

(b) *Definitions.* The following definitions apply to this section:

*Designated representative* means Coast Guard Patrol Commanders including Coast Guard coxswains, petty officers and other officers operating Coast Guard vessels, and federal, state, and local officers designated by or assisting the Captain of the Port (COTP) St. Petersburg, Florida, in the enforcement of regulated navigation areas and safety and security zones.

(c) *Regulations.* In accordance with the general regulations in § 165.23 of this part, no person or vessel may anchor, moor or transit the Regulated Area without the prior permission of the Captain of the Port St. Petersburg, Florida, or his designated representative.

(d) *Date.* This rule is effective from 5 a.m. on April 12 through 4 p.m. on May 10, 2006 and will be enforced when concrete pouring operations are taking place.

Dated: April 12, 2006.

**J.A. Servidio,**

*Captain, U.S. Coast Guard, Captain of the Port St. Petersburg, Florida.*

[FR Doc. 06-4189 Filed 5-3-06; 8:45 am]

**BILLING CODE 4910-15-P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

#### 36 CFR Part 7

RIN 1024-AD21

#### Gulf Islands National Seashore, 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 Gulf Islands National Seashore, Florida and Mississippi. 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. Individual parks must 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:** *Effective Date:* This rule is effective May 4, 2006.

**ADDRESSES:** Mail inquiries to Superintendent, Gulf Islands National Seashore, 1801 Gulf Breeze Parkway, Gulf Breeze, FL 32563. E-mail: [Jerry\\_Eubanks@nps.gov](mailto:Jerry_Eubanks@nps.gov), 850-934-2604.

**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 banned PWC use in all park units effective April 20, 2000, except for 21 parks, lakeshores, seashores, and recreation areas. The regulation established a 2-year grace period following the final rule publication to provide these 21 park units time to consider whether PWC use should be permitted to continue.

##### *Description of Gulf Islands National Seashore*

Gulf Islands National Seashore is located in the northeastern portion of the Gulf of Mexico and includes a widely spaced chain of barrier islands extending nearly 160 miles from the eastern end of Santa Rosa Island in Florida to Cat Island in Mississippi. Other islands in the national seashore include Horn, Petit Bois, and East Ship and West Ship islands in Mississippi and a section of Perdido Key in Florida. Gulf Islands National Seashore also includes mainland tracts at Pensacola Forts and Naval Live Oaks Reservation near Pensacola, Florida, and Davis Bayou, adjacent to Ocean Springs, Mississippi. The national seashore contains 139,775.46 acres within the authorized boundary, excluding Cat Island (only a portion has been acquired as of this date). Of this total acreage, 19,445.46 acres are fastlands (above water) and 119,730 acres are submerged lands.

Gulf Islands National Seashore contains snowy-white beaches, sparkling blue waters, fertile coastal marshes, and dense maritime forests. Visitors can explore 19th century forts, enjoy shaded picnic areas, hike on winding nature trails, and camp in comfortable campgrounds. In addition,

Horn and Petit Bois islands located in Mississippi are federally designated wilderness areas. Nature, history, and recreational opportunities abound in this national treasure. All areas of Gulf Islands National Seashore in the Florida District and the Davis Bayou area in the Mississippi District are reachable from Interstate 10. The Mississippi District barrier islands are only accessible by boat.

##### *Purpose of Gulf Islands National Seashore*

Gulf Islands National Seashore, Florida and Mississippi, was authorized by Act of Congress, Public Law 91-660, January 8, 1971, to provide for recognition of certain historic values such as coastal fortifications and other purposes such as the preservation and enjoyment of undeveloped barrier islands and beaches.

Gulf Islands National Seashore conserves certain outstanding natural, cultural and recreational resources along the Northern Gulf Coast of Florida and Mississippi. These include several coastal defense forts spanning more than two centuries of military activity, historic and prehistoric archaeological sites, and pristine examples of intact Mississippi coastal barrier islands, salt marshes, bayous, submerged grass beds, complex terrestrial communities, emerald green water, and white sand beaches.

Gulf Islands National Seashore was established for the following purposes:

- Preserve for public use and enjoyment certain areas possessing outstanding natural, historic, and recreational values.
- Conserve and manage the wildlife and natural resources.
- Preserve as wilderness any area within the national seashore found to be suitable and so designated in accordance with the provisions of the Wilderness Act (78 Stat. 890).
- Recognize, preserve, and interpret the national historic significance of Fort Barrancas Water Battery (Battery San Antonio), Fort Barrancas; Advanced Redoubt of Fort Barrancas at Pensacola Naval Station; Fort Pickens on Santa Rosa Island, Florida; Fort McRee site, Perdido Key, Florida; and Fort Massachusetts on West Ship Island, Mississippi, in accordance with the Act of August 21, 1935 (49 Stat. 666). That act states: "It is a National policy to preserve for public use historic sites, buildings, and objects of National significance for inspiration and benefits of the people of the United States."

### *Significance of Gulf Islands National Seashore*

Gulf Islands National Seashore is significant for the following reasons:

- Nationally significant historical coastal defense forts representing a continuum of development.
- Several mostly undisturbed, natural areas in close proximity to major population centers.
- Areas of natural significant high quality beaches, dunes, and water resources.
- Endangered species occur in several areas.
- Contains regionally important prehistoric archaeological sites.
- Provides outstanding controlled areas conducive to the successful reintroduction of native threatened and endangered species.
- Provides habitat for early life stages of many coastal and marine flora and fauna of commercial and recreational importance.
- Provides a benchmark to compare environmental conditions in developed areas of the Gulf Coast.

### *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 Gulf Islands National Seashore**

Personal watercraft use emerged at Gulf Islands National Seashore in the 1980s. Although PWC use was a small percentage of total boat use within the national seashore, park staff believes that use had increased over the five years prior to the closure. If reinstated, PWC use at the national seashore is not expected to decrease. In fact, an increase in usage would be expected as more residents purchase personal watercraft and tourism continues to grow.

Prior to the closure to personal watercraft in April 2002, personal watercraft were recognized as a Class A motorboat and were treated as any other such vessel. All regulations that apply to any registered vessel operating in waters of Florida and Mississippi that are regulated by the NPS applied to personal watercraft.

Personal watercraft were permitted throughout the national seashore, except as follows: no motorized vessels are permitted above the mean high tide line on the designated wilderness islands of Horn and Petit Bois; the lakes, ponds, lagoons and inlets of East Ship Island, West Ship Island, Horn Island, Petit Bois Island, and Cat Island (lands under NPS management) are closed to the use of motorized vessels; the lagoons of Perdido Key within Big Lagoon are closed to all combustion engines; and the areas 200 feet from the remnants of the old fishing pier and 200 feet from the new fishing pier at Fort Pickens are closed to all boating operations. There are also seasonal closures to watercraft to protect nesting shorebirds and other sensitive wildlife and relict dunes.

Perdido Key in Florida and East Ship and West Ship islands in Mississippi have the most concentrated boating use within the national seashore. Many area residents in both States have boat docks and own boats or personal watercraft, and visit the national seashore.

*Florida District.* In Florida, the park is situated between the Gulf of Mexico and the Pensacola Bay system. Although the Gulf offers almost unlimited area for personal watercraft use, most operation occurs within the bay. In 2000, personal watercraft comprised 12.5% of all registered vessels statewide. In the Florida District of the park, it is estimated that personal watercraft comprised 0.5% of recreational boating. Personal watercraft traversed along the north shoreline of Santa Rosa Island while very few traversed the south, or Gulf, shoreline. In general, PWC usage

within the Florida District of the park was concentrated in the Perdido Key area. During the summer months, most areas of PWC use consisted of 6 or 7 personal watercraft per month, while on a peak-use day PWC activity in the Perdido Key area might have comprised 25 personal watercraft. The reason for the higher use in the Perdido Key area is the sheltered nature of the area and the proximity to residences with launching facilities.

*Mississippi District.* The Mississippi portion of the park separates the Gulf of Mexico from the Mississippi Sound. Personal watercraft account for 6% of the registered boats in Mississippi, and it is estimated that they comprised approximately 4% of recreational boating in the Mississippi District of the park. The islands are situated between 6 to 14 miles from the mainland, weather conditions can change quickly, and large ships use the intracoastal waterway shipping channels. These factors combined to limit PWC use in the Mississippi District as transportation to the islands, and use of Gulfside waters was almost nonexistent except immediately adjacent to the islands. Observations of PWC use indicate that they were mainly used for recreational riding and not for transportation. Most personal watercraft used in the Mississippi District of the park were towed by larger boats from the Pascagoula/Biloxi/Gulfport, Mississippi, area. The primary use season reflects overall visitation patterns, with use decreasing during the winter months.

