National Parks and Conservation Association v. Babbitt: Titanic Mess, Restricting Cruise Ships in Order to Protect Glacier Bay

Monica Mintz
NATIONAL PARKS AND CONSERVATION ASSOCIATION V. BABBITT: TITANIC MESS, RESTRICTING CRUISE SHIPS IN ORDER TO PROTECT GLACIER BAY

I. INTRODUCTION

Alaska's Glacier Bay is "a place of unrivaled scenic and geological values associated with natural landscapes and wildlife species of inestimable value to the citizens."1 Calvin Coolidge proclaimed Glacier Bay a national monument in 1925, and Congress designated it a national park and preserve in 1980.2 Visiting Glacier Bay is similar to traveling back in time to the ice age due to views of the breathtaking tidewater glaciers.3 In addition to being home to 420 species of plants, over forty species of land and marine life and 230 species of birds, Glacier Bay also provides a unique environment for the scientific study of important ecological resources.4 The National Parks and Conservation Association (NPCA) declared Glacier Bay one of the "crown jewels" of the United States park system and warned that the rise in cruise ship traffic increases risk to the wildlife and the environment.5 Large cruise ships provide an opportu-

nity for thousands of tourists to visit Glacier Bay each year. In 1996, the National Park Service (Parks Service) implemented a plan to immediately increase the number of cruise ships to Glacier Bay each summer by thirty percent and overall by seventy-two percent.

The potential for increased noise and air pollution, vessel collisions and oil spills caused by cruise ships heightened the NPCA’s concern. Vessel traffic has created serious problems for Alaska’s environment in the past, evidenced by the Exxon Valdez disaster in 1989. On November 29, 2002, the Prestige, an oil tanker carrying about twenty million gallons of heavy fuel oil, sank off the coast of Spain, causing a catastrophic oil spill. This is more evidence that danger persists from oil tankers all over the world. The NPCA alleged that the Parks Service failed to follow guidelines pursuant to the National Environmental Policy Act (NEPA) when it increased the amount of cruise ship traffic to Glacier Bay. The NPCA emphasized that preservation of Glacier Bay’s diverse environment far outweighed any economic benefit from tourism. The main issue
in dispute was whether further environmental impact studies should be completed before allowing heavy cruise ship traffic into Glacier Bay.\textsuperscript{14}

This Note discusses the Ninth Circuit's decision in \textit{National Parks and Conservation Ass'\textquoteright n v. Babbitt (National Parks)},\textsuperscript{15} which restricts the number of cruise ships that can enter Glacier Bay.\textsuperscript{16} Section II of this Note summarizes the facts of \textit{National Parks}.\textsuperscript{17} Section III discusses Glacier Bay's environment, NEPA requirements and injunctive relief.\textsuperscript{18} Section IV of this Note includes a discussion of the Ninth Circuit's opinion, followed by a critique of the Ninth Circuit's analysis in Section V.\textsuperscript{19} Finally, Section VI analyzes the impact of this case.\textsuperscript{20}

\section{FACTS}

Vessel traffic through Glacier Bay has increased significantly between 1968 and 1978.\textsuperscript{21} The United States National Marine Fisheries Service (Fisheries Service) issued a "biological opinion" in 1978, which expressed concern about the increase and impact of vessel traffic on the humpback whale population.\textsuperscript{22} The Fisheries Service feared the extinction of the humpback whale population and advised the Parks Service to regulate the number of vessels entering Glacier Bay and restrict vessels from approaching and pursuing whales.\textsuperscript{23} The Fisheries Service suggested that studies be

\begin{itemize}
\item\textit{See Nat'l Parks,} 241 F.3d at 727 (indicating why United States National Marine Fisheries Service began to take notice of potential environmental problems in Glacier Bay).
\item\textit{See id.} (emphasizing substantial increase of vessel traffic in whales' departure from Glacier Bay during 1978 and 1979).
\item\textit{See id.} (explaining vessel proximity to whales would interfere with acoustic environment, which is key to development of humpback whale vocalizations).
\end{itemize}
conducted on whale feeding behavior, the effect of vessels on whale behavior and the acoustic environment.24

In response to the Fisheries Service's opinion, the Parks Service began regulating the entry and activity of cruise ships and smaller boats in Glacier Bay.25 Restrictions were imposed on vessels regarding how close they could travel near whales.26 The Fisheries Service issued a second biological opinion in 1983, concluding that an increase in vessel traffic would adversely affect the humpback whales, although a slight increase in vessel traffic was tolerable.27 The Parks Service then developed a Vessel Management Plan (VMP) in 1984, which permitted an incremental twenty percent increase in the number of previously authorized vessel entry quotas.28

The Parks Service sought to implement a new VMP in 1992 to increase the current level of cruise ship entries in Glacier Bay by seventy-two percent.29 The Fisheries Service issued a third biological opinion in 1993, urging the Parks Service to consider how its VMP affected humpback whales and detailing the need to implement research and monitoring programs.30 The Parks Service considered this and, following NEPA guidelines, issued a combined proposed VMP and environmental assessment (EA).31 An EA is less

24. See id. The Parks Service states that whale songs help whales to maintain social organization, recognize other whales, know where they are in the water, provide information about feeding or become alert about danger. See id.

25. See id. (providing two cruise ships could enter Glacier Bay each day, with maximum of eighty-nine cruise ship entries between June 1st and August 31st). Smaller boats, which were "private/pleasure craft," were limited to twenty-one entries per day with a seasonal maximum of 538 entries. See id.

26. See Nat’l Parks, 241 F.3d at 727 (adding that vessels could not be within quarter of nautical mile of whales or attempting to pursue whales). Vessels must also maintain a constant speed of ten knots or less and follow a mid-channel course in designated "whale waters." See id.

27. See id. (stressing increase in vessel traffic will add to traffic faced by whales, adding to cumulative impacts they face). An increase in vessel traffic was acceptable as long as the number of individual whales entering the bay did not fall below the 1982 level and corrective measures were put in place. See id.

28. See id. (highlighting total of 107 cruise ship entries per season would be allowed). This new plan became a reality in 1988. See id.

29. See id. (noting Parks Service’s new Vessel Management Plan was developed taking Fisheries Service’s recommendations into consideration).

30. See id. (establishing Fisheries Service’s concern that no studies disprove that humpback whale population was declining when vessel traffic is avoided).

