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VIA FACSIMILE AND OVERNIGHT MAIL

Dirk Kempthorne, Secretary
Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Mary Bomar
Director, National Park Service
Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Re: Jetski Use At Gulf Islands and Cape Lookout National
Seashores and Pictured Rocks National Lakeshore

Dear Secretary Kempthorne and Director Bomar:

We are writing on behalf of Bluewater Network, a team of Friends of the Earth¹, The Wilderness Society, and the National Parks Conservation Association to urge you to reconsider the National Park Service's recent decisions to permit Jetski use in Gulf Islands and Cape Lookout National Seashores and Pictured Rocks National Lakeshore. In light of your commitment to the 2006 Park Service Management Policies, we are hopeful that you will reverse these decisions, which are plainly inconsistent both with those Policies, and with the Park Service's earlier decisions to *end* Jetski use at these three Parks, based on overwhelming findings that these loud, destructive and dangerous vehicles are fundamentally inconsistent with these Units' "superb environmental quality." 16 U.S.C. § 1a-1.

¹ Bluewater Network merged with Friends of the Earth in March, 2005. As a result of the merger, Bluewater Network and Friends of the Earth are now one organization, combining the missions of both.



Moreover, as explained below, in making these decisions the Park Service has violated the terms of the Settlement Agreement in Bluewater Network v. Stanton, No. 00-2093 (GK) (D.D.C. Apr. 11, 2001). Although that Settlement requires that any decisions to permit Jetski use in a National Park System Unit must be based on site-specific analyses of impacts due to Jetski use, this kind of review has not been conducted at any of these Parks Units.

We would welcome the opportunity to meet with you to discuss these issues further. As provided by the Settlement Agreement, we are available over the next thirty days. If we are unable to resolve these concerns, our clients intend to seek judicial relief in order to protect these national treasures from further degradation due to Jetski use.

BACKGROUND

A. The Park Service's Ban On Jetski Use In The National Parks

In 1998, Bluewater Network (Bluewater) submitted a Rulemaking Petition requesting a ban on Jetski (also called "personal watercraft") use in the National Park System. The Petition detailed the myriad adverse impacts of Jetski use on Park resources, including, *inter alia*, destroying seagrasses and other aquatic vegetation; disturbing shore birds and marine wildlife; and degrading the experiences of the visiting public who come to the National Parks for natural quiet and solitude, but instead are confronted with these loud and polluting vehicles.²

Finding Bluewater's arguments - and the scientific studies on which they were based - conclusive, in 2000 the Park Service promulgated a general ban on Jetski use in National Park System Units. See 65 Fed. Reg. 15077 (Mar. 21, 2000); see also 36 C.F.R. § 3.24 (Jetski Rule). Under the new Rule, before the Park Service can permit Jetski use in a Park Unit, the agency must undertake a park-specific rulemaking.

As promulgated, the Rule contained two exceptions from this general requirement. First, for all of those Parks that had a history of Jetski use, the Rule provided a two-year "grace period" before the ban would go into effect. Thus, although the agency could make an affirmative decision to ban Jetski use at specific Park Units at any time, if no such decision was made they would be banned automatically after two years. Second, for a subset of those Park Units, the

² Although in recent years the Jetski industry has introduced less polluting four-stroke Jetski engines, hundreds of thousands of heavily polluting, two-stroke Jetskis will remain in use for the foreseeable future. These two-strokes - which are permitted in every National Park where Jetski use is now allowed - discharge up to three *gallons* of gas and oil directly into the water during an average two hour ride, and as much air pollution as a 1998 passenger car driven 100,000 miles. Moreover, in light of the significant pollution emitted by even the current generation of 4-stroke machines, EPA has recently proposed even more stringent engine requirements. See 72 Fed. Reg. 28,098 (May 18, 2007).

Rule authorized the Park Service to simply decide that Jetski use could continue *indefinitely*, without any rulemaking.

Seeking to further limit the circumstances under which Jetski use would be permitted in the National Park System, Bluewater and others filed a lawsuit challenging these two exceptions. See Bluewater Network v. Stanton, No. 00-2093 (GK) (D.D.C., filed August 31, 2000). The plaintiffs and the Park Service subsequently reached a Settlement Agreement eliminating the authority to allow Jetski use in some Parks without any rulemaking or review under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, et seq. Thus, the Settlement requires that, as to *all* Park Units, the agency may only allow Jetski use to continue pursuant to notice and comment rulemaking and appropriate review under NEPA. The Agreement - and several subsequent modifications - also extended the grace periods at certain Parks.