PWC use areas are similar to general motorboat use areas. Personal watercraft were concentrated mostly on the east and west tips of the islands, around the West Ship Island Pier, and the entire north side of Spoil Island.

### **NPRM and Environmental Assessment**

On March 17, 2005, the National Park Service published a Notice of Proposed Rulemaking (NPRM) for the operation of PWC at Gulf Islands National Seashore (70 FR 12988). 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 Gulf Islands National Seashore. The EA was open for public review and comment from April 19, 2004 to May 18, 2004. Copies of the EA may be downloaded at <http://www.nps.gov/guis/pphtml/documents.html> or obtained at park headquarters Monday through Friday, 8 a.m. to 4:30 p.m. Mail inquiries should be directed to park headquarters: Gulf Islands National Seashore, 1801 Gulf Breeze Parkway, Gulf Breeze, FL 32563.

The purpose of the EA was to evaluate a range of alternatives and strategies for the management of PWC use at Gulf Islands to ensure the protection of park resources and values, while offering recreational opportunities as provided for in the National Seashore's enabling legislation, purpose, mission, and goals. The analysis assumed alternatives would be implemented beginning in 2002 and considered a 10-year period, from 2002 to 2012. The EA evaluated three alternatives concerning the use of personal watercraft at Gulf Islands:

- The no-action alternative would continue the prohibition of PWC use in Gulf Islands National Seashore. No special rule would be promulgated.
- Alternative A would reinstate PWC use under a special NPS regulation as previously managed.
- Alternative B would reinstate PWC use under a special NPS regulation with additional management prescriptions.

Based on the environmental analysis prepared for PWC use at Gulf Islands, and after considering the comments received, as discussed below, the NPS considers alternative B the environmentally preferred alternative because it best fulfills park responsibilities as trustee of this sensitive habitat; ensures safe and healthy, productive, and aesthetically and culturally pleasing surroundings; and attains a wider range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.

This document contains regulations to implement alternative B at Gulf Islands National Seashore.

### Summary of Comments

A proposed rule was published in the **Federal Register** for public comment on March 17, 2005 with the comment period lasting until May 16, 2005 (70 FR 12988). The National Park Service received 4,516 timely written responses regarding the proposed regulation and EA. Of the responses, 4,394 were form letters in 3 different formats, and 122 were separate letters. Of the 122 separate letters, 98 were from individuals, 10 from organizations, 5 from government agencies, 2 from Indian Tribes, and 7 from members of State legislatures and the U.S. Congress. 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 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 alternative B (reinstate PWC use with additional management prescriptions) is the preferred alternative and that the decision has been adequately analyzed and explained.

2. Several commenters stated that by allowing damaging PWC use on park waters the NPS violates its mandate to fully protect park resources.

*NPS Response:* No part of the settlement agreement or NPS analysis of PWC use has violated or overturned Gulf Islands National Seashore's enabling legislation. Both the personal watercraft settlement agreement and the authorizing legislation for Gulf Islands were considered when developing alternatives for the EA. The objective of the EA, as described in the "Purpose and Need" chapter, was derived from the enabling legislation for Gulf Islands. As further stated in that 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 National Park Service.

As a result, the alternatives presented in the EA would protect resources and values while providing recreational opportunities at Gulf Islands. 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 the preferred alternative (alternative B) will not result in impairment of park resources and values for which Gulf Islands National Seashore was established.

3. One commenter stated that PWC usage, even with restrictions, will negatively impact the natural experience of Florida National Scenic Trail users and compromise the Certification Agreement between the Gulf Islands National Seashore, the

USDA Forest Service, and the Florida Trail Association.

*NPS Response:* Under alternative B, the preferred alternative, as implemented in this final rule, a flat wake zone will be established 300 yards from all park shorelines at the low-water mark, with more stringent restrictions at West Ship Island Pier and around designated wilderness boundaries. This restriction should be sufficient in minimizing the disturbance to land-based recreational users, including trail users.

4. One commenter stated that the EA underestimated the PWC population in its analysis, and that the National Marine Manufacturers Association Web site was incorrectly quoted.

*NPS Response:* A check of the NMMA Web site revealed that indeed, PWC numbers for the years 2000 and 2001 are higher than quoted in the EA (1.24 million for 2000 and 1.29 million for 2001). However, the numbers were underestimated by approximately 23 percent for 2001, not 30 percent as the comment indicates.

Regardless, these are nationwide PWC numbers that were not used in the impacts analysis. The numbers used in the impacts analysis were park-specific, based on available visitor data for each district and observations by Gulf Islands National Seashore staff.

5. Several commenters stated that alternative B is in direct conflict with Florida law, which expressly prohibits discriminatory regulation of PWC.

*NPS Response:* The National Park Service has the authority to regulate maritime activities within Gulf Islands National Seashore boundaries. Although the NPS will seek to work cooperatively with state entities on vessel management, the National Park Service does not relinquish the authority to regulate activities that occur in NPS waters and that impact national seashore resources.

6. Several commenters stated that the EA fails to meet the requirements of NEPA because a reasonable range of alternatives was not evaluated. The park should have considered an alternative that better protects park wilderness values, water resources, and areas that were damaged by Hurricane Ivan.

*NPS Response:* The NPS believes a reasonable range of alternatives was evaluated, including an alternative that would reinstate PWC use as previously managed (alternative A), an alternative that would continue the PWC ban (no-action alternative), and the preferred alternative (alternative B), which will reinstate PWC use with additional management restrictions, such as additional flat wake zones. After

analyses were done for every applicable impact topic with the best available data and input from the public was analyzed, Gulf Islands selected alternative B as its preferred alternative. Alternative B will allow PWC to use the majority of park waters, while still providing resource protection.

With regard to the wilderness areas, the park considered closing specific areas and designated beach access points, but ultimately determined that park resources and values would be protected with additional flat wake zone areas. PWC operating at a flat wake speed in the 0.5 mile flat wake zone around the wilderness areas would create the same amount, or perhaps less, noise than other watercraft that are also allowed near the wilderness areas.

With regard to keeping PWC farther away from fragile areas where pollutants can collect, within all areas of the park, collection of pollutants from PWC should be minimal under the final rule for the following reasons: Use is relatively low in all areas of the park; the flat wake speed zone areas will reduce the amount of pollutants emitted; and the bodies of water within the park are not closed and are subject to regular flushing. Hurricane Ivan had not occurred at the time the EA was written, but the impacts from PWC operating at flat wake speeds would probably not have a large impact on resources damaged by hurricanes. Through the Superintendent's Compendium, the park has the option of temporarily closing areas to all vessels if necessary to protect damaged resources.

7. Several commenters stated that the proposed restrictions under alternative B discriminate against PWC because alternative B regulates PWC use at Gulf Islands more restrictively than other motorized vessels without any reasonable justification.

*NPS Response:* It appears that PWC are being discriminated against but the prohibition from traveling above a flat wake speed for PWCs within 300 yards of the shoreline essentially equals the playing field for all vessels. Shallow, uneven bottom lands within 300 yards of most shorelines severely restrict vessels other than PWC from traveling at high speeds. These shallow waters in effect create a self-imposed speed restriction for all other vessels while PWCs were still able to travel at high speeds. Within 300 yards of shore you will find submerged aquatic vegetation (seagrass beds) and aquatic fauna. The jet engine thrust from a PWC running at high speeds through the shallow waters will likely impact these aquatic species. Also PWC traveling above a flat wake

speed in these shallow near shore waters creates a potential for conflict and a safety concern for water sports enthusiasts that may be restricted to these shallow waters and for fisherman traversing at slow speeds or at anchor.

Though these rules were developed specifically to regulate PWC use, the park realizes and appreciates that an appearance of discrimination exists between PWC and other vessels and that there may be a need for rulemaking to regulate vessels other than PWC in similar ways we are managing PWC. The park is committed to working toward rulemaking that will correct these differences.

8. One commenter was concerned that the current EA is being politically manipulated in order to reauthorize PWC operation and that the EA has made a 180 degree turn from the 2001 determination.

*NPS Response:* Due to the increased level of public comment and congressional interest, Gulf Islands reanalyzed the issues and impact topics described in the 2001 determination in more detail in the EA. The results of the in-depth analysis in the EA indicated that impacts would range from negligible to moderate for all impact topics, and chose alternative B as the preferred alternative.

