve park units, if appropriate, to promulgate special regulations to designate use areas for PWC. During the two years, these twelve units can authorize PWC use under the procedures of 36 C.F.R. sections 1.5 and 1.7.

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155 Id.
156 See id.
157 See id. at 49,316.
158 See id. The thirteen units are: Amistad, Bighorn Canyon, Chickasaw, Curecanti, Gateway, Glen Canyon, Golden Gate, Lake Mead, Lake Meredith, Lake Roosevelt, Whiskeytown-Shasta-Trinity National Recreation Areas, and Gulf Islands and Padre Islands National Seashores. See id.
159 See 63 Fed. Reg. at 49,316.
160 See id. The additional twelve areas are: Assateague Island, Cape Canaveral, Cape Cod, Cape Hatteras, Cape Lookout, Cumberland Island, and Fire Island National Seashores; Indiana Dunes, Pictured Rocks, and Sleeping Bear Dunes National Lakeshores; and Delaware Water Gap and Chattahoochee River National Recreation Areas. See id.
161 See id. at 49,316.
B. Background

NPS invoked its regulatory powers and responsibilities under the Organic Act's mandate to propose the System-wide ban.\(^\text{162}\) In the supplementary information accompanying the proposed rule, NPS characterized its approach to PWC use in the System as conservative.\(^\text{163}\) NPS presumes, as a general matter, that PWC use is inappropriate in most units of the System.\(^\text{164}\) NPS based its decision, in part, on safety concerns (particularly the high accident rates of the vessels).\(^\text{165}\)

NPS also cited adverse environmental impacts as a reason for the rule, including the ability of PWC to penetrate aquatic vegetation in shallow areas, elevated noise levels, and discharge of oil and gas mixtures into water.\(^\text{166}\) Wildlife harms included interruption of normal activity and alarm or flight, loss of habitat use, decreased reproductive success, and direct mortality.\(^\text{167}\)

In explaining its decision to regulate PWC but not other conventional watercraft in this manner, NPS made several distinctions.\(^\text{168}\) First, the agency pointed to general differences in design, use, safety record, controversy, and visitor and resource impacts.\(^\text{169}\) Next, NPS distinguished the purpose of PWC, reasoning that while conventional watercraft provide access and enjoyment, PWC are often referred to as "thrill crafts," used only for their excitement value.\(^\text{170}\)

NPS explained its provision of two methods of authorizing PWC use as a recognition that a System unit's enabling legislation, resources and values, other visitor uses, and overall management objectives may make their use appropriate in certain areas.\(^\text{171}\) According to NPS, the first group of thirteen units specified in the rule—which do not have to apply the rule until two years after its final regulation—were all established for water-related recreation and are characterized by substantial motorized use.\(^\text{172}\) In these System units, a park superintendent would be able to use the locally-based procedures authorized in 36 C.F.R. sections 1.5 and 1.7 in order to "maintain[\]
public health and safety, protection of environmental or scenic values, protection of natural or cultural resources, . . . or the avoidance of conflict among visitor use activities.”

However, if opening up a park unit to PWC use would result in a significant alteration in the public use pattern of the park area; adversely affect the park’s natural, aesthetic, scenic, or cultural values; or be highly controversial in nature, the superintendent must elevate the authorization process by participating in a rulemaking published in the Federal Register. To satisfy these locally-based procedures, a superintendent must prepare a written determination, available to the public upon request, justifying the action. A superintendent must also notify the public about the action through posted signs, maps, publication in a local newspaper, or through another appropriate method.

A unit-specific rulemaking through the Federal Register is the process required for all park units besides the thirteen specified by NPS. NPS pointed out that such an approach is similar to approaches taken in regulating activities such as off-road bicycling and snowmobiling. Acknowledging that the promulgation of unit-specific regulations can be time consuming, however, NPS provided twelve System units with a two-year grace period during which the ban would not be effective. All twelve System units are characterized by current PWC use and, according to the NPS, should use the reprieve to develop and finalize special regulations as appropriate. During this two-year period, System unit superintendents can authorize PWC use under the procedures of 36 C.F.R. sections 1.5 and 1.7.