31. See 42 U.S.C. § 4321 (2001); see Nat’l Parks, 241 F.3d at 728. An environmental assessment is defined as a document that, under NEPA, (1) “provides sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact; (2) aids an agency’s compliance with NEPA when no EIS is necessary; and (3) facilitates preparation of an EIS when one is necessary.” Id.
formal than an environmental impact statement (EIS). The combined VMP/EA reported on six potential alternative approaches for managing the environment and vessels in Glacier Bay; the Parks Service preferred Alternative Five, which maintained a limit of two cruise ship entries per day, but increased the total number of seasonal vessel entries from 107 to 184.

The Parks Service conducted six public hearings regarding the VMP and received a substantial amount of negative criticism. In response, the Parks Service implemented a modified version of Alternative Five and a revised EA discussing the effects on threatened and endangered marine mammals, other marine mammals, birds and the human environment, including air quality. The revised EA was extremely vague as it described the VMP’s effects on animals and the environment as largely “unknown.” In addition, the Parks Service released a Finding of No Significant Impact (FONSI) under NEPA, stating a modified Alternative Five could be implemented without serious effects on the environment, and mitigation

32. See Nat’l Parks, 241 F.3d at 728 (quoting Conner v. Buford, 848 F.2d 1441, 1446 (9th Cir. 1998)).
33. See id. (explaining six alternative plans). Alternative One maintained the status quo. See id. Alternative Four reduced vessel traffic between fourteen to twenty-two percent. See id. Alternative Five increased cruise ship entries by seventy-two percent and seasonal entries for other vessels were not increased. See id.
34. See id. (revealing that of 450 comments Parks Service received regarding alternative plans, eighty-five percent opposed Alternative Five, favoring Alternative Four). The Sierra Club, the Alaska Wildlife Alliance and the Plaintiff NPCA all admonished Alternative Five. See id.
35. See id. (stating seasonal entry quota for cruise ships would increase by thirty percent for 1996 and 1997, also potentially by as much as seventy-two percent). The entry quotas for charter boats and private/pleasure craft would increase by eight percent and fifteen percent, respectively. See id.
36. See id. at 729. The EA stated:

The potential for daily and seasonal exposure of humpback whales to underwater noise would increase. The effect of increased levels of disturbance on these cetacean populations was unknown. Marine mammals using open-water habitats would be subject to increased vessel traffic and its related disturbance. However, little is known about the effects of the disturbance. The risk of vessels colliding with marine mammals would increase, although the degree of increase is unknown. Similarly, there would be an increased risk of ship collisions, other accidents, and associated fuel spills. The rate of actual spills could increase, but the degree of increase is unknown. The degree to which disturbance and displacement would affect the humpback whale populations in Glacier Bay is unknown. The overall effect on bald eagles is unknown. It is unknown if waterfowl populations would change under this alternative. The biological effects of these air pollutants from stack emissions are unknown.

Id.
strategies would significantly reduce environmental effects resulting from vessel entries.\textsuperscript{37}

The NPCA submitted objections to the VMP/EA and proposed FONSI on April 19, 1996.\textsuperscript{38} On May 2, 1997, the NPCA filed suit against Bruce Babbitt, Secretary, United States Department of the Interior, and Dennis J. Galvin, Acting Director of the Parks Service, in the United States District Court for the District of Alaska, claiming that the Parks Service must not implement its VMP/EA until it has complied with NEPA and prepared an EIS.\textsuperscript{39} The district court held that there were some uncertainties surrounding the potential adverse environmental effects of increased vessel traffic, but these uncertainties were not sufficient to require an EIS.\textsuperscript{40} The district court also suggested that further studies be conducted.\textsuperscript{41} The United States Court of Appeals for the Ninth Circuit, in \textit{National Parks}, overruled the district court’s holding, reasoning that the Parks Service’s plans raised too many uncertainties regarding the likelihood of environmental harm to Glacier Bay.\textsuperscript{42}

\section*{III. Background}

\subsection*{A. Glacier Bay Park: A Precious Ecosystem}

Glacier Bay is a breathtaking environmental area with snow-capped mountain ranges, glaciers and pristine waters along the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{37} See \textit{Nat’l Parks}, 241 F.3d at 729 (explaining that Findings of No Significant Impact state reasons why agency’s proposed action will not have significant effect on environment). A FONSI will be able to show that the preparation of an EIS is unnecessary under NEPA. See id.; see also 40 C.F.R. § 1508.13 (2002) (defining “Findings of No Significant Impact”).
\item \textsuperscript{38} See \textit{Nat’l Parks}, 241 F.3d at 729. The Parks Service adopted the VMP/EA and issued its FONSI and final regulations on May 30, 1996. Id.
\item \textsuperscript{39} See id. (stating that NPCA requested declaratory and injunctive relief until compliance is met under NEPA).
\item \textsuperscript{40} See id. at 730. The district court stated that the EA indicated “interactions between whales and vessels might be seriously disruptive to wildlife residing in the park.” See id. The EA added that cruise ship operations have unknown effects on Glacier Bay National Park and the animals that live there. See id. The EA and FONSI contain a long list of uncertainties regarding increased vessel traffic. See id.
\item \textsuperscript{41} See id. The district court held: The EA in this case thoroughly canvasses all existing information and recognizes that theoretical harms might occur, but concludes that there is no evidence suggesting that a significant risk exists that the harms will occur. [A] modest increase in the number of visitors may be allowed while the studies are commissioned and the existing data base increased with care taken through ameliorization to recognize and eliminate problems as they arise. See id.
\item \textsuperscript{42} See id. at 739 (explaining reasoning behind court of appeals holding).
\end{itemize}
\end{footnotesize}
CRUISE SHIPS IN GLACIER BAY

Alaskan panhandle. Glacier Bay is home to many plant and animal species, including moose, wolves, bears, bald eagles, sea otters, harbor seals and humpback whales. Eighty percent of the park's visitors consist of cruise ship passengers who enjoy viewing the Bay's glacier faces, as well as breathing the crisp air. The number of cruise ships entering Glacier Bay has steadily increased, causing an intrusion to the home of the Steller sea lion and the humpback whale, two species struggling for continued existence. The NPCA alleges that unless the Parks Service complies with NEPA and decreases the amount of cruise ships to Glacier Bay, the park is in danger of losing its natural resources and indigenous animal species.

B. National Environmental Policy Act

In 1969, Congress promulgated NEPA and launched the "environmental decade of the 1970s." NEPA was in the forefront in establishing a broad national framework for protecting the environment. NEPA's policy "is to assure that all branches of government give proper consideration to the environment prior to undertaking any major federal action that significantly affects the environ-

43. See Nat'l Parks, 241 F.3d at 726. "There may be no place on Earth more spectacular than Glacier Bay." Id.; see National Park Service: Glacier Bay National Park and Preserve: Vessel Management Planning - Background, at http://www.glba.ene.com/background.htm (last updated Dec. 4, 2002). "Glacier Bay National Park and Preserve comprises 3.3 million acres and encompasses 940 square miles of marine waters." Id.

