

*Effects on the Nation's Energy Supply (Executive Order 13211)*

E.O. 13211 requires the agency to prepare a Statement of Energy Effects when it takes a regulatory action that is identified as a significant energy action. This rule is not a significant energy action, and therefore does not require a Statement of Energy Effects, because it:

- (1) Is not a significant regulatory action under E.O. 12866,
- (2) Is not likely to have a significant adverse effect on the supply, distribution, or use of energy, and
- (3) Has not been designated by the Administrator of the OIRA, OMB, as a significant energy action.

*Consultation and Coordination With Indian Tribal Governments (Executive Order 13175)*

In accordance with E.O. 13175, this rule will not have tribal implications that impose substantial direct compliance costs on Indian tribal governments.

**Clarity of This Regulation**

E.O. 12866 requires each agency to write regulations that are easy to understand. We invite your comments on how to make this rule easier to understand, including answers to questions such as the following:

- (1) Are the requirements in the rule clearly stated?
- (2) Does the rule contain technical language or jargon that interferes with its clarity?
- (3) Does the format of the rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity?
- (4) Is the description of the rule in the **SUPPLEMENTARY INFORMATION** section of this preamble helpful in understanding the rule? What else can we do to make the rule easier to understand?

Send a copy of any comments that concern how we could make this rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW., Washington, DC 20240. You may also e-mail the comments to this address: [Exsec@ios.doi.gov](mailto:Exsec@ios.doi.gov).

**List of Subjects in 30 CFR Part 250**

Continental shelf, Environmental impact statements, Environmental protection, Government contracts, Investigations, Oil and gas exploration, Penalties, Pipelines, Public lands—mineral resources, Public lands—right-of-way, Reporting and recordkeeping requirements, Sulphur.

*List of Subjects in 30 CFR Part 256*

Administrative practice and procedure, Continental shelf, Environmental protection, Government contracts, Intergovernmental relations, Oil and gas exploration, Public lands—mineral resources, Public lands—rights-of-way, Reporting and recordkeeping requirements, Surety bonds.

Dated: October 17, 2005.

**Chad Calvert,**

*Acting Assistant Secretary—Land and Minerals Management.*

- For the reasons explained in the preamble, MMS amends 30 CFR parts 250 and 256 as follows:

**PART 250—OIL AND GAS AND SULPHUR OPERATIONS IN THE OUTER CONTINENTAL SHELF**

- 1. The authority citation for part 250 continues to read as follows:

**Authority:** 43 U.S.C. 1331 *et seq.*

- 2. Section 250.1015 is amended by adding a new paragraph (e) as follows:

**§ 250.1015 Applications for pipeline rights-of-way grants.**

\* \* \* \* \*

(e) Notwithstanding the provisions of paragraph (a) of this section, the requirements to pay filing fees under that paragraph are suspended until January 3, 2006.

- 3. Section 250.1018 is amended by adding a new paragraph (c) as follows:

**§ 250.1018 Assignment of pipeline right-of-way grants.**

\* \* \* \* \*

(c) Notwithstanding the provisions of paragraph (b) of this section, the requirement to pay a filing fee under that paragraph is suspended until January 3, 2006.

**PART 256—LEASING OF SULPHUR OR OIL AND GAS IN THE OUTER CONTINENTAL SHELF**

- 4. The authority for part 256 continues to read as follows:

**Authority:** 43 U.S.C. 1331 *et seq.*, 42 U.S.C. 6213.

- 5. Section 256.64 is amended by adding a new paragraph (a)(9) as follows:

\* \* \* \* \*

(a) \* \* \*

(9) Notwithstanding the provisions of paragraph (a)(8) of this section, the requirements to pay a filing fee in connection with any application for approval of any instrument of transfer and to pay a fee in connection with

documents not required to be filed are suspended until January 3, 2006.

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**BILLING CODE 4310–MR–P**

**DEPARTMENT OF THE INTERIOR****National Park Service****36 CFR Part 7**

**RIN 1024–AC93**

**Pictured Rocks National Lakeshore, Personal Watercraft Use**

**AGENCY:** National Park Service, Interior.  
**ACTION:** Final rule.

**SUMMARY:** This final rule designates areas where personal watercraft (PWC) may be used in Pictured Rocks National Lakeshore, Michigan. This final rule implements the provisions of the National Park Service (NPS) general regulations authorizing parks to allow the use of PWC by promulgating a special regulation. The NPS Management Policies 2001 require individual parks to determine whether PWC use is appropriate for a specific park area based on an evaluation of that area's enabling legislation, resources and values, other visitor uses, and overall management objectives.

**DATES:** This rule is effective October 27, 2005.

**ADDRESSES:** Mail inquiries to Superintendent, Pictured Rocks National Lakeshore, N8391 Sand Point Road, P.O. Box 40, Munising, Michigan 49862–0040. E-mail to [PIRO@den.nps.gov](mailto:PIRO@den.nps.gov).

**FOR FURTHER INFORMATION CONTACT:** Jerry Case, Regulations Program Manager, National Park Service, 1849 C Street, NW., Room 7241, Washington, DC 20240. Phone: (202) 208–4206. E-mail: [Jerry\\_Case@nps.gov](mailto:Jerry_Case@nps.gov).

**SUPPLEMENTARY INFORMATION:****Background***Personal Watercraft Regulation*

On March 21, 2000, the National Park Service published a regulation (36 CFR 3.24) on the management of personal watercraft (PWC) use within all units of the national park system (65 FR 15077). This regulation prohibits PWC use in all national park units unless the NPS determines that this type of water-based recreational activity is appropriate for the specific park unit based on the legislation establishing that park, the park's resources and values, other visitor uses of the area, and overall

management objectives. The regulation prohibits PWC use in all park units effective April 20, 2000, except a limited exception was provided for 21 parks, lakeshores, seashores, and recreation areas. The regulation established a 2-year grace period following the final rule publication to give these 21 park units time to consider whether PWC use should be allowed. Accordingly, on April 22, 2002, Pictured Rocks National Lakeshore closed for PWC use.

#### *Description of Pictured Rocks National Lakeshore*

Pictured Rocks National Lakeshore is situated in the north-central section of Michigan's Upper Peninsula, along the southern shore of Lake Superior. The eastern half of the Upper Peninsula is bounded by Lakes Superior, Michigan, and Huron. There are a variety of other national parks in the upper Great Lakes, including Apostle Islands National Lakeshore and Isle Royale National Park on Lake Superior, and Sleeping Bear Dunes and Indiana Dunes National Lakeshores on Lake Michigan. Canadian provincial parks are also located on Lake Superior.

The national lakeshore stretches from Munising to Grand Marais, approximately 40 miles to the northeast. The shoreline consists of narrow sandy beaches, sandstone cliffs, and a perched sand dune system. The sandy shoreline is susceptible to erosion from natural weather conditions.

Pictured Rocks National Lakeshore was authorized in 1966. The lakeshore is noted for its multicolored sandstone cliffs, beaches, sand dunes, waterfalls, inland lakes, wildlife, and forested shoreline. Attractions include a lighthouse and former Coast Guard lifesaving stations, along with old farmsteads and orchards. The lakeshore is a year-round recreational destination where hiking, camping, hunting, nature study, and winter activities abound.

#### *Purpose of Pictured Rocks National Lakeshore*

As formulated during the Pictured Rocks National Lakeshore general management planning process, the purpose of the national lakeshore includes the following:

- Preserve a portion of the Great Lakes shoreline for its geographic, scientific, scenic, and historic features, and its associated ecological processes.
- Provide opportunities for public benefit in recreation, education, enjoyment, and inspiration.
- Protect the character and use of the shoreline zone while allowing economic

utilization of the inland buffer zone's renewable resources.

#### *Significance of Pictured Rocks National Lakeshore*

As stated in the national lakeshore's Draft General Management Plan/Wilderness Study/Environmental Impact Statement, Pictured Rocks National Lakeshore is significant because:

1. Pictured Rocks National Lakeshore preserves and affords public access to a spectacular and diverse segment of the Lake Superior shoreline.
2. Unmatched in their scenic value, the 200-foot high Pictured Rocks cliffs rise perpendicularly from Lake Superior, creating a rock mosaic of form, color, and texture, which is enhanced by cascading waterfalls. Grand Sable Dunes, perched atop 300-foot-high sand banks above Lake Superior, is one of two perched dune systems on the Great Lakes; within these dunes live unique plant communities resulting from geomorphic processes.
3. Twelve miles of unspoiled and undeveloped Lake Superior beach contrast with the Pictured Rocks cliffs and Grand Sable Dunes.
4. Bedrock geology and glacial landforms provide significant topographic relief marked by streams, inland lakes, and a diversity of associated vegetation.
5. The shoreline offers extraordinary and inspirational scenic vistas of Lake Superior, which has the largest surface area of any fresh water lake on earth.
6. Pictured Rocks National Lakeshore offers a variety of affordable year-round recreational opportunities for appropriate public use.
7. Within a distinct area, the lakeshore contains a spectrum of cultural resources focused on the human use of Lake Superior and its shoreline.
8. Lying in a transition zone between boreal and eastern hardwood forest, the lakeshore's scientifically recognized assemblage of flora and fauna is representative of associations unique to the Lake Superior Basin.
9. Pictured Rocks National Lakeshore is the only national park system area with a legislated buffer zone.