C. Criticism

The Personal Watercraft Industry Association (PWIA), an organization representing manufacturers in the PWC industry, leads the
criticism of the NPS proposed ban on PWC.182 In a document written by Executive Director John Donaldson, PWIA outlined three perceived flaws in the NPS approach.183

First, PWIA argues that NPS should not ban PWC use on a System-wide level.184 PWIA characterizes the System as diverse, with each System unit making a unique contribution.185 The organization advocates a case-by-case examination of the natural resources and visitor expectations of each System unit which has a boat ramp.186 It believes that if a System unit has a tradition of powerboats and accompanying water contact sports, such as water skiing and wake boarding, PWC use is compatible.187

Second, PWIA contends that NPS reneged on its commitment to public participation in its planning process.188 It points to NPS's management policies, which require the agency to involve the public in decision-making about park resources.189 PWIA maintains that NPS should follow these management policies.190

Finally, PWIA criticizes NPS's reliance on a ban to address PWC concerns, arguing that a ban should be a last resort.191 The organization suggests alternatives such as designation of slow-speed, no-wake areas or prohibiting early morning riding as ways to eliminate user conflicts and protect sensitive habitats.192 As a whole, PWIA characterizes the NPS approach as capricious.193

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183 See National Park Service Has Gone Too Far, supra note 10.
184 See id.
185 See id.
186 See id.
187 See id.
188 See National Park Service Has Gone Too Far, supra note 10.
189 See id.
190 See id.
191 See id.
192 See id.
193 See National Park Service Has Gone Too Far, supra note 10.
V. Analysis

A. NPS's Proposed Ban Is a Reasonable Solution to a System-Wide Problem

1. A General PWC Ban Is Appropriate

In deciding how to address increasing PWC use within its System units, NPS opted to implement a System-wide ban, just as it had in the hunting, off-road bicycling, and snowmobiling contexts.194 A System-wide ban is a significant change from its heretofore ad hoc or unit-by-unit approach to PWC management.195 The Organic Act's language and legislative history support the proposed approach, as does relevant case law.196

Both Congress's broad directive to the NPS to "make and publish such rules and regulations . . . necessary or proper for the use and management of the parks . . ." and its description of the System as "cumulative expressions of a single national heritage . . ." illustrate that not only does NPS have the authority to ban PWC from park units in general, but to not do so would risk vitiating Congress's clear intent that NPS adopt uniform management policies.197 This argument is bolstered by legislative history of the amendment, which explicitly rejected the notion that because the System had grown to include recreation areas—the very areas in which PWC use occurs—different management policies were appropriate.198

Case law interpreting the Organic Act, its amendments, and accompanying legislative histories also support the idea that a System-wide ban is preferable to examining PWC use on a unit-by-unit basis.199 Invoking the typical Chevron analysis that most courts seem to apply to System-wide bans, the relevant inquiry is whether Congress, in the Organic Act, unambiguously intended to outlaw PWC use in all units of the System.200 Since the Organic Act is silent on this issue,201

195 See, e.g., supra notes 128-37 and accompanying text.
197 16 U.S.C. §§ 1a-1, 3.
198 See H.R. Rep. No. 91-1265 at 3785-86.
199 See, e.g., Bicycle Trails Council, 82 F.3d at 1451-54; Potter, 628 F. Supp. at 906.
201 See, e.g., Potter, 628 F. Supp. at 909. But see Bicycle Trails Council, 82 F.3d at 1452-53. In applying the Chevron analysis, the Ninth Circuit posed the first question as to whether
the next question is whether NPS’s “closed-unless-designated-open” strategy is a permissible interpretation of the Organic Act.202