44. See Nat'l Parks, 241 F.3d at 726 (adding that many animals live in park's spruce and hemlock rain forest); see also Samantha S. Marrin, Rough Seas Ahead for Alaska Cruises? The Judicial and Legislative Battle Over Glacier Bay, 13 FORDHAM ENVTL. L.J. 323, 326 (2002) (noting Glacier Bay is home to many endangered species).

45. See Nat'l Parks, 241 F.3d at 725-26 (stating Glacier Bay extends sixty miles inland). Glacier Bay encompasses ten deep fjords, four of which contain actively calving tidewater glaciers, and 940 square miles of "pristine marine" waters. Id.

46. See id. at 726 (emphasizing Steller sea lions were classified as endangered under Endangered Species Act (ESA), 16 U.S.C. § 1531(a) – (c) (2001), in 1990). Their worldwide population has declined by forty-eight percent in the thirty years prior to 1992. See id. The humpback whale has been classified as an endangered species under the ESA since its enactment in 1973 and only 10,000 to 12,000 exist today. See id.

47. See id. at 725 (explaining NPCA's argument).

48. Bradley C. Karkkainen, Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance, 102 COLUM. L. REV. 903, 904 (2002) (highlighting that NEPA has been hailed as one of nation's most important environmental laws).

ment. The Ninth Circuit held in *Sierra Club v. United States Forest Service* (*Sierra Club*) that federal agencies must include an environmental impact statement (EIS) with every recommendation or report on major federal actions significantly affecting the quality of the human environment pursuant to NEPA. An EIS eliminates the need for speculation by ensuring available data is gathered and analyzed prior to the implementation of the proposed action. In *Robertson v. Methow Valley Citizens* (*Robertson*), the Ninth Circuit held that NEPA "ensures that the agency...will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the public audience."  

1. **Significantly Affecting the Environment**

An agency may prepare an EA to determine whether an action will "significantly affect the environment," thereby necessitating an EIS. If the EA concludes there will be no potential significant impact on the environment, the agency may proceed with its environmental plan. In *Wetlands Action Network v. United States Army Corps of Engineers* (*Wetlands Action Network*), the Ninth Circuit held

---

50. Id. (outlining purpose of NEPA's policy); see 42 U.S.C. § 4332(2)(C) (2001). "The Congress authorizes and directs that, to the fullest extent possible...all agencies of the Federal Government shall...include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." *Id.*

51. 843 F.2d 1190 (9th Cir. 1988).

52. See id. at 1192-93 (noting that Council on Environmental Quality has promulgated regulations, binding federal agencies in implementing this requirement); see also 40 C.F.R. §§ 1500-17 (2002) (detailing NEPA's purposes and procedures).


55. *Id.* at 349 (stating NEPA ensures all environmental effects will be considered).


57. See *Marrin, supra* note 44, at 328. The Park Service's perception of the significance of the action indicates the degree to which a potential environmental impact will be assessed. *See id.*

58. 222 F.3d 1105 (9th Cir. 2000).
that an EIS must be completed if an EA finds a significant environmental impact.\(^{59}\)

2. Requirements for an EIS

An investigation must consider the context and intensity of an agency's action to determine whether the impact on the environment will be significant enough to require an EIS.\(^{60}\) Context refers to the scope of the agency's action, including the interests affected, while intensity relates to the degree to which the agency action affects the location and interests identified in the context portion of the inquiry.\(^{61}\)

An agency must complete an EIS when the environmental effects of a proposed action are highly uncertain.\(^{62}\) "Preparation of an EIS is mandated where uncertainty may be resolved by further collection of data, or where the collection of such data may prevent speculation on potential...effects."\(^{63}\) It is critical that such uncertainty be resolved to prevent speculation in completing an EIS.\(^{64}\)

In *Idaho Sporting Congress v. Thomas*,\(^{65}\) the Ninth Circuit held that an agency must prepare an EIS whenever a federal action is "controversial," meaning that "substantial questions are raised as to whether a project...may cause significant degradation of some human environmental factor."\(^{66}\) Further, to meet the EIS uncertainty requirement, a plaintiff need not show that significant effects will definitely occur; a plaintiff must only raise substantial questions as to whether a project may have a significant effect.\(^{67}\)

\(^{59}\) See id. at 1119 (noting that EIS must address "purpose and need for the action, the environmental impacts of the action, and alternatives to the action").

\(^{60}\) See Nat'l Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 731 (9th Cir. 2001) (explaining significant effect on environment requires consideration of two broad factors).

\(^{61}\) See id. (indicating standards for intensity are enumerated in 40 C.F.R. § 1508.27 (2002)); see infra notes 92-93 and accompanying text.

\(^{62}\) See Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212-13 (9th Cir. 2000) (noting significant environmental impact when effects are highly uncertain or involve unique or unknown risks).

\(^{63}\) See Nat'l Parks, 241 F.3d at 732 (noting lack of data in EA does not support refusal to produce EIS).

\(^{64}\) See Sierra Club v. United States Forest Serv., 843 F.2d 1190, 1195 (9th Cir. 1988) (stating purpose of EIS is to eliminate uncertainty regarding proposed environmental effects).

\(^{65}\) 137 F.3d 1146 (9th Cir. 1998).

\(^{66}\) See id. at 1149 (quoting Greenpeace Action v. Franklin, 14 F.3d 1324, 1332 (9th Cir. 1992)); see also Northwest Envtl. Def. Ctr. v. Bonneville Power Admin., 117 F.3d 1520, 1539 (9th Cir. 1997).

\(^{67}\) See Idaho Sporting Congress, 137 F.3d at 1150 (quoting Greenpeace Action, 14 F.3d at 1332) (holding NEPA did not require preparation of EIS).
In Blue Mountains Biodiversity Project v. Blackwood (Blue Mountains), the Ninth Circuit held that an agency’s decision not to prepare an EIS under NEPA is held to an arbitrary and capricious standard. The Ninth Circuit examined whether the agency had taken a “hard look” at the environmental consequences of its proposed actions and based its decision on a consideration of the relevant factors. In Metcalf v. Daley, the Ninth Circuit found that an agency must also provide a “convincing statement of reasons” explaining the insignificance of the project’s impact. Federal agencies that fail to properly determine the environmental impact of their plans have a high likelihood of violating NEPA. Agencies must balance this liability against the expensive, time consuming, and often very controversial process of preparing an EIS.