9. One commenter stated that the proposed rule should be rejected because it unfairly limits PWC use and that the short- and long-term impacts of alternatives A and B are essentially identical.

*NPS Response:* The enabling legislation that established Gulf Islands National Seashore in 1971 states that the park was established "In order to preserve for public use and enjoyment certain areas possessing outstanding natural, historic and recreational values. \* \* \*" The preferred alternative meets this legislation and the objectives of the national seashore to a large degree, as well as meeting the purpose and need for action, and therefore is within the legislative and regulatory duties of Gulf Islands National Seashore. NPS agrees that PWC use will neither impair nor significantly impact park resources. Impacts differ between alternative A and B for soundscapes, shoreline and submerged aquatic vegetation, wildlife and wildlife habitat, aquatic fauna, visitor use and experience, and visitor conflicts and safety. The EA provides sufficient justification for why alternative B (Reinstate PWC Use Under a Special Regulation with Additional Management Prescriptions) was chosen as the preferred alternative. Alternative B provides additional restrictions that are necessary for resource protection,

and its selection is not arbitrary or capricious.

10. Mississippi Senator William G. Hewes III commented that allowing PWC in certain areas where boats are already prevalent is a better option than banning them outright.

*NPS Response:* Under this final rule, PWC use will be reinstated with additional management prescriptions to protect natural and cultural resources, to mitigate PWC safety concerns, to provide for visitor health and safety, and to enhance overall visitor experience. As part of this final rule, flat wake zones will be established in various locations within the national seashore.

11. One commenter suggested the placement of buoys along the coastline to delineate the flat wake zones.

*NPS Response:* The seashore has over 100 miles of shoreline. Placement of buoys throughout the entire park would not be feasible due to cost and maintenance, and the buoys would be confusing to most operators. The park believes that through education and enforcement, such delineation will not be necessary. Where it is shown that education or enforcement do not result in compliance, buoys could be placed as a temporary measure. The limits of the flat wake zones offer an envelope large enough to allow the prudent operator and enforcement officer to recognize when gross violation may be occurring.

12. One commenter is concerned that the prohibition of PWC within 200 feet of non-motorized vessels and people in the water will eliminate PWC use for legitimate and accepted recreational activities, such as towing and water sports.

*NPS Response:* Towing of waterskiers is allowed so long as the activity does not significantly impact natural resources or create potentially hazardous situations. The final rule will not preclude towing or water sports, but will control PWC speeds in portions of Seashore waters. The intent of the 200' prohibition would apply to operating near swimmers, divers, fisherman, or non-motorized vessels that may be in or on the water, and are not affiliated with the PWC. Examples of times when the 200' prohibition would not apply are as follows: A passenger, intended passenger or skier associated with the PWC who may be skiing, wading or waiting in the water to be picked up by the PWC. A water skier may not ski within the flat wake zone.

13. Several members of the Mississippi legislature and U.S. Congress stated that PWC should be allowed within Gulf Islands National

Seashore and that they should not be discriminated against.

*NPS Response:* The EA analyzed a variety of impact topics to determine if personal watercraft use was consistent with the park's enabling legislation and management goals and objectives. As a result of this analysis, it was determined that the management prescriptions under alternative B, Reinstate PWC Use with Additional Management Prescriptions, would best protect natural and cultural resources, mitigate PWC safety concerns, provide for visitor health and safety, and enhance overall visitor experience.

14. One commenter suggested that a 100-yard flat wake zone be established for all motorized craft within park waters. Several commenters suggested that a 300-yard flat wake zone be established for all motorized craft within park waters, as the Final Rule governing PWC use in the Lake Mead National Recreation Area reflects. The U.S. Coast Guard and the National Association of State Boating Law Administrators have recommended a policy that requires uniform application of flat wake zones to all motorized vessels.

*NPS Response:* As described under the "Scope of the Analysis" in the "Purpose and Need" section of the EA, the focus of the EA is to define management alternatives specific to PWC use. The plan analyzed a variety of impact topics to determine if personal watercraft use was consistent with the park's enabling legislation and management goals and objectives. The goal of the EA was not to determine if these restrictions should also apply to boats. That analysis must be completed as part of a separate EA. Gulf Islands National Seashore will consider subsequent rulemaking to address the issue of flat wake zones for other watercraft.

15. One commenter stated that the EA reaches many conclusions regarding the impact of PWC upon Gulf Islands National Seashore resources and wildlife that are directly contradicted by the 2001 Determination, specifically regarding visitor conflicts and complaints from PWC.

*NPS Response:* No documented complaints have been received by the public regarding PWC. In addition, no comments were received about PWC in the annual visitor surveys over the last four years.

#### Comments Regarding Water Quality

16. One commenter stated that there is no requirement that people use lower emission engines, so there is no legitimate basis for the assumption

regarding cumulative impacts. In addition, the amount of emissions from PWC compared to cumulative emissions from all motorized watercraft is very high, considering the percentage of recreational boaters who use PWC is only 0.5.

*NPS Response:* Impact estimates for personal watercraft and other motorboats have been revised in the errata to more correctly reflect impacts to water quality as discussed on pages 107–125 of the EA. Based on these revised impact estimates, personal watercraft contribute up to 29 percent of the total pollutants to water in 2002 and up to 42 percent of the total pollutants in 2012, depending on the district (Florida or Mississippi) and the area within the district. While personal watercraft constitute fewer than 1 percent of the motorboats in the Florida District and 4 percent in the Mississippi District, they typically operate for much longer periods of time than other motorboats.

17. 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 hydrocarbon emissions, including benzene and Polycyclic Aromatic Hydrocarbons (PAHs), to the water. In addition, the water quality analysis uses assumptions that result in overestimation of potential PWC hydrocarbon 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 estimates of personal watercraft use and emissions are based on the best information available at the time of preparation of the EA and are meant to be conservative (i.e., protective of the environment). By using conservative input assumptions in estimating impact to water quality, the probability of underestimating impacts is minimized.

The evaporation rate for benzene—half-life of approximately 5 hours at 25 °C—is based on information presented by the United States Environmental Protection Agency (USEPA) and Verschuren (see EA). Because impacts to water quality were determined to be negligible before any discussion or application of this evaporation rate, it was not discussed in the impact assessments of the alternatives.

As stated in Appendix A of the EA, the concentration of benzo(a)pyrene can be up to 2.8 mg/kg (or 2.07 mg/L). Because this concentration could be

found in the gasoline used in Gulf Islands, this measure was used to be protective of the environment. It is not an unrealistic assumption.

Annual sales of personal watercraft (200,000 units) are mentioned on page 7 of the EA. However, the text directs the reader to Table 1, which shows that ownership declined after 1995. The discussion of national trends is not germane to the estimate of PWC use in the seashore since the numbers of personal watercraft and hours of use are based on observations by park staff (see page 109 of the EA).

In summary, if changes in evaporation rates, concentrations of gasoline constituents, sales of personal watercraft, and rates of replacement of older personal watercraft were made, as suggested, the conclusions of negligible impacts from personal watercraft would not change. However, these conclusions would no longer be considered as conservative (protective of the environment) and could be challenged by other parties.

18. One commenter questioned the assertion that PWC will be responsible for 50 percent of the cumulative boating hours, since PWC emissions are declining at a faster rate than the NPS and the USEPA presume.

*NPS Response:* Risk estimates for personal watercraft and other motorboats have been revised to more correctly reflect impacts to water quality. Impacts to water quality from PWC use in both districts and in both years evaluated (2002 and 2012) are still negligible despite these recalculations.

Emission rates for personal watercraft were taken from data presented in NPS, California Air Resources Board (CARB), and Bluewater Network (see page 107 of the EA), and the rate of decrease taken from data presented by the USEPA in 1996 and 1997. These rates may be higher than more recent estimates, but they are conservative and are meant to be protective of the environment. Even with these conservative emission rates, impacts to water quality from personal watercraft are expected to be negligible.

The percentage of contributions from personal watercraft may appear disproportionate to the number of PWC versus other motorboats, but personal watercraft are typically operated for longer periods of time than other motorboats in both districts of the park.