Based on both National Rifle Ass’n v. Potter and Bicycle Trails Council v. Babbitt, discussed earlier, the System-wide PWC ban is a permissible interpretation of the Organic Act because it is sufficiently reasonable and not manifestly contrary to the statute.203 First, the same deference that reviewing courts afforded to NPS’s expertise in its System-wide bans of off-road bicycling and hunting respectively, should be given to NPS in the PWC context.204 This deference, in large part, should be based on the fact that the Organic Act is silent as to the specifics of park management.205 Instead, the Organic Act provides NPS with broad discretion in deciding what uses of park resources are proper.206 Implicit in this silence and broad discretion to promulgate regulations is the ability of NPS to decide whether a rule should apply throughout the System or to individual units.207

Second, the reasonableness of NPS’s statutory interpretation is underscored by what the Organic Act does say.208 The same language cited by the Ninth Circuit in Bicycle Trails Council emphasizing the Secretary of the Interior’s responsibility to administer all System units “in light of the high public value and integrity of the National Park System” is applicable in the PWC context.209 Additionally, it is also clear from the Organic Act’s language that Congress envisioned the System as a single system that derives its stature—at least in part—from its management as an integrated whole, with each System unit adding to “increased national dignity.”210 This type of language strongly supports NPS’s “closed-unless-designated-open” approach to PWC use.211

Congress intended the Organic Act and the 1970 and 1978 amendments to uniformly manage all areas with the fundamental goal of resource protection. See Bicycle Trails Council, 82 F.3d at 1452. The court answered in the affirmative. See id. at 1453. Although posing such a question in the PWC analysis would yield the same answer (and make proceeding to the next question unnecessary), it seems more logical that most courts would ask a narrower question which focused more on a relationship between the Organic Act and the specific activity in question. See, e.g., Potter, 628 F. Supp. at 909.

202 See Bicycle Trails Council, 82 F.3d at 1454.
203 See id.; 628 F. Supp. at 909-10.
204 See Bicycle Trails Council, 82 F.3d at 1454; Potter, 628 F. Supp. at 909.
205 See Bicycle Trails Council, 82 F.3d at 1454.
206 See id.
207 See id.
208 See id.; Potter, 628 F. Supp. at 909.
209 82 F.3d at 1454.
210 See 16 U.S.C. § 1a-1 (1994); see also supra notes 27–32 and accompanying text.
211 See Bicycle Trails Council, 82 F.3d at 1454.
Relevant case law also indicates that the record NPS relied upon and the explanation provided in proposing a System-wide ban of PWC are sufficient to survive an arbitrary and capricious challenge.\textsuperscript{212} NPS went beyond general references to "public safety, resource protection, and the avoidance of visitor conflicts" that courts have previously deemed a rational and reasoned analysis for System-wide bans by citing specific accident statistics and adverse environmental impacts caused by PWC.\textsuperscript{213} It also matched the explanation the D.C. Circuit deemed satisfactory in \textit{Personal Watercraft Industry Ass'n v. Department of Commerce}, to date the only case involving a federal agency and a PWC ban.\textsuperscript{214}

The sufficiency of NPS's record is underscored further when compared to the sufficiently "rational" administrative record in \textit{Mausolf v. Babbitt}, a case in which the Eighth Circuit, despite describing the record as "not overwhelming," upheld a ban on snowmobiling in a park unit based primarily on anecdotal evidence.\textsuperscript{215} NPS offers more than anecdotal evidence in support of its decision to prohibit PWC throughout the System, and does not face allegations that PWC do not pose the dangers alleged by the agency claims (as was the situation in \textit{Mausolf}).\textsuperscript{216}

2. The PWC Ban Does Not Violate the Organic Act's "Use" Mandate

A continuing topic of discussion among both commentators and the courts interpreting the Organic Act is the conflicting "preservation" and "use" mandates contained in Section One.\textsuperscript{217} This discussion is relevant to NPS's current proposal because of the probable argument that the PWC ban completely sacrifices the "use" mandate in favor of "conserv[ing] the scenery and the historic objects and wildlife . . . [so as to] leave them unimpaired."\textsuperscript{218} Such an argument fails because there is clear evidence that "preservation" was the paramount congressional mandate.\textsuperscript{219} Alternatively, even if a case can be made