3. FONSI and Mitigation Measures

A FONSI is “a public document that briefly presents the reasons why an action will not have a significant impact on the quality of the human environment and therefore will not require the preparation of an [EIS].” The Ninth Circuit held in Wetlands Action Network that when an EA concludes that the federal action will not significantly affect the environment, an agency may issue a FONSI. An agency might be able to avoid an EIS if it demonstrates certain mitigating measures in a FONSI.

68. 161 F.3d 1208 (9th Cir. 1998).
69. See id. at 1211 (stating deference is usually given to agency’s decision). The agency’s decision will be reviewed to see if the decision was an abuse of discretion, or otherwise not in accordance with the law. Id.
70. See id. (quoting Oregon Natural Res. Council v. Lowe, 109 F.3d 521, 526 (9th Cir. 1997)).
71. 214 F.3d 1135 (9th Cir. 2000).
72. See id. at 1142; see also Blue Mountains Diversity Project, 161 F.3d at 1211 (indicating agency’s decision not to complete EIS will be considered unreasonable if agency fails to supply convincing statement of reasons).
73. See Marrin, supra note 44, at 327 (discussing federal agencies’ required duties under NEPA).
74. See id. at 328 (emphasizing that substantial number of lawsuits involving NEPA also involve agency failure to file EIS for each federal action significantly affecting environment).
76. See Wetlands Action Network v. United States Army Corps of Engineers, 222 F.3d 1105, 1119 (9th Cir. 2000) (adding if there is significant impact, EIS must be done).
77. See id. at 1121 (stating significant mitigation measures need not completely compensate for adverse environmental impacts). In Wetlands Action Net-
The focus in evaluating the sufficiency of mitigation measures is whether they "constitute an adequate buffer against the negative impacts that result from the authorized activity to render the impacts so minor that an EIS is not required."\(^78\) The Ninth Circuit concluded in *Okanogan Highlands Alliance v. Williams (Okanogan Highlands Alliance)*\(^79\) that an EIS is incomplete unless it contains a "reasonably complete discussion of possible mitigation measures."\(^80\) NEPA, however, does not require that a complete mitigation plan actually be formulated and adopted.\(^81\) A court will only consider whether an agency took the requisite "hard look" at possible mitigation measures.\(^82\) A perfunctory description is insufficient to meet NEPA's requirements.\(^83\) Listing mitigating measures without supporting analytical data is additionally inadequate.\(^84\)

C. Injunctive Relief

In *Amoco Production Co. v. Village of Gambell*,\(^85\) the Supreme Court found that monetary damages often fail to remedy environmental damage, which may persist indefinitely.\(^86\) Injunctive relief is an appropriate remedy, therefore, due to the inadequacy of legal remedies according to the Ninth Circuit in *Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*.\(^87\) To determine the appropriate role of injunctive relief, courts balance competing claims of injury work, the creation of a freshwater system would mitigate any negative impact from the filling of wetlands. See *id.* at 1121-22.

78. See *id.* at 1121 (citing *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332 (9th Cir. 1992)).

79. 236 F.3d 468 (9th Cir. 2000).

80. See *id.* at 473 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989)). NEPA requires that an EIS "must discuss any adverse environmental effects which cannot be avoided should the proposal be implemented." See *id.*

81. See *id.* (noting that complete mitigation plan would be inconsistent with NEPA's use of procedural guidelines).

82. See *id.* (stating what is required in discussing mitigation measures in EA). NEPA requires an EIS to discuss adverse environmental effects that cannot be avoided if the proposal is implemented. See *id.* (quoting *Robertson*, 490 U.S. at 351-52).

83. See *id.* (citing *Neighbors of Cuddy Mountain v. United States Forest Service*, 137 F.3d 1372, 1380 (9th Cir. 1998)).

84. See *Okanogan Highlands Alliance*, 236 F.3d at 473 (citing *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1151 (9th Cir. 1998)). There must be a good faith effort in detailing mitigation measures even though they have not been implemented. See *id.*


86. See *id.* at 545 (explaining that environmental damage is often irreparable).

87. See *Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, 731-32 (9th Cir. 1995) (construing *Amoco Production*, 480 U.S. at 542). An injunction is an equitable remedy. See *id.*
while considering the effect of granting or withholding the requested relief on each party.88

IV. NARRATIVE ANALYSIS

A. Context and Intensity

NPCA brought an action to suspend implementation of the Parks Service’s VMP until completion of an EIS.89 The Ninth Circuit’s EIS analysis first addressed whether there would be a significant effect on the environment through an examination of context and intensity.90 Glacier Bay National Park is the context in the case at bar.91 The unique characteristics of Glacier Bay’s geographic area, the uncertain degree of VMP Alternative Five’s effects on the human environment, and the degree of controversy surrounding those indeterminate effects collectively established intensity.92 The Ninth Circuit concluded that Glacier Bay met the test for context and intensity due to its extraordinary environmental qualities.93

B. Uncertainty

Plaintiff NPCA argued, and the Ninth Circuit agreed, that the effects on the quality of the environment were highly uncertain and necessitated the preparation of an EIS.94 The Ninth Circuit discovered uncertainty regarding the intensity of the environmental eff-

88. See id. (quoting Amoco Production, 480 U.S. at 542). A court uses a “balance of harms” analysis before deciding to afford injunctive relief. See id.
89. See Marrin, supra note 44, at 334 (stating that NPCA requested injunction).
90. See Nat’l Parks & Conservation Ass’n v. Babbitt, 241 F.3d 722, 731 (9th Cir. 2001) (noting that identifying context and intensity is first step in determining if EIS is necessary).
91. See id. (including Glacier Bay’s natural setting, diverse wildlife and pure air quality). Context also means that the significance of an action must be analyzed in considering society as a whole, the affected region, the affected interests and the locality. See id. Significance varies with the setting of the proposed action. See id. The significance of a site-specific action will usually “depend on the effects in the locale rather than in the world as a whole;” short- and long-term effects are also relevant. See id.; see supra note 61 and accompanying text.
92. See Nat’l Parks, 241 F.3d at 731 (noting intensity also refers to severity of impact); see also 40 C.F.R. § 1508.27 (2002) (addressing ten factors used to evaluate intensity); see also Sierra Club v. United States Forest Serv., 843 F.2d 1190, 1193 (discussing criteria for evaluating intensity).
93. See Nat’l Parks, 241 F.3d at 731 (noting Glacier Bay is home to diverse natural vegetation and wildlife).
94. See id. (stating uncertainty and controversy are additional factors to be considered in determining whether there will be a significant impact on environment); see also Sierra Club, 843 F.2d at 1193 (defining uncertainty as including unique or unknown risks); see supra notes 62-64 and accompanying text.
fects listed in the Parks Service's own studies. The FONSI indicated that humpback whales and other marine life would have increased daily and seasonal exposure to underwater noise, there would be more potential collisions between boats and marine life, and there would be an increased risk of oil pollution for all Glacier Bay animal life. Additional cruise ships would increase air pollution and violations of state air quality standards.

