

Fordham Environmental Law Review

Volume 13, Number 2

2001

Article 4

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ROUGH SEAS AHEAD FOR ALASKA CRUISES? THE JUDICIAL AND LEGISLATIVE BATTLE OVER GLACIER BAY

*Samantha S. Marrin**

INTRODUCTION

In February 2001, a three-judge panel of the Ninth Circuit of the U.S. Court of Appeals dealt a huge blow to the booming cruise industry in Alaska.¹ The panel found that the federal government violated the law when they allowed the number of cruise ships sailing in Glacier Bay, Alaska to increase from 107 ships during the height of the summer cruise season, to 138, a 32% increase.² This action, in effect, stemmed the recent explosion of tourists to the picturesque Glacier Bay, where approximately 350,000 cruise visitors visit every year.³ But the court's decision has done, and

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1. *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722 (9th Cir. 2001).

2. Paula Dobbyn, *Court Rules Cut In Glacier Bay Cruises*, ANCHORAGE DAILY NEWS, Feb. 24, 2001; available at http://www.earthland.org/bw/adn2_24.shtml (last visited April 11, 2002).

3. Associated Press, *Judge Orders Fewer Ships in Glacier Bay* (Aug. 6, 2001) available at http://www.abpnews.com/newscenter/breakingnews/2001/09/01/story_fewer_ships_inglacier_bay.html (last visited April 11, 2002).

continues to do little to solve the problem that plagues Glacier Bay and other remote areas of natural beauty, namely the competing valuation between the financial prosperity brought to areas in severe economic need by cruise ship passengers and the protection of the very natural resource the ships seek to exploit.

Cruise ships in Alaska offer to show their customers a slice of Utopia. Birds swoop down from the pines lining the edge of the bay to grab fish from the frigid water. The sun sets in vibrant colors behind the mountains. But on the ship, high above the water they glide upon, cruise ship passengers are unaware of the roaring noise below. Not the growl of a bear or the song of a heron, but the engine roar of a ship designed to carry thousands of people through this Utopia. Is this ship friend or foe of the nature that it exploits? For Alaska, “[t]he cruise ship industry, once embraced as a savior for Alaska’s lagging economy, has worn out its welcome. . . .”⁴ A source of the tension lies in the very reason why cruise ships flock to Alaska: to let tourists pay to see the overwhelming beauty of the land. But these same people who flock to see the natural wonders constitute one of the largest threats to these precious resources, and the government is now caught between protecting the environment and protecting the economy, which uses the exploitation of the environment as its very basis.

Recently there has been legislative action concerning the protection of Alaska’s natural resources from contamination caused by the deluge of cruise ships that pass through it every year.⁵ There is a large concern among environmentalists that these ships cause a sever and detrimental impact upon the shores of Alaska, as well as other national shorelines.⁶ But many of the residents and business owners in Alaskan port cities depend on the money spent by cruise ship passengers.⁷ Both the federal and state governments are left in a

4. Douglas Frantz, *Sovereign Islands—A Question of Regulation; Alaskans choose Sides in Battle Over Cruise Ships*, N.Y. TIMES, Nov. 29, 1999, at A1.

5. See generally Constantine G. Papavizas & Lawrence I. Kiern, *1999-2000 U.S. Maritime Legislative Nat’l Parks*, 241 F.3d at 722.

6. Keith Schneider, *Alaska Cruise-Ship Plan Stirs Environmentalists*, N.Y. TIMES, Mar. 19, 1995, at D3; see also Papavizas & Kiern, *supra* note 5, at 350.

7. See generally Alfred Borcover, *Cruise Ships Mixed Blessing for Alaskan Towns*, CHI. TRIB., Sept. 16, 2001, at C6.

quandary. How can they best balance the economic needs of Alaska with the global and national interest of preserving a clean environment?⁸ So far, there has been a mixed response from both the judiciary and the legislature.

Part I of this Note discusses the particulars of the Glacier Bay area and ships' impact on this environment. Part II outlines the National Environmental Protection Act's requirements, directed towards governmental agencies, that must be completed before enacting any plans that may affect the environment and the problem of pollution in the wake of cruise ships. Part II also discusses the recent Ninth Circuit decision in *National Parks and Conservation Association v. Babbitt*.⁹ Part III weighs the controversy surrounding the balancing of economic need versus environmental harm.

