

- 1 ☐ **BICYCLE TRAILS COUNCIL OF MARIN
v.
BABBITT**
- 2 ☐ **challenge the National Park Service ("NPS") regulations governing the use of bicycles within areas administered by it,**

including the Golden Gate National Recreation Area ("GGNRA").
- 3 ☐ **NPS at its own initiative implemented a management by categories scheme by which units of the National Park System would be classified**

"natural," "historical," or "recreational,
- 4 ☐ **recreational units would be managed in a less restrictive and less resource-protective manner**

than units classified natural or historical.
- 5 ☐ **except in units classified as recreational, in which**

trails would be presumed open to bicycle use unless designated closed
- 6 ☐ **By a series of amendments to the National Park Service Organic Act,**

16 U.S.C. sections 1 et seq.,
- 7 ☐ **Congress disapproved of this management by categories scheme**

- 8 ☐ directed that all units of the national parks were to be treated consistently,
- with resource protection the primary goal,
- 9 ☐ while retaining the flexibility for individual park units
- to approve particular uses consistent with their specific enabling legislation.
- 10 ☐ adopted pursuant to notice and comment
- established a uniform rule
- 11 ☐ wherein all bicycle use of off-road areas would be prohibited
- unless local park superintendents designated particular trails to be open.
- 12 ☐ As noted, this had previously been the rule
- in all but the recreation units.
- 13 ☐ prosecutorial discretion, the 1987 regulation was not enforced
- and bicyclists in fact retained access to all trails in the GGNRA pending the development of a trail use plan.
- 14 ☐ 1987 rule: use of a bicycle is prohibited
- except on park roads, in parking areas and on routes designated for bicycle use;

- 15 ☐ **Routes may only be designated for bicycle use based on a written determination that such use is consistent**
- with the protection of the park area's natural, scenic and aesthetic values,**
- 16 ☐ **safety considerations and management objectives and will not disturb wildlife or park resources.**
- 17 ☐ **The National Park Service Organic Act provides that the National Park Service shall:**
- 18 ☐ **promote and regulate the use of the Federal areas known as national parks, monuments, and reservations hereinafter specified, . . .**
- 19 ☐ **by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations,**
- 20 ☐ **which purpose is to conserve the scenery and the natural and historic objects and the wild life therein**
- 21 ☐ **and to provide for the enjoyment of the same in such manner and by such means**
- as will leave them unimpaired for the enjoyment of future generations.**

16 U.S.C. section 1.

- 22 ☐ **Secretary of the Interior shall make and publish such rules**

- and regulations as he may deem necessary or proper
- 23 ☐ for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service.
16 U.S.C. section 3.
- 24 ☐ Chevron
- 25 ☐ Legislative regulations promulgated pursuant to such express authority will be upheld
- "unless they are arbitrary, capricious, or manifestly contrary to the statute."
- 26 ☐ Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984).
- 27 ☐ arbitrary and not based upon a permissible interpretation of the Organic Act.
- 28 ☐ permissible interpretation of the Organic Act
- mandated and certainly permissible construction of the Organic Act and its amendments.
- 29 ☐ NPS interpreted Congress's amendments to the Organic Act to be clear in the message
- NPS was not to single out a particular class of units of the park system (i.e. recreational units) for less protective treatment,
- 30 ☐ instead NPS was to manage all units of the park system so as to effect the purpose of the Organic Act—

primarily resource protection.

- 31 ☐ **Supreme Court has established a two-step process for reviewing an agency's construction of a statute it administers:**
- 32 ☐ **First, always, is the question whether Congress has directly spoken to the precise question at issue.**
- 33 ☐ **If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.**
- 34 ☐ **If, however, the court determines Congress has not directly addressed the precise question at issue,**
- 35 ☐ **the court does not simply impose its own construction on the statute,**

as would be necessary in the absence of an administrative interpretation.
- 36 ☐ **Rather, if the statute is silent or ambiguous with respect to the specific issue,**

the question for the court is whether the agency's answer is based on a permissible construction of the statute.
- 37 ☐ **Chevron**
- 38 ☐ **At "step one," if a court "employing traditional tools of statutory construction ascertains that Congress had an**

intention on the precise question at issue,
that intention is the law and must be given effect."

39 ☐ At "step two," "The Court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction,

40 ☐ or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."

41 ☐ Chevron Step One

42 ☐ Congress clearly intended by its 1970 and 1978 amendments to the Organic Act

that NPS alter its practice of governing recreational park units under less restrictive standards

43 ☐ instead manage all areas of the park system uniformly with the fundamental goal of resource protection in mind.

legislative history of the 1970 amendments

44 ☐ House Report, H.R. Rep. No. 91-1265, accompanying the bill amending the Organic Act, Pub. L. No. 91-383,

45 ☐ noted that because the Organic Act "contains no reference to more recent concepts like national recreation areas, national seashores, or national lakeshore," . . .