Projections of PWC emissions in 2012 indicate that they will increase from 2002 due to the increased number of personal watercraft (for example, see revised Tables 30 and 32 in the Errata). As seen in Table 23 of the EA, the numbers of personal watercraft will increase at an annual rate of 9.6 percent,

or a 250 percent increase over 10 years. In contrast, other motorboats are expected to increase at a slower annual rate of 3.7 percent, or a 144 percent increase over 10 years. Consequently, the proportion of emissions from personal watercraft is expected to increase from 2002 to 2012—personal watercraft would contribute up to 29 percent of the total pollutants to water in 2002 and up to 42 percent of the total pollutants in 2012, depending on the district (Florida or Mississippi) and the area within the district. Personal watercraft would not be responsible for a decreasing percentage of emissions as posited in the comment.

19. One commenter stated that studies have shown that two-cycle engine emissions did not have a huge effect on the marine environment because any fuel that mixes with water swiftly evaporated. The amount of unburned fuel that does pass through two-cycle engines is in a gaseous state and is superheated by the combustion process.

*NPS Response:* Without a citation in the comment, it is difficult to examine these assertions. However, the California Air Resources Board (CARB 1999) states that a PWC operated for 7 hours emits more smog-forming emissions than a 1998 passenger car driven 100,000 miles (161,000 km). This CARB emission estimate is roughly one-fifth the rate in the comment. Other estimates of fuel emission rates range between 1.5 and 4.5 gallons/hour (National Park Service 1999; Personal Watercraft Illustrated *In: Bluewater Network* 2001). For the purpose of estimating impacts to water quality and air quality in the Gulf Islands EA, it was assumed that PWC with two-cycle engines discharge fuel at a rate of 3 gallons/hour. Regarding evaporation of fuel, in the EA (page 111), the evaporation rate of benzene (half life of approximately 5 hours; USEPA 2001) is factored into the water quality impact assessment.

#### Comments Regarding Air Quality

20. 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 number of PWC already converted to four-stroke engines is not known. In addition, the USEPA 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 PWC use at Gulf Islands National Seashore

would result in negligible impacts to air quality.

21. One commenter stated that continued PWC operation will contribute major, not moderate, damage to the area's air quality, and that over the next ten years, the NPS estimates that eliminating PWC will reduce carbon monoxide (CO) emissions by more than 50 tons.

*NPS Response:* The definition of major air quality impact on page 130 of the EA is:

- Emissions levels would be greater than or equal to 250 tons/year for any pollutant, and
- The first highest 3-year maximum for each pollutant is greater than NAAQS [National Ambient Air Quality Standards].

The annual emissions of CO for personal watercraft and other motorized boats in the Florida District (Table 42 of the EA) would be 563.6 tons in 2002 and 908.5 tons in 2012. The cumulative emissions are correctly termed "moderate" because, as described on page 133 of the EA, "\* \* \* moderate [adverse impacts] for CO and hydrocarbons (HC) based on the quantities of emissions and maximum pollutant levels that are less than the NAAQS." NAAQS (concentrations) are defined as 9 parts per million (ppm) over 8 hours and 35 ppm over 1 hour. Of the cumulative emissions, personal watercraft would contribute only 9.0 tons in 2002 and 17.9 tons in 2012 (Table 40 of the EA). These PWC emissions are considerably lower than 50 tons/year and are, therefore, negligible. The comment is correct in that eliminating personal watercraft would improve air quality at the seashore (Florida and Mississippi districts) by reducing CO emissions by an estimated 56.5 tons/year. However, impacts would be moderate.

22. One commenter expressed concern that PWC emissions were declining faster than forecasted by the USEPA. As the Sierra Report documents, in 2002, hydrocarbons (HC) plus nitrogen oxides (NO<sub>x</sub>) emissions from the existing fleet of PWC were already 23% lower than they were before the USEPA regulations became effective, and will achieve reductions greater than 80% by 2012.

*NPS Response:* The U.S. Environmental Protection Agency's (USEPA) data incorporated 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 the Sierra Research data show a greater rate of emissions reductions than the assumptions in the 1996 Rule and in the

USEPA's NONROAD Model, which was used to estimate emissions. However, the level of detail included in the Sierra Research report was not carried into the EA for reasons of consistency and conformance with the model predictions. Most states use the USEPA'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 PWC EAs.

It is also agreed that the relative quantity of HC plus 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.

California Air Resources Board (CARB) certified PWCs 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.

23. One commenter stated that improved engine technology would actually cause an increase in NO<sub>x</sub> emissions, a precursor for ground level ozone. Ozone has been a problem for Pensacola in the past, although it is in attainment at this time.

*NPS Response:* The comment is correct in its assertion that "improved engines" would result in an increase in NO<sub>x</sub> emissions. According to data presented in CARB (2001), the carbureted two-stroke engines in personal watercraft and outboard motors had lower NO<sub>x</sub> emissions (12–20 grams/test) than either the two-stroke direct injection engines (102–128 grams/test) or the four-stroke engines (230–4226 grams/test). The impact thresholds described on page 130 of the EA, including "impairment," are based on measurable parameters, whereas a standard of degradation, as suggested, could not be pragmatically applied in the impact analyses.

24. One commenter stated that the Lake Mead National Recreation Area's proposed PWC rule stated that PAH concentrations derived from modeling conducted by Sierra Research were orders of magnitude below the permissible exposure limits established by the Occupational Safety and Health Administration (OSHA) and the National Institute for Occupational Safety and Health (NIOSH). A proper PAH analysis refutes claims by PWC opponents that PAH emissions from PWC operating in the Gulf Islands National Seashore will endanger human health.

*NPS Response:* The criteria for analysis of impacts from PWC to human health are based on the NAAQs for criteria pollutants, as established by the USEPA under the Clean Air Act (CAA), and on criteria pollutant annual emission levels. This methodology was selected to assess air quality impacts for all NPS PWC 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 USEPA's emissions standards directed at manufacturers of spark ignition marine gasoline engines (see October 4, 1996; 61 FR 52088). 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. The NPS agrees with the technical statement and summation that adverse health risk to the public would be unlikely from exposure.

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 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.

#### Comments Regarding Soundscapes

25. One commenter stated that continued PWC use in the Gulf Islands National Seashore 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, based on location and time, ambient noise levels at the national seashore can range from negligible to moderate, and improved technology resulting in a reduction of noise emitted from PWC would not significantly change impact thresholds.

26. 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, whereas the levels for other motorized vessels at 82 feet were approximately 64 to 86 A-weighted decibels.

*NPS Response:* The 2001 noise study at Glen Canyon National Recreation Area is discussed on pages 143 and 144 of the EA, and the correct numbers are cited. Specific noise studies were conducted in three areas of the park as part of this assessment. The noise of two or more PWC operating at the same time (when one unit produces 76 dB), and at a distance of 25 meters from the source, was shown to be 79 dB. Ambient sound levels at Gulf Islands National Seashore vary due to the wide range of land cover types and visitor and other activities within and near the national seashore.

In addition to intensity, other aspects of PWC noise were assessed, including changes in pitch. In most locations, except in high use areas, natural sounds would prevail and motorized noise would be very infrequent or absent.

27. One commenter stated that the EA does not include any noise complaint data, and relies on anecdotal accounts. Gulf Islands is one of the most heavily used parks in the National Park System and the park's soundscapes are already impacted by a variety of "human-caused sounds." The park experiences high ambient noise levels because of its proximity to a major airport, numerous military bases, and high-traffic commercial waterways. Furthermore, the 15dBA increase is meaningless because it lacks context. Any reference to decibel increases must indicate the distance from which the sound was measured and the method by which the measurement was taken.

*NPS Response:* The EA states that the level of sound impact associated with PWC use varies based on location, time of day, and season. The EA also states that sound impacts associated with PWC use would be most prevalent in quieter areas, such as coves, river corridors, and backwater areas. Sound impacts associated with PWC use in areas where ambient sound levels are high or where nearshore operation is restricted would be expected to be negligible, while the higher levels of impact (minor to moderate) would be expected to occur in areas where, or during times when, ambient noise levels are lower.

The reference to the 15dBA noise level increase associated with PWC leaving the water was taken from a study conducted by Komanoff and Shaw (2000) and is referenced in the EA.

The scope of the EA did not include the conduct of site-specific studies or sound testing studies for PWC use at the Gulf Islands National Seashore. Analysis of potential impacts of PWC use relating to sound was based on best available data, input from park staff, and the results of analysis using that data.

28. One commenter stated that there is no evidence that PWC noise adversely affects aquatic fauna or animals. PWC typically exhaust above the water or at the air/water transition area; therefore, most PWC sound is transmitted through the air and not the water.

*NPS Response:* Typically PWC exhaust below or at the air/water transition areas, not above the water. Sound transmitted through the water is not expected to have more than negligible adverse impacts on fish (page 111 of the EA), and the EA does not

state that PWC noise adversely affects underwater fauna.