I. GLACIER BAY: A THING OF BEAUTY LASTS FOREVER?

As far back as 1981, Glacier Bay was seen as a vital preserve for the endangered species, and there was a push to establish strict limits on the number of large cruise ships permitted to enter the Bay.¹⁰ The purposes of these limitations were to "freeze in place" levels of human activity.¹¹ But this goal was reconsidered and abandoned when, more than ten years later, the National Parks Service decided to allow a huge increase in the number of large cruise ships into the same waters.¹²

8. This debate is by no means restricted to the national economy and shorelines. "In recent years, there has been increasing attention given to, and, increasing debate over, the relationship between the promotion of global trade and the protection of the natural environment." See generally Paul Stanton Kibel, *The Paper Tiger Awakens: North America Environmental Law After the Cozumel Reef Case*, 39 COLUM. J. TRANSNAT'L L. 395, 398 (2001) (discussing the North American Agreement on Environmental Cooperation).

9. 241 F.3d 722 (9th Cir. 2001).

10. *Watt Acts to Assure Survival of Alaska's Humpback Whales*, N.Y. TIMES, Aug. 16, 1981, at A32 [hereinafter *Humpback Whales*].

11. *Id.*

12. *Nat'l Parks*, 241 F.3d at 727.

Glacier Bay is a place of exquisite beauty. But its value goes further than the purely aesthetic. It is also the natural habitat and refuge for an untold number of plant and wildlife species, many of which are endangered.¹³ Glacier Bay National Park is “the habitat for an extraordinary array of wildlife.”¹⁴ It is also home to at least two of the most imperiled sea mammals that reside in America’s waters: the Stellar sea lion and the humpback whale,¹⁵ which are both listed as endangered species under the Endangered Species Act (“ESA”).¹⁶

No species typifies the clash between nature and tourism in Glacier Bay than the humpback whale. The threat of ships to the continued existence of the species was so great that in the early 1980s, the Parks Service restricted cruise ship entries to just two a day.¹⁷ Noise pollution is a particular concern for the humpback whale, which utilized sounds in order to function.¹⁸ The noise pollution that cruise ships produce under the water interferes with the navigational, societal and hunting structures of the humpback whale.¹⁹ It seems that an increase in cruise ships also increases the risk of whale and boat collisions. A pregnant whale was “recently found dead from head injuries . . . and officials suspect a ship . . .”²⁰ caused these injuries.

Also concerning environmentalists is the waste that is dumped—both intentionally and unintentionally—from cruise ships.²¹ While cruise ships are enormous “floating cities,”²² they do not need a permit to dump their sewage (“greywayter”) under federal or international law, unless under federal law, the ship is within three

13. *Id.* at 726

14. *Id.* at 726.

15. *Id.*

16. 16 U.S.C. § 1533 (2001).

17. *Nat'l Parks*, 241 F.3d at 727; *see also Humpback Whales*, *supra* note 10.

18. *Nat'l Parks*, 241 F.3d at 727; *see also Schneider*, *supra* note 6.

19. *Nat'l Parks*, 241 F.3d at 727.

20. Associated Press, *supra* note 3.

21. Papavizas & Kiern, *supra* note, 5 at 350; *see also Frantz*, *supra* note 4.

22. Frantz, *supra* note 4.

miles off shore.²³ A loophole technically allows cruise ships to dump waste within Glacier Bay's interior waters because there are pockets of international waters within the passage.²⁴ This loophole permits cruise ship operators to dump their greywater into "fertile fishing grounds and feeding areas for humpback whales."²⁵

II. THE NATIONAL ENVIRONMENTAL POLICY ACT, GLACIER BAY AND RECENT COURT DECISIONS

A. *The National Environmental Policy Act*

The National Environmental Policy Act ("NEPA")²⁶ states the government's interests in the environment. To protect this interest, NEPA requires federal agencies to perform an environmental impact statement when any action under consideration may have a large environmental impact.²⁷ Courts have found time and time again that federal agencies who, prior to issuing a directive, fail to assess the environmental impacts of their plans of commercial use of national parks, will be found to have violated NEPA.²⁸

23. *Id.*

24. *Id.*

25. *Id.*

26. National Environmental Policy Act of 1969 § 102, 42 U.S.C. §§ 4321-4370(d) (1994 & Supp. III 1997).

27. *See, e.g.,* Flint Ridge Dev. Co. v. Scenic River Ass'n of Okla., 426 U.S. 776 (1976). NEPA "requires all federal agencies 'to the fullest extent possible' to include 'in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment' an environmental impact statement analyzing the consequences of, and alternatives to, the proposed action." *Id.* at 776-77.