Finally, the Agreement provides that before deciding to permit Jetski use in any National Park System Unit, the Park Service must first address “the impacts of PWC [Personal Watercraft] use *in the particular unit*,” including “impacts on water quality, air quality, soundscapes, wildlife and wildlife habitat, shoreline vegetation, and visitor conflicts and safety.” See Settlement, ¶ 5 (emphasis added). In a subsequent Modification, the Park Service also agreed that these decisions would meaningfully compare the environmental impacts of the *elimination* of Jetski use with *allowing* Jetski use in the Unit. See Sept. 2, 2002 Modification, ¶ 6. Judge Kessler of the U.S. District Court approved the Settlement Agreement and retained jurisdiction to enforce its terms.

At around the same time the Settlement Agreement was approved, in April 2001, the Park Service exercised the option to immediately *ban* Jetski use at several Parks before the expiration of the grace period. However, several months later the agency announced that any decision to permanently ban Jetski use in a particular Park would be based on a park-specific, *affirmative* determination that Jetski use is inappropriate.

Pursuant to this directive, in October 2001, the Park Service decided that Jetski use is inappropriate at Gulf Islands National Seashore (Gulf Islands) - a 160 mile stretch of barrier islands in the Gulf of Mexico, off the shores of Florida and Mississippi. To support this decision, the agency explained that “PWC use poses considerable threats to estuarine flora and fauna, pollutes waters essential to estuarine and marine health, poses unacceptable risks of injury to operators and bystanders, and conflicts with the majority of other longstanding uses of the Seashore.” Based on this analysis, the Park Service permanently banned Jetski use at Gulf Islands.

The agency reached the same conclusion at Cape Lookout National Seashore (Cape Lookout) - a series of barrier islands and surrounding waters three miles off the coast of central North Carolina. At that Park the agency found that “PWC use is in derogation of the values and purposes for which the seashore was established by Congress,” and, in particular, that “PWC

noise has a very high potential to degrade the visitor experience”; “hydrocarbon emissions from PWC use has a potential to damage the natural estuarine systems of the seashore”; and “significant impacts to wildlife are likely if PWC’s are permitted in the seashore.”

Finally, the Park Service let the grace period expire at Pictured Rocks National Lakeshore (Pictured Rocks) - 42 miles of Lake Superior shoreline along Michigan’s upper peninsula. Accordingly, Jetski use was banned in that Park as of April, 2002.

B. The Park Service’s Recent Decisions To Reopen Gulf Islands, Cape Lookout and Pictured Rocks To Jetski Use, And The New Management Policies

Despite the Park Service’s overwhelming findings that Jetski use is inappropriate at most National Park System Units, and subsequent *specific* findings that they should not be permitted at Park Units like Gulf Islands and Cape Lookout, last year the Park Service reversed course and reauthorized Jetski use at Gulf Islands, Cape Lookout, and Pictured Rocks.

At Gulf Islands, the Park Service’s Proposed Regulations and Draft Environmental Assessment (DEA) elicited more than 4,500 comments, most of which opposed Jetski use, and many of which raised concerns with the patent inconsistency between the new proposal and the Park Service’s decision, only a few years earlier, that permitting *any* Jetski use in the Park would be “in derogation of the values and purposes for which the Seashore has been established.” Commenters also questioned whether the Park Service had meaningfully considered the adverse impacts of Jetski use, including their site-specific impacts, as required by the 2000 Settlement. However, despite these concerns, last year the agency issued a Final Regulation *reopening the Park Unit to Jetski use*. See 71 Fed. Reg. 26,232 (May 4, 2006); see also 36 C.F.R. § 7.12.

The Park Service did a similar about-face at Cape Lookout, issuing a Proposed Regulation and DEA that drew more than 1,500 comments - many of which raised the same kinds of concerns that went unaddressed at Gulf Islands, and opposed Jetski use in Cape Lookout. Last fall the Park Service issued a Final Rule reintroducing Jetski use into that Park as well. See 71 Fed. Reg. 53,020 (Sept. 8, 2006); see also 36 C.F.R. § 7.49.

Finally, the Park Service has allowed Jetski use back into Pictured Rocks. See 70 Fed. Reg. 61,896 (Oct. 27, 2006); see also 36 C.F.R. § 7.32. Once again, this decision was made over the objections of hundreds of commenters, without adequate site-specific analysis, and in contradiction of the Park Service’s statutory mandate to preserve the “superb environmental quality” of our National Parks. 16 U.S.C. § 1a-1.