#### *Authority and Jurisdiction*

Under the National Park Service's Organic Act of 1916 (Organic Act) (16 U.S.C. 1 *et seq.*) Congress granted the NPS broad authority to regulate the use of the Federal areas known as national parks. In addition, the Organic Act (16 U.S.C. 3) allows the NPS, through the Secretary of the Interior, to "make and publish such rules and regulations as he

may deem necessary or proper for the use and management of the parks \* \* \*".

16 U.S.C. 1a-1 states, "The authorization of activities shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which these various areas have been established \* \* \*".

As with the United States Coast Guard, NPS's regulatory authority over waters subject to the jurisdiction of the United States, including navigable waters and areas within their ordinary reach, is based upon the Property and Commerce Clauses of the U.S. Constitution. In regard to the NPS, Congress in 1976 directed the NPS to "promulgate and enforce regulations concerning boating and other activities on or relating to waters within areas of the National Park System, including waters subject to the jurisdiction of the United States \* \* \*". (16 U.S.C. 1a-2(h)). In 1996 the NPS published a final rule (61 FR 35136, July 5, 1996) amending 36 CFR 1.2(a)(3) to clarify its authority to regulate activities within the National Park System boundaries occurring on waters subject to the jurisdiction of the United States.

#### **PWC Use at Pictured Rocks National Lakeshore**

PWC use in Pictured Rocks National Lakeshore began around 1990. Before the ban, use was only allowed on Lake Superior, and it was relatively low. Restrictions on inland lakes precluded PWC use on those lakes. Pictured Rocks National Lakeshore has jurisdiction on the surface water of Lake Superior extending 0.25 mile from the shoreline. This final rule would only apply to the waters under the lakeshore's jurisdiction. In addition, Michigan's Personal Watercraft Safety Act of 1998 (Public Act 116) stipulates regulations for PWC use. One of the regulations is that personal watercraft cannot operate within 200 feet of the shoreline unless traveling perpendicular to shoreline at no-wake speed.

Before the ban, PWC operation on Lake Superior was concentrated between Sand Point and Chapel Beach, along the Lake Superior shoreline. The eastern side of the park had little PWC use. Rivers and streams within Pictured Rocks National Lakeshore are not accessible to personal watercraft due to extremely small size, shallow depths, and rocky bottoms. On inland lakes within the Lakeshore boundaries, the size of powerboat engines is restricted to two- and four-stroke internal

combustion engines of 50 hp or less, essentially eliminating PWC use.

Before the ban was imposed, most PWC users at the park were from within 100 miles of the lakeshore. Based on staff observations, some users came from other parts of Michigan, Wisconsin, and Minnesota, and perhaps Ohio and Illinois. There are many other areas for water-based recreation in this portion of the Upper Peninsula, including State parks, national forests, and other lakes with public access. Such areas include other portions of Lake Superior (excluding the shore of Grand Island), many lakes within the Escanaba River and Lake Superior State Forests, several lakes within the Hiawatha National Forest, Manistique Lake, South Manistique Lake, and Lake Michigan.

To document actual PWC use and to provide peak usage information, staff conducted a survey at the Sand Point launch July 4–8, 2001. During the five-day survey, small craft warnings prohibited personal watercraft on two days. PWC use for the remaining three days ranged from 8 to 13 personal watercraft each day. Thus, the peak number of personal watercraft that were operating before the ban in the lakeshore was 13 per day—6.6 from the Sand Point launch and 6.6 from the Munising boat ramp.

Before the ban, because personal watercraft were also launched from the Munising boat ramp on the west end of the lakeshore, the city was contacted to determine launch numbers. However, specific data were not available. Based on discussions with lakeshore staff, the number of personal watercraft launched from Munising was assumed to be the same as the number launched from Sand Point. Based on the analysis of the survey and assumptions, 6.6 personal watercraft would be launched from the Munising boat ramp each day during July and August weekends. All of these personal watercraft would likely travel within the lakeshore's jurisdiction.

Grand Marais, on the east end of the lakeshore, also has boat launch facilities. According to city staff, very few personal watercraft are launched—perhaps 12 all summer, for an average of 1 personal watercraft every seven days. This analysis assumes that on average no personal watercraft would be launched from Grand Marais during July and August.

The low PWC numbers are primarily a result of the cold water temperature, cool ambient air temperature, changeable weather conditions, and heavy winds and wave action. The average PWC trip within Pictured Rocks National Lakeshore lasted between three and five hours, from mid morning to

mid or late afternoon. State regulations restrict operations to the hours of 8 a.m. to one hour before sunset. Most PWC users cruised and sometimes raced along the shoreline, explored the rock cliffs up close, jumped the wakes of tour boats (which make 4–5 foot swells), and traveled to beach destinations and spent the day or afternoon on the beach. Fewer PWC users assembled in pontoons and did short trips or went to beach areas. A very small number may have done day trips between Munising and Grand Marais (40+ miles). Only a few users asked about PWC camping opportunities.

Before the ban, PWC users were distributed throughout the lakeshore. According to NPS staff, most personal watercraft were operated on the west end of the lakeshore. This is consistent with the launch locations and predicted launch numbers. Few PWC operators traveled the entire length of the lakeshore due to the long distance, rough waters, and potential for changing weather.

Generally, there is very little information specific to visitor concerns about PWC use. Visitor surveys were conducted for the winter of 1999–2000 and for the summer of 2000 (with questions specific to PWC use in the national lakeshore). A majority of the respondents to the survey supported or strongly supported restricting PWC use to designated areas. No PWC accidents have been observed or reported to NPS staff. Five incident reports have been documented, one for operating too close to other motorcraft, two for operating too close to swimmers, and two for operating illegally on inland lakes. There are no observations or reports related to natural resource concerns.

#### **Notice of Proposed Rulemaking and Environmental Assessment**

On November 15, 2004, the National Park Service published a Notice of Proposed Rulemaking (NPRM) for the operation of PWC at Pictured Rocks National Lakeshore (69 FR 65556). The proposed rule for PWC use was based on alternative B (one of three alternatives considered) in the Environmental Assessment (EA) prepared by NPS for Pictured Rocks National Lakeshore. The environmental assessment was available for public review and comment for the period August 1 through November 15, 2002. An errata sheet was prepared to address the changes to alternative B, the preferred alternative. To request a copy of the document and the errata sheet contact Superintendent, Pictured Rocks National Lakeshore, N8391 Sand Point Road, P.O. Box 40, Munising, MI 49862–

0040. A copy of the Environmental Assessment and the errata sheet may also be found at <http://www.nps.gov/piro/pwc/pwc.htm>.

The purpose of the environmental assessment was to evaluate a range of alternatives and strategies for the management of PWC use at Pictured Rocks National Lakeshore to ensure the protection of park resources and values while offering recreational opportunities as provided for in the National Lakeshore's enabling legislation, purpose, mission, and goals. The assessment assumed alternatives would be implemented beginning in 2002 and considered a 10-year period, from 2002 to 2012.

The environmental assessment evaluated three alternatives addressing the use of personal watercraft at Pictured Rocks National Lakeshore. The errata sheet modified one of the alternatives, Alternative B. Each alternative is described below:

Alternative A—Under alternative A, PWC use would continue as was provided and managed within Pictured Rocks National Lakeshore before the ban. PWC use would be unrestricted on Lake Superior from the lakeshore's 0.25-mile jurisdictional boundary to the lakeshore's shoreline. Launch and retrieval of personal watercraft would be permitted only at the Sand Point boat ramp on Lake Superior. PWC users would be able to land anywhere along the shoreline. PWC users would continue to abide by Michigan's Personal Watercraft Safety Act of 1998 (Public Act 116) and related regulations.

Alternative B—Alternative B was modified by the errata dated October 2003. Under the modified alternative B, PWC use would be allowed to operate on the waters of Lake Superior within the boundaries of Pictured Rocks National Lakeshore from the western boundary of the lakeshore up to the east end of Miners Beach.

PWC use would be allowed under the following conditions: Personal watercraft may only be launched from a designated launch site at Sand Point, PWC users may beach their craft only at Sand Point Beach and Miners Beach, and PWC users may not launch or operate in any other area of the lakeshore. The superintendent of the park may temporarily limit, restrict, or terminate access to areas designated for PWC use after taking into consideration public health and safety, natural and cultural resource protection, and other management activities and objectives. PWC use would be restricted at specific locations during the permitted use of ethnographic resources. Boat patrols would be conducted in the vicinity of

the ethnographic resource use in order to reduce the potential for PWC-related intrusion into the ceremonial activity. PWC users would continue to abide by Michigan's Personal Watercraft Safety Act of 1998 (Public Act 116) and related regulations, as identified in alternative A. This alternative would allow PWC use along the Lake Superior shoreline within the western end of the park, covering approximately 8 miles of shoreline. The numbers of personal watercraft would not be restricted.

**No-Action Alternative**—Under the no-action alternative, the National Park Service would take no action to reinstate the use of personal watercraft at Pictured Rocks National Lakeshore and no special rule would be promulgated to continue personal watercraft use. Under this alternative, NPS would continue to prohibit personal watercraft use at Pictured Rocks National Lakeshore begun on April 22, 2002.