28. *See* High Sierra Hikers Ass'n v. Powell, No. C-00-01239-EDL, 2001 U.S. Dist. LEXIS 18087 (N.D. Cal. Nov. 1, 2001); *see also* Nat'l Audubon Soc'y v. Butler, 160 F. Supp. 2d 1180 (N.D. Cal. 2001).

Any action taken by the National Parks Service is subject to the regulations promulgated by NEPA.²⁹ But “[t]he degree to which the Nation Park System initially documents and analyzes potential environmental impacts may vary with its perception of the significance of the action.”³⁰ If there is any indication that the proposed plan may have an impact of the environment, then an environmental assessment (“EA”) is prepared.³¹ If the EA finds that there is no significant impact on the environment, then the agency may proceed further with their proposed action.³² But if there is a finding of significant impact, then a more in-depth study must be made, called an environmental impact statement (“EIS”).³³

An EIS is required by NEPA if “substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factors”³⁴ and there does not need to be a showing by the plaintiffs that the effects “will in fact occur.”³⁵ Factors required by an agency in deciding if any potential affects are “significant” are whether the potential effects are extremely unsure, the effects are probably going to be controversial, and if the overall impact of other related and similar actions have the potential to be significant.³⁶

Agencies often attempt to avoid preparing an EIS because its preparation is expensive, time consuming and often very controversial.³⁷ Indeed, “[t]he vast majority of lawsuits involving NEPA pertain to agency failure to adhere to . . . [the] requirement that the lead agency file an EIS for ‘each federal action significantly affecting the human environment.’”³⁸ The Parks Services’ actions in *National Parks and Conservation Association v. Babbitt* reflect this

29. NAT’L PARKS & CONSERVATION ASS’N, OUR ENDANGERED PARKS: WHAT YOU CAN DO TO PROTECT OUR NATIONAL HERITAGE 170 (1994).

30. *Id.*

31. 42 U.S.C. § 4332(2)(C) (2001).

32. *Id.*

33. NAT’L PARKS & CONSERVATION ASS’N, *supra* note 29, at 172.

34. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998).

35. *Blackwood*, 161 F.3d at 1212.

36. 40 C.F.R. § 1508.27(b) (2002).

37. *Id.*

38. *Id.*

attitude by governmental agencies. The Parks Service refused to do an EIS claiming that the impact on the environment was unknown, although there was sufficient evidence to necessitate one.³⁹

B. *Pollution and Cruise Ships: The Greywater Problem*

Exacerbating the problem of congestion and noise pollution that plagues any place that is frequented by cruise ships is the problem of greywater.⁴⁰ In the past, there have been several loopholes in both state, federal and international law that allow for the dumping of human wasters from cruise ships.⁴¹ But Alaskan officials and politicians in Washington have recently banded together and written new federal legislation regulating both chemicals and general waste water generated by cruise ships.⁴² These wastes range from the chemicals produced from the laundry and film developing shops on the ships, to the dirty water that is the result of bathing and washing.⁴³

“The new [legislation] reflect[s] a compromise reached by diverse interests including certain Alaska economic interests, the Clinton Administration, the cruise ship industry, and environmental groups.”⁴⁴ The resulting statutes are both expansive and narrow. While applying to only some Alaskan cruise ship operations,⁴⁵ they do constitute a bar on untreated sewage and attempts to regulate other discharges, “such as treated sewage and greywater . . . in certain waters in Alaska.”⁴⁶

39. Nat'l Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 733 (9th Cir. 2001).

40. “Greywater is washwater EXCLUDING toilet wastes [blackwater].” Carl Lindstrom, *Greywater*, at <http://www.greywater.com>. (last visited Apr. 11, 2002) (emphasis supplied).