The Parks Service's EA only indicated that the intensity or practical consequences of these effects were "highly unknown" due to an absence of information on the practical effect of increased traffic on the Bay and its inhabitants, as well as a lack of adequate proposals suggesting how to offset environmental damage through mitigation measures. The Parks Service's EA indicated that a park research and monitoring program could be implemented to aid in understanding the effects of increased vessel traffic on air quality, marine mammals and birds. The Ninth Circuit held that this case required an EIS because a more comprehensive understanding was needed before the Parks Service implemented the VMP.

The Ninth Circuit added that the Parks Service's method of implementing the VMP and then conducting impact studies may ultimately harm the environment. An EIS must be done prior to implementing the VMP so as to explore the intensity of the environmental effects. The Ninth Circuit required a "hard look" to be

95. See Nat'l Parks, 241 F.3d at 732 (noting there was scientific evidence in Parks Service's studies to support this conclusion of uncertainty).
96. See id. (emphasizing that underwater noise could adversely affect whales' behavior). The increase in the risk of collision is referred to as "traffic effects," which could affect whales, harbor seals, sea otters, murrelets, and molting waterfowl. See id.
97. See id. (noting that cruise ship stack emissions would be responsible for air pollution).
98. See id. (stating lack of data regarding effects diminishes EA's credibility). The EA states that several factors are unknown. See id. These factors include the degree of increase in oil spills as a result of increased traffic, the extent to which air pollution will diminish the beauty and quality of the natural environment, and the effect of increased levels of disturbance on Glacier Bay's cetacean populations. See id.
99. See id. at 733 (noting effects of humans on environment would be very important for further study).
100. See Nat'l Parks, 241 F.3d at 733 (9th Cir. 2001) (indicating more studies were needed because VMP would have significant adverse impact on environment).
101. See id. (noting Parks Service has already implemented first part of its VMP before conducting appropriate studies).
102. See id. (noting some environmental changes may be irreversible so it is wise to explore their potential impact); see also Sierra Club v. United States Forest Serv., 843 F.2d 1190, 1195 (9th Cir. 1988) (stating EIS should be done when substantial questions are raised).
taken before, not after, adverse environmental change has begun.\textsuperscript{103} Indicating only that the effects were "unknown" was insufficient to meet the requisite "hard look," and the Parks Service failed to explain why it did not obtain this information prior to the VMP's implementation.\textsuperscript{104} The Ninth Circuit held that the Parks Service's plan warranted an EIS because the VMP's environmental effects on Glacier Bay's air, water and wildlife were largely unknown.\textsuperscript{105}

C. Success Rate of Proposed Mitigation Measures

A subsequent cause of uncertainty, according to the NPCA, was due to the low probability of success regarding the Parks Service's proposed mitigation measures.\textsuperscript{106} There are times when an EIS is not required because an agency takes significant measures to mitigate the project's effects.\textsuperscript{107} The test for adequate mitigation measures is whether the measures constitute an adequate buffer against the negative impacts that may result from the authorized activity.\textsuperscript{108} A FONSI requires more than just a list of mitigation measures.\textsuperscript{109} The Ninth Circuit ruled that the Parks Service did not conduct a study of the anticipated effects of the mitigation measures.\textsuperscript{110}

The Ninth Circuit also found that the Parks Service's initial EA was ambiguous as to whether the proposed mitigation measures would lessen or cure the environmental impacts.\textsuperscript{111} The Ninth Circuit further indicated that the proposed studies were vague in terms

\begin{itemize}
\item \textsuperscript{103} See Nat'l Parks, 241 F.3d at 733 (indicating there is no reason that Parks Service could not conduct informative study before implementing their VMP).
\item \textsuperscript{104} See id. (discussing other preparatory measures that Parks Service could take to conduct studies, including studying current vessel traffic while considering effects of increase in vessel traffic).
\item \textsuperscript{105} See id. The Ninth Circuit is not directing the Parks Service on how to conduct EIS, but indicates that this is a case where a valid study should be conducted. See id.
\item \textsuperscript{106} See id. (noting NPCA's belief that mitigation measures would offset environmental impact of increased vessel traffic).
\item \textsuperscript{107} See id. at 733-34 (quoting Wetlands Action Network v. United States Army Corps of Engineers, 222 F.3d 1105, 1121 (9th Cir. 2000)).
\item \textsuperscript{108} See Greenpeace Action v. Franklin, 14 F.3d 1324, 1332 (9th Cir. 1993) (explaining mitigation measures might render impacts so minor that EIS is not necessary).
\item \textsuperscript{109} See Nat'l Parks, 241 F.3d at 735 (stating Parks Service failed to include information regarding ongoing examination of mitigation measures or for taking any needed corrective action).
\item \textsuperscript{110} See id. (stating Parks Service intended to act first and then study effects of VMP).
\item \textsuperscript{111} See id. The Parks Service's EA stated that the mitigation measures could mitigate some effects to humpbacks, could reduce some whale collisions with vessels, could reduce the noise emanating from the ships and could reduce air pollution. See id.
\end{itemize}
of their impact. The Ninth Circuit added that the final EA was vague because it contained only speculative and conclusory statements regarding how the mitigation measures would combat the mostly "unknown" effects of the increase in vessel traffic; this was unacceptable, rendering an environmental impact so minor as to not warrant an EIS.

While the Parks Service sought to test the effects of its mitigation measures, this was not enough to complete an EIS. The district court did not require an EIS due to the uncertainty surrounding the existing state of knowledge regarding increased vessel traffic; the debate regarding cruise ships' environmental impact was not new, however, because cruises have been sailing in Glacier Bay for years. The Ninth Circuit ultimately wanted the Parks Service to perform studies as an initial effort to answer these uncertainties.

D. Showing of Controversy

The Ninth Circuit found that the NPCA sufficiently established enough controversy to require an EIS. The Parks Service received enough negative comments regarding their plans for Glacier Bay to meet the "out-pouring of public protest" standard to satisfy the controversy requirement. The negative comments suggested

112. See id. (stating Parks Service will ensure environmental effects do not exceed acceptable levels).

113. See id. The initial EA stated that "the increase in seasonal entries could reduce whale/vessel collisions and reduce the noise level emanating from the ships ...." Id. There is no indication as to how long a reduction in air pollution would take or how it would be accomplished. Id.; see also Greenpeace Action, 14 F.3d at 1382 (explaining mitigation measures).