29. One commenter suggested that PWC engine noise could adversely affect the experience of hikers and other recreational users along the Florida National Scenic Trail, which follows the Gulf of Mexico surf-line nearly the entire length of Gulf Islands National Seashore. Section 7c of the National Trails System Act states "the use of motorized vehicles by the general public along any national scenic trail shall be prohibited." Allowing PWC use along the Gulf of Mexico surf line where the trail is located appears to violate the spirit of the National Trails System Act and the National Park Service's certification agreement with the Florida Trail Association and the USDA Forest Service.

*NPS Response:* Under this final rule, a flat wake zone will be established 300 yards from all park shorelines at the low-water mark, with more stringent restrictions at West Ship Island Pier and around designated wilderness boundaries. This restriction should be sufficient to minimize the disturbance to land-based recreational users from noise, including trail users.

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

30. One commenter stated that natural forces, such as waves and wind, have a greater impact on vegetation than PWC use.

*NPS Response:* The EA was not conducted to determine if personal watercraft caused more environmental damage to park resources than other boats, other shoreline uses, or natural forces, but rather to determine if PWC use has an impact on the resources. Access of PWC into emergent marsh habitats, beaching PWC on vegetated shorelines for access, and nearshore operation of PWC has potential to result in damage to vegetation.

31. One commenter is concerned that if PWC were allowed unrestricted access, they could cause severe damage to seagrasses, which take years to recover.

*NPS Response:* The EA found that access of PWC into emergent marsh habitats, beaching of PWC on vegetated shorelines for access, and nearshore operation of PWC has potential to result in damage to vegetation. Specifically, under alternative A the EA found that reinstating PWC use within the national seashore would have adverse impacts to seagrass habitats in both the Florida and Mississippi districts that would be direct and indirect, minor to moderate, and short- and long-term, because shallow water habitats in the park are

the preferred areas for PWC use, particularly in the Perdido Key and Mississippi Sound areas. However, alternative B found that PWC use would have impacts to seagrass habitats that are direct and indirect, minor, and short- and long-term. The flat wake zoning will restrict PWC impacts to about one-half of the potential seagrass habitat in the Florida District and one-quarter of the potential seagrass habitat in the Mississippi District. Therefore, alternative B, as implemented in this final rule, will have fewer adverse impacts to submerged aquatic vegetation than alternative A.

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

32. The U.S. Fish and Wildlife Service (USFWS) concurs with the determination of "not likely to adversely affect" any of the threatened or endangered species found within the national seashore.

*NPS Response:* Comment noted.

33. The National Marine Fisheries Service (NMFS) stated that PWC can enter and maneuver in shallow water areas at high speeds that can result in erosion of shorelines supporting emergent marshes and a disturbance to benthic habitats including submerged aquatic vegetation (SAV) and shallow water zones utilized by a wide diversity of fish, invertebrates, and aquatic mammals. Essential Fish Habitat (EFH) for various species has been designated within the park.

NMFS further stated that in addition to being EFH for various species, the project area provides nursery, foraging, and refuge habitat for other commercially and recreationally important fish and shellfish. Although alternative B, if strictly enforced, would provide significant habitat protection, the NMFS is concerned about the need to protect SAV habitat from PWC outside of the flat wake zones as well. Adequately educating the public about these flat wake zones, marking them appropriately, enforcing the conditions/restrictions, and monitoring the protective measure will be difficult and require an extensive effort by Gulf Islands National Seashore. Details addressing these issues should be included in the EA. Because no entry zones are easier to manage and enforce, this management tool should be given greater consideration, especially for areas of particular concern.

*NPS Response:* Gulf Islands National Seashore has created a subaquatic vegetation management plan, which outlines how the park proposes to manage PWC use with regard to the four components in the 1995 Florida Marine

Research Institute seagrass scarring report. The four-point approach to management options includes education, channel marking, enforcement, and limited-monitoring zones, which will reduce impacts from PWC to EFH and associated species within the park.

The education component includes enhancing PWC user and boater education through interpretive talks, onsite bulletins, pamphlets, and brochures made available to PWC operators at marinas and boater registration locations, as well as to visitors who rent PWC. The park will also explore the feasibility of installing informational signs at marinas and boat launching sites to alert PWC operators to applicable flat wake zones. All media will clearly delineate and emphasize open and flat wake zones. Park staff will also attend boat shows within the greater Pensacola-Gulf Breeze, Florida, area to distribute boater education materials to interested PWC operators.

Gulf Islands National Seashore does not intend to install any new channel markers or aids to navigation within park waters. Park managers determined that channel markers would impose substantial visual intrusions to the view shed surrounding the islands and shorelines. It would also be cost prohibitive to acquire and maintain the number of signs necessary to delineate the 108 miles of coastal marine areas within the park. If monitoring results indicate a large increase in the number of scars occurring due to PWC use, the park will implement more restrictive closures through signage or other measures.

Park-commissioned law enforcement rangers will increase their water based patrols and vigilance in proximity to all flat wake zones. The rangers have full delegated authority to enforce all applicable laws within the jurisdictional boundaries of the park, including issuing verbal and written warnings and penalty citations at their discretion. NPS also has the wherewithal through the Park System Resource Protection Recovery Act to pursue legal recourse and secure damage recovery funds from violators who may cause significant resource injuries requiring restoration.

Regarding limited-monitoring zones, park resource managers will compare aerial photography taken before and after the implementation of special regulations permitting PWC use to quantify seagrass injuries and associated scarring. Biologists will also establish random underwater sample plots within all park seagrass beds in the PWC flat wake zones to determine if there is any increase in scarring attributed to PWC



use and to characterize observed injuries to seagrass beds. If resource managers observe a proportional increase to the amount of seagrass scarring after PWC is permitted, these areas will be identified for subsequent increased enforcement and/or closure. Surveys will also be conducted on an annual basis to determine the familiarity and understanding of PWC operators' knowledge of PWC restrictions.

34. One commenter stated that the analysis lacked site-specific data for impacts to wildlife, fish, and threatened and endangered species at Gulf Islands.

*NPS Response:* The scope of the EA did not include the conduct of site-specific studies regarding potential effects of PWC use on wildlife species at Gulf Islands National Seashore. Analysis of potential impacts of PWC use on wildlife at the national seashore was based on best available data, input from park staff, and the results of analysis using that data. A list of federal and state protected species is provided in Table 10 of the EA.

35. 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. 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:* We agree 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 motorboats 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. Several shoreline restrictions related to wildlife and wildlife habitat are included under the final rule as an added precaution. Impacts to wildlife and wildlife habitat under all the alternatives were judged to be negligible to moderate from all visitor activities.

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 seashore's enabling legislation and management goals and objectives. The alternatives identified and the determination of their consequences were based upon the best information available.

36. One commenter pointed out discrepancies for wildlife impacts between the EA and the 2001 Determination. Specifically, the EA states that nearshore flat wake zones will minimize wildlife impacts, even though no new surveys have been conducted to support this conclusion.

*NPS Response:* The EA does not imply that all potential impacts associated with nearshore use of PWC would be minimized as a result of implementing a flat wake zone. Implementation of a flat wake zone would reduce potential impacts associated with high speed use in nearshore areas as compared to use without the speed restriction. The scope of the EA did not include the conduct of surveys to determine potential effects of the current PWC ban on wildlife use or the effects of PWC use on visitor experience at Gulf Islands National Seashore. Analysis of potential impacts of PWC use or the ban of their use at the national seashore was based on best available data, input from park staff, and the results of analysis using that data.

37. One commenter stated that the EA did not adequately investigate the impact of PWC use on marine mammals or the impact of the PWC ban on biological migration patterns.

*NPS Response:* The scope of the EA did not include the conduct of surveys to determine potential effects of the current PWC ban on biological use patterns or marine mammals in Gulf Islands National Seashore. Analysis of potential impacts of PWC use on wildlife at the national seashore was based on best available data, input from park staff, and the results of analysis using that data.

38. One commenter reminded NPS that consultation with the USFWS and National Marine Fisheries Service (NMFS) must be completed before any regulations are finalized. Consultation with the NMFS is required under section 305 of the Magnuson-Stevens Act. In addition, either "small take permits" or a waiver is required under the Marine Mammal Protection Act.