41. Frantz, *supra* note 4.

42. Consolidated Appropriations Act of 2001, Pub. L. No. 106-554, 114 Stat. 2763 (2000) (enacted).

43. Papavizas & Kiern, *supra* note 5, at nn. 4 & 5.

44. H.R. 4577, 106th Cong. (2000); *see also* Papavizas & Kiern, *supra* note 5, at 350.

45. H.R. 5666, 106th Cong., tit. XI. (2000)

46. Papavizas & Kiern, *supra* note 5, at 350.

The legislation also requires the Coast Guard to establish an inspection method to ensure full compliance by the cruise ships.⁴⁷ In April 2001, the Coast Guard finalized cruise ship effluent standards.⁴⁸ The rules established restrictions on where cruise ships may discharge sewage and greywater waste, and also established a regimen for sampling and record-keeping concerning cruise ship effluent.⁴⁹ Furthermore, the rules, as issued under "Title XIV—Certain Alaskan Cruise Operations,"⁵⁰ also give authority power to require cruise ships to establish procedures for collecting and monitoring their own discharges.⁵¹

Alaska has also moved to help and protect itself against the pollution from the booming cruise ship industry.⁵² Starting in 2001, cruise ships that operate within the borders of Alaska must submit to Alaska's Department of Environmental Conservation solid waste plans.⁵³ Strict discharge limits were set by the Alaskan legislature,⁵⁴

47. H.R. 5666 § 1406(a).

48. *See Coast Guard finalizes cruise ship effluent standards*, 12 ENVTL. LABORATORY WASH. REP. 15 (2001).

49. *See id.*

50. H.R. 5666, tit. XIV.

51. *Id.*

52. *Keeping Alaska Wild*, BOSTON GLOBE, Aug. 20, 2001, at A10.

53. *See Alaska Commercial Passenger Vessel Environmental Compliance Program*, ALASKA STAT. § 46.03.460 (Michie 2001); "The bill would require cruise ships to get permits, would establish solid-waste disposal plans and provide for state civil and criminal penalties for violations, and would allow the state to bar entry to ships with repeat violations." *Alaska Bill Would Enforce Clean Water Standards For Cruise Ships*, HAZARDOUS WASTE LITIG. REP., Apr. 17, 2001, at 15 [hereinafter *Alaska Bill*].

54. ALASKA STAT. § 46.03.463(a)–(c) states:

Prohibited discharges; limitations on discharges. (a) Except as provided in (h) of this section, a person may not discharge untreated sewage from a commercial passenger vessel into the marine waters of the state. (b) Except as provided in (h) of this section or under AS 46.03.462(c)–(d), a person may not discharge sewage from a commercial passenger vessel into the marine waters of the state that has suspended solids greater than 150 milligrams per liter or fecal coliform count greater

as well as stringent record keeping⁵⁵ and reporting procedures.⁵⁶ These statutes and others were enacted by the Alaskan legislature in

than 200 colonies per 100 milliliters except that the department may by regulation adopt a protocol for retesting fecal coliform, if this discharge limit for fecal limit is exceeded, under which a discharger will be considered to be in compliance with the fecal coliform limit, if the geometric mean of fecal coliform count in the samples considered under the protocol does not exceed 200 colonies per 100 milliliters. Upon submission by the owner or operator of a small commercial passenger vessel of a plan for interim protective measures, the department shall extend the time for compliance of that vessel with this subsection.

(c) Except as provided in (h) of this section or under AS 46.03.462(c)-(d), a person may not discharge graywater or other wastewater from a commercial passenger vessel into the marine waters of the state that has suspended solids greater than 150 milligrams per liter or fecal coliform count greater than 200 colonies per 100 milliliters except that the department may by regulation adopt a protocol for retesting for fecal coliform, if this discharge limit for fecal coliform is exceeded, under which a discharger will be considered to be in compliance with the fecal coliform limit if the geometric mean of fecal coliform count in the samples considered under the protocol does not exceed 200 colonies per 100 milliliters. Upon submission by the owner or operator of a large commercial passenger vessel of a plan for interim protective measures, the department shall extend the time for compliance of that vessel with this subsection for a period of time that ends not later than January 1, 2003.

Id.

55. *Id.* § 46.03.470. "Record keeping requirements. An owner or operator subject to AS 46.03.465 shall record the information required to be gathered under that statute and shall maintain the records for three years after the date the information was gathered."

Id.

reaction to the detrimental effects that were felt by Alaskan towns that suffered from the worst of the cruise tourism industry in Alaska.⁵⁷

C. *The National Parks Dilemma*

The Ninth Circuit recently tackled the complicated environmental need versus economic need issue in *National Parks and Conservation v Babbitt*.⁵⁸ However, the court decided that not enough is known about the environmental impact of cruise ships upon Glacier Bay on which to make a decision.⁵⁹ Until there is, the government cannot increase the number of ships passing through Glacier Bay.⁶⁰ An in-depth EIS is necessary,⁶¹ and until an EIS is compiled, there is an injunction against any increase in cruise ships entering Glacier Bay.⁶²

