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## Bluewater Network v. Salazar

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**ABSTRACT**

The United States District Court for the District of Columbia stopped personal watercraft use in Gulf Islands National Seashore and Pictured Rocks National Lakeshore after concluding that the Park Service did not sufficiently explain the reasoning behind its decision to reopen the areas to personal watercraft use. This case was brought by Bluewater Network, the Wilderness Society, Endid Sisskin, and Robert Goodman against the National Park Service with the Personal Watercraft Industry Association and the American Watercraft Association intervening. The court called the Park Service’s reasoning “impermissibly conclusory” in holding that the Park Service rules violated NEPA, the APA, and failed to explain how allowing personal watercraft use in Pictured Rocks and Gulf Islands was consistent with the Organic Act.

**I. INTRODUCTION**

On July 8, 2010, the United States District Court for the District of Columbia halted Personal Watercraft (PWC) use in Pictured Rocks National Lakeshore (Pictured Rocks) and Gulf Islands National Seashore (Gulf Islands).<sup>170</sup> The court remanded the National Park Service (Park Service) rules regarding PWC use to the Park Service to provide sufficient reasoning for its conclusions.<sup>171</sup> Calling the Park Service’s analysis “opaque” and “impermissibly conclusory,”<sup>172</sup> the court held that the Park Service rules violated the National Environmental Policy Act

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<sup>170</sup> *Bluewater Network v. Salazar*, 721 F. Supp. 2d 7 (D.D.C. July 8, 2010).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 31.

(NEPA)<sup>173</sup> the Administrative Procedures Act (APA),<sup>174</sup> and failed to explain how allowing PWC use in Pictured Rocks and Gulf Islands was consistent with the Organic Act.<sup>175</sup>

## **II. BACKGROUND**

The Park Service promulgated the “National Jetski Rule” (Rule) on March 21, 2000 prohibiting PWCs in all Park Service units except those with a history of jetski use.<sup>176</sup> Twenty-one parks had historic jetski use and were given two-year grace periods to develop and implement park-specific PWC regulations.<sup>177</sup> Upon expiration of the grace period, failure to implement regulations would result in a ban on PWC use.<sup>178</sup> Pictured Rocks and Gulf Islands had historic use, and both failed to implement regulations before expiration of the grace period.<sup>179</sup>

After the Rule was issued, Bluewater Network sued claiming the exception failed to protect parks with historic use.<sup>180</sup> The lawsuit resulted in a settlement agreement that was approved by the United States District Court for the District of Columbia on April 11, 2001.<sup>181</sup> This settlement required parks that allowed PWC use to comply with NEPA and issue park-specific regulations.<sup>182</sup> After Gulf Islands and Pictured Rocks issued park-specific regulations, Bluewater sued again claiming the Park Service violated NEPA and the settlement agreement,

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<sup>173</sup> *Id.* at 43 (referencing 42 U.S.C. §§ 4331 -35 (2006)).

<sup>174</sup> *Id.* at 40.

<sup>175</sup> *Id.* at 38 (referencing 16 U.S.C. § 1 ).

<sup>176</sup> *Id.* at 11 (citing 36 C.F.R. § 3.9 (2010)).

<sup>177</sup> *Id.* (citing 65 Fed. Reg. 15077, 15078 (Mar. 21, 2000)).

<sup>178</sup> *Id.* (citing 65 Fed. Reg. 15077, 15078 (Mar. 21, 2000)).

<sup>179</sup> *Id.* at 14-15.

<sup>180</sup> *Id.* at 11.

<sup>181</sup> *Id.* (citing *Bluewater I*, Order (Apr. 11, 2001)).

<sup>182</sup> *Id.* at 11.

and failed to explain how its decision was consistent with the Organic Act.<sup>183</sup> Both sides moved for summary judgment, and the court granted in part and denied in part their motions.<sup>184</sup>

### **A. Pictured Rocks National Lakeshore**

Pictured Rocks is in northern Michigan along Lake Superior and was designated as a National Lakeshore because of its “multicolored sandstone cliffs, beaches, sand dunes, waterfalls, inland lakes, wildlife and forested shoreline.”<sup>185</sup> In February 2002, the Pictured Rocks Superintendent issued a compendium closing the park to PWC use.<sup>186</sup> When the grace period expired in April of 2002, PWCs were banned in Pictured Rocks.<sup>187</sup> That same year, Pictured Rocks prepared an Environmental Assessment (EA) on the impact of PWCs.<sup>188</sup> The Park Service analyzed three alternatives in terms of their context, duration, and intensity.<sup>189</sup> Each alternative was compared to the baseline of continued PWC use at pre-ban levels.<sup>190</sup> The Park Service identified Alternative B as the best option for protecting park resources and visitors, while still permitting a range of recreational activities.<sup>191</sup> Alternative B would allow continued PWC use with some additional restrictions.<sup>192</sup> The Park Service declined to prepare an Environmental Impact Statement (EIS), choosing instead to issue a Finding of No Significant Impact (FONSI) in September 2005.<sup>193</sup> Pictured Rocks issued its final rule officially re-authorizing PWC use in October of 2005.<sup>194</sup>

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<sup>183</sup> *Id.* at 9.