114. See Nat'l Parks, 241 F.3d at 735 (indicating importance of studying impact of mitigation measures in preparation of EIS rather than waiting until after environment has been adversely affected).

115. See id. (adding no new information is necessary).

116. See id. at 736 (emphasizing role of Glacier Bay as valued environmental resource, where it is imperative to do studies before proceeding with VMP).

117. See id. (citing Blue Mountains, 161 F.3d 1208, 1212 (9th Cir. 1998), and defining controversy as "a substantial dispute about the size, nature, or effect of the major Federal action"); see supra notes 66-67 and accompanying text. There is a substantial dispute when evidence in preparation of an EIS or FONSI casts serious doubt upon the reasonableness of an agency's conclusions. See Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1150 (9th Cir. 1998). The burden then shifts to the agency to provide a "well-reasoned" explanation demonstrating why those responses disputing the EA's conclusions "do not suffice to create a public controversy based on potential environmental consequences." See Nat'l Parks, 241 F.3d at 736. A well-reasoned explanation means that the explanation must be convincing.

118. See Nat'l Parks, 241 F.3d at 736 (noting comments were also received before publication of EA and FONSI). See Greenpeace Action, 14 F.3d at 1334 (indi-
that the EA’s analysis was incomplete, the mitigation measures were uncertain, and the public doubted the adequacy of the Parks Service’s methodology and data. The data did not establish the intensity of the impact of increased vessel traffic and failed to indicate whether the mitigation measures could offset such impact.

The main reason for the controversy, however, was the Parks Service’s assertion that the extent of the environmental effects was unknown. The Ninth Circuit stated that “the absence of currently available information does not excuse the Parks Service from preparing an EIS when there is a reasonable possibility that such information can be obtained in connection with the preparatory process.” The Parks Service’s plan of implementing the VMP and then conducting studies was insufficient given the controversy surrounding the extent of the environmental impact.

E. Injunctive Relief

The Ninth Circuit granted the NPCA’s request for injunctive relief because it believed that an EIS was necessary to explore the significant adverse impact that might result from the VMP. The Parks Service previously instituted a thirty percent increase in cruise ship traffic and planned an increase to seventy-two percent, impacting many species of arctic wildlife. The Ninth Circuit stated that the VMP should not have been implemented until the Parks Service prepared an EIS and studied the effects of increased vessel traffic on the animals and air quality.

119. See Nat’l Parks, 241 F.3d at 736-37 (noting data was insufficient because agency’s conclusions were not drawn from “reasoned extrapolation from the data”).

120. See id. at 737 (stating NPCA believed impacts to be substantial).

121. See id. (indicating Parks Service would determine impact by implementing VMP and studying effects).

122. Id. The Parks Service needed to perform more complete studies of future effects of their proposed VMP. See id.

123. See id. (explaining court’s conclusion that EIS is required if controversy and uncertainty of intensity is proven).

124. See Nat’l Parks, 241 F.3d at 737 (stating if EIS is required, it runs contrary to NEPA’s purpose to allow potentially environmentally damaging project to proceed before examining all of its effects); see supra notes 85-88.

125. See Nat’l Parks, 214 F.3d at 738 (noting increase in cruise ship traffic will affect not only endangered mammal population, but also kittiwakes, murrelets, eagles, sea otters, seals, sea lions, porpoises and killer and minke whales). Glacier Bay’s air quality is also at risk. See id.

126. See id. (stressing there is too much possibility of environmental harm if VMP is implemented before EIS is completed).
The Ninth Circuit’s holding expressly reversed the district court and remanded the case with instructions to issue an injunction enjoining the granting of permits to vessels pursuant to the 1996 increase in vessel quotas pending the Parks Service’s completion of an EIS. On remand, the district court would determine whether the injunction should take effect immediately or after the current cruising season.

V. CRITICAL ANALYSIS

A. Taking a “Hard Look” to Minimize Speculation

The Ninth Circuit’s decision is consistent with prior decisions regarding dismissals of an EA for lack of certainty in predicting the practical effect of increased vessel traffic. The Ninth Circuit has previously stated in Blue Mountains that “general statements about ‘possible’ effects and ‘some risk’ do not constitute a ‘hard look’ absent a justification regarding why more definitive information could not be provided.” It is not enough for the Parks Service to say that the effects are “unknown” and that the impacts can be studied later.

The Parks Service must conduct an EIS to ensure that a new VMP will not adversely affect the environment. “The purpose of an EIS is to obviate the need for such speculation by insuring that available data are gathered and analyzed prior to the implementation of the proposed action.”

127. See id. at 739-40 (stating district court has discretion in means necessary to ensure number of cruise ships does not exceed number prior to 1996 season).

128. See id. (noting district court should take into account that injunction could cause many last-minute cruise cancellations).

129. See Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1213 (9th Cir. 1998) (recognizing Forest Service’s EA in Blue Mountains was dismissed for similar failure to investigate environmental impacts).

130. Id. (quoting Neighbors of Cuddy Mountain v. United States Forest Serv., 137 F.3d 1372, 1380 (9th Cir. 1998)).

131. See Nat’l Parks, 241 F.3d at 732-33 (discussing information should be gathered before implementation of plan that may significantly impact environment). “A project may have significant environmental impacts where its effects are ‘highly uncertain or involve unique or unknown risks.’” See Blue Mountains, 161 F.3d at 1213 (quoting 40 C.F.R. § 1508.27(b)(5) (2002)).

132. See Nat’l Parks, 241 F.3d at 733 (reemphasizing “hard look” should be taken before and not after environment is affected).