46 ☐ "the usual rules of construction . . . could result in interpretations which would lead to the administration of the system so that it would be almost devoid of uniformity."

- 47 ☐ However, the Organic Act (and some other statutes) "have desirable, useful, and necessary provisions

and they should be applicable uniformly throughout the National Park System."

- 48 ☐ Thus, the bill's "Section 1 . . . emphasizes the common purpose of all units of the national park system

- 49 ☐ and declares that its purpose is to include all such areas in the system and to clarify the authorities applicable to it."

1970 U.S. Code Cong. & Adm. News, Vol.2, 91st Cong., 2d Sess., at 3785-87.

- 50 ☐ the statutory language and the legislative intent of the 1970 and 1978 amendments mandated that NPS discontinue the practice

- 51 ☐ of managing recreation areas under less protective rules than it was using in managing natural and historic areas.

- 52 ☐ NPS could only effect the intent of Congress by amending 4.30 such that all parks were to be treated uniformly

- 53 ☐ in the manner that natural and historical units had previously been managed

and thus that all trails were to be "closed-unless-designated-open."

- 54 ☐ NPS in amending section 4.30 (in accordance with its more general policy of eliminating management categories

- 55 ☐ and deleting the less restrictive "recreation" unit rules)

acted so as to "give effect to the unambiguously expressed intent of congress."

56 ☐ **The challenged regulation, therefore, is valid.**

57 ☐ **Chevron Step Two**

58 ☐ **Even if the intent of Congress were not so clear on this issue,**

the regulation would still be upheld as based on a permissible interpretation of the Organic Act.

59 ☐ **As noted above, legislative regulations promulgated pursuant to an express grant of statutory rulemaking authority are valid**

60 ☐ **"unless they are arbitrary, capricious, or manifestly contrary to the statute."
Chevron, 467 U.S. at 844.**

61 ☐ **If an agency decision "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute,**

we should not disturb it

62 ☐ **unless it appears from the statute or its legislative history
that the accommodation is not one that Congress would have sanctioned."**

Chevron, 467 U.S. at 845

- 63 ☐ Courts have noted that the Organic Act is silent as to the specifics of park management
- 64 ☐ "under such circumstances, the Park Service has broad discretion
- in determining which avenues best achieve the Organic Act's mandate. . . .
- 65 ☐ Further, the Park Service is empowered with the authority to determine
- what uses of park resources are proper and what proportion of the park's resources are available for each use."
- 66 ☐ an interpretation that the Organic Act allows for this closed-unless-designated open approach for bicycle trail access
- cannot be termed "manifestly contrary to the statute."
- 67 ☐ The legislative history and the statutory amendments discussed above further reinforce this finding.
- 68 ☐ This regulation is thus based upon a permissible interpretation of the statute and is valid on this alternate ground as well.
- 69 ☐ An agency's view of what is in the public's interest may change, either with or without a change in circumstances, but an agency changing its course must supply a reasoned analysis.

- 70 ☐ **agency flip-flopped in its interpretation of a single unamended standard?**
- 71 ☐ **No, situation where the agency changed its position to accommodate the amendments by Congress**
- 72 ☐ **following amendments to the Organic Act and pursuant to a longstanding policy by which NPS was eliminating its management categories,**
- 73 ☐ **NPS changed 36 C.F.R. section 4.30 so as to be consistent with the newly worded statute.**
- 74 ☐ **here the NPS did provide a rational and principled analysis of its decision to amend 36 C.F.R. section 4.30.**
- 75 ☐ **change in policy by the agency is to be upheld where the policy change is "based on a rational and principled reason"**
- 76 ☐ **even assuming arguendo that NPS's decision to revise section 4.30 represents a reversal of policy,**
- NPS has provided the "reasoned analysis" necessary to support such a change.**
- 77 ☐ **NEPA**
- 78 ☐ **challenge the 1987 rulemaking on the basis that NPS did not prepare an Environmental Impact Statement (EIS) or even an Environmental Assessment (EA)**
- in the course of amending
36 C.F.R. section 4.30.**