*NPS Response:* NPS consulted with the Fish and Wildlife Service and the National Marine Fisheries Service as required under section 7 of the Endangered Species Act. Concurrence with the EA's determinations was received from the Fish and Wildlife Service on May 10, 2005, and from the National Marine Fisheries Service on

November 4, 2005. NPS consulted with the National Marine Fisheries Service Habitat Conservation Division as required under section 305 of the Magnuson-Stevens Act. Gulf Islands National Seashore developed a subaquatic vegetation management plan, which outlines how the park proposes to manage PWC use with regard to the four components in the 1995 Florida Marine Research Institute seagrass scarring report. This plan is described further above. NPS also consulted with the National Marine Fisheries Service Office of Protected Resources regarding the Marine Mammal Protect Act. In a letter dated November 15, 2005, NMFS stated that an authorization for incidental taking under section 101(a)(5) of the Marine Mammal Protect Act is not necessary.

#### **Comments Related to Visitor Experience and Satisfaction**

39. One commenter stated that demographic and usage information demonstrates that today's PWC owner typically uses PWC for family-oriented outings, and that they are not reckless "stunt" operators.

*NPS Response:* NPS agrees that some PWC operators are more mature and are not reckless with their machines, and that many trips are family-oriented. However, PWC use does vary, and some operators still use the machines for "thrill," including stunts, wake jumping, and other more risky exercises. Some users can still create disturbances or safety concerns, especially if children are operating the vessel. Under alternative B, as implemented by this final rule, NPS will provide additional enforcement and education to minimize the possibility of any serious injuries.

#### **Comments Associated With Safety**

40. 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:* The mediating factors described in the comment are recognized. However, these factors are unlikely to fully explain the large difference in percentages (personal watercraft are only 7.5% of registered vessels, yet they are involved in 36% of reported accidents). In other words, personal watercraft are 5 times more likely to have a reportable accident than are other boats. Despite these national boating accident statistics, impacts of PWC use and visitor conflicts are judged to be negligible relative to swimmers and minor relative to other motorboats at the national seashore.

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 in the national seashore are estimated to go unreported.

41. The U.S. Coast Guard requested that NPS work cooperatively with the Coast Guard, the State of Florida, and other agencies in the development of any changes to current regulations concerning boating in Gulf Islands National Seashore. The Coast Guard strives to ensure uniformity and effectiveness of recreational boating laws. Uniform regulations make it both easier for compliance and enforcement.

*NPS Response:* The park has solicited input from other government agencies throughout the process and wants to work cooperatively with them.

42. One commenter stated that the EA does not cite any park-specific accident data, and instead relies on Florida State and county data. No Mississippi accident data is included. There is substantial empirical support for concluding that PWC use does not create disproportionate safety concerns. An analysis of accident data at Fire Island National Seashore suggests that the percentage of boating accidents in the park involving PWC is actually less than might be expected based on the level of usage.

*NPS Response:* Although no boating accident data is available for the park, page 97 of the EA discusses boating violation citations in both districts of the park. From 1997 to 2002, PWC-related violation citations accounted for 36 percent to 68 percent of all boating violation citations within the park. Although the number of citations has generally decreased since 1997, park staff still observed PWC being operated carelessly and recklessly in congested boating and swimming areas and among anchored boats, as stated on page 97 of the EA. Many of these violations went unreported since they were observed from the beach and enforcement was not possible. The accident data analysis conducted at Fire Island National Seashore is not necessarily applicable to Gulf Islands National Seashore.

Furthermore, as noted on page 200 of the EA, the National Transportation Safety Board reported in 1996 that personal watercraft represented 7.5 percent of State-registered recreational boats but accounted for 36 percent of recreational boating accidents. In the same year, PWC operators accounted for more than 41 percent of people injured in boating accidents. PWC operators accounted for approximately 85 percent of the persons injured in accidents studied in 1997.

43. One commenter stated that the NPS supports the preferred alternative by assuming that PWC operation will not adversely impact public safety and that a majority of PWC users operate their craft in "a lawful manner." However, in 2001 the NPS reported that PWC use threatened the safety of visitors and that PWC are often operated in a "reckless" manner.

*NPS Response:* NPS' analysis recognizes that there is some potential danger in PWC operation. However, not all PWC operation is conducted in a reckless manner, and NPS cannot regulate activities based on the type of injuries likely to be sustained if the public wishes to participate in an activity that is supported by the park's enabling legislation. However, NPS is providing safe operating instructions, use restrictions, and enforcement to minimize the possibility of any serious injuries. Alternative B, as implemented in this final rule, will provide more enforcement of PWC restrictions and education for PWC users.

#### **Comments Regarding Cultural Resources**

44. One commenter stated that the analysis refers to a potential concern that the ability of PWC operators to access remote areas of the park unit might make certain cultural, archeological and ethnographic sites vulnerable to looting or vandalism. However, there is no indication of any instances where these problems have occurred. Nor is there any reason to believe that PWC users are any more likely to pose these concerns than canoeists, kayakers, hikers, or others who might access these same areas.

*NPS Response:* The EA was focused on the analysis of impacts from PWC use. PWC can make it easier to reach some remote upstream areas, compared to hiking to these areas, but the NPS agrees that the type of impacts to cultural resources from any users of remote areas of the park would be similar if visitors can reach these areas.

45. The Mississippi State Historic Preservation Office stated that it has no issues of concern or reservations with the PWC EA. The Florida State Historic Preservation Office stated that alternative B is the preferred alternative, if the no action alternative cannot be chosen.

*NPS Response:* Comments noted.

#### **Comments Regarding Socioeconomics**

46. One commenter stated that the EA ignores the positive socioeconomic effects of banning PWCs, and that a recent study found that non-PWC users preferentially seek out areas without

PWCs and thus banning PWCs would likely be beneficial to the local economy.

*NPS Response:* The number of recreational visits at Gulf Islands National Seashore in calendar year 2001 was 389,499, a 0.8 percent reduction from 2000. No data were available for more recent years, including those since the park was closed to PWC use, at the time the EA was written. A variety of factors influence visitor use numbers at national parks.

47. Several commenters, including two U.S. Congressmen, stated that access by PWC to national parks is vital to local economies, and PWC enthusiasts support small businesses providing services to these riders. These businesses will be adversely affected if PWC operators who travel to the park cannot recreate on their PWC. Banning PWC will have a negative economic impact on the State of Mississippi. Tourism will probably suffer if visitors cannot ride their PWC freely within the park.

*NPS Response:* The EA analysis evaluated the socioeconomic impact of each alternative. NPS chose alternative B, Reinstate PWC Use Under a Special NPS Regulation with Additional Management Prescriptions, as the preferred alternative. NPS anticipates that under alternative B, as implemented by this final rule, consumer and producer surplus (i.e., benefits) for PWC-related goods and services is expected to increase as a result of lifting the ban on PWC use at Gulf Islands National Seashore. Overall, alternative B is considered to provide the greatest level of net benefits.

48. One commenter stated that the EA does not investigate the economic impact that lifting the PWC ban would have upon businesses that are dependent upon the conservation of wildlife and their habitat.

*NPS Response:* Page 214 of the EA states that consumer surplus is expected to decrease slightly for visitors other than PWC users as a result of decreased solitude, decreased water quality, and an increase in the risk of accidents involving PWC. However, the flat wake zone requirement 300 yards from all shorelines will reduce these impacts.

49. Several commenters stated that the EA fails to provide a true accounting of the costs and benefits of the alternatives, and that the socioeconomic analysis is skewed to support a decision to authorize continued PWC operation. The EA does not include a detailed description of the costs of continued PWC operation upon other resources, such as other visitors' experiences, wildlife, and seagrass beds. The NPS

admits these “costs could not be quantified.” This calls into question the accuracy and fairness of the economic analysis.

*NPS Response:* When conducting the socioeconomic analysis, six major affected groups were identified. Two of these groups were “other visitors or potential visitors who may have a different experience at the national seashore if personal watercraft continue to be banned or restricted (canoeists, anglers, swimmers, hikers, boaters, and other visitors),” and “producers of services to other types of summer visitors (e.g., canoe rentals or powerboat rentals) who may experience a change in their welfare.”

NPS agrees that the costs of continued PWC operation upon other resources, such as other visitors’ experiences, wildlife, and seagrass beds, could not be quantified because of a lack of available data. The scope of the EA did not include gathering these types of data. The EA states that if all costs could be incorporated, the indicated net benefits for each alternative would be lower. Those costs would likely be greater for alternative A than for alternative B, and alternative B would likely have the greatest level of net benefits. It is unlikely that these conclusions would change even if better data were available.