\textsuperscript{212} See id. at 1455; \textit{Mausolf v. Babbitt}, 125 F.3d 661, 669–70 (8th Cir. 1997).
\textsuperscript{214} See 48 F.3d 540, 545 (D.C. Cir. 1995).
\textsuperscript{215} See \textit{Mausolf}, 125 F.3d at 669–70.
\textsuperscript{216} See id.; 63 Fed. Reg. at 49,313–49,314.
\textsuperscript{218} 16 U.S.C. § 1.
that the mandates need to be balanced against each other, it is acceptable for an agency to resolve conflicting goals in favor of one of those goals so long as the accommodation is reasonable.220

The language and structure of the Organic Act's mandate clause illustrate the dominance of the protectionist role of NPS.221 Although Congress mentioned "enjoyment" twice, both references are qualified by language emphasizing conservation of natural resources and, at least implicitly, limiting the type of acceptable enjoyment to that which will not degrade natural resources.222 The first "enjoyment" refers to scenery, natural resources, and wildlife that NPS has "conserved."223 The second "enjoyment" again refers to the System units' natural resources, but this time also applies to future generations who will enjoy them in their "unimpaired" state.224 Such strong language supports placing preservation ahead of use and suggests that PWC use is not acceptable if it degrades water quality, destroys aquatic vegetation, and disrupts wildlife habitats.225 All of these adverse environmental impacts prevent future generations from enjoying the System's natural resources that have been kept in an unimpaired state.

Also confirming NPS's decision to safeguard System units' natural resources from PWC use are the 1978 amendment and the accompanying legislative history.226 While the amendment itself discussed "protection" of the System's integrity, the legislative history contained even stronger language that forbids, in general, management practices which compromise resource values.227 Read against this backdrop, NPS is merely fulfilling its congressional mandate by prohibiting PWC use within the System.228

In addition to fulfilling its congressional mandate, NPS is also following its own management policies that direct System unit superintendents to err on the side of resource protection in situations of

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222 See id.
223 See id.
224 See id.
225 See MANTELL & METZGER, supra note 33, at 13. The authors also make the point that, as a practical effect, if the preservation mandate is neglected, both conservation and enjoyment of the System are endangered. See id.
user conflicts.\textsuperscript{229} It supplies this directive despite naming "use" as one of its broad operating principles.\textsuperscript{230} All that is required to limit public use of System resources is a reasonable basis to believe a resource is or would become impaired.\textsuperscript{231} NPS satisfied this low threshold by outlining current environmental impacts caused by PWC as well as a desire to prevent further destruction as recreational activity continues to gain popularity.\textsuperscript{232}

Finally, case law also supports elevating the Organic Act's preservation mandate above the use mandate.\textsuperscript{233} \textit{National Rifle Ass'n v. Potter}, discussed throughout this Comment, is often cited for this proposition because of unequivocal statements that "the paramount objective of the park system . . . was, from the beginning, one of protectionism" and "[the] primary management function with respect to Park wildlife is its preservation unless Congress has declared otherwise."\textsuperscript{234} Courts have relied upon \textit{Potter} to reject arbitrary and capricious challenges in the hunting, trapping, off-road bicycling, and snowmobiling contexts.\textsuperscript{235} Language such as this can and should also be applied to the PWC context to arrive at a conclusion that a System-wide ban is consistent with NPS's overarching duty to protect natural resources.\textsuperscript{236}

Even assuming, arguendo, that resource protection is not necessarily the higher mandate of the Organic Act or that environmental damage inflicted by PWC is not severe enough to justify ignoring the use mandate, the proposed ban remains a reasonable solution to a System-wide problem.\textsuperscript{237} NPS satisfied the judicial requirement of providing "a reasonable accommodation of conflicting mandates" in primarily two ways.\textsuperscript{238} First, recalling the emphasis placed on preservation in the Organic Act, its 1978 amendment, and the amendment's