<sup>184</sup> *Id.* at 10.

<sup>185</sup> *Id.* at 11-12 (citing 70 Fed. Reg. 61893, 61894 (Oct. 27, 2005)).

<sup>186</sup> *Id.* at 12.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* (referencing 40 C.F.R. § 1501.3 ).

<sup>189</sup> *Id.* at 12-13.

<sup>190</sup> *Id.* at 13.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* (referencing 40 C.F.R. § 1501.4).

<sup>194</sup> *Id.* (citing 70 Fed. Reg. 61893 -01 (Oct. 27, 2005)).

## **B. Gulf Islands National Seashore**

Gulf Islands is located along the Gulf Coast of Florida and Mississippi and consists of a 160-mile expanse of barrier islands and “snowy-white beaches, sparkling blue waters, fertile coastal marshes, and dense maritime forests.”<sup>195</sup> PWCs were historically allowed in Gulf Islands and subject to the same regulations as other motorized watercraft.<sup>196</sup> The Gulf Islands Superintendent initially planned to continue PWC use by issuing park-specific regulations.<sup>197</sup> However, the settlement agreement required Gulf Islands issue a special regulation and conduct NEPA review for PWC use to continue.<sup>198</sup> Pursuant to this requirement, Gulf Islands conducted a study on PWC use.<sup>199</sup> Following its study, Gulf Islands concluded that PWC use was inappropriate in Gulf Islands because of its negative impacts on water quality, wildlife, and enjoyment of the park by other visitors.<sup>200</sup>

After the grace period ended, Gulf Islands conducted an EA to further analyze PWC use impacts.<sup>201</sup> Similar to the Pictured Rocks EA, the Gulf Islands EA considered three alternatives and analyzed the impacts of each on park resources and visitors.<sup>202</sup> Following completion of the EA, Gulf Islands concluded that PWCs should be re-authorized with enhanced restrictions.<sup>203</sup> Gulf Islands issued its final rule permitting PWCs with additional restrictions on May 4, 2006.<sup>204</sup>

## **III. ANALYSIS**

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<sup>195</sup> *Id.* (citing 71 Fed. Reg. 26232 (May 4, 2006)).

<sup>196</sup> *Id.* at 14.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 15.

<sup>204</sup> *Id.* (citing 71 Fed. Reg. 26232 (May 4, 2006)).

As a threshold issue, the Park Service and intervenors contested plaintiffs' standing. The court agreed the plaintiffs could not establish an "injury in fact" in its Pictured Rocks claims because only Robert Goodman had visited the park on one occasion.<sup>205</sup> However, the court determined the plaintiffs had standing to enforce the terms of that settlement because Goodman was a party to the settlement agreement, which preserved the Pictured Rocks claims under NEPA but not the Organic Act.<sup>206</sup>

The plaintiffs argued the decision to re-introduce PWCs was arbitrary and capricious because the Park Service failed to adequately explain its "reversal of policy" in re-introducing PWCs.<sup>207</sup> The plaintiffs further claimed that even in the absence of a policy reversal, the Park Service failed to explain how allowing PWC use was consistent with the Organic Act.<sup>208</sup> The defendants argued there was no reversal of policy and that even if there was they were not required to provide a more detailed justification nor adhere to a heightened standard of review.<sup>209</sup>

The court agreed with the plaintiffs that whether an agency is reversing existing policy or creating new policy, the agency must provide a "rational connection between the facts found and the choices made."<sup>210</sup> Accordingly, the court determined that it did not matter whether the Park Service's decision to re-authorize PWC use was a reversal of policy; there had to be a rational explanation of the decision either way.<sup>211</sup>

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<sup>205</sup> *Id.* at 17-18.

<sup>206</sup> *Id.* at 18.

<sup>207</sup> *Id.* at 19.

<sup>208</sup> *Id.* at 20 (citing The Organic Act, 16 U.S.C. § 1).

<sup>209</sup> *Id.* at 21-22 (citing *FCC v. Fox TV Stations, Inc.*, 129 S. Ct. 1800, 1804 (2009); *Anna Jaques Hosp. v. Sebelius*, 583 F.3d 1, 3 (D.C. Cir. 2009)).