As stated in the NPRM, alternative B is the park's preferred alternative because it best fulfills the park responsibilities as trustee of the sensitive habitat; ensures safe, healthful, productive, and aesthetically and culturally pleasing surroundings; and attains a wider range of beneficial uses of the environment without degradation, risk of health or safety, or other undesirable and unintended consequences. This final rule contains regulations to implement alternative B at Pictured Rocks National Lakeshore.

### Summary of Comments

A proposed rule was published in the **Federal Register** for public comment on November 15, 2004, with the comment period lasting until January 14, 2005 (69 FR 65556). The National Park Service (NPS) received 600 timely written responses regarding the Environmental Assessment (EA) and proposed regulation. Of the responses, 387 were form letters in 6 different formats, and 213 were separate letters. Of the 213 separate letters, 202 were from individuals, 8 from organizations, one from a congressional affiliation, and 2 from government agencies. Within the following discussion, the term "commenter" refers to an individual, organization, or public agency that responded. The term "comments" refers to statements made by a commenter.

### General Comments

1. One commenter stated that the Environmental Assessment (EA) failed to use the best data available and picked alternative B without adequate scientific justification.

*NPS Response:* Where data was lacking, best professional judgment prevailed, using assumptions and extrapolations from scientific literature, other park units where personal watercraft (PWC) are used, and personal observations of park staff. The NPS believes that the EA is in full compliance with the court-ordered settlement and that the Finding of No Significant Impact (FONSI) shows that modified alternative B (Continued PWC use under special NPS regulation with management restrictions) is the preferred alternative and that decision has been adequately analyzed and explained.

2. The American Land Alliance suggested that the EA fails to analyze the surrounding opportunities for PWC use in the Upper Peninsula, because there are ample opportunities outside the park for PWC use, including state and private lands.

*NPS Response:* The location of nearby launching facilities is described in several sections of the EA and includes the Munising boat ramp and Grand Marais public launch, as well as the lakeshore's Sand Point launch. The EA notes that there are many other areas for water-based recreation in the central Upper Peninsula, including state parks, national forests, and other lakes with public access (See page 51 of the EA, Affected Environment—Visitor Use and Experience). There is a text change on the errata sheet adding other areas available for water-based recreation.

3. One commenter stated that the labeling of the alternative prohibiting PWC as the "no-action alternative" is misleading since PWC have been used without restriction for many years at the lakeshore. The commenter suggested issuing a revised EA with a clear designation of a No PWC alternative, and providing a new comment period after the revised EA is released.

*NPS Response:* The NPS Director's Order #12 states that a full range of alternatives must be examined and that "the alternatives carried forward for analysis must meet project objectives to a large degree, although not necessarily completely." Under a full range of alternatives, the no-action alternative is developed as a viable choice in the range of alternatives and it sets a baseline of existing impact continued into the future against which to compare impacts of action alternatives. The No-Action alternative is a continuation of existing conditions and activities, which at the time the environmental analyses were being conducted was a ban on personal watercraft.

4. Two commenters stated that the EA fails to meet the requirements of NEPA

because a reasonable range of alternatives was not evaluated.

*NPS Response:* A summary of the personal watercraft litigation is contained under "Personal Watercraft Regulatory Framework" in the "Purpose and Need" chapter of the EA. The NPS had to comply with the court order, which resulted from *Bluewater v. Stanton*, and assess the impacts of personal watercraft on those resources specified by the judge, as well as other resources that could be affected. NPS believes a reasonable range of alternatives was evaluated. After analyses were done for every applicable impact topic with the best available data and input from the public was analyzed, Pictured Rocks National Lakeshore management selected modified alternative B as its preferred alternative. Implementation of Alternative B in the final rule will allow PWC use west of Miners Beach.

5. Several commenters stated that allowing PWC use with additional restrictions violates the park's enabling legislation and NPS mandate to protect resources from harm.

*NPS Response:* No part of the settlement agreement or NPS analysis of PWC use has violated or overturned Pictured Rocks National Lakeshore's enabling legislation. Both the personal watercraft settlement agreement and the authorizing legislation for Pictured Rocks National Lakeshore were considered when developing alternatives for the EA. The objective of the EA, as described in the "Purpose and Need" chapter of the EA, was derived from the enabling legislation for Pictured Rocks National Lakeshore. As further stated in this chapter, a special analysis on the management of personal watercraft was also provided under each alternative to meet the terms of the settlement agreement between Bluewater Network and the NPS.

As a result, the alternatives presented in the EA protect resources and values while providing recreational opportunities at Pictured Rocks National Lakeshore. As required by NPS policies, the impacts associated with personal watercraft and other recreational uses are evaluated under each alternative to determine the potential for impairment to park resources. The NPS finds that implementation of the modified preferred alternative (alternative B) in the final rule will not result in impairment of park resources and values for which the Pictured Rocks National Lakeshore was established.

6. One commenter suggested that the EA does not comply with the court settlement with Bluewater Network, and

is out of compliance with the agreement.

*NPS Response:* A summary of the NPS rulemaking and associated personal watercraft litigation is provided in Chapter 1, Purpose of and Need for Action, Background, of the EA. NPS believes it has complied with the court order and has assessed the impacts of personal watercraft on those resources specified by the judge, as well as other resources that could be affected. This analysis was completed for every applicable impact topic with the best available data, as required by Council on Environmental Quality regulations (40 CFR 1502.22). Where data was lacking, best professional judgment prevailed using assumptions and extrapolations from scientific literature, other park units where personal watercraft are used, and personal observations of park staff.

The NPS believes that the EA is in full compliance with the court-ordered settlement and that the FONSI shows that the decision to implement modified alternative B (Continued PWC use under special NPS regulation with management restrictions) as the preferred alternative in the final rule has been adequately analyzed and explained.

7. One commenter stated that PWC have not been recognized by the U.S. Coast Guard as Class A vessels, and that the Coast Guard has refrained from defining PWC.

*NPS Response:* The NPS has chosen to define PWC and our definition is as follows: Personal watercraft refers to a vessel, usually less than 16 feet in length, which uses an inboard, 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.

8. One person commented that the EA incorrectly references the Michigan Personal Watercraft Safety Act of 1998 regarding the prohibition of PWC 'through submerged and emergent vegetation.'

*NPS Response:* The statement in the EA was incorrect and has been updated on the errata sheet as follows: Guiding Regulations and Policies, second paragraph, change last sentence to read "Personal watercraft are not allowed to operate in waters where the water depth is less than two feet unless the watercraft is being operated at slow, no-wake speed or is being docked or launched."

9. Several commenters stated that the preferred alternative is likely to violate

the Organic Act by sacrificing full protection of park resources if PWC use is allowed within the park. Further, the draft regulations appear to violate the NPS mandate to fully protect park resources by allowing the use of damaging PWC on park waters.

*NPS Response:* The "Summary of Laws and Policies" section in the "Environmental Consequences" chapter of the EA summarizes the three overarching laws that guide the National Park Service in making decisions concerning protection of park resources. These laws, as well as others, are also reflected in the NPS Management Policies. An explanation of how the Park Service applied these laws and policies to analyze the effects of personal watercraft on Pictured Rocks National Lakeshore resources and values can be found under "Impairment Analysis" in the "Methodology" section of the EA.

Impact thresholds are not arbitrary; rather, they are established by a review of applicable literature, consultation with subject matter experts, applicable regulatory standards, and best professional judgment. The methods for establishing specific thresholds are disclosed under each impact topic.

The National Park Service has determined that, under the modified preferred alternative (alternative B), as implemented in this final rule, there will be no major negative impacts on park resources or values.

10. One commenter stated that PWC use estimates used in the EA are inaccurate. Specifically, the launch points within the lakeshore are unmonitored, so the number of PWC that use the lakeshore, along with trends in PWC use, are unknown.

*NPS Response:* See Errata Sheet, Table 11, for the EA: The totals have been corrected and do not substantially change NPS conclusions.

The 2000 and 2001 data indicate a 1% increase in PWC registration. While PWC registration increased by as much as 19% in 1996, the past five years of data exhibit a substantial decreasing trend in PWC registration in the state. This trend is also confirmed by industry sales data ([http://www.pwia.org/Abo\\_PWC.htm](http://www.pwia.org/Abo_PWC.htm)). In consultation with park staff and through review of national data, the NPS believes that a 2% annual increase in PWC use at the lakeshore is appropriate.

Historical use of PWC is described on pages 51 and 52 of the "Affected Environment" section of the EA. The NPS used all available data to extrapolate PWC use trends within the lakeshore. PWC visitor use trends were determined using data available from

the park, discussions with staff, as well as discussions with the Cities of Munising and Burt Township, which oversee local public launch facilities. The best practicable data was used and the NPS is confident that the analysis provides a reasonable evaluation of potential PWC use within the lakeshore.

11. One commenter stated that there is an error in Table 12: Peak Daily Visitor Use Numbers in the EA, because the whole chart is based on an overly simplistic interpretation of the PWC/Motorboat relationship. When segment three states that there will be zero "PWC users," the model accidentally extrapolates that there will be zero "other motorboats" as well. In addition, the model should have predicted some amount of growth in kayaking and canoeing over the next 10 years.

*NPS Response:* Alternative B and the no-action alternative assume that all motorized craft would be excluded from areas designated as primitive under a draft or final general management plan. The potential primitive area would extend 0.25 mile into Lake Superior from the shoreline, between Spray Falls and 1.25 miles east of Sevenmile Creek. The modified preferred alternative (alternative B), as implemented in this final rule, further restricts PWC use by discontinuing PWC use east of Miners Beach.