\begin{itemize}
\item \textsuperscript{229} See NPS Management Policies: Introduction, \textit{supra} note 102.
\item \textsuperscript{230} See id.
\item \textsuperscript{231} See id.
\item \textsuperscript{234} 628 F. Supp. at 905, 912. In this opinion, the court also directed attention to the 1978 amendment's reference to a singular "purpose" of the Organic Act. See \textit{id.} at 910.
\item \textsuperscript{235} See, e.g., \textit{Michigan United Conservation Clubs}, 949 F.2d at 207; Bicycle Trails Council v. Babbitt, 82 F.3d 1445, 1450 (9th Cir. 1996).
\item \textsuperscript{236} See, e.g., \textit{Michigan United Conservation Clubs}, 949 F.2d at 207; \textit{Bicycle Trails Council}, 82 F.3d at 1450.
\item \textsuperscript{237} See Wilderness Pub. Rights Fund v. Kleppe, 608 F.2d 1250, 1254 (9th Cir. 1979); Southern Utah Wilderness Alliance v. Dabney, 7 F. Supp. 2d 1205, 1211 (D. Utah 1998).
\item \textsuperscript{238} See \textit{Kleppe}, 608 F.2d at 1254; \textit{Southern Utah Wilderness Alliance}, 7 F. Supp. 2d at 1211.
\end{itemize}
legislative history, the ban is consistent with Congress's intent to protect the System's natural resources. Therefore, it is likely that Congress would sanction the ban.

Second, NPS has provided two methods for designating PWC use within System units when certain conditions are satisfied. Analytically, this accommodation of the "use" mandate is similar to NPS's allowance of jeep trails in certain System units where unique resources would not be severely or permanently impaired. Both situations reflect good faith attempts to provide a meaningful balance between the preservation and use mandates of the Organic Act.

As illustrated in Southern Utah Wilderness Alliance v. Dabney, possible qualifications on such an accommodation appear to be the nature and extent of damage to the System's natural resources, as well as the effectiveness of NPS's efforts to mitigate this damage. Unwilling to forego a general ban because of the serious safety and environmental threats PWC pose to System units, NPS nonetheless attempted to accommodate the use mandate by allowing more relaxed authorization procedures in units that were created for water-related, recreational purposes rather than preservation purposes. For other units, the process of promulgating a special regulation will help ensure thoughtful, and possibly narrow, PWC authorizations that hopefully will mitigate possible damage.

3. Singling Out PWC Use Is Within NPS's Discretion

Another likely attack on the PWC ban, also challenging the reasonableness underlying the ban, may focus on NPS's decision to target only PWC and not other motorized watercraft. Adding fuel to this attack would be USCG's classification of PWC as Class A vessels,


See id.


See Southern Utah Wilderness Alliance, 7 F. Supp. 2d at 1212.

See id.; 63 Fed. Reg. at 49,313.

See Southern Utah Wilderness Alliance, 7 F. Supp. 2d at 1212.

See id.; 63 Fed. Reg. at 49,313.


the same classification which applies to motorboats in general. However, when the nature of USCG’s Class A regulations and case law are considered, NPS’s decision to single out PWC is not arbitrary and capricious.

The Organic Act mandates that NPS can regulate the waters of the System only in a manner consistent with the authority of the USCG to regulate waters of the United States. As discussed earlier, the purpose of NPS’s regulatory powers over water is to protect natural, wildlife, cultural, and historical resources. USCG retains clear authority over issues such as boat design, safety, numbering, vessel documentation, and inspection requirements. Since NPS’s motivation in banning PWC is, in large part, an attempt to reverse and prevent environmental problems, it does not conflict with USCG’s authority to oversee the more physical and mechanical aspects of motorboats or violate the Organic Act.

The one reported federal case on point, *Personal Watercraft Industry Ass’n v. Department of Commerce*, also confirms the reasonableness of NPS’s proposed ban on PWC. In that case, the court embraced the established principle that agencies can address issues one step at a time so long as the remedy is reasonable. The same factors which made the distinction reasonable in *Personal Watercraft Industry Ass’n*—in particular, the smaller size and increased maneuverability of PWC—also make NPS’s distinction reasonable. Additionally, the PWC ban was proposed more than three years after NOAA’s prohibition was challenged unsuccessfully. If it were reasonable to ban PWC when the activity was a “new phenomenon,” then the NPS ban seems even more reasonable when, presumably, the agency has had three years to observe and confirm the destruction witnessed in areas such as the Monterey Bay National Marine Sanctuary.