While these decisions were underway, the Park Service was also working on its new Management Policies, which were issued in August, 2006. In those Policies the Park Service recognizes that “many forms of recreation enjoyed by the public do not require a national park setting and are more appropriate to other venues,” and directs that the Park Service focus on

providing “opportunities for forms of enjoyment that are uniquely suited and appropriate to the superlative natural and cultural resources found in the parks.” Management Policies at 8.1. With regard to loud, motorized craft like Jetskis, the Management Policies recognize that “the sounds of motor vehicle[s] . . . can greatly diminish the solemnity of a visit to a national memorial, the effectiveness of a park interpretive program, or the ability of a visitor to hear a bird singing its territorial song,” and instruct the Park Service “to preserve the natural quiet and natural sounds associated with the physical and biological resources of parks.” Id. at 8.2.3.

DISCUSSION

The Park Service’s decisions to reintroduce Jetski use into Gulf Islands, Cape Lookout and Pictured Rocks cannot be reconciled with the Management Policies you adopted shortly after taking office. Jetskis are a perfect example of an activity that does “not require a national park setting,” since they typically are used for fast-speed thrills and motorized stunts, rather than as a means for the kind of quiet contemplation and appreciation of natural beauty that are “uniquely suited and appropriate to the superlative natural and cultural resources found in the parks.” Management Policies at 8.1.

Accordingly, we urge you to reconsider whether Jetski use is appropriate in these three Park Units in light of the new Management Policies. In conducting this evaluation, we also urge you to take a close look at the Park Service’s earlier decisions that Jetski use impairs Park resources at Gulf Islands and Cape Lookout, and the underlying findings on which those decisions were made. As noted above, in 2001 the Park Service analyzed the kinds of adverse impacts Jetski use was having on Gulf Islands and Cape Lookout, and affirmatively concluded that permitting these vehicles would be “in derogation of the values and purposes for which [each] seashore was established by Congress.”

Indeed, it is evident that even apart from the new Management Policies, these decisions are arbitrary and capricious in violation of the Administrative Procedure Act (APA), 5 U.S.C. § 706. See, e.g., Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983). It is well-established that while an agency may reverse an earlier decision, it may do so only if it “adequately justifies the change.” Natl Cable & Telecomm. Assn. v. Brand X Internet Svcs., 545 U.S. 967, 1001 (2005). In this case, nowhere has the Park Service explained why Jetski use, which was found to be so problematic at these Park Units only several years ago, is now an entirely appropriate form of recreation at these Parks. For example, the Park Service did not point to *any* new data or information that had been developed since the earlier determination was made. Under these circumstances, these decisions cannot be sustained. See Fund for Animals v. Norton, 294 F. Supp. 2d 92, 104 (D.D.C. 2003) (“When, as here, an agency reverses an earlier decision . . . the agency is obligated to supply a reasoned analysis for the change”).

These decisions also violate the 2000 Settlement Agreement. That agreement requires that:

Any Special Regulation [concerning] PWCs will be based on appropriate environmental analysis under the National Environmental Policy Act, which analysis will, *inter alia*, consider the impacts of PWC use in the particular unit. Such analysis will evaluate impacts of PWC use including impacts on water quality, air quality, soundscapes, wildlife and wildlife habitat, shoreline vegetation, and visitor conflicts and safety.

Settlement Agreement, ¶ C.5 (emphasis added). Contrary to this requirement, the NEPA review conducted at Gulf Islands, Cape Lookout, and Pictured Rocks was not based on detailed analyses of the impacts of Jetski use in *each individual unit*. Instead, the Park Service relied on *general* information concerning Jetski impacts as the basis for its evaluation of impacts at each of the Parks - which the Settlement Agreement does not permit.

For example, with regard to water quality, the Gulf Islands EA states that the Seashore has no “quantifiable water quality data documenting the effects of PWC emissions since the introduction of personal watercraft in the 1970s.” EA at 108. Nonetheless, without this site-specific data, the Park Service purported to conclude that the water quality impacts of Jetski use on the Seashore are “negligible.” *Id.* at 122. Similarly, in discussing impacts on wildlife, rather than collect any empirical data on wildlife impacts, the impacts assessment was based on numerous assumptions and “the professional judgment of the project team.” *Id.* at 159; see also 71 Fed. Reg. 26,240 (“The scope of the EA did not include the conduct of site-specific studies regarding potential effects of PWC use on wildlife species at Gulf Island”); *id.* (“The scope of the EA did not include the conduct of surveys to determine potential effects [on] marine mammals in Gulf Islands”); Gulf Islands EA at 168 (“[t]here are no data for PWC-related noise effects on marine mammals, reptiles, or fish, and no specific monitoring has been done at the national seashore to quantify impacts”).