133. See Sierra Club v. United States Forest Serv., 843 F.2d 1190, 1195 (9th Cir. 1988) (noting Forest Service’s EA did not discuss past and future cumulative impacts in its EA).
form studies of the current vessel traffic to predict the effects of the proposed increase.\footnote{134}{See Nat’l Parks, 241 F.3d at 733 (stating Parks Service may also do other kinds of studies to make sure environment will be safe). The Ninth Circuit is not going to decide how the EIS should be conducted. See id. The Ninth Circuit does state, though, that in this case an actual study could be conducted on the basis of existing conditions. See id.}

B. Sufficiency of Proposed Mitigation Measures

The Parks Service’s proposed mitigation measures served as an inadequate justification for failing to complete an EIS.\footnote{135}{See id. (noting proposed mitigation measures created second source of uncertainty).} An agency does not have to produce a complete mitigation plan precisely detailing the mitigation measures, however, the proposed mitigation measures must be reasonably developed.\footnote{136}{Id. (indicating uncertainties must be dealt with during EIS preparation period).} On the other hand, “‘a perfunctory description or mere listing of mitigation measures,’ without supporting analytical data is insufficient to support a finding of no significant impact.”\footnote{137}{Id. (quoting Okanogan Highlands Alliance v. Williams, 236 F.3d 468, 473 (9th Cir. 2000), Neighbors of Cuddy Mountain v. United States Forest Serv., 137 F.3d 1372, 1380 (9th Cir. 1998) and Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1151 (9th Cir. 1998)).} The Parks Service’s mitigation measures did not provide specific plans as to how they would offset the environmental effects.\footnote{138}{See id. (stating Parks Service had very little analytic data to demonstrate adequate mitigation measures).} In Okanogan Highlands Alliance, the mitigation measures were sufficient to allow a FONSI.\footnote{139}{See Okanogan Highlands Alliance v. Williams, 236 F.3d 468, 477 (9th Cir. 2000) (indicating EIS in Okanogan took “hard look” at environmental effects and mitigating measures).} The Forest Service in Okanogan Highlands Alliance:

conducted computer modeling to predict the quality and quantity of environmental effects, discussed the monitoring measures to be put in place, ranked the probable efficacy of the different measures, detailed steps to achieve compliance should the measures fail, and identified the environmental standards by which mitigation success could be measured.\footnote{140}{See Nat’l Parks, 241 F.3d at 734 (summarizing mitigation measures described in Okanogan, 236 F.3d at 473-77).} The Parks Service in National Parks conducted no studies of the anticipated effects of the mitigation measures, did not provide criteria

\begin{flushright}
18
\end{flushright}
for an ongoing examination of them and did not describe any needed corrective action.\textsuperscript{141}

This case can be distinguished from \textit{Wetlands Action Network}, where less detailed mitigation measures were allowed.\textsuperscript{142} In \textit{Wetlands Action Network}, the imposition of special conditions, enforced through a permit and reviewed by various other agencies, ensured that the measures would be enforced in a manner that properly reduced negative environmental impact.\textsuperscript{143} While \textit{Wetlands Action Network} allowed less specific mitigation measures, the Ninth Circuit in \textit{National Parks} followed the standard articulated in \textit{Okanogan Highlands Alliance} because unique conditions do not exist in this case regarding the Parks Service or the tour boat operators in connection with the mitigation measures.\textsuperscript{144} It remains uncertain whether mitigation measures described in the Parks Service's EA will provide an adequate buffer against the new VMP's harmful effects.\textsuperscript{145} It will be difficult to predict the extent of harmful effects and the corresponding necessary mitigation, further illustrating a need for an EIS.\textsuperscript{146}

C. Amount of Controversy Requirement

The Ninth Circuit in \textit{Greenpeace Action v. Franklin} discussed an "out-pouring of public protest" standard to determine whether there was a sufficient amount of controversy to demand the preparation of an EIS.\textsuperscript{147} The volume of negative comments here were more than enough to meet this EIS requirement, as eighty-five percent of 450 comments opposed VMP Alternative Five.\textsuperscript{148} "More important, to the extent the comments urged that the EA's analysis was incomplete and the mitigation uncertain, they cast doubt on

\textsuperscript{141}. See id. (explaining that Parks Service planned to act first, conducting studies later).
\textsuperscript{142}. See \textit{Wetlands Action Network v. United States Army Corps of Engineers}, 222 F.3d 1105 (9th Cir. 2000) (explaining part of holding).
\textsuperscript{143}. See \textit{Nat'l Parks}, 241 F.3d at 735 (justifying why underdeveloped mitigation measures in \textit{Wetlands Action Network} were acceptable); see also \textit{Wetlands Action Network}, 222 F.3d at 1121 (discussing mitigation measures).
\textsuperscript{144}. See id. (reiterating that mitigation measures must have supporting data).
\textsuperscript{145}. See id.; see \textit{supra} notes 75-84 and accompanying text.
\textsuperscript{146}. See \textit{Nat'l Parks}, 241 F.3d at 735 (noting impact of mitigation measures must be studied in preparation of EIS, not after environment has been injured).
\textsuperscript{147}. See \textit{Greenpeace Action v. Franklin}, 14 F.3d at 1324, 1334 (9th Cir. 1992) (indicating outpouring of public protest must be established during formulation of EA, and that protest after EA is completed is insufficient).
\textsuperscript{148}. See \textit{supra} note 34 and accompanying text describing the percent of negative comment; see \textit{supra} note 117 and accompanying text.
the adequacy of the Parks Service’s methodology and data.” The combination of finding controversy and uncertainty regarding the Parks Service’s plans strengthened the NPCA’s demand for an EIS.

D. Need for Postdecision Monitoring

The Ninth Circuit was correct in overruling the district court’s analysis of NEPA requirements. The timeline for implementation, however, remains unclear. Currently, NEPA does not require or encourage an agency to pursue any follow-up effort to verify the predictions made in an EA or EIS, or in adjusting its decisions in light of what it subsequently learns. It would be beneficial for each agency to devise and implement a postdecision monitoring program to gauge the actual environmental consequences of its actions, adjust its mitigation measures, modify its plans or revise its environmental analysis in light of revealed conditions.

Overall, the Ninth Circuit’s decision is an environmental victory, even though the government has yet to reach a permanent solution in “protecting the environment and protecting the econ-

149. See Nat’l Parks, 241 F.3d at 736-37 (emphasizing that dispute between NPCA and Parks Service involves more than disagreement among experts as to data’s conclusions).

150. See id. (noting that Parks Service’s response was not sufficient to resolve controversy).

151. See Marrin, supra note 44, at 325 (stating that balance is needed between amount of tourism to Glacier Bay and environmental protection).

152. See id.

The district court shall provide in its order for whatever specific actions it deems necessary to ensure that the number of cruise ships and other vessels authorized to enter Glacier Bay (pending completion of an EIS) shall not exceed the number authorized prior to the 1996 increase. It shall have the discretion, however, to determine the effective date of its injunction, including whether the order shall be made effective prior to the completion of this year’s cruising season. Nat’l Parks, 241 F.3d at 740.

153. See Karkkainen, supra note 48, at 938 (highlighting that NEPA predictions to begin with are usually uncertain and predicted impacts will also be uncertain).