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252 See id.
254 See 48 F.3d 540, 544 (D.C. Cir. 1995).
255 See id. at 544 (citing United States v. Edge Broad. Co., 509 U.S. 418 (1993) for its statement that an agency does not have “to make progress on every front before it can make progress on any front.”).
256 See id. at 545.
257 See id. at 546.
B. NPS Should Favor the Special Regulation Alternative for Authorizing PWC Use

As detailed earlier in this Comment, NPS provides two ways in which units can authorize PWC use. Generally, authorization occurs through a special regulation which requires notice in the Federal Register and an opportunity for public comment. However, NPS exempted thirteen units from this procedure, requiring only that they follow the locally-based procedures outlined in C.F.R. chapter 36, sections 1.5 and 1.7. NPS's justification for this more relaxed procedure is that these System units were all established for water-related recreation and are characterized by substantial motorized use. Despite this reasoning, however, the language of the regulations in question, the exceptions clause of the Organic Act, and case law all suggest that NPS should exercise extreme caution in allowing System unit superintendents to avoid a Federal Register rulemaking. There are also strong policy considerations that support such a rulemaking instead of unilateral action on the part of System unit superintendents.

1. Applicable Regulations Should Be Read Narrowly in PWC Context

According to C.F.R. chapter 36, section 1.5(a), System unit superintendents may only designate areas for a specific activity if such designation is “necessary” for the maintenance of certain conditions, including equitable allocation and use of facilities or the avoidance of user conflicts. “Necessary” does not suggest a balancing of user conflicts but implicitly requires a finding by superintendents that allowing PWC use is the only way user conflicts can be avoided.

The difficulty of making such a determination is compounded by the fact that as soon as a superintendent decides that PWC use is necessary to avoid user conflicts, he or she triggers other conditions in section 1.5(a) that then make the prohibition of PWC use necessary. Namely, in light of the high accident rate of PWC and the

259 See id. at 49,316.
260 See id.
261 See id. at 49,313.
263 See 36 C.F.R. § 1.5(a).
264 See id.
265 See id.
damage they cause to wildlife habitation and aquatic vegetation, the prohibition of PWC use would be necessary to maintain public health and safety, as well as to protect environmental and scenic values.266

Even if such a literal translation of section 1.5(a) is not undertaken, section 1.5(b) also restricts superintendents in relying on these locally-based procedures to authorize PWC use.267 The degradation of water quality inflicted by PWC, the destruction of sea grass when PWC operate in shallow water, and the "flight" of wildlife caused by PWC can be viewed as examples of adverse effects on a System unit's natural values.268 Such adverse impacts require a Federal Register rulemaking.269 Also supporting a Federal Register rulemaking is the highly controversial nature of PWC use, as evidenced, in part, by the widespread media coverage of NPS's proposed ban.270

2. A PWC Ban in Units Established for Water-Related Recreation Does Not Per Se Violate Specified System Units' Enabling Legislation

NPS's contention that less demanding procedures are required for System units established for water-related recreation may not be sufficient to avoid a Federal Register rulemaking.271 First, the Organic Act directs that the System cannot be managed in derogation of NPS's preservation mandate unless "directly and specifically provided by Congress."272 Second, case law indicates that courts interpret the Organic Act's exceptions clause narrowly and literally.273

Therefore, unless the enabling legislation of the thirteen units specifically provides for PWC use, it seems reasonable to conclude that NPS cannot use the exceptions clause to justify the less demand-