The Gulf Islands EA is similarly flawed in its analysis of impacts due to Jetski use on soundscapes and the overall visitor experience. It certainly would not have been difficult to collect *empirical* data concerning the extent to which visitors prefer to visit the Seashore free of the roar of Jetskis. Yet, the Park Service not only failed to conduct “site-specific studies or sound testing studies for Jetski use,” 71 Fed. Reg. at 26,238, it did not even conduct visitor use surveys to learn the extent to which visitors’ experiences at the Seashore are diminished as a result of Jetski noise and pollution. *Id.* at 26,240 (“The scope of the EA did not include the conduct of surveys to determine . . . the effects of PWC use on visitor experience at Gulf Islands”). Indeed, the Park Service went even further than *failing* to collect data - it made completely unfounded assumptions about Jetski use and improvements, and used those assumptions as a basis for *discounting* the adverse effects that these machines will continue to have on the Park and Park resources for years to come. See, e.g. EA at 150 (concluding that increased Jetski use in future years will not result in increased noise because “it is *possible* that newer technology engines will

be quieter”); 71 Fed. Reg. at 26,242 (assuming that Jetski users will know the locations of the mandated “flat wake zone” without any markers or buoys, despite the Florida Fish and Wildlife Conservation Commission’s comment that “enforcement will be unrealistic without marking of the areas with buoys”); Gulf Islands EA at 121 (“PWC flat-wake speed engine emissions *were assumed* to be negligible”)(emphasis added).

Once again, the Settlement Agreement requires that decisions be based on *site-specific* analyses of the impacts of Jetski use on these various Park resources and values - “water quality, air quality, soundscapes, wildlife and wildlife habitat, shoreline vegetation, and visitor conflicts and safety” - not simply the Park Service’s “professional judgment,” assumptions based on data collected elsewhere, or simple guesswork. Therefore, because, at all three Parks, the Park Service failed to reintroduce Jetski use based on a NEPA review of “*the impacts of PWC use in the particular unit*,” the Park Service is in violation of the Settlement Agreement.³

Each of these three Park Service decisions also violate NEPA and the Park Service Organic Act. 16 U.S.C. § 1. As the D.C. district court recently explained in setting aside several other Park Service EAs, the Park Service cannot fulfill its obligations under NEPA and the Organic Act by merely characterizing various impacts as short versus long-term; negligible versus minor, moderate, or major; and direct versus indirect, *see* Sierra Club v. Mainella, 459 F. Supp. 76, 97-108 (D.D.C. 2006) - the very kinds of terms used throughout these three EAs. Instead, the agency must *explain* what these impacts will be, and then must explain *how* it determined whether that level of impact will, or will not, impair park resources. *Id.* Thus, because the EAs for Gulf Islands, Cape Lookout and Pictured Rocks - just like the EAs at issue in Sierra Club - neither meaningfully *explain* the impacts at issue, nor tie those impacts to the agency’s ultimate impairment determinations, these EAs flatly violate NEPA and the Organic Act.⁴

³ *See also* Cape Lookout EA at 101 (“Cape Lookout National Seashore does not have quantifiable water quality data documenting the effects of PWC emissions”); *id.* at 63 (“No air quality monitoring stations are located within the park boundaries or in the adjacent coastal areas. Therefore, there is no representative quantitative data for the [Cape Lookout] seashore area”); 71 Fed. Reg. at 53,028 (“[t]he scope of the EA did not include the conduct of site-specific studies regarding potential effects of PWC use on wildlife species at Cape Lookout”); Pictured Rocks EA at 61 (“Pictured Rocks National Lakeshore does not have quantified water quality data documenting the effects of personal watercraft”); 70 Fed. Reg. at 61,899 (“The [Pictured Rocks] EA analyzed air impacts by assessing the effects of predicted pollutant emissions, rather than measuring ambient air conditions, due to the lack of available site-specific monitoring data”); *id.* at 61,901 (“The scope of the [Pictured Rocks] EA did not include site-specific surveys for species with the potential to occur at Pictured Rocks”).