The number of sea kayakers and canoeists was estimated to increase 5% over the next ten years. A more accurate estimate, per recent discussions with park staff, would be an increase of 5% per year over the next 10 years. Thus, the number of canoeists/kayakers is estimated to increase from 45 persons in 2002 to 73 persons in 2012. These visitors would be distributed throughout the lakeshore. Although this is a relatively large increase in use as compared to the numbers evaluated in the EA, it would not change the evaluation that was completed. As indicated in the Visitor Experience section (page 107 of the EA), most non-motorized craft are concentrated closer to shore, such that interactions between these users and PWC would be infrequent. Additionally, PWC present near the shore are required to travel at flat-wake speed and would have minimal impact on non-motorized watercraft in that area.

#### Comments Regarding Water Quality

12. One commenter stated that impacts to water quality from PWC are underestimated. Polycyclic Aromatic Hydrocarbons (PAHs) can remain suspended in the water column or deposited in sediment for years after initial deposition. Even minor, short-

term oil spills can cause detrimental damage to aquatic wildlife. Exposure to hydrocarbon (HC) pollution can interfere with biological processes of the lakeshore's plants and wildlife.

*NPS Response:* The protection of water quality within the Pictured Rocks National Lakeshore has been addressed in the EA in a conservative evaluation of surface water quality impacts. Estimated minimum threshold volumes of water were determined for the PWC use areas where concentrations of gasoline constituents discharged from personal watercraft and other outboard engines could potentially be toxic to aquatic organisms or humans. Using the estimated threshold volumes, volumes of the areas being evaluated, PWC and other motorboat high-use-day loadings of chemicals identified as constituents of gasoline, and water quality benchmarks, it is possible to identify potentially unacceptable impacts to human health or the environment. Chronic water quality benchmarks protective of aquatic populations and protective of human health were acquired from various sources, including USEPA water quality criteria. Potential impacts to wildlife and plants from personal watercraft were addressed in other sections of the EA.

This comment appears to have several errors in its assertions regarding the water quality impact section of the EA: None of the three alternatives is expected to have a "moderate to major" impact as stated in the comment. All water quality impacts from personal watercraft are expected to be negligible to minor. Despite the fact that estimated water concentrations of individual PAHs are well below water quality benchmarks, cumulative impacts from PWC and motorboat use were judged to be "minor to moderate" when the potential for phototoxicity from total PAHs is considered.

This comment also misquotes the EA as follows: "\* \* \* most PWC gas and oil spills 'volatize' into the atmosphere \* \* \*". The EA for Pictured Rocks National Lakeshore considers the range of organic compound behavior in water on page 65 of the EA:

Many organic pollutants that are initially dissolved in the water volatilize to the atmosphere, especially if they have high vapor pressures, are lighter than water, and mixing occurs at the air/water interface. Other compounds that have low vapor pressure, low solubility, and high octanol/water partition coefficients tend to adhere to organic material and clays and eventually adsorb onto sediments.

13. One commenter stated that the analysis represents an outdated look at potential emissions from an overstated

PWC population of conventional two-stroke engines, and underestimated the accelerating changeover to four-stroke and newer two-stroke engines. The net effect is that the analysis overestimates potential PWC HC emissions, including benzene and PAHs, to the water. In addition, the water quality analysis uses assumptions that result in overestimation of potential PWC HC emission to the water. For example, the analysis states that benzo(a)pyrene concentrations in gasoline can be "up to 2.8 mg/kg."

*NPS Response:* The NPS recognizes that the assumption of all personal watercraft using 2-stroke engines in 2002 is conservative but believes it was appropriate to be protective of park resources. The assumption is consistent with emission data available in California Air Resources Board (CARB) (1998) and Bluewater Network (2001). The emission rate of 3 gallons per hour at full throttle is a mid-point between 3 gallons in two hours (1.5 gallons per hour; NPS 1999) and 3.8 to 4.5 gallons per hour for an average 2000 model year personal watercraft (Personal Watercraft and Bluewater Network 2001). The assumption also is reasonable in view of the initiation of production line testing in 2000 (EPA 1997) and expected full implementation of testing by 2006 (EPA 1996).

Reductions in emissions used in the water quality impact assessment are in accordance with the overall hydrocarbon emission reduction projections published by the EPA (1996). EPA (1996) estimates a 52% reduction by personal watercraft by 2010 and a 68% reduction by 2015. The 50% reduction in emissions by 2012 (the future date used in the EA) is a conservative interpolation of the emission reduction percentages and associated years (2010 and 2015) reported by the EPA (1996) but with a one-year delay in production line testing (EPA 1997).

The estimate of 2.8 mg/kg for benzo(a)pyrene in gasoline used in the calculations is considered conservative, yet realistic, since it is within the range of concentrations measured in gasoline, according to Gustafson *et al.* (1997).

14. One commenter stated that the "cleaner and quieter" PWC will still cause significant damage to the environment and wildlife because PWC produce pollutants such as PAHs that are toxic to plants and animals even at minute levels.

*NPS Response:* Personal watercraft and outboard motorboat engines discharge both unburned and burned gasoline and oil. In fact, it was shown in the EA that because more outboards

than personal watercraft are used in the lakeshore, the outboards contributed more of the organic compounds evaluated (PAHs and benzene) than personal watercraft. The new engine technology, including four-stroke engines and two-stroke direct injection engines, substantially reduces the emissions of most pollutants to the water and the air. As older personal watercraft are replaced with new, cleaner models, the emission rates of pollutants will decrease.

It is agreed that some research indicates that PAH toxicity can be enhanced by exposure to ultraviolet radiation in oligotrophic lakes having high light penetration (Oris *et al.* 1998). Limited data indicate that, under these conditions, PAHs may have toxic effects on fish and zooplankton at very low concentrations (less than 1 µg/L). Conversely, some PAHs may be degraded via photodegradation or microbial degradation (Fasnacht and Blough 2002; Albers 2002). Impacts to water quality from the emission of selected PAHs present in gasoline emissions (benzo(a)pyrene, naphthalene, and 1-methyl naphthalene) were evaluated in the EA. Also, the potential for increased toxic effects of PAHs is recognized and discussed qualitatively in the impact analyses, where appropriate.

15. One commenter stated that Lake Superior was designated by the U.S. and Canada Joint Commission as a zero discharge body of water, and the considerable amount of pollution discharged by PWC comprises more than "zero" discharge.

*NPS Response:* The impacts of both noise and discharge of burned and unburned fuel by personal watercraft were evaluated in the EA. In 1991, an International Joint Commission recommended that Lake Superior be a "zero discharge" demonstration zone (GLC 2003). However, the latest listing (March 2003) of priorities by the Great Lakes Commission in "2003 Great Lakes Program: Restore the Greatness" does not mention zero discharge as a priority for the coming year. The only current reference to zero discharge found on the Great Lakes Commission Web site (<http://www.glc.org>) is for zero discharge of aquatic nuisance species that are often carried in ship ballast water that is dumped after the ships enter the Great Lakes. Zero discharge of fuel from recreational boating does not appear to be an achievable objective since one of every three registered recreational vessels in the United States is found in the Great Lakes (GLC 2003). In response to the EPA emission reduction regulations (EPA 1996, 1997),

the discharge of fuel and its associated pollutants by personal watercraft and other motorboats is being reduced. The net effect of this reduction is factored into the EA impact analysis of water quality.

#### Comments Regarding Air Quality

16. One commenter stated that the analysis does not properly account for the rapid engine conversion that is occurring due to the phase-in of cleaner running engine technologies.

*NPS Response:* A conservative approach was used in the analysis, since the numbers of PWC that have already converted to four-stroke engines are not known. In addition, the Environmental Protection Agency (EPA) model takes into account the reduction in emissions over time. Even with the conservative approach, the analysis for alternative B presented in the EA indicates that current PWC use at Pictured Rocks National Lakeshore would result in negligible to moderate impacts to air quality.

17. One commenter indicated that direct-injected two-stroke engines are dirtier than four-stroke engines.

*NPS Response:* The comment is correct in stating the relationships between emissions of two-stroke direct injection and four-stroke PWC engines. EPA NONROAD model factors differ from those of the California Air Resources Board (CARB). As a result of the EPA rule requiring the manufacturing of cleaner PWC engines, the existing carbureted two-stroke PWC will, over time, be replaced with less-polluting PWC models. This replacement, with the anticipated resultant improvement in air quality, is parallel to that experienced in urban environments as the automobile fleet becomes cleaner over time.

18. One commenter stated that the analysis fails to mention the impact of PWC permeation losses on local air quality.

*NPS Response:* Permeation losses of volatile organic compounds (VOCs) from personal watercraft were not included in the calculation of air quality impacts primarily because these losses are insignificant relative to emissions from operating watercraft. Using the permeation loss numbers in the comment (estimated to be half the total of 7 grams of losses per 24 hours from the fuel system), the permeation losses per hour from fuel systems are orders of magnitude less than emissions from operating personal watercraft. Therefore, including permeation losses would have no effect on the results of the air quality impact analyses. Also, permeation losses were not included

because of numerous related unknown contributing factors, such as the number of personal watercraft refueling at the lakeshore and the location of refueling (inside or outside of the airshed).

19. One commenter stated that none of the air quality monitoring sites used as part of the analysis are located at the lakeshore, and that the most recent data available to the NPS are from 1999.