<sup>210</sup> *Id.* at 22 (quoting *Motor Vehicle Mfrs. Ass'n v. St. Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

<sup>211</sup> *Id.*

The court determined that because of new facts and restrictions it was within the Park Service’s authority to re-consider the Gulf Islands ban.<sup>212</sup> However, the court cautioned that did not necessarily mean the agency provided a “clear, reasoned, and adequately justified analysis in arriving at its final decision.”<sup>213</sup> The court also noted the Park Service correctly made the conservative assumption that users would continue to ride the older, noisier, and more polluting 2-stroke PWCs instead of the newer 4-stroke PWCs.<sup>214</sup> However, the Park Service relied on this assumption inconsistently, and when necessary assumed that the 4-stroke PWCs would be the norm.<sup>215</sup>

### **A. The Organic Act**

In its Organic Act analysis, the court assessed the sufficiency of the Park Service’s reasoning in its resource impact conclusions. The court examined the Park Service conclusions regarding impacts on water quality, air quality, soundscapes, vegetation, wildlife, and visitor experience to determine whether the conclusions were rationally connected to the facts found.<sup>216</sup>

The court noted that the Park Service chose to apply national water quality standards and did not explain why such standards were relevant to Gulf Islands.<sup>217</sup> Despite predicting an increase of more than 66% in emissions from PWCs, the Park Service concluded that no water quality impairment would occur.<sup>218</sup> The court described this conclusion as devoid of “any logical

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<sup>212</sup> *Id.* at 24.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 26.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 26-27.

<sup>217</sup> *Id.* at 30.

<sup>218</sup> *Id.* at 29.

link between the impact thresholds (e.g. negligible, minor, moderate, or major), and the ultimate conclusion that PWC use [did] not impair park resources under the Organic Act.”<sup>219</sup>

The Park Service’s air quality analysis followed methodology similar to its water quality analysis.<sup>220</sup> The Park Service again applied national standards and the same impact thresholds.<sup>221</sup> As with its water quality analysis, the court said the Park Service “failed to provide a rational link between its objective factual data and its ultimate conclusions [of] non-impairment.”<sup>222</sup>

The Park Service’s soundscapes analysis fared no better than its water or air quality analyses.<sup>223</sup> Again, the court said the Park Service did not explain why the standards and thresholds they applied were relevant.<sup>224</sup> The court concluded that the Park Service’s soundscapes analysis was insufficient because it inconsistently relied on the conservative assumption that 2-stroke PWCs would continue to be popular and did not account for peak days.<sup>225</sup>

The court found the Park Service’s vegetation analysis suffered from some of the same “infirmities” as the air, water, and soundscapes analyses.<sup>226</sup> Specifically, the court found the vegetation analysis contained no objective standards and impermissibly conclusory language.<sup>227</sup> The court concluded the Park Service again failed to provide a rational connection between a conclusion of non-impairment and the data.<sup>228</sup>

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<sup>219</sup> *Id.* at 30.

<sup>220</sup> *Id.* at 30-31.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* 31.

<sup>223</sup> *Id.* 32.

<sup>224</sup> *Id.* 33.

<sup>225</sup> *Id.* at 34 (referencing 36 C.F.R. § 3.15).

<sup>226</sup> *Id.* at 35.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 35-36.



The wildlife analysis was insufficient except for its threatened and endangered species analysis.<sup>229</sup> The court found the wildlife analysis did not provide a rational explanation for its conclusion and failed to address impacts on the bottlenose dolphin.<sup>230</sup> However, the court was satisfied with the Park Service’s threatened and endangered species analysis.<sup>231</sup> Specifically, the court determined the Park Service was correct in concluding that a no-wake zone would allow PWCs to be re-introduced with no significant impact on any federally or state-listed species.<sup>232</sup>

The Park Service’s visitor use and safety analysis was also determined to be insufficient.<sup>233</sup> The court explained that the Park Service’s visitor use and safety analysis concluded the impacts would be “minor” and “long-term,” but did not explain how this equated to a finding of non-impairment.<sup>234</sup> Thus, the court again said the Park Service failed to adequately explain its conclusion.<sup>235</sup>

The court held that the Park Service failed to explain how its decision was consistent with the Organic Act by inadequately explaining its non-impairment conclusions with respect to each impacted resource.<sup>236</sup> Specifically, the court said that the Gulf Islands final rule relied upon conclusory language in the EA and was arbitrary and capricious because the Park Service’s non-impairment conclusions under the Organic Act were not based on reasoned conclusions.<sup>237</sup>

## **B. NEPA**

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<sup>229</sup> *Id.* at 37.