- 79 ☐ **not a major federal action having a significant impact on the quality of the human environment**
- 80 ☐ **no EA appropriate categorical exclusion.**
- 81 ☐ **Court reviews an agency decision not to prepare an EIS under an "arbitrary or capricious" standard.**
- 82 ☐ **This standard also applies to an agency's determination that a particular action falls within one of its categorical exclusions.**
- 83 ☐ **1987 rulemaking did not require the preparation of an EA or an EIS**
- because it was categorically excluded by departmental regulations**
- 84 ☐ **not expected to:**
- (a) Increase public use to the extent of compromising the nature and character of the area or causing physical damage to it;**
- 85 ☐ **(b) Introduce noncompatible uses which might compromise the nature and characteristics of the areas, or cause physical damage to it;**
- 86 ☐ **(c) Conflict with adjacent ownerships or land uses; or**

**(d) Cause a nuisance to adjacent owners or occupants.
Arbitrary and Capricious**

- 87 ☐ **Court cannot find that NPS's determination that this rulemaking fell within a categorical exclusion was arbitrary or capricious.**
- 88 ☐ **To the extent that closing all off-road areas to bicycle use will force bicyclists onto paved roads more,**
- 89 ☐ **it would not be arbitrary (or unreasonable) for the NPS to have concluded that this increased use of the paved roads and developed areas would not "compromis[e] the nature and character of the area or caus[e] physical damage to it,"**
- 90 ☐ **NPS's determination that its amendment of section 4.30 fit within a categorical exclusion and did not significantly impact the environment**
- was reasonable and was not arbitrary and capricious.**

91 ☐ **1992 GGNRA TRAIL PLAN**

92 ☐ **Plaintiffs also challenge the 1992 GGNRA trail plan promulgated by NPS.**

93 ☐ **GGNRA is established by statute at 16 U.S.C. section 460bb.**

In the management of the recreation area, the Secretary of the Interior (hereinafter referred to as the "Secretary")

94 ☐ **shall utilize the resources in a manner which will provide**

— for recreation and educational opportunities consistent with sound principles of land use planning and management.

- 95 ☐ In carrying out the provisions of this subchapter, the Secretary shall preserve the recreation area, as far as possible, in its natural setting, and protect it from development and uses which would destroy the scenic beauty and natural character of the area.
- 96 ☐ Secretary may utilize such statutory authority available to him for the conservation and management of wild life and natural resources as he deems appropriate to carry out the purposes of this subchapter. 16 U.S.C. section 460bb-3(a).
- 97 ☐ Thus, in order to open unpaved trails or other undeveloped areas for bicycle use, the Secretary had to comply with 36 C.F.R. section 4.30
- 98 ☐ i.e., promulgate as a special regulation the trail designation plan and reach "a written determination that such use is consistent with the protection of a park area's natural, scenic, and aesthetic values,
- 99 ☐ safety considerations and management objectives and will not disturb wildlife or park resources." 36 C.F.R. section 4.30(a).
- 100 ☐ Plaintiffs challenge the final trail plan.

They allege that the agency action was arbitrary and capricious in violation of the APA.

- 101 ☐ They also allege that NPS violated NEPA by failing to prepare an EIS.

102 ☐ **GGNRA Advisory Commission**

103 ☐ **Ad Hoc Bicycle Trail Subcommittee was established**

to review the trail system and make a recommendation for designation of bicycle trails.

104 ☐ **Subcommittee consisted of two members each of the bicycling, hiking, and equestrian constituencies.**

105 ☐ **Subcommittee presented both a majority and a minority report to the Marin committee of the Advisory Commission in May of 1988.**

106 ☐ **NPS developed an EA considering each of four alternate trail designation plans**

ranging from no trail access to nearly total trail access for bicycles.

107 ☐ **EA considered both the majority and the minority reports of the Subcommittee, with some minor modifications, as two of the four alternatives.**

108 ☐ **four public hearings, held three individual user group workshops (one each for bicyclists, hikers, and equestrians),**

109 ☐ **considered hundreds of letters from individuals and dozens of letters from organizations,**

heard the testimony of dozens of individuals at both the public hearings

- 110 ☐ and the subsequent GGNRA Advisory Commission meetings, and considered observations and views of experts and staff members.
- 111 ☐ staff report was itself circulated for public review and comment.
- 112 ☐ "supplemental environmental assessment and finding of no significant impact" ("SEA/FONSI") was completed in May of 1991.
- 113 ☐ It concluded that allowing bicycle use of trails as provided in the staff report "is consistent with the protection of the natural, scenic, aesthetic values, safety considerations and management objectives of the GGNRA, and will not disturb wildlife or park resources"
- 114 ☐ and that "the proposed project is not a major federal action significantly affecting the quality of the human environment, nor is it one without precedent or similar to one which normally requires an [EIS]."
- 115 ☐ In December of 1992, NPS published a Federal Register notice
- adopting as a special regulation the final Trail Use Designation Plan. 57 Fed. Reg. 58711.
- 116 ☐ publication included detailed responses to public comments that had been received.
- 117 ☐ Arbitrary and Capricious
- 118 ☐ Plaintiffs argue that the final plan as adopted is arbitrary

and capricious

because it is based on inadequate data,

119 ☐ that no rational connection is established between the data found and the results reached,

120 ☐ that the NPS failed to consider relevant criteria,

and that the resulting plan is inconsistent with (and therefore an impermissible construction of) the GGNRA Act.