*NPS Response:* The statewide air quality monitoring sites are located near areas where air quality is known or likely to be impaired. As the comment states, data used in the EA were obtained from the 1999 Air Quality Report which, at time of preparation, was the best published regional source of general air quality information. Current site-specific background air monitoring data were also reviewed, available from the State of Michigan's website [http://www.michigan.gov/deq/0,1607,7-135-3310\\_4104--,00.html](http://www.michigan.gov/deq/0,1607,7-135-3310_4104--,00.html). The closest monitoring site is for PM<sub>2.5</sub> located at Traverse City, Michigan. It is agreed that monitoring sites distant from the location do not provide representative data for Pictured Rocks National Lakeshore; however, they are the nearest available sources of data. The absence of closer State monitoring sites is indicative of the good overall air quality in the area and attainment status with respect to all national ambient air quality standards. No health or environmental risks are identified by the Michigan Department of Environmental Quality that would warrant more frequent or intensive monitoring in the area. The 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 and cost and uncertainty factors inherent in obtaining and interpreting such data. In this context, the NPS takes the position that "appropriate consideration" has been given to air quality impacts from PWC.

20. One commenter stated that the EA fails to analyze new four-stroke engine technology. The PAH concentrations derived from worst-case modeling are orders of magnitude below the permissible exposure limits established by the Occupational Safety and Health Administration (OSHA) and National Institute for Occupational Safety and Health (NIOSH); therefore, continued PWC use would not pose any adverse health risks for park visitors under worst-case airborne PAH concentrations.

*NPS Response:* The criteria for analysis of impacts from PWC to human health are based on the National Ambient Air Quality Standards

(NAAQS) for criteria pollutants, as established by the U.S. EPA under the Clean Air Act, and on criteria pollutant annual emission levels. This methodology was selected to assess air quality impacts for all NPS EAs to promote regional and national consistency, and identify areas of potential ambient standard exceedances. PAHs are not assessed specifically as they are not a criteria pollutant. However, they are indirectly included as a subset of Total Hydrocarbons (THC), which are assessed because they are the focus of the EPA's emissions standards directed at manufacturers of spark ignition marine gasoline engines (See 61 FR 52088; October 4, 1996). Neither peak exposure levels nor NIOSH nor OSHA standards are included as criteria for analyzing air quality related impacts, except where short-term exposure is included in a NAAQS.

As stated above, the methodology for assessing air quality impacts was based on a combination of annual emission levels and the NAAQS, which are aimed at protection of the public. OSHA and NIOSH standards are intended primarily for workers and others exposed to airborne chemicals for specific time periods. The OSHA and NIOSH standards are not as suitable for application in the context of local and regional analysis of a park or recreational area as are the ambient standards, nor are they intended to protect the general public from exposure to pollutants in ambient air.

The "Kado Study" (Kado *et al.* 2000) presented the outboard engine air quality portion of a larger study described in Outboard Engine and Personal Watercraft Emissions to Air and Water: A Laboratory Study (CARB 2001). In the CARB report, results from both outboards and personal watercraft (two-stroke and four-stroke) were reported. The general pattern of emissions to air and water shown in CARB (2001) was two-stroke carbureted outboards and personal watercraft having the highest emissions, and four-stroke outboard and personal watercraft having the lowest emissions. The only substantive exception to this pattern was in nitrogen oxide (NO<sub>x</sub>) emissions to air: Two-stroke carbureted outboards and personal watercraft had the lowest NO<sub>x</sub> emissions, while the four-stroke outboard had the highest emissions. Therefore, the pattern of emissions for outboards is generally applicable to personal watercraft and applicable to outboards directly under the cumulative impacts evaluations.

21. One commenter expressed concern that PWC emissions were declining faster than forecasted by the

EPA. As the Sierra Report documents, in 2002, HC+ NO<sub>x</sub> emissions from the existing fleet of PWC were already 23% lower than they were before the EPA regulations became effective, and will achieve reductions greater than 80% by 2012.

*NPS Response:* The U.S. EPA's data incorporate into the 1996 Spark Ignition Marine Engine rule were used as the basis for the assessment of air quality, and not the Sierra Research data. It is agreed that these data show a greater rate of emissions reductions than the assumptions in the 1996 rule and in the EPA's NONROAD Model, which was used to estimate emissions. However, the level of detail included in the Sierra Research report has not been carried into the EA for reasons of consistency and conformance with the model predictions. Most states use the EPA's NONROAD Model for estimating emissions from a broad array of mobile sources. To provide consistency with state programs and with the methods of analysis used for other similar NPS assessments, the NPS has elected not to base its analysis on focused research such as the Sierra Report for assessing PWC impacts.

It is agreed that the Sierra Research report provides data on "worst case" scenarios. However worst case or short-term scenarios were not analyzed for air quality impacts in this or other NPS EAs.

It is agreed that the relative quantity of HC+ NO<sub>x</sub> are a very small proportion of the county-based emissions and that this proportion will continue to be reduced over time. The EA takes this into consideration in the analysis.

CARB certified PWC may be used; however, the degree of certainty of overall use of this engine type nationwide is not well established. For consistency and conformity in approach, the NPS has elected to rely on the assumptions in the 1996 S.I. Engine Rule, which are consistent with the widely used NONROAD emissions estimation model. The outcome is that estimated emissions from combusted fuel may be in the conservative range, if compared to actual emissions.

#### Comments Regarding Soundscapes

22. One commenter stated that continued PWC use in the Pictured Rocks National Lakeshore will not result in sound emissions that exceed the applicable federal or state noise abatement standards, and technological innovations by the PWC companies will continue to result in substantial sound reductions.

*NPS Response:* The NPS concurs that on-going and future improvements in

engine technology and design will likely further reduce the noise emitted from PWC. However, given the ambient noise levels at the lakeshore, it is unlikely that the improved technology could reduce all impacts to negligible adverse, particularly at the Sand Point launch.

23. One commenter cited noise testing conducted at Glen Canyon National Recreation Area (NRA) that indicated the maximum noise levels for PWC were actually lower than the maximum noise levels for other motorized vessels. In particular, the levels for PWC at 25 meters (82 feet) were approximately 68 to 76 A-weighted decibels (dB), whereas the levels for other motorized vessels at 82 feet were approximately 64 to 86 A-weighted decibels.

*NPS Response:* A correction has been included in the errata sheet to indicate that one PWC would emit 68 to 76 A-weighted dB at 82 feet. The reasons for assuming that PWC operate in pairs at the National Lakeshore are stated in the EA, and are based on staff observation and safety issues related to operating small watercraft at the park. Based on the PWC noise levels from the Glen Canyon study, two PWC would emit 66 to 77 dB at 82 feet, 65 to 75 dB at 100 feet, and 59 to 69 dB at 200 feet. The noise levels of two PWC traveling together would be less than the NPS noise limit of 82 dB at 82 feet for all alternatives. Given that ambient sound levels range from 22 dBA to 55 dBA in the lakeshore, the operation of PWC 200 feet from shore would still have negligible to minor adverse effects on the soundscape. In most locations natural sounds would prevail and motorized noise would be very infrequent or absent. At destinations such as the Sand Point launch and Miners Castle, natural sounds would predominate but motorized noise could be heard occasionally throughout the day. The correction noted above will not change the impact determinations identified in the original analysis.

24. One commenter stated that the EA has no site-specific support regarding the conclusion that PWC will inflict "short-term negligible impacts" upon the lakeshore's soundscapes and "negligible adverse impacts" upon visitor experience. The commenter stated that most of the public comments received on the lakeshore's draft General Management Plan (GMP) complained about PWC noise and urged that the machines be banned.

*NPS Response:* The effects of PWC on soundscapes were evaluated for site-specific areas, such as Sand Point, and general use areas, such as backcountry locations. The effects of PWC noise were determined to be negligible adverse to

minor adverse, depending on the alternative and location. While many comments on the GMP were related to PWC noise, commenters also mentioned noise from chain saws, snowmobiles, and cars. Additionally, the visitor use survey conducted in the summer of 2000 provided the following results: on a scale of 1 (not a problem) to 5 (very serious problem), backcountry visitors ranked "PWC disturbing backcountry experience" as 1.6 (no problem to slight problem). Frontcountry users identified PWC disruption as 1.4 on the same scale. Overall, more than 80% of the 228 persons responding to this question indicated that PWC operation within the lakeshore was "no problem." The NPS is confident that the soundscape analysis portrays an accurate description of the effects of PWC operation within the lakeshore.

25. One commenter stated that the impact of PWC on non-motorized visitors was grossly underestimated.

*NPS Response:* As stated previously, the summer visitor survey indicated that over 80% of the respondents, including backcountry visitors, identified PWC disturbance as "no problem." Approximately 8% of the 228 respondents identified PWC disturbances as a "serious or very serious" problem. The NPS recognizes that the degree to which a visitor is disturbed is a function of the timing, duration, and character of the PWC activity, as well as the visitor's personal perceptions of PWC use. Based on the data evaluated, the NPS is confident that the impact evaluation provides a reasonable estimate of PWC impacts on soundscapes and visitor experience.