<sup>230</sup> *Id.* at 36.

<sup>231</sup> *Id.* at 37.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 37-38.

<sup>235</sup> *Id.* at 37.

<sup>236</sup> *Id.* at 36.

<sup>237</sup> *Id.*

The Park Service violated NEPA by failing to take the necessary “hard look” at PWC impacts.<sup>238</sup> The Park Service was required by the settlement agreement and the Park Service’s Jetski Rule to comply with NEPA’s procedural requirements.<sup>239</sup>

The court started by considering the Park Service’s decision at Gulf Islands. Because the Gulf Islands NEPA analysis was simply the same impairment analysis it performed under the Organic Act, the court determined that the Park Service failed to take the necessary “hard look” at the impacts.<sup>240</sup> The court said the Gulf Islands EA was conclusory, internally inconsistent, and failed to explain the connection between the objective facts and conclusions reached.<sup>241</sup> The court concluded that the Gulf Islands FONSI and Final Rule were arbitrary and capricious because they were based on an EA that inadequately explained the connections between facts found and conclusions made.<sup>242</sup>

### C. APA

The Park Service’s decision to reopen Pictured Rocks and Gulf Islands to PWC use was arbitrary and capricious.<sup>243</sup> Instead of explaining how it arrived at its conclusion, the Park Service “relied on conclusory language that did little more than recite its compliance with duties imposed by that act.”<sup>244</sup> The court concluded that the Park Service failed to provide a “rational connection between the facts found and the choice made.”<sup>245</sup>

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<sup>238</sup> *Id.* at 39-40.

<sup>239</sup> *Id.* at 38.

<sup>240</sup> *Id.* at 39-40

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 40.

<sup>243</sup> *Id.* at 43 (citing 5 U.S.C. § 706(2) (A) (1966)).

<sup>244</sup> *Id.* at 27.

<sup>245</sup> *Id.* at 35-36 (quoting *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43).

The Pictured Rocks EA suffered from the same deficiencies found in the Gulf Islands EA.<sup>246</sup> The most serious deficiencies were related to the water quality and soundscape analyses. Despite the fact that Michigan prohibited lowering the quality of the “outstanding state resource waters” at Pictured Rocks, the Pictured Rocks EA included the same impact thresholds used in the Gulf Islands EIS.<sup>247</sup> In addition, the Pictured Rocks’ soundscapes analysis failed to use a recent study that looked at decibel levels resulting from PWC use.<sup>248</sup> Further, despite a decibel level that exceeded its own limits, the Park Service concluded that Pictured Rocks would only experience “negligible adverse impacts,” on soundscapes.<sup>249</sup> The court also found deficiencies in the Pictured Rocks air quality, wildlife, vegetation, and visitor experience analysis.<sup>250</sup>

Similar to its Gulf Islands conclusions, the court determined that the Pictured Rocks Final Rule and FONSI were insufficient because they relied on faulty reasoning in the EA.<sup>251</sup> Therefore, both the Pictured Rocks Final Rule and FONSI were arbitrary and capricious and failed to meet the NEPA “hard look” requirements.<sup>252</sup>

#### **D. Settlement Agreement**

To the extent that their analysis did not meet NEPA’s “hard look” requirement, the Park Service violated the settlement agreement.<sup>253</sup> Further, the court held that the Park Service improperly relied on conclusory reasoning to support its decision not to prepare an EIS.<sup>254</sup> The court held that on remand the settlement agreement did not require the Park Service to conduct

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<sup>246</sup> *Id.* at 40.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* at 41.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* at 41-43.

<sup>251</sup> *Id.* at 42-43.

<sup>252</sup> *Id.* at 43.

<sup>253</sup> *Id.* at 45.

<sup>254</sup> *Id.*

park-specific studies but did require NEPA compliance.<sup>255</sup> The court noted that the Park Service could rely on studies from other locations to assess the impacts of PWCs and still comply with NEPA.<sup>256</sup>

#### **IV. CONCLUSION**

The United States District Court for the District of Columbia determined that the Park Service violated NEPA, the APA, and failed to explain how its actions were consistent with the Organic Act when it re-authorized PWC use within Pictured Rocks and Gulf Islands. This decision puts the “Jetski Rule” back into effect and bans PWC use within these parks. Bluewater Network claims this decision protects two units of our National Park system from the noise; air and water quality degradation; and user-conflicts that occur because of PWC use. Motorized recreation groups claim this decision restricts access to public lands and locks out those who are physically unable to access these areas without motorized assistance.

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<sup>255</sup> *Id.*

<sup>256</sup> *Id.*