121 ☐ a. NPS Carefully Considered Recreation and All Other Relevant Criteria

122 ☐ An agency decision can be found arbitrary and capricious

where the agency "entirely failed to consider an important aspect of the problem."

123 ☐ GGNRA Act clearly envisions that the park will be operated in a manner which will "provide for recreational and educational opportunities consistent with sound principles of land use planning and management." 16 U.S.C. section 460bb.

124 ☐ bicyclists' complaint is that their interests were not given priority.

125 ☐ this complaint is really just a disagreement with the outcome of the process.

- 126 ☐ **b. The Final Trail Plan is Based Upon a Permissible Interpretation of the Relevant Legislation**
- 127 ☐ **an agency action based upon an impermissible construction of a statute is invalid.**
- 128 ☐ **Plaintiffs argue that any construction of the GGNRA Act that does not recognize recreation as the primary purpose of the Act is such an impermissible construction.**
- 129 ☐ **The GGNRA Act does not require that recreational opportunities be provided in complete derogation of any other interests.**
- 130 ☐ **Rather, the Act specifically provides that recreational opportunities be provided**
- "consistent with sound principles of land use planning and management"**
- 131 ☐ **and that "In carrying out the provisions of this subchapter, the Secretary shall preserve the recreation area, as far as possible,**
- 132 ☐ **in its natural setting, and protect it from development and uses which would destroy the scenic beauty and natural character of the area."**
- 16 U.S.C. section 460bb.**
- 133 ☐ **NPS Organic Act**
- includes as an overarching concern the goal of resource protection**

-
- 134 ☐ **For NPS to consider factors other than recreation and to temper recreational uses**
- by its concern for resource protection and visitor safety**
- 135 ☐ **is not indicative of an impermissible construction of the GGNRA and NPS Organic Acts.**
- 136 ☐ **Further, the GGNRA Act in no way mandates that any particular type of recreation be given primacy over other types.**
- 137 ☐ **There is simply nothing in the GGNRA Act or the NPS Organic Act requiring the NPS to give bicyclists unfettered reign of the park without regard to the recreational interests of those whose chosen mode of recreation is inconsistent with such unfettered reign.**
- 138 ☐ **Allocation of the limited use between two groups is well within the area of administrative discretion granted to the NPS**
- 139 ☐ **c. NPS Reasonably Relied Upon Evidence Showing That Restricting Mountain Bicycle Access Would Serve the Goal of Resource Protection**
- 140 ☐ **In order for an agency decision to be upheld under the arbitrary and capricious standard, a court must find that evidence before the agency provided a rational and ample basis for its decision."**
- 141 ☐ **After considering the relevant data, the agency must**

— **articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.**

- 142 ☐ **Therefore, in order to uphold this agency action of promulgating the trail plan on the basis of resource protection,**
- 143 ☐ **this Court must find that ample evidence supported the agency's findings of resource damage**
- 144 ☐ **and that the agency articulated a reasoned connection between stemming this resource damage and its decision to prevent bicycle use of some trails.**
- 145 ☐ **park officials noted serious erosion problems on certain steep narrow trails and determined that restricting bicycle use would slow such erosion.**
- 146 ☐ **narrow trails bicyclists passing other users would either leave the trail or force the other users off the trail to the detriment of off-trail vegetation and wildlife.**
- 147 ☐ **"GGNRA Erosion Rehabilitation Survey" in 1990**
- 148 ☐ **many bicyclists seem to express disagreement with this finding and argue that bicycle use does not cause erosion**
- 149 ☐ **NPS is not required to embrace the bicyclists' evidence and is free in its exercise of expertise to give conflicting evidence whatever weight it deems appropriate in light of the accuracy and credibility of such evidence.**
- 150 ☐ **As long as ample evidence supports the NPS**

determination, this Court is not free to substitute its judgment for that of the agency.