The events leading up to the National Parks litigation began in 1996 with the National Park Service implementing a Vessel Management Plan ("VMP") that increased the number of cruise ships entering Glacier Bay.⁶³ In increasing the number of ships, the National Parks Service conducted an Environmental Assessment (EA) as required by NEPA.⁶⁴ The National Parks Service acknowledged that the VMP would subject wildlife that inhabited the park to increased exposure to vessel encounters, pollution and vessel collision,⁶⁵ but they did not feel the overall affect⁶⁶ of the

56. *Id.* § 46.03.475. "Reporting requirements. (a) An owner or operator of a commercial passenger vessel who becomes aware of a discharge violation of AS 46.03.463 shall immediately report that discharge to the department." *Id.*

57. *See infra* Part IV.A.

58. 241 F.3d 722 (9th Cir. 2001).

59. *Nat'l Parks*, 241 F.3d at 739-40.

60. *Id.* at 740.

61. *Id.* at 731.

62. *Id.* at 737.

63. *See generally id.* at 725.

64. *See* Mary K. Fitzgerald, Comment, *Small-Handles, Big-Impacts: When Should the National Environmental Policy Act Require an Environmental Impact Statement*, 23 B.C. ENVTL. AFF. L. REV. 437 (1996).

65. *Nat'l Parks*, 241 F.3d at 735.

proposed action triggered the EIS requirement.⁶⁷ So instead, the Parks Service “wrote a combined environmental assessment and VMP assessing the six alternatives for managing vessels, including big cruise ships in Glacier Bay.”⁶⁸

At the conclusion of the EA and VMP, the Parks Service admitted that they did not know the actual impact that the increased cruise ship traffic would have,⁶⁹ or what level of danger the wildlife in Glacier Bay would be exposed to.⁷⁰ “Despite these admissions, the National Parks Service concluded that there would be no ‘significant impact’ on the environment due to the Plan and that the Plan could be implemented without an EIS,”⁷¹ even though an EIS is required by NEPA.⁷²

An agency’s decision as to the extent that NEPA applies to their actions is always subject to judicial review.⁷³ In *National Parks*, the Ninth Circuit found that, in this instance, “the agency’s conclusions were not reached by reasonable extrapolation from the data, rather the data was simply insufficient.”⁷⁴

The Parks Service’s own admission that the effects was unknown,⁷⁵ seemed to irk the court. The Park Service’s proposal to study the effects of the VMP *while* implementing the VMP, also was

66. See Fitzgerald, *supra* note 64 (a comparative study between government agencies analyzing their proposed actions by an over-all affect approach or a single-action approach) *Id.*

67. *Id.*

68. *Friends of Mt. Hood v. U.S. Forest Serv.*, No. 97-1787-KI, 2001 U.S. District LEXIS 7829, at *2 (D. Or. June 4, 2001).

69. *Nat’l Parks*, 241 F.3d at 737. “The Parks Service acknowledged that an increase in vessel traffic would have an environmental impact. The data, however, did not establish the intensity of the impact, nor the efficacy of the mitigation measures designed to offset the unquantified impact.” *Id.*

70. *Id.*

71. *Id.* at 725

72. 42 U.S.C. § 4322 (C) (2001).

73. Fitzgerald, *supra* note 64, at 439.

74. *Nat’l Parks*, 241 F.3d at 737.

75. *Id.* “NPCA (National Parks & Conservation Association) asserted that the effects on the environment would likely be substantial. The Parks Service responded that the extent of the effects were unknown.” *Id.*

looked upon with disfavor by the court.⁷⁶ As it stated multiple times in its decision, “the absence of currently unavailable information does not excuse the Parks Service from preparing an EIS when there is reasonable possibility that such information can be obtained in connection with the preparatory process.”⁷⁷ In the face of such controversy over what the impact of the VMP on the environment would be,⁷⁸ “NEPA then places the burden on the agency to come forward with 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.’”⁷⁹

The plaintiffs in *National Parks* asked the Ninth Circuit to suspend the implementation of the VMP until a complete EIS was done.⁸⁰ That is, they requested an injunction. In an environmental case, where often times environmental injury cannot be remedied by money damages⁸¹ and the “proposed project may significantly degrade some human environmental factor,”⁸² injunctive relief is the appropriate remedy.⁸³ Having already decided that a full EIS was necessary, “allowing a potentially environmentally damaging project to proceed prior to its preparation runs contrary to the very purpose

76. *Id.*

77. *Id.*

78. *Id.* at 736. “‘Agencies must prepare environmental impact statements whenever a federal action is ‘controversial,’ that is, when ‘substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factor.’” *Id.* (citing *N.W. Env’tl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1539 (9th Cir. 1997)). And there was certainly enough controversy in this case. Soon after the Parks Service published the initial EA, there were 450 comments received by the Parks service. Eighty-five percent of these comments were in opposition to the VMP which increase vessel access to Glacier Bay. *Id.* at 736.