154. See id. (noting postdecision monitoring information should be disclosed to public). This postdecision monitoring has five purposes: First, the data generated would provide the agency with information to be tested, verified and revised with specific predictions. See id. Second, transparency and accountability in the NEPA process would be improved because anyone could now know the predicted and actual consequences. See id. Third, an agency would be able to better measure, evaluate and predict environmental impacts of proposed actions. See id. at 938-39. Fourth, “adaptive management” techniques would enable an agency to make alternative predictions. See id. at 999. Fifth, postdecision monitoring would allow an agency to gauge aggregate and cumulative impacts across a series of projects. See id.
o my, which uses the exploitation of the environment as its very basis.”

VI. IMPACT

The ultimate holding in National Parks was a triumph for the environment. The cruise ship industry must now wait for the completion of the EIS and hope that no significant environmental impact is found before sending a larger number of cruise ships to Glacier Bay. The Supreme Court denied certiorari on appeal. Unfortunately, the final holding does not provide guidance as to how an agency should proceed if current science is not able to provide adequate information for an EIS. The answers to some environmental questions are beyond an agency’s expertise and NEPA does not allow a court to order an agency to “halt its decision-making process until the science is within reach.”

The battle still rages, however, because a 1997 study found that cruise ship passengers alone spend more than $160 million dollars per year in southeast Alaska. In the past ten years, the number of cruise ship passengers in Alaska has increased from 200,000 to more than 640,000, where a total of 45,000 are on all ships in Alaska at any one time.

155. See Marrin, supra note 44, at 324. The Ninth Circuit’s decision provides no answer for the larger problem of protecting the environment while maintaining Alaska’s economy. See id.

156. See Nat’l Parks, 241 F.3d at 739 (emphasizing Glacier Bay’s ecosystem is too precious to ignore significant risks to its diverse inhabitants).

157. See Marrin, supra note 44, at 335 (indicating Parks Service could only proceed if EIS did not find significant impact).

158. See Holland America Line-Westours, Inc., v. Nat’l Parks & Conservation Ass’n, 534 U.S. 1104 (2002). Westours argued that an injunction restricting the amount of cruise ships would cause a loss of anticipated revenue and financial damages. See Nat’l Parks & Conservation Ass’n, 241 F.3d at 738. The NPCA objected to the Parks Service’s plan five years ago and sought an injunction one year later. See id. This was enough time for Westours to inform its customers that they were involved in pending litigation that could affect their travel plans. See id.

159. See Mattix & Becker, supra note 2, at 1141. Some answers to environmental questions are at the frontiers of science, “going beyond even the expertise of the agency.” Id.

160. Id. The Parks Service’s decision to avoid an EIS was based on an incomplete investigation, which probably needed further exploration. See id. at 1139. The Ninth Circuit does not provide guidance as to how to proceed in gathering information for an EIS if it is scientifically impossible to gather the data. See id. at 1141.

161. See Marrin, supra note 44, at 335 (stating economic advocates of cruise ships say that cruise ship industry is vital to Alaska’s economy).

162. Id. at 335-36 (highlighting this number makes combined cruise ship population third largest city in Alaska).

Published by Villanova University Charles Widger School of Law Digital Repository, 2003
Alaska's citizens, though, are displeased with the prospect of thousands more tourists burdening their town infrastructures.\(^{163}\) Alaskan voters approved a 1999 passenger tax to impose an environmental compliance fee on every commercial passenger vessel sailing in Alaskan waters.\(^{164}\) The cruise ship industry has since cut down on the number of cruises.\(^{165}\) Alaska citizens, however, must still rely heavily on cruise ship tourism to support their economy.\(^ {166}\)

Legislation has made it difficult for the district court to issue its injunction because a rider attached to an Interior Appropriations bill for the fiscal year 2002 practically reverses the Ninth Circuit's injunction to reduce the number of cruise ships while the EIS is being completed.\(^ {167}\) The rider states that until the new EIS is completed, the number of vessels allowed in Glacier Bay shall remain the same as the number allowed in 2000, the number permitted under modified Alternative Five, and promulgation of the final rule issued on May 30, 1996.\(^ {168}\) The effects of the rider are such that a record number of cruise ships may enter Glacier Bay until January 1, 2004, when the EIS should be complete.\(^ {169}\) Legislation continues to threaten Alaska's environmental resources as the Senate narrowly defeated a measure in April 2002, supported by President

\(^{163}\). See id. (noting citizens resent large crowds and pollution including noise, air, and water).

\(^{164}\). Id. at 336-37 (indicating seventy percent of population approved this new tax, which was similar to failed tax three years earlier). See ALASKA STAT. § 46.03.480(b) (Michie 2002). The fee ranges from $.70 to $1.75 per berth based "on the overnight accommodation capacity of vessel, determined with reference to the number of lower berths according to the following categories . . . ." See id. §§ (b)(1) – (10).

\(^{165}\). See Marrin, supra note 44, at 337 (stating one cruise line shortened time spent in Alaska for 2003).

\(^{166}\). See id. Holland America also stopped contributing to some Alaska charities due to the new environmental compliance fee tax. See id.

\(^{167}\). See id. at 338-39 (describing H.R. 2217, 107th Cong. § 130 (1st Sess. 2001) (enacted)). It is ironic that the two primary supporters of the rider were Alaska Senators Frank Murkowski and Ted Stevens, both supporters of the cruise ship industry. See id.

\(^{168}\). See H.R. 2217, 107th Cong. § 130 (1st Sess. 2001) (enacted). Senator Murkowski stated that "ongoing environmental studies have shown no evidence of damage to the natural resources from the ships." See Marrin, supra note 44, at 338.

\(^{169}\). See Marrin, supra note 44, at 339 (noting that this rider overrules Ninth Circuit's decision, which was intended to protect environment). This rider is particularly devastating because the extent of environmental injuries that may be caused in the interim is unknown, and there are no available remedies to fix the potential damage. See id. Wisconsin Senator Feingold expressed concern over the rider and believes that reduction of cruise ship traffic deserves complete hearings and review. See id.
Bush, to allow oil exploration in Alaska’s Arctic National Wildlife Refuge.\textsuperscript{170}

The impact of the Ninth Circuit’s decision indicates that the fight in Alaska continues, as a balance is needed between protecting the environment and allowing people to experience the true beauty of Glacier Bay.

\textit{Monica Mintz}

\footnotesize{\textsuperscript{170} See Senate Rejects Drilling for Oil in Arctic, at http://www.cnn.com/2002/TECH/science/04/18/arctic.refuge/index.html (Apr. 19, 2002) (stating amendment would have allowed no more than 2,000 acres within 1.5 million-acre part of refuge to be opened for exploration).}