#### Comments Related to Enforcement

50. Several commenters stated that restricting PWC to flat wake zones would only work with increased education and law enforcement. Without an overall budget increase, any increased law enforcement and education would take resources away from other operations, such as resource management.

*NPS Response:* Gulf Island National Seashore is fully aware that current enforcement activities would not be successful under the preferred alternative and that this new regulation will require changes and reallocations of assets and resources, with increased education and enforcement.

Additional boats and mooring facilities have recently been acquired, increased training of marine enforcement staff has occurred, and initial efforts at educating the boating public have occurred. The majority of seashore users are law-abiding and sensitive to the special values of seashore waters and lands. An active education program backed by a reasonable enforcement effort should, within a few seasons, educate PWC users to the requirements of the new regulation. After an initial period of adjustment to the new regulations, the

small number of PWC users who encounter seashore waters should be knowledgeable enough to conduct themselves within the law, and the initial need for focused attention on PWC operators will diminish. Additional water presence and education are proven methods of protecting resources for the future enjoyment of all visitors, with the end result of enhancing the visitor experience.

51. The Florida Fish and Wildlife Conservation Commission stated that it does not support the flat wake zone for PWC for several reasons. Expectation for enforcement will be unrealistic without marking of the areas with buoys. The application of flat wake restrictions for PWC only would create unnecessary boating safety and navigational hazards for boaters, and will be worse in narrow areas along the Intracoastal Waterway. The flat wake zone would result in a significant reduction in the amount of riding area for PWC operators, potentially resulting in an increased likelihood of vessel collisions.

*NPS Response:* The national seashore has over 100 miles of shoreline. Placement of buoys throughout the entire park is not feasible due to cost and maintenance, and would be confusing to most operators. The park believes that through education and enforcement, such delineation will not be necessary. Where it is shown that education or enforcement do not result in compliance, buoys could be placed as a temporary measure. The limits of the flat wake zones will offer an envelope large enough to allow the prudent operator and enforcement officer to recognize when gross violation may be occurring.

The Intracoastal Waterway is outside of the park boundary, so none of the flat wake zones apply to this area. None of the flat wake zones are so narrow that PWC will be forced into the Intracoastal Waterway, or forced outside of park boundaries.

The final rule will provide access to all areas of the park that are open to other watercraft, so no riders will be forced to operate outside park boundaries in unprotected waters. In addition, PWC use will not be eliminated; the final rule simply requires that PWC operate in designated areas at a flat wake speed.

Though these rules were developed to specifically regulate PWC use, the park realizes and appreciates that an appearance of discrimination exists between PWC and other vessels and that there is a need for rulemaking to regulate vessels other than PWC in similar ways we are managing PWC.

The park is committed to working toward rulemaking that will correct the differences.

#### Comments Regarding Other NEPA Issues

52. Several commenters, including two U.S. Congressmen, stated that the public has not had sufficient opportunity to be involved in the rulemaking process, and that additional public scoping meetings, hearings, and other opportunities to comment are necessary.

*NPS Response:* During the development of the *PWC Determination*, which was published in 2002, the park received over 1,000 written individual comments. Comments indicated that approximately one-third of the commenters were in favor of the PWC prohibition, and two-thirds were opposed on the basis of discrimination against personal watercraft.

The EA was written to evaluate a range of alternatives and strategies for managing PWC use at Gulf Islands National Seashore to ensure the protection of park resources and values while offering recreational opportunities as provided for in the national seashore’s enabling legislation, purpose, mission, and goals. As part of the EA process, two public scoping open house meetings were held (on January 28, 2003, in Gulf Breeze, Florida, and January 30, 2003, in Ocean Springs, Mississippi). Public comments were collected for 30 days after the meetings, from January 28 to February 28, 2003, and were based on preliminary alternatives that were presented at the open house meetings. The preliminary alternatives were revised to reflect public concerns and comments. Alternative B, Reinstate PWC Use with Additional Management Prescriptions, was chosen as the preferred alternative as a result of the EA analysis.

53. One commenter stated that the proposed rule makes no mention of Hurricane Ivan, which struck the area in the fall of 2004, and the environmental implications of this event on national seashore resources and values. The cumulative impact must be taken into account in evaluating the environmental impact of permitting PWC use in these areas.

*NPS Response:* No mention was made of Hurricane Ivan because it had not occurred when the EA was prepared. All storms have the potential to impact park resources and cannot be predicted.

#### Changes to the Final Rule

Based on the preceding comments and responses, the NPS has made no

changes to the proposed rule language with regard to PWC operations.

**Summary of Economic Impacts**

*Personal Watercraft Regulations in Gulf Islands National Seashore*

Alternative C, the no-action alternative, represents the baseline of this analysis. Under that alternative, all PWC use would remain prohibited in the park. Alternative A would permit PWC use as managed in the park prior to the ban and Alternative B would permit PWC use, but with additional restrictions compared with pre-ban

management. All benefits and costs associated with these regulatory alternatives are measured relative to the baseline established by Alternative C. Therefore, there are no incremental benefits or costs associated with Alternative C.

The primary beneficiaries of Alternatives A and B would be the park visitors who use PWCs and the businesses that provide services to PWC users such as rental shops, restaurants, gas stations, and hotels. The present value of benefits to PWC users are estimated to range between \$670,100

and \$881,500 for these alternatives. The present value of benefits to businesses that provide services to PWC users for Alternatives A and B are estimated to range between \$479,900 and \$4,130,400. Additional beneficiaries include the individuals who use PWCs outside the park where PWC users that are displaced from the park may decide to ride if PWC use within the park were prohibited. These benefit estimates are presented in Table 1. The amortized values per year of these benefits over the ten-year timeframe are presented in Table 2.

**TABLE 1.—PRESENT VALUE OF BENEFITS FOR PWC USE IN GULF ISLANDS NATIONAL SEASHORE, 2003–2012**  
[Thousands]<sup>a</sup>

|                                     | PWC users | Businesses                 | Total                   |
|-------------------------------------|-----------|----------------------------|-------------------------|
| Alternative A:                      |           |                            |                         |
| Discounted at 3% <sup>b</sup> ..... | \$881.5   | \$664.6 to \$4,130.4 ..... | \$1,546.1 to \$5,011.9. |
| Discounted at 7% <sup>b</sup> ..... | 705.3     | \$511.9 to \$3,181.2 ..... | \$1,217.2 to \$3,886.5. |
| Alternative B:                      |           |                            |                         |
| Discounted at 3% <sup>b</sup> ..... | 837.5     | \$623.1 to \$3,859.6 ..... | \$1,460.5 to \$4,697.0. |
| Discounted at 7% <sup>b</sup> ..... | 670.1     | \$479.9 to \$2,972.6 ..... | \$1,149.9 to \$3,642.7. |

<sup>a</sup> Benefits may not sum to the indicated totals due to independent rounding.

<sup>b</sup> Office of Management and Budget Circular A-4 recommends a 7% discount rate in general, and a 3% discount rate when analyzing impacts to private consumption.

**TABLE 2.—AMORTIZED TOTAL BENEFITS PER YEAR FOR PWC USE IN GULF ISLANDS NATIONAL SEASHORE, 2003–2012**  
[Thousands]

|                                     | Amortized total benefits per year <sup>a</sup> |
|-------------------------------------|--|
| Alternative A:                      |  |
| Discounted at 3% <sup>b</sup> ..... | \$181.3 to \$587.5.                            |
| Discounted at 7% <sup>b</sup> ..... | \$173.3 to \$553.4.                            |
| Alternative B:                      |  |
| Discounted at 3% <sup>b</sup> ..... | \$171.2 to \$550.6.                            |
| Discounted at 7% <sup>b</sup> ..... | \$163.7 to \$518.6.                            |

<sup>a</sup> This is the present value of total benefits reported in Table 1 amortized over the ten-year analysis timeframe at the indicated discount rate.

<sup>b</sup> Office of Management and Budget Circular A-4 recommends a 7% discount rate in general, and a 3% discount rate when analyzing impacts to private consumption.

The primary group that would incur costs under Alternatives A and B would be the park visitors who do not use PWCs and whose park experiences would be negatively affected by PWC use within the park. At Gulf Islands National Seashore, non-PWC uses include boating, canoeing, fishing, and hiking. Additionally, the public could incur costs associated with impacts to aesthetics, ecosystem protection, human health and safety, congestion, nonuse values, and enforcement. However, these costs could not be quantified because of a lack of available data. Nevertheless, the magnitude of costs associated with PWC use would likely be greatest under Alternative A, and lower for Alternative B due to increasingly stringent restrictions on PWC use.