266 See id.
267 See id. § 1.5(b).
269 See 36 C.F.R. § 1.5(b).
270 See id.; see, e.g., Sward & Doyle, supra note 10, at A-22; Winegar, supra note 10, at E3.
273 See Michigan United Conservation Clubs, 949 F.2d at 207–08 (reasoning System unit enabling legislation permitting hunting did not extend to trapping because the legislation in question and legislative histories did not mention trapping and, in other instances, Congress had explicitly provided for trapping); see also supra notes 89–92 and accompanying text.
ing designation procedures. At least three of the thirteen units named by NPS—Amistad National Recreation Area, Bighorn Canyon National Recreation Area and Padre Island National Seashore—do not specifically mention PWC use. In fact, the enabling legislation of Amistad and Padre Island do not even explicitly or impliedly authorize pleasure boating, an activity of which NPS could at least argue that PWC is a subset. If the exceptions clause does not apply, then these System units are in the same position as the other System units and, like the other units, should only be permitted to authorize PWC use through Federal Register rulemakings.

Even if broad language such as the purpose clause in Amistad’s legislation stating the unit was established to “provide for public outdoor recreation use and enjoyment of the lands and waters . . .” does trigger the Organic Act’s exceptions clause, NPS would not automatically be able to rely on it to permit less demanding authorization procedures. Another possible limitation on invoking the exceptions clause is the presence of multiple purposes in a System unit’s enabling legislation. According to Bicycle Trails Council, if there is language in a System unit’s enabling legislation that calls for the preservation or protection of natural resources or scenic beauty, such language prevents a complete derogation of any interest other than recreational use.

Both Amistad and Bighorn Canyon’s enabling legislation contain such language. This language should at least indicate to NPS that the preservation mandate of the Organic Act still applies. Given that the preservation mandate appears to be dominant and that NPS has a clear responsibility to manage System units uniformly, the Federal Register Rulemaking that occurs on a national level is a better choice than relying on locally-based procedures.

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274 See 16 U.S.C. § 1a-1; Michigan United Conservation Clubs, 949 F.2d at 207–08.
276 See id. §§ 459d-d-7, 460fff-ff-2.
277 See id. §§ 460fff(a)(1); Bicycle Trails Council v. Babbitt, 82 F.3d 1445, 1460–61 (9th Cir. 1996).
278 See Bicycle Trails Council, 82 F.3d at 1461.
279 See id.
280 See 16 U.S.C. §§ 460fff(a)(2), 460t(a), 460t-2(a). For example, Bighorn Canyon’s enabling legislation leaves it to the Secretary of the Interior to provide “for conservation of scenic, scientific, historic, and other values contributing to public enjoyment.” Id. § 460t-2(a).
282 See id. §§ 1, 1a-1; Michigan United Conservation Clubs v. Lujan, 949 F.2d 202, 207 (6th Cir. 1991); Bicycle Trails Council, 82 F.3d at 1451–54; National Rifle Ass’n v. Potter, 628
3. Policy Considerations Support a Stricter Approach

In addition to purely legal issues, there are also several policy reasons why NPS should favor the stricter alternative for authorizing PWC use in System units. First, PWC are still a relatively new phenomenon. As safety and environmental issues continue to surface and environmentalists and members of the general public voice concerns about the vessels, an increasing number of cities, states, and System units are banning or severely restricting PWC use in their jurisdictions. NPS's System-wide PWC ban represents a comprehensive solution to a far-reaching problem before irreparable harm occurs. Application of the locally-based procedures would chip away at this comprehensive solution. It could also lead to overcrowding and substantial environmental degradation of System units that do allow PWC use. Such a concern was expressed by a Golden Gate National Recreation Area official in explaining why unit officials decided to permanently ban PWC.

Second, the special regulation alternative is a better idea from a policy standpoint because the American public as a whole has a vested interest in the System and its uses. If authorization of PWC use occurs through a special regulation, the proposed rule is published in the Federal Register, as NPS's proposed PWC ban was, and it is open to comment from all sectors of American society. In contrast, if locally-based procedures are used, a System unit superintendent is required only to prepare a written justification for his or her actions, to make the justification available to the public, and to notify the “af-


See id. at 49,314. For example, Everglades National Park and the Tahoe Regional Planning Agency, consisting of representatives from Nevada and California, banned PWC from their respective jurisdictions. See id.