#### Comments Regarding Wildlife

26. One commenter stated that PWC use and human activities associated with their use may not be any more disturbing to wildlife species than any other type of motorized or non-motorized watercraft. The commenter cites research by Dr. Rodgers, of the Florida Fish and Wildlife Conservation Commission, whose studies have shown that PWC are no more likely to disturb wildlife than any other form of human interaction, and that PWC posed less of a disturbance than other vessel types. Dr. Rodgers' research clearly shows that there is no reason to differentiate PWC from motorized boating based on claims on wildlife disturbance.

*NPS Response:* The NPS agrees that some research indicates that personal watercraft are no more apt to disturb wildlife than are small outboard motorboats; however, disturbance from both PWC and outboard motor boats does occur. Dr. Rodgers recommends



that buffer zones be established for all watercraft, creating minimum distances between boats (personal watercraft and outboard motorboats) and nesting and foraging waterbirds. As part of the Michigan Personal Watercraft Safety Act, PWC operating within 200 feet of the shoreline of any Great Lake must travel perpendicular to the shore and operate at a flat-wake speed. With this restriction in mind, impacts to wildlife and wildlife habitat under all three alternatives were judged to be negligible at most locations along the shoreline.

In addition, the EA was not conducted to determine if personal watercraft caused more environmental damage to park resources than other boats, but rather to determine if personal watercraft use was consistent with the national lakeshore's enabling legislation and management goals and objectives. The alternatives listed and the determination of their consequences was based upon the best information available.

27. One commenter stated that PWC cause lasting impacts to fish and wildlife. Two-stroke engines have been shown to produce pollutants that cause significant damage to aquatic plants and fish.

*NPS Response:* It is anticipated that more combustion-efficient engines in personal watercraft will reduce pollutant emissions to air and water in the same manner that increased efficiencies in automobile engines, combined with catalytic converters and other technologies, decreased the amount and types of automobile exhaust emissions. EPA-sponsored evaluations of different personal watercraft engine designs and emissions concluded that emission reductions would result with implementation of the EPA emission standards for marine engines. The modified preferred alternative provides for further protection of wildlife in the lakeshore. Phasing in of new personal watercraft technology under the modified preferred alternative (alternative B) will reduce impacts to aquatic and shoreline species by reducing the discharge of fuel components into the water. These reductions should indirectly benefit wildlife by reducing some of the contaminant loading of surface waters.

PAH toxicity to fish and wildlife species is a complicated topic because PAHs consist of dozens of different chemical compounds, each of which has substantially different toxicity characteristics in water, sediment, and soils, and toxicity varies dramatically among different fish and wildlife species. The ecological toxicity analysis for PAHs reported in the EA explains

the chemical, physical, and biological conditions that were used to conduct the assessment of PAH effects to fish species.

#### **Comments Regarding Threatened and Endangered Species**

28. One commenter stated that the EA lacks site-specific data on PWC impacts to threatened and endangered species.

*NPS Response:* The scope of the EA did not include site-specific surveys for species with the potential to occur at Pictured Rocks National Lakeshore. Potential for the occurrence and the location of special status species at Pictured Rocks National Lakeshore was based on existing surveys and studies conducted in the park in addition to input by park staff and federal and state agencies responsible for special status species management and protection.

Identification of state and federally listed species was accomplished through discussions with park staff and informal consultation with U.S. Fish and Wildlife Service. Primary steps in assessing impacts on listed species were to determine (1) which species are found in areas likely to be affected by management actions described in the PWC alternatives, (2) current and future use and distribution of PWC by alternative, (3) habitat loss or alteration caused by the alternatives, and (4) displacement and disturbance potential of the actions and the species' potential to be affected by PWC activities.

The information used in the analysis was obtained through best professional judgment of park staff and experts in the field and by conducting a literature review.

Documentation of the occurrence and locations of federal and state rare, threatened and endangered species at Pictured Rocks National Lakeshore was provided by National Park Service through several studies and surveys that have been conducted at the park. A list of federal and state protected species is provided in Table 6 in the EA.

29. The U.S. Fish and Wildlife Service commented that the Grand Sable Dunes site was last verified by the Michigan Natural Features Inventory (MNFI) in 1989, and recommended that the current presence of Pitcher's thistle be verified.

*NPS Response:* The location of Pitcher's thistle described in the EA is based on discussion with park staff and is current. Park staff will advise the MNFI as requested.

30. The U.S. Fish and Wildlife Service (USFWS) commented that the "not likely to adversely affect" determination for both action alternatives for the gray wolf, bald eagle, and Pitcher's thistle

suggests that there are beneficial, insignificant, or discountable effects of the proposed actions on these species. These effects are not clear in the EA. The USFWS stated that the EA seems to make a better case that the alternatives would have no effect on these three species, and suggested the park considers these determinations and provides support when the park requests Section 7 consultation with the USFWS office.

*NPS Response:* The determination of "not likely to adversely affect" was made based on the fact that, while PWC may provide access to locations where threatened/endangered species may be present, the likelihood of having an effect is extremely unlikely to occur. The errata has been updated to reflect a "no effect" determination for the gray wolf and Pitcher's thistle. After further analysis and discussions with U.S. Fish and Wildlife Service staff, the "not likely to adversely affect" determination for the bald eagle will remain, since the bald eagle's use of the shoreline is limited and known nest sites are located east of Miners Beach, where PWC use would be prohibited. The errata has been updated with further information to support this determination.

31. The U.S. Fish and Wildlife Service suggested that the extent to which bald eagles use the Lake Superior shoreline within Pictured Rocks National Lakeshore be described. If any such use occurs or can be expected to occur in the future, the park should clarify whether PWC use in the lakeshore could affect bald eagles.

*NPS Response:* Based on discussions with park staff, the bald eagle's use of the Lake Superior shoreline within Pictured Rocks National Lakeshore is limited. Known nest sites are located east of Miners Beach, where PWC use would be prohibited under the preferred alternative. The errata has been updated to reflect this.

32. The U.S. Fish and Wildlife Service stated that NPS must complete Section 7 consultation with the USFWS prior to completing a FONSI. The USFWS concurs that the only federally listed species currently on or near Pictured Rocks National Lakeshore are the piping plover, gray wolf, bald eagle, and Pitcher's thistle.

*NPS Response:* As indicated on page 96 of the Environmental Consequences section of the EA, Section 7 consultation would be initiated if the NPS determined that actions in the preferred alternative would be "likely to adversely affect" one or more of the federally listed threatened or endangered species identified in the lakeshore. The modified preferred

alternative (alternative B) will have no effect on piping plover, Pitcher's thistle, gray wolf, or Lake Huron tansy, and is not likely to adversely affect the common loon, bald eagle or the peregrine falcon. The errata has been updated to reflect a "no effect" determination for the gray wolf. The USFWS concurred with this determination after submitting this comment.

33. One commenter stated that the EA inadequately describes the impacts from PWC to osprey and bald eagle, and underestimates the impacts to the peregrine falcon and common loon, along with other species.

*NPS Response:* The NPS concurs that some studies have shown that PWC operation in proximity to nesting osprey and other wildlife species can have adverse effects. Studies also indicate that the timing, duration, and character (aggressiveness of PWC operation) of these interactions are important factors in determining the effect. As discussed in the EA (pages 20 and 96–101), state regulations require that PWC operating within 200 feet of the shore must be running perpendicular to the shore at flat-wake speeds. This state regulation minimizes the potential for adverse effects on shoreline wildlife at the lakeshore.

34. The U.S. Fish and Wildlife Service stated that piping plovers currently do not nest on Pictured Rocks National Lakeshore, but at nearby Grand Marais. Nesting occurred there in 2002 and has occurred there annually for more than 10 years. As the EA indicates, there is the potential for piping plover to use the Pictured Rocks National Lakeshore beach, at least for foraging, if not nesting. The piping plover breeding population has increased in recent years. As the population expands, piping plover may be found in previously unexpected areas. The USFWS recommended annual efforts to survey Pictured Rocks National Lakeshore for the bird. The USFWS also recommended that when the park requests Section 7 consultation, it refer to the appropriate information in the EA that supports the conclusion that interactions between piping plovers and PWC would be extremely limited.

*NPS Response:* Pictured Rocks National Lakeshore staff will continue to monitor and document piping plover activities within the lakeshore. PWC would not be allowed in the Grand Sable segment, where potential piping plover habitat exists. If plovers ever become established in the western end of the lakeshore, then mitigating actions could be required to minimize any adverse effect from PWC use. The

modified preferred alternative will result in "no effect" on future populations of piping plover that may inhabit the lakeshore.

#### **Comments Regarding Shoreline/ Submerged Aquatic Vegetation**

35. One commenter stated that since PWC lack an exposed propeller, they are much more environmentally friendly in shallow water environments. Further, Michigan law prohibits PWC from operating in less than two feet of water and in areas where aquatic rooted vegetation is visible in sensitive wetland areas.

*NPS Response:* The NPS recognizes that scientists do not agree on the potential for impacts to aquatic vegetation from personal watercraft. However, because of their design, personal watercraft can potentially operate in shallower water than conventional outboard motorboats, and it is not possible to know if all operators fully adhere to manufacturer's recommendations. As described in the EA (pages 103–104), impacts to sensitive shoreline vegetation are expected to be negligible for all alternatives and both years evaluated (2002 and 2012).

#### **Comments Associated With Visitor Experience**

36. One commenter stated that the EA failed to adequately assess the safety threat posed to park visitors by PWC use, and failed to analyze existing accident data available from the U.S. Coast Guard.