Because the costs of Alternatives A and B could not be quantified, the net benefits associated with those alternatives (benefits minus costs) also could not be quantified. However, from an economic perspective, the selection of Alternative B as the preferred alternative was considered reasonable even though the quantified benefits are somewhat smaller than under Alternative A. That is because the costs associated with non-PWC use, aesthetics, ecosystem protection, human health and safety, congestion, and nonuse values would likely be greater under Alternative A than under Alternative B. Quantification of those costs could reasonably result in Alternative B having the greatest level of net benefits.

**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 Gulf Islands National Seashore” (MACTEC Engineering, January 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 "Economic Analysis of Personal Watercraft Regulations in Gulf Islands National Seashore" (MACTEC Engineering, January 2004). Copies of this report are available at: <http://www.nps.gov/guis/pphtml/documents.html>.

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

This rule 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.*). The effect will be positive for businesses that provide services to PWC users such as rental shops, restaurants, gas stations, and hotels. The present value of benefits to businesses that provide services to PWC users are estimated at \$4,130,400.

#### *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. See also number 5 in the responses to comments section of this preamble.

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

In accordance with Executive Order 12988, the Department 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*

The National Park Service has analyzed this rule in accordance with the criteria of the National Environmental Policy Act and has prepared an Environmental Assessment (EA). The EA was available for public review and comment from April 19, 2004 to May 18, 2004. A Finding of No Significant Impact (FONSI) was signed on January 25, 2006. Copies of the EA and FONSI may be downloaded at <http://www.nps.gov/guis/pphtml/documents.html> or obtained at park headquarters Monday through Friday, 8 a.m. to 4:30 p.m. Mail inquiries should be directed to park headquarters: Gulf Islands National Seashore, 1801 Gulf Breeze Parkway, Gulf Breeze, FL 32563.

#### *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 rule allows use of PWC in Gulf Islands National Seashore under specified conditions. Because current regulations do not allow use of PWC at all, this rule relieves a restriction on the public. For this reason, and because NPS wishes to allow the public to take advantage of the new rules as soon as possible, this final rule is effective upon publication in the **Federal Register**, as allowed by the Administrative Procedure Act at 5 U.S.C. 553(d)(1).

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

National Parks, Reporting and recordkeeping requirements.

■ In consideration of the foregoing, the National Park Service amends 36 CFR part 7 as follows:

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

■ 1. The authority citation 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 D.C. Code 8-137 (1981) and D.C. Code 40-721 (1981).

■ 2. Add new paragraph (c) to § 7.12 to read as follows:

#### **§ 7.12 Gulf Islands National Seashore.**

\* \* \* \* \*

(c) *Personal Watercraft (PWC)*. (1) PWCs may operate within Gulf Islands National Seashore except in the following closed areas:

- (i) The lakes, ponds, lagoons and inlets of Cat Island, East Ship Island, West Ship Island, Horn Island, and Petit Bois Island;
- (ii) The lagoons of Perdido Key within Big Lagoon;
- (iii) The areas within 200 feet from the remnants of the old fishing pier and within 200 feet from the new fishing pier at Fort Pickens; and
- (iv) Within 200 feet of non-motorized vessels and people in the water, except individuals associated with the use of the PWC.

(2) PWC may not be operated at greater than flat wake speed in the following locations:

- (i) Within 0.5 mile from the shoreline or within 0.5 mile from either side of the pier at West Ship Island;
- (ii) Within 0.5 mile from the shoreline on the designated wilderness islands of Horn and Petit Bois; and

(iii) Within 300 yards from all other park shorelines.

(3) PWC are allowed to beach at any point along the shore except as follows:

(i) PWC may not beach in any restricted area listed in paragraph (c)(1) of this section; and

(ii) PWC may not beach above the mean high tide line on the designated wilderness islands of Horn and Petit Bois.

(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: April 17, 2006.

**Matthew Hogan,**

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

[FR Doc. 06-4180 Filed 5-3-06; 8:45 am]

BILLING CODE 4310-X8-P

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 1

[WT Docket No. 05-211; FCC 06-52]

#### Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** This document adopts a number of modifications to the Commission's competitive bidding rules and procedures. The Commission believes the rule modifications it adopts will allow it to achieve its statutory mandates to ensure that designated entities are given the opportunity to participate in spectrum-based services and that in providing such opportunity it prevents the unjust enrichment of ineligible entities.

**DATES:** Effective June 5, 2006.

**FOR FURTHER INFORMATION CONTACT:** Brian Carter at (202) 418-0660.

**SUPPLEMENTARY INFORMATION:** This is a summary of the *Second Report and Order* released on April 25, 2006. The complete text of the *Second Report and Order* including attachments and related Commission documents is available for public inspection and copying from 8 a.m. to 4:30 p.m. Monday through Thursday or from 8 a.m. to 11:30 a.m. on Friday at the FCC Reference Information Center, Portals II, 445 12th

Street, SW., Room CY-A257, Washington, DC 20554. The *Second Report and Order* and related Commission documents may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, SW., Room CY-B402, Washington, DC 20554, telephone 202-488-5300, facsimile 202-488-5563, or you may contact BCPI at its Web site: <http://www.BCPIWEB.com>. When ordering documents from BCPI please provide the appropriate FCC document number, for example, FCC 06-52. The *Second Report and Order* and related documents are also available on the Internet at the Commission's Web site: <http://wireless.fcc.gov/auctions>.

#### Synopsis of the Second Report and Order

1. In the *Second Report and Order* (*Second R&O*), the Commission addresses its rules concerning the eligibility of applicants and licensees for designated entity benefits. In the *Second R&O*, the Commission modifies its rules in order to increase its ability to ensure that the recipients of designated entity benefits are limited to those entities and for those purposes Congress intended.

2. The Commission revises its general competitive bidding rules (Part 1 rules) governing benefits reserved for designated entities to include certain material relationships as factors in determining designated entity eligibility. Specifically, the Commission adopts rules to limit the award of designated entity benefits to any applicant or licensee that has impermissible material relationships or an attributable material relationship created by certain agreements with one or more other entities for the lease or resale of its spectrum capacity. These definitions of material relationships are necessary to strengthen the Commission's implementation of Congress's directives with regard to designated entities and to ensure that, in accordance with the intent of Congress, every recipient of the Commission's designated entity benefits is an entity that uses its licenses to directly provide facilities-based telecommunications services for the benefit of the public.

3. The Commission also adopts rule modifications to strengthen its unjust enrichment rules so as to better deter entities from attempting to circumvent the Commission's designated entity eligibility requirements and to recapture designated entity benefits when ineligible entities control designated entity licenses or exert impermissible influence over a designated entity. To ensure the Commission's continued

ability to safeguard the award of designated entity benefits, the Commission provides clarification regarding how it will implement its rules concerning audits and refines its rules with respect to the reporting obligations of designated entities.

4. The rules the Commission adopts will apply to all determinations of eligibility for all designated entity benefits, including bidding credits and, as applicable, set-asides, and installment payments, unless excepted by the grandfathering provisions. These rules will be applied to any application filed to participate in auctions and to all long-form applications filed by winning bidders, as well as to all applications for an authorization, an assignment or transfer of control, a lease, or reports of events affecting a designated entity's ongoing eligibility, including impermissible material relationships or attributable material relationships, filed on or after release of the *Second R&O*. However, the rules will not apply to the upcoming auction of 800 MHz Air-Ground Radiotelephone Service licenses, scheduled to begin on May 10, 2006, nor to the Form 601 applications to be filed subsequent to the close of that auction by the winning bidders.

#### I. Background

5. Throughout the history of the auctions program, the Commission has endeavored to carry out its Congressional directive to promote the involvement of designated entities in the provision of spectrum-based services. The challenge for the Commission in carrying out Congress's plan has always been to find a reasonable balance between the competing goals of, first, providing designated entities with reasonable flexibility in being able to obtain needed financing from investors and, second, ensuring that the rules effectively prevent entities ineligible for designated entity benefits from circumventing the intent of the rules by obtaining those benefits indirectly, through their investments in qualified businesses.

6. The Commission's primary method of promoting the participation of designated entities in competitive bidding has been to award bidding credits—percentage discounts on winning bid amounts—to small business applicants. The Commission also has utilized other incentives, such as installment payments and, in broadband Personal Communications Services, a license set-aside to encourage designated entities to participate in spectrum auctions and in the provision of service.