See id. at 49,313–49,314.

See Sward & Doyle, supra note 10.

See id. (citing spokeswoman who said GGNRA acted in part because “there was the possibility that as other agencies put tighter controls on jet skis, their use would increase in the bay.”)


See Personal Watercraft Use Within the NPS System, 63 Fed. Reg. 49,312, 49,313 (1998) (to be codified at 36 C.F.R. pts. 1 & 3) (proposed Sept. 15, 1998). Since, theoretically, all Americans had the opportunity to comment on and then, if need be, challenge NPS's handling of PWC use, the PWIA's complaint that there was no public participation in the process is unfounded. See id.; National Park Service Has Gone Too Far, supra note 10.
fected” public through the posting of signs or through local newspapers.290 The Federal Register rulemaking is more consistent with Congress’s insistence that the System units are part of an integrated, national system.291 It is also more consistent with the popular image of the System as America’s “playgrounds,” areas that belong to all Americans.292

Finally, policy reasons support the special regulation alternative because of NPS’s own statements when initially proposing the System-wide ban.293 When NPS proposed outlawing PWC use in all System units, it stated that, as a general matter, it presumed that PWC use was inappropriate in most units of the System.294 In its background section, NPS also estimated that PWC use had been observed in about thirty-two System units that allowed motorized boating.295 The result is that more than forty percent of the System units which are characterized by the most PWC use—and therefore are subject to the most harm—are able to continue their use most easily.296 Such a result undercuts the “conservative” approach taken by NPS.297

The result is even more disturbing when the additional twelve units in which NPS has authorized the use of locally-based procedures for a two-year period are considered.298 For two years after the NPS PWC ban is finalized, seventy-eight percent of park units will be allowed to continue PWC use if a superintendent believes it is warranted.299 Although it may be within NPS’s authority to invoke the locally-based procedures, and superintendents should have some flexibility in management practices because they are the most familiar with their units’ circumstances and use patterns, NPS should still exercise caution in allowing the use of locally-based authorization procedures in the PWC context.300 If it does not, the presumption of PWC inappropriateness will be whittled away.301

290 See 36 C.F.R. §§ 1.5(3) (c), 1.7(a) (1) & (2) (1998).
292 See Winks, supra note 13, at 585.
294 See id. at 49,314.
295 See id. at 49,313.
296 See id. at 49,313–49,314.
297 See id.
298 See 63 Fed. Reg. at 49,313.
299 See id.
300 See 36 C.F.R. §§ 1.5, 1.7 (1998).
CONCLUSION

PWC pose significant safety and environmental hazards to boaters, swimmers, wildlife, aquatic vegetation, and to water bodies themselves.\(^{302}\) To date, most of these issues have been dealt with on an ad hoc basis at city and state levels.\(^{303}\) In addition to state laws establishing age limits and licensing requirements for PWC use, some states and agencies have banned or severely limited PWC from particular stretches of water.\(^{304}\)

The PWC ban, proposed by NPS in September, 1998, represents the first System-wide and comprehensive attempt to address the destruction caused by these recreational vessels.\(^{305}\) The System-wide ban is both a legal and effective remedy. It reflects the preservationist mandate of the Organic Act, its amendments, and legislative history. It is also consistent with the Organic Act’s directive that System units be managed as an integrated whole.

To remain true to its assumption that PWC use is inappropriate for most System units, the thirteen units that can authorize use through locally-based procedures should rely on these procedures with extreme caution. In most cases, a Federal Register rulemaking—the default authorization process of the proposed rule—would seem to be the more appropriate option. The System-wide and permanent ban, coupled with a strict authorization procedure, effectively address increasing PWC use in the System while simultaneously supporting and setting an example for cities and states grappling with similar issues.

\(^{302}\) See, e.g., id. at 49,314–49,315; Carey, supra note 4, at 56.

\(^{303}\) See 63 Fed. Reg. at 49,314.


\(^{305}\) See 63 Fed. Reg. at 49,316.