*NPS Response:* Incidents involving watercraft of all types, including personal watercraft, are reported to and logged by National Park Service staff. A very small proportion of incidents on the lake are estimated to go unreported. The accident data for the three-year period of 1999 through 2001 displays a consistent pattern and differs from nationally reported results for all watercraft. In the "Visitor Conflicts and Visitor Safety" section of the "Affected Environment" chapter of the EA, it is reported that personal watercraft represent 26 percent of the watercraft on the lake but did not exceed 18 percent of all watercraft accidents over the three-year time period. While personal injury rates for personal watercraft were somewhat higher, they did not exceed 24 percent of all watercraft personal injuries—approximately equal to their representation in the population of all watercraft.

37. One commenter stated that keeping PWC 200 feet from shore is not sufficient to prevent serious loss to those seeking solitude and/or a natural

experience. What happens if the number of PWC users increases over the years to a level that is intolerable?

*NPS Response:* The best available data was used to determine existing and future PWC use in the lakeshore, and was based on a visitor survey, discussion with park staff, and discussion with local launch site operators in Grand Marais and Munising. The analysis indicates that PWC use would have minor adverse impacts to backcountry visitors who seek solitude within the lakeshore. The selection of the modified preferred alternative (alternative B) would result in negligible to moderate beneficial impacts on soundscapes and visitor experience for non-PWC users.

38. One commenter indicated that the EA fails to include the numbers of comments received about PWC noise and offers no comparison of those comments with others regarding noise produced by other recreational pursuits, such as tour boats. Were the noise comments regarding PWC use any more positive or negative than those related to other lakeshore user groups?

*NPS Response:* The comments received for the GMP regarding noise disturbance from PWC, motorboats, and other recreational users have not been quantified. However, the summer visitor survey conducted in 2000 provides specific data about noise issues within the lakeshore. Over 80% of the survey respondents, including backcountry visitors, identified PWC disturbance as "no problem." Approximately 8% of the 228 respondents identified PWC disturbances as a "serious or very serious" problem. Likewise, approximately 6% of those surveyed identified motorized boats on Lake Superior "disturbing my backcountry experience" as a "serious or very serious" problem; 4% indicated that too many commercial tour boats on Lake Superior shoreline as a "serious or very serious problem"; and 1% indicated noise from airplanes as a "serious or very serious problem." Overall, only 2.6% of those surveyed indicated that too much noise on Lake Superior shoreline was a "serious or very serious problem."

39. One commenter stated that the 1998 Boating Accident Report Database (BARD) estimates reported in the EA are outdated, and that more recent BARD data shows that, despite the increasing number of PWC in use, the number of reported PWC-associated accidents has been declining every year since 1997.

*NPS Response:* Incidents involving watercraft of all types, including personal watercraft, are reported to and logged by National Park Service staff. A

very small proportion of incidents on the lake are estimated to go unreported. The accident data for the three-year period of 1999 through 2001 displays a consistent pattern and differs from nationally reported results for all watercraft. In the "Visitor Conflicts and Visitor Safety" section of the "Affected Environment" chapter of the EA, it is reported that personal watercraft represented 26 percent of the watercraft on the lake but did not exceed 18 percent of all watercraft accidents over the three-year time period. While personal injury rates for personal watercraft were somewhat higher, they did not exceed 24 percent of all watercraft personal injuries—approximately equal to their representation in the population of all watercraft.

40. One commenter stated that, according to Coast Guard statistics, PWC represent roughly 10 percent of all boats, yet are involved in approximately 30 percent of all boating accidents. In addition, nearly 80 percent of PWC accidents are the result of a collision with objects such as another boat, swimmer, or dock.

*NPS Response:* The concern about PWC operation and safety is discussed in the EA, which provides similar national statistics (page 16) and statistics from the park itself (page 51). Some of the provisions of the preferred alternative, such as increasing the number of areas with flat-wake restrictions, were included to provide a higher level of safe PWC operations and to lessen potential conflicts with other park users.

#### Comments Associated With Visitor Conflicts and Safety

41. One commenter stated that the accident data used in the analysis was outdated and incorrect because PWC accidents are reported more often than other boating accidents.

*NPS Response:* We disagree. Incidents involving watercraft of all types, including personal watercraft, are reported to and logged by National Park Service staff. A very small proportion of watercraft accidents at Fire Island National Seashore are estimated to go unreported.

42. One commenter suggested that all boaters should abide by the restrictions, and that there is no justification for imposing any additional restrictions or requirements on PWC operators based on safety considerations.

*NPS Response:* The proposed alternatives did not impose additional restrictions or requirements on PWC based solely on safety considerations. The final rule, implementing modified

preferred alternative (alternative B), will discontinue PWC use east of Miners Beach. The selection of modified alternative B is based on the evaluation of all issues analyzed in the EA and the public comments received regarding the proposed action.

43. Several commenters stated that the NPS analysis downplayed the threat PWC pose to the visiting public, specifically regarding PWC fire hazards.

*NPS Response:* According to the National Marine Manufacturers Association, PWC manufacturers have sold roughly 1.2 million watercraft during the last ten years. Out of 1.2 million PWC sold, the U.S. Coast Guard received only 90 reports of fires/explosions in the years from 1995–1999. This is less than 1% of PWC boats reporting problems associated with fires/explosions. As far as the recall campaigns conducted by Kawasaki and Bombardier, the problems that were associated with fuel tanks were fixed. Kawasaki conducted a recall for potentially defective fuel filler necks and fuel tank outlet gaskets on 23,579 models from the years 1989 and 1990. The fuel tank problems were eliminated in Kawasaki's newer models, and the 1989 and 1990 models are most likely not in use anymore, since life expectancy of a PWC is only five to seven years, according to PWIA. Bombardier also recalled its 1993, 1994, and 1995 models to reassess possible fuel tank design flaws. However, the number of fuel tanks that had to be recalled was a very small percent of the 1993, 1994, and 1995 fleets because fuel tank sales only amounted to 2.16% of the total fleet during this period. The replacement fuel tanks differed from those installed in the watercraft subject to the recall in that the replacement tanks had revised filler neck radiuses, and the installation procedure now also requires revised torque specifications and the fuel system must successfully complete a pressure leak test. Bombardier found that the major factor contributing to PWC fires/explosions was over-torquing of the gear clamp. Bombardier was legally required by the U.S. Coast Guard to fix 9.72% of the recalled models. Out of 125,349 recalls, the company repaired 48,370 units, which was approximately 38% of the total recall, far exceeding their legal obligation to repair units with potential problems.

Further fuel tank and engine problems that could be associated with PWC fires have been reduced significantly since the National Marine Manufacturers Association (NMMA) set requirements for meeting manufacturing regulations established by the U.S. Coast Guard.

Many companies even choose to participate in the more stringent Certification Program administered by the NMMA. The NMMA verifies boat models annually, or whenever a new product is put on the market, to determine that they satisfy not only the U.S. Coast Guard Regulations, but also the more rigorous standards based on those established by the American Boat and Yacht Council.

#### Comments Associated With Cultural Resources

44. One commenter suggested that the NPS consider requiring permits or other approval for ceremonial activities, so that motorized boaters can be given adequate advance notice of any specific time/location restrictions on vessel usage. This will better enable PWC users and other boaters to respect these observances, reduce the potential for user conflicts, and assist in enforcement efforts.

*NPS Response:* Historically, tribal groups pursuing traditional activities in the park have been very small and permits have not been issued. In addition, past observances have occurred in seasons of the year when PWC use is light or non-existent. If and when the ceremonial activities become larger in scope or number, the park will initiate more formal permitting.

#### Comments Regarding Socioeconomics

45. One commenter stated that there is no discussion of the economic costs of continued PWC operation upon the lakeshore's wildlife, public safety, and visitor use. In addition, it is questionable to assume that a PWC ban will automatically result in a decrease in park visitation. The commenter states that the EA also incorrectly assumes that a PWC ban will reduce the consumer surplus of other motorized boaters.

*NPS Response:* The socioeconomic study did not address the future potential costs of environmental damage. The study examined the potential effect that the ban would have on the local economy, and the potential effects on socio-economically disadvantaged groups. The comment is correct in stating that the same level of analysis was not given to the future environmental costs.

The number of recreational visits at Pictured Rocks National Lakeshore in calendar year 2000 was 424,533, which is a 4.6% reduction from 1999. The most recent available visitation data was used at the time the EA was written. A variety of factors influence visitor use numbers at national parks; therefore, it is not possible to precisely ascertain

specific reasons for increases or decreases in visitation.

46. One commenter stated that the analysis of socioeconomic effects of the different alternatives failed to consider the possibility that the no-action alternative could have positive economic effects upon those renting kayaks or providing guiding services.

*NPS Response:* The evaluation concentrated on the effects of PWC management on the local economy. No data is available indicating that the presence of PWC has decreased the lakeshore visitation by kayakers or other visitors. Thus, a conclusion cannot be made that banning PWC would increase use by other groups. According to the visitor survey (summer 2000), most visitors identified issues associated with PWC operation within the lakeshore as "no problem or slight problem." This indicates that banning PWC would not have a substantial effect on visitor experience or visitor satisfaction. The NPS concurs that a ban on PWC would allow local businesses to target their marketing and services to an audience that is sensitive to PWC use.

#### Comments Related to Enforcement

47. Several commenters stated that additional staff would be required to adequately address the increased enforcement needed under the final rule.