79. *Id.*

80. *Id.* at 737.

81. *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 541–42 (1987).

82. *Ala. Wilderness Recreation & Tourism Ass’n v. Morrison*, 67 F.3d 732, 733 (1995).

83. *Nat’l Parks*, 241 F.3d at 737.

of the statutory requirement.”⁸⁴ Because of the potential for an unknown amount of environmental damage to be inflicted before an EIS is completed, injunctive relief was necessary, and accordingly the VMP was not implemented.⁸⁵

After *National Parks*, it seems as if the cruise ship industry had lost the battle. At that time, they could either appeal the Ninth Circuit’s decision or wait for the EIS to be completed and hope that no significant impact would be found by the study. Did the Ninth Circuit’s decision in *National Parks* actually have any real effect on the Alaskan cruise line industry? As will be discussed, with heavy lobbying from the cruise ship industry, Congress passed legislation that negates the injunctive relief awarded in *National Parks* and renders the decision moot.⁸⁶

III. WHO’S WINNING NOW?

A. *Economic Harm v. Environmental Damage*

Economic harm never justifies irreparable harm to the environment that is caused by federal issuance of special use permits without strict NEPA compliance.⁸⁷ But, economic advocates of cruise ships maintain that the cruise ship economy is vital to Alaska’s very economic existence.⁸⁸ A 1997 study financed by the cruise industry and Alaskan port cities found that cruise ship passengers alone spend more than \$160 million a year in southeast Alaska.⁸⁹ In the past ten years, the number of passengers on cruise ships that sail in Alaska has risen from 200,000 to more than 640,000.⁹⁰ There are 45,000

84. *Id.*

85. *Id.* at 738.

86. H.R. 2217, 107th Cong. § 130 (1st Sess. 2001).

87. *Nat’l Parks*, 241 F.3d at 738. “[T]he loss of anticipated revenues, however, does not outweigh the potential irreparable damage to the environment.” *Id.*

88. Franz, *supra* note 4, at A22.

89. *Id.*; see also Borcover, *supra* note 7. Cruise ships, passengers and crews combined, spend \$181 million in four cities alone: Juneau, Ketchikan, Sitka and Haines. *Id.*

90. *Alaska Bill*, *supra* note 53.

people total on all ships combined in Alaska waters at any given time.⁹¹ That makes the combined cruise ship population the third largest city in Alaska.⁹²

For all of the economic benefits that the cruise industry brings to the residents of Alaska, some citizens are starting to see a backlash against the powerful business industry.⁹³ Recently, citizens have started resenting the large crowds and pollution—noise, air and water—that accompanies the presence of large cruise ships.⁹⁴ Even towns, such as Juneau and Ketchikan, where the economic impact is greatest, are experiencing and loathing the problems that accompany large cruise ships.⁹⁵ The town of Ketchikan is an excellent example of what happens to a town frequented by cruise ships during the tourism season in Alaska. From early May until September, Ketchikan, with a population of 13,000, gets anywhere from two to three ships into port.⁹⁶ “On Fridays, as many as 7,600 passengers jam the town.”⁹⁷

Partly in reaction to the overwhelming burdens placed upon the infrastructures of Alaskan towns by cruise ships and their passengers, voters in Alaska have approved several measures that seek to regulate the cruise ship industry.⁹⁸ One such reaction was a passenger tax⁹⁹ that was passed in 1999 by nearly 70% of the population and was almost identical to a previous tax measure that

91. Press Release, Alaska Governor Tony Knowles, Cruise Ship Bill Strengthens State Regulation of Industry (Mar. 9, 2001), available at http://www.state.ak.us/dec/press/2001/re1_0309.htm (last visited Apr. 11, 2002).