⁴ The EAs also failed to consider alternatives in the manner NEPA requires. For example, at Cape Lookout the Park Service refused to even *consider* an alternative whereby Jetskis would be limited to concessionaire rentals - which the Park Service could then regulate by

Finally, it is also evident that the Park Service was required to prepare a full-blown Environmental Impact Statement (EIS) for each Park before deciding whether to reintroduce Jetski use there. NEPA requires that an EIS be prepared for all major federal actions that “may” have significant environmental impacts. Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212 (9th Cir. 1998). Among the factors governing whether an EIS is required are whether (a) the action is taking place on “unique . . . ecologically critical areas [such as] park lands”; (b) the “possible effects on the human environment are highly uncertain”; and (c) “the effects on the quality of the human environment are likely to be highly controversial.” 40 C.F.R. § 1508.27(b). The presence of any one of these factors alone may warrant an EIS. National Parks & Conservation Ass’n v. Babbitt (“NPCA”), 241 F.3d 723, 731-32 (9th Cir. 2001).

As regards the first factor, Congress has mandated that the “superb environmental quality” of the national parks, which include “superlative natural, historic, and recreation areas,” be “preserved and managed for the benefit and inspiration of all the people of the United States. . . .” 16 U.S.C. § 1a-1. In light of this mandate, it is absolutely clear that before the Park Service can reintroduce vehicles that the agency itself has described as posing “considerable threats to estuarine flora and fauna” and “unacceptable risk[s] [and] conflicts with the majority of other Park users,” it must prepare an EIS.⁵

Second, it is evident that the Park Service’s decisions at these three Parks was highly controversial. There were an overwhelming number of comments opposed to each of the Rules, which attests to the significant controversy here. See NPCA, 241 F.3d at 736 (EIS warranted where 85% of comments were negative).

Third, by failing to collect site-specific data on Jetski impacts, the Park Service has created the very kind of “uncertainty” at each of these Parks that *requires* an EIS. Anderson v. Evans,

requiring such measures as 4-stroke engines, minimum age requirements, etc . . . - on the grounds that no such concessionaire exists. Cape Lookout EA, at 28. Of course, this entirely fails to address whether the agency could *find* a concessionaire to provide this kind of service. Certainly, the agency’s summary rejection of this, and other, alternatives offered for each of the Parks violates NEPA. See e.g., Native Ecosystems Council v. U.S. Forest Service, 428 F.3d 1233, 1245 (9th Cir. 2005).

⁵ Indeed, in light of the incredible beauty and other environmental qualities of Gulf Islands, Cape Lookout, and Pictured Rocks in particular, it is especially evident that an EIS for each Park is necessary before reintroducing Jetski use there. See Gulf Islands EA at iii (noting the “snowy-white beaches, sparkling blue waters, fertile coastal marshes, and dense maritime forests” of the Gulf Islands); Cape Lookout EA at 1 (describing the area’s “wide, bare beaches with low dunes covered by scattered grasses, flat grasslands bordered by dense vegetation, and large expanses of salt marsh”); Pictured Rocks EA at 1 (noting the area’s pristine “multicolored sandstone cliffs, beaches, sand dunes, waterfalls, inland lakes, wildlife, and forested shoreline”).

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371 F.3d 475, 489-92 (9th Cir. 2004). Indeed, even apart from the Settlement Agreement, NEPA requires that, in order to fulfill the statute's twin aims to (a) "place[] upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action" and (b) "inform the public that [the agency] has indeed considered environmental concerns in its decisionmaking process," Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 97 (1983) (other citations omitted), an agency must collect missing data before making its decision. NPCA, 241 F.3d at 732 ("[p]reparation of an EIS *is mandated* where uncertainty may be resolved by further collection of data"). Accordingly, before allowing Jetski use back into these Parks, the Park Service must compile the requisite data in an EIS for the agency and the public to consider. Found. for N. Am. Wild Sheep v. USDA, 681 F.2d 1172, 1179 (9th Cir. 1982 (NEPA "obviate[s] the need for speculation by insuring that available data is gathered and analyzed prior to the implementation of the proposed action").

CONCLUSION

We support your adoption of the 2006 Management Policies, and we believe that if you evaluate these three decisions in light of those Policies, as well as the requirements of NEPA, the Organic Act, the APA, and the 2000 Settlement Agreement, you will agree that the Park Service made a mistake in authorizing Jetski use at Gulf Islands, Cape Lookout, and Pictured Rocks. Accordingly, we urge you to reinstate the Jetski ban at these three Parks; vacate the regulations permitting Jetski use there; and commit that the Park Service will not permit the pristine environmental qualities of these natural areas to continue to be degraded by Jetski use, which plainly does not belong in our National Park System.

We look forward to hearing from you.

Sincerely,



Howard M. Crystal
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