*NPS Response:* The NPS used the best available data to evaluate potential conflicts between PWC and other park visitors. The NPS concurs that it is likely that some violations are not reported, particularly those that may be considered minor infractions by the general public. The evaluation in the EA assumed that some violations would occur and noted that staffing was insufficient to properly police existing boating activities, with or without PWC use in the lakeshore.

The analysis indicated that increased staffing would be necessary to more adequately monitor watercraft on Lake Superior. The NPS believes that operation of PWC in the lakeshore will not require more staff than that required for increased monitoring of all watercraft because (1) the number of PWC operating within the lakeshore is small in comparison to the number of other motorboats and watercraft, (2) the location of PWC operation is separated from most other visitors (excluding motorboats) and (3) the increased patrols necessary to monitor all boating traffic will increase the observed presence of policing such that all infractions will likely decrease.

#### Changes to the Final Rule

Based on the preceding comments and responses, the NPS has made no substantive changes to the proposed rule language with regard to PWC operations.

#### Compliance With Other Laws

##### *Regulatory Planning and Review (Executive Order 12866)*

This document is not a significant rule and has not been reviewed by the Office of Management and Budget under Executive Order 12866.

(1) This rule will not have an effect of \$100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. The National Park Service has completed the report "Economic Analysis of Personal Watercraft Regulations in Pictured Rocks National Lakeshore" (RTI, International, November 2004).

(2) This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. Actions taken under this rule will not interfere with other agencies or local government plans, policies or controls. This rule is an agency specific rule.

(3) This rule does not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients. This rule will have no effects on entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients. No grants or other forms of monetary supplements are involved.

(4) This rule does not raise novel legal or policy issues. This rule is one of the special regulations being issued for managing PWC use in National Park Units. The National Park Service published general regulations (36 CFR 3.24) in March 2000, requiring individual park areas to adopt special regulations to authorize PWC use. The implementation of the requirement of the general regulation continues to generate interest and discussion from the public concerning the overall effect of authorizing PWC use and National Park Service policy and park management.

##### *Regulatory Flexibility Act*

The Department of the Interior certifies that this rulemaking will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5

U.S.C. 601 *et seq.*). This certification is based on a report entitled report "Economic Analysis of Personal Watercraft Regulations in Pictured Rocks National Lakeshore" (RTI, International, November 2004), copies of which are available from the address in the **ADDRESSES** section.

##### *Small Business Regulatory Enforcement Fairness Act (SBREFA)*

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This final rule:

- a. Does not have an annual effect on the economy of \$100 million or more.
- b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.
- c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

##### *Unfunded Mandates Reform Act*

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than \$100 million per year. The rule does not have a significant or unique effect on State, local or tribal governments or the private sector. This rule is an agency specific rule and does not impose any other requirements on other agencies, governments, or the private sector.

##### *Takings (Executive Order 12630)*

In accordance with Executive Order 12630, the rule does not have significant takings implications. A taking implication assessment is not required. No taking of personal property will occur as a result of this rule.

##### *Federalism (Executive Order 13132)*

In accordance with Executive Order 13132, the rule does not have sufficient Federalism implications to warrant the preparation of a Federalism Assessment. This final rule only affects use of NPS administered lands and waters. It has no outside effects on other areas by allowing PWC use in specific areas of the park.

##### *Civil Justice Reform (Executive Order 12988)*

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

*Paperwork Reduction Act*

This regulation does not require an information collection from 10 or more parties and a submission under the Paperwork Reduction Act is not required. An OMB Form 83-I is not required.

*National Environmental Policy Act*

As a companion document to the NPRM, NPS issued the Personal Watercraft Use Environmental Assessment for Pictured Rocks National Lakeshore and subsequent errata sheet. The environmental assessment was available for public review and comment for the period August 1 through November 15, 2004. A Finding of No Significant Impact (FONSI) was signed on September 9, 2005. To request a copy of these documents contact Superintendent, Pictured Rocks National Lakeshore, N8391 Sand Point Road, P.O. Box 40, Munising, MI 49862-0040. A copy of the Environmental Assessment, errata sheet, and FONSI may also be found at <http://www.nps.gov/piro/pwc>.

*Government-to-Government Relationship With Tribes*

In accordance with the President's memorandum of April 29, 1994, "Government to Government Relations with Native American Tribal Governments" (59 FR 22951) and 512 DM 2, we have evaluated potential effects on Federally recognized Indian tribes and have determined that there are no potential effects.

*Administrative Procedure Act*

This final rule is effective upon publication in the **Federal Register**. In accordance with the Administrative Procedure Act, specifically, 5 U.S.C. 553(d)(1), this rule, 36 CFR 7.32(d), is exempt from the requirement of publication of a substantive rule not less than 30 days before its effective date.

As discussed in this preamble, the final rule is a part 7 special regulation for Pictured Rocks National Lakeshore that relieves the restrictions imposed by the general regulation, 36 CFR 3.24. The general regulation, 36 CFR 3.24, prohibits the use of PWC in units of the national park system unless an individual park area has designated the use of PWC by adopting a part 7 special regulation. The proposed rule was published in the **Federal Register** (69 FR 51788) on August 23, 2004, with a 60-day period for notice and comment consistent with the requirements of 5 U.S.C. 553(b). The Administrative Procedure Act, pursuant to the exception in paragraph (d)(1), waives the section 553(d) 30-day waiting period

when the published rule "grants or recognizes an exemption or relieves a restriction." In this rule the NPS is authorizing the use of PWCs, which is otherwise prohibited by 36 CFR 3.24. As a result, the 30-day waiting period before the effective date does not apply to Pictured Rocks National Lakeshore final rule.

**List of Subjects in 36 CFR Part 7**

National Parks, Reporting and recordkeeping requirements.

■ For the reasons stated in the preamble, the National Park Service amends 36 CFR part 7 as follows:

**PART 7—SPECIAL REGULATIONS, AREAS OF THE NATIONAL PARK SYSTEM**

■ 1. The authority for part 7 continues to read as follows:

**Authority:** 16 U.S.C. 1, 3, 9a, 460(q), 462(k); Sec. 7.96 also issued under DC Code 8-137 (1981) and DC Code 40-721 (1981).

■ 2. Amend § 7.32 by adding paragraph (d) to read as follows:

**§ 7.32 Pictured Rocks National Lakeshore.**

\* \* \* \* \*

(d) *Personal Watercraft (PWC)*. (1) PWC are allowed on the waters within Pictured Rocks National Lakeshore, from the western boundary of the lakeshore to the east end of Miners Beach.

(2) PWC may be launched only from a designated launch site at Sand Point.

(3) PWC users may beach their craft only at Sand Point Beach and Miners Beach.

(4) The Superintendent may temporarily limit, restrict, or terminate access to the areas designated for PWC use after taking into consideration public health and safety, natural and cultural resource protection, and other management activities and objectives.

Dated: October 19, 2005.

**Paul Hoffman,**

*Deputy Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. 05-21426 Filed 10-26-05; 8:45 am]

**BILLING CODE 4312-52-U**

**LIBRARY OF CONGRESS****Copyright Office****37 CFR Part 202**

[Docket No. RM 2005-9]

**Preregistration of Certain Unpublished Copyright Claims**

**AGENCY:** Library of Congress, Copyright Office.

**ACTION:** Interim regulation.

**SUMMARY:** Pursuant to the Artists' Rights and Theft Prevention Act of 2005, the Copyright Office is publishing an interim regulation governing the preregistration of unpublished works that are being prepared for commercial distribution in classes of works that the Register of Copyrights has determined have had a history of pre-release infringement.

**EFFECTIVE DATE:** November 15, 2005.

**FOR FURTHER INFORMATION CONTACT:** David O. Carson, General Counsel, or Charlotte Douglass, Principal Legal Advisor, P.O. Box 70400, Washington, DC 20024-0400, Telephone: (202) 707-8380. Telefax: (202) 707-8366.

**SUPPLEMENTARY INFORMATION:** On April 27, 2005, President Bush signed the Family Entertainment and Copyright Act ("FECA"). Pub. L. No. 109-9, 119 Stat. 218. Title I of FECA is the Artists' Rights and Theft Prevention Act of 2005, or "ART Act," which among other things addresses copyright infringement of works committed prior to their authorized commercial distribution, or pre-release infringement. Section 104 directs the Copyright Office to conduct a rulemaking proceeding to establish a procedure for preregistration of unpublished works that are being prepared for commercial distribution.

Specifically, Section 104 provides that "Not later than 180 days after the date of enactment of this subsection, the Register of Copyrights shall issue regulations to establish procedures for preregistration of a work that is being prepared for commercial distribution and has not been published." 17 U.S.C. 408(f)(1). Preregistration is a new procedure in the Copyright Office that permits such an action to serve as a place-holder for limited purposes - notably where a copyright owner needs to sue for infringement while a work is still being prepared for commercial release.

Congress also assigned the Register to determine which works are eligible for preregistration by directing that "the regulations established under paragraph (1) shall permit preregistration for any work that is in a class of works that the Register determines has had a history of infringement prior to authorized commercial distribution." 17 U.S.C. 408(f)(2). Thus, falling in one or more of the classes so determined by the Register is a precondition to eligibility for preregistration, and applications for works that do not appear to fall within these classes should not be entertained.

On July 22, 2005, the Register of Copyrights initiated this rulemaking