92. *Id.*

93. See generally Frantz, *supra* note 4.

94. *Id.*

95. Borcover *supra* note 7. Towns have “realized they pay a price for this tourism bonanza . . . [t]heir streets are flooded with visitors, there’s more traffic congestion, noise and annoyances.” *Id.*

96. *Id.*

97. *Id.*

98. Press Release, *supra* note 91; see also *supra* notes 53–55 and accompanying text.

99. ALASKA STAT. § 46.03.480(a) (Michie 2001). “There is imposed an environmental compliance fee on each commercial vessel operating in the marine waters of the state.” *Id.*

failed three years earlier.¹⁰⁰ The passenger tax imposed an “environmental compliance fee” on every commercial passenger vessel sailing in Alaskan waters, ranging from \$.70 to \$1.75 “per berth.”¹⁰¹

The reactions to Alaska’s tightening of the regulation of the cruise ship industry were swift, immediate and harsh. One cruise line company shortened the time spent in ports in Alaska next year.¹⁰² Another, Holland America, “cut off charitable donations to some charitable and civic organizations in Juneau . . . and explained that the tax vote had prompted a ‘reassessment’ of its relationship with the city.”¹⁰³ But the cruise ship industry did not abandon Alaska completely.

Pressure from the cruise ship industry on Alaska remains high. Alaska is still very economically dependant upon the money brought into the state by the passengers of cruise ships, and do not seek to ban cruise ships, just merely regulate them, keeping the balance between their invaluable natural resources and the ability to profit from them.¹⁰⁴ Recently, the cruise ship industry just turned to other channels to ensure that they would have expanded access to Glacier Bay, disregarding mandates that the judicial system, environmentalists and concerned citizens may impose.¹⁰⁵

B. *Legislature Trumps Judiciary: How Alaska’s Politicians Sold Glacier Bay Down the River?*

Just when it seemed that the Ninth Circuit had ended the argument over the number of cruise ships until at least the necessary EIS was performed, politicians in Washington decided differently. Attached to the Interior appropriations bill¹⁰⁶ for the fiscal year 2002 is a rider

100. Frantz, *supra* note 4; *see also* Press Release, *supra* note 91.

101. ALASKA STAT. §46.03.480(b).

102. *See* Frantz, *supra* note 4; *see also* Borcover, *supra* note 7.

103. *See* Frantz, *supra* note 4; *see also* Borcover, *supra* note 7.

104. *See* Frantz, *supra* note 4; *see also* Borcover, *supra* note 7.

105. *See* H.R. 2217, 107th Cong. § 130 (1st Sess. 2001).

106. *Id.*

[U]ntil the Secretary [of the Interior] sets the level of vessel entries based on the new EIS, the number of vessel entries shall be the same as that in effect during the 2000

that, in effect, reverses the Ninth Circuit's decision granting an injunction stopping the increase in cruise ships entering Glacier Bay, while an EIS was being conducted in *National Parks and Conservation Association v. Babbitt*.¹⁰⁷ Who proposed the rider to the Interior Appropriations bill? The answer is Senator Ted Stevens, republican, Alaska senator and staunch ally of the cruise industry.¹⁰⁸ Another vocal supporter of the rider was Senator Frank Murkowski, another republican from Alaska.¹⁰⁹ Senator Murkowski "says on going environmental studies have shown no evidence of damage to the natural resources from the ships."¹¹⁰

Environmentalists have complained about the way in which the riders to the Interior spending bill were passed.¹¹¹ "Once the riders emerged from a conference committee [on] October 11, environmental groups and their sympathizers in Congress were at a

calendar year and the National Park Service approval of modified Alternative 5 and promulgation of the final rule issued on May 30, 1996, relating to vessel entries, including the number of such entries, for Glacier Bay National Park and Preserve are hereby approved and shall be in effect notwithstanding any other provision of law until the Secretary sets the maximum level of vessel entries consistent with this section.

Id.

107. Brian Stempeck, *House to Vote on Interior Conference Report*, ENV'T & ENERGY DAILY, Oct. 15, 2001, at 9.

108. *Id.*; see also Faith Bremner, *Environmentalists Unhappy With Changes in Interior Spending Bill*, GANNETT NEWS SERVICE, Oct. 18, 2001, at 1. Interestingly enough, the Alaskan Republican Party was the beneficiary of a \$75,000 contribution by the cruise industry. *Keeping Alaska Wild*, *supra* note 52. "The state's Congressional delegation . . . are friends of the industry no question about that." Frantz, *supra* note 4.

109. Bremner, *supra* note 108.

110. *Id.* It seems that Senator Murkowski does not see a pregnant endangered humpback whale dying from a collision with a ship as any evidence of the affect of cruise ships in Glacier Bay. *Id.*; Cat Lazaroff, *Interior Bill Carries Anti-Environmental Riders*, ENV'T NEWS SERVICE, at <http://ens.lycos.com/ens/oct2001/2001L-10-12-06.html> (last visited Apr. 11, 2002).

111. Lazaroff, *supra* note 110.

serious disadvantage. At that stage, the bill had to be voted up or down, without amendment . . . [and] President Bush [was] expected to sign the bill.”¹¹² The effects of the rider will mean that for at least the next two years, cruise ships will be able to enter Glacier Bay in record numbers.

More significantly, unknown environmental injuries may be caused in the interim, with no satisfactory remedy available with which to fix the damage later, when the significant impact becomes known.¹¹³ Perhaps most disturbingly, the rider to the Interior Appropriations bill¹¹⁴ effectively strips Glacier Bay of the court’s decisions that have sought to protect its natural resources from unknown harm. This effect did not go unnoticed or uncommented upon with in the Senate.¹¹⁵ Senator Feingold, expressing concern over the amendment concerning cruise ship regulation in Glacier Bay said, “I believe legislative language which seeks to address serious legal issues over the reduction of cruise ship traffic required by Federal courts deserves full and fair consideration through proper hearings and review.”¹¹⁶

CONCLUSION

As demonstrated by the rider to the Interior Appropriations bill,¹¹⁷ the fight over Glacier Bay and other places like it in Alaska is not over. The cruise ship industry has powerful legislative allies that have continually pushed for pro-cruise ship industry legislation at

112. Bremner, *supra* note 108. Further commentary said “[t]he Stevens rider sacrifices park resources and endangered species in favor of an industry whose pollution record speaks for itself . . . There’s been no debate on this issue and no recorded vote.” Cat Lazaroff, *supra* note 110.

113. This is exactly the dilemma that the Ninth Circuit tried to avoid when it awarded the injunction pending the completion of the full EIS. *See supra* note 75 and accompanying text.

114. H.R. 2217, 107th Cong. (1st Sess. 2001).

115. 147 CONG. REC. S7554 (daily ed. July 12, 2001) (statement of Senator Feingold).

116. *Id.* Senator Feingold continued, “I hope that the conference committee will give serious consideration to removing this provision.” *Id.*

117. H.R. 2217.

both the state and the federal levels.¹¹⁸ Indeed, it was pressure from outside groups and Alaskan politicians that led to the increase in ships to begin with.¹¹⁹ Politicians hold that this is not a question of bowing to the pressure of the large cruise ship industry. Instead, this is about

promoting tourism in Alaska, where the economy has suffered from declines in the timber industry and a slackening of oil revenue. And many businesspeople throughout the region have applauded their delegation's efforts as loudly as environmentalists have condemned them, noting that the cruise industry has been crucial to the state's economy.¹²⁰

The will of the business people and politicians has over-come the decision of the judiciary, for now. The legislature has trumped the judiciary.

But the question that has not been answered is what happens when there is no tourism, not because of over-regulation, but because of under-regulation. It must be realized that the cruise ship industry is only a friend of the Alaskan economy while there are natural resources to exploit. Once these resources are gone, due in large part

118. Schneider, *supra* note 6, at E3; *see also* Press Release, Committee on Resources, Glacier Bay Cruise Ship Provision Included in National Parks Concession Bill (Oct. 13, 1998), *available at* <http://www.house.gov/resources/press/1998/981013glacierbaycruiseprovision.htm>. (last visited Apr. 11, 2002).

119. Schneider, *supra* note 6.

Under pressure from the cruise ship industry and Alaskan officials, the park service began reviewing its policy and for several years has been preparing a new plan for managing the ships. As part of the plan, the service will determine a 'preferred alternative,' which is bureaucratic language for the optimum number of cruise ships the agency thinks should be allowed in Glacier Bay during the breeding season [for humpback whales]. Last December Mr. Babbitt intervened and made clear to the agency's top officials that expanding the limit to 184 ships should be given serious consideration as the preferred alternative.

Id.

120. Frantz, *supra* note 4.

to the pollution of the cruise industry, the cruises will no longer sail in Alaska and the economy will be completely bereft of all economic benefits that the industry provides. This is what the Ninth Circuit in *National Parks & Conservation Association v. Babbitt*¹²¹ was trying to prevent.

121. 241 F.3d 722 (9th Cir. 2001).