- 151 ☐ whether the agency articulated a reasoned connection between these facts found and the final agency action undertaken
- 152 ☐ why all single-track trails but one were closed to bicycle use
- 153 ☐ Two considerations were key in this evaluation process-- user conflict and resource preservation.
- 154 ☐ This is not a case where the agency has thought up some rationale after the fact to justify its action.
- 155 ☐ Rather, NPS provided a reasoned articulation of its concern for resource protection and the relationship of its proposed conduct to this issue throughout this rulemaking process.
- 156 ☐ d. NPS Reasonably Relied Upon Evidence Showing That Restricting Mountain Bicycle Use
- 157 ☐ Ample evidence in the administrative record supports the finding by NPS that bicycle access to all trails increases incidents of user conflict and compromises visitor safety.
- 158 ☐ Plaintiffs contend that the only credible evidence of user conflict would be a survey or study performed scientifically to determine how many conflicts occur and how and why they occur.
- 159 ☐ Plaintiffs argue that only by counting accident reports or

other objectively verifiable indicators of conflict and risk can NPS arrive at a reasonable conclusion that user conflict and danger exist.

- 160 ☐ Plaintiffs argue that by relying on subjective individual reports of user conflict, NPS allowed its decision making process to be manipulated by non-bicyclists pursuing a political (not safety-based) agenda against bicycles.
- 161 ☐ subjective reports by park visitors of user conflict could support a reasonable agency determination that such conflict existed:
- 162 ☐ Individual comment is a very persuasive indicator of "user conflict," for determining the existence of conflicts between humans cannot be numerically calculated or counted;
- 163 ☐ rather, the existence of conflict must be evaluated. The court can envision no better way to determine the existence of actual past or likely future conflict between two user groups than to hear from members of those groups.
- 164 ☐ Since ample evidence supported the NPS finding that bicycle access to all trails increased user conflict and decreased visitor safety,
- 165 ☐ and since NPS articulated a reasoned connection between these facts and the final agency action of closing some trails to bicycles,
- 166 ☐ this Court cannot find such agency action to be arbitrary and capricious on this basis.

- 167 ☐ **NEPA And The 1992 Trail Plan**
- 168 ☐ **EIS must be prepared whenever there is contemplated a major federal action having a significant impact on the human environment. 42 U.S.C. section 4332(2)(C).**
- 169 ☐ **Where an Environmental Assessment (EA) is performed, an agency decision not to complete an EIS is reviewed under the arbitrary and capricious standard.**
- 170 ☐ **Under this standard, a reviewing court "still must ensure that an agency has taken a `hard look' at the environmental consequences of its proposed action, . . .**
- 171 ☐ **carefully reviewing the record to ascertain whether the agency decision is founded on a reasoned evaluation of the relevant factors."**
- 172 ☐ **plaintiffs allege that the closing of trails will force bicyclists to travel more on paved roads shared with motor vehicles.**
- 173 ☐ **Supreme Court has interpreted the human environment to mean the "physical environment--the world around us, so to speak."**
- 174 ☐ **Thus NEPA does not require that an agency take into account every conceivable impact of its actions, including impacts on citizens' subjective experiences.**
- 175 ☐ **Rather, it requires agencies to take into account environmental impacts on the physical "world around us." An increased risk of accident is not an impact to the physical environment.**

- 176 ☐ **A risk of an accident is not an effect on the physical environment. A risk is, by definition, unrealized in the physical world.**
- 177 ☐ **NPS discussed plaintiffs' concerns as well as the park officials' findings that these impacts would not be sufficiently significant as to justify the preparation of an EIS.**
- 178 ☐ **NPS articulated in its published positions its reasoned consideration and analysis of plaintiffs' congestion concerns, as well as possible options for mitigating these impacts.**
- 179 ☐ **The authority of NPS to strike such balances in a reasoned manner inheres in the Organic Act and the GGNRA Act.**
- 180 ☐ **16 U.S.C. section 1 provides that the "fundamental purpose" of National Park Service Units "is to conserve the scenery and the natural and historic objects and wildlife therein**
- 181 ☐ **and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."**
- 182 ☐ **An agency satisfies NEPA if it applies its categorical exclusions and determines that neither an EA nor an EIS is required,**
- 183 ☐ **so long as the application of the exclusions to the facts of the particular action is not arbitrary and capricious.**
- 184 ☐ **NEPA imposes only procedural requirements and does not dictate a substantive environmental result.**

185 ☐ **The policy behind NEPA is to ensure that an agency has at its disposal all relevant information about environmental impacts of a project**

before the agency embarks on the project.

186 ☐ **Further, courts defer to agency expertise on questions of methodology**

187 ☐ **unless the agency has completely failed to address some factor,**

consideration of which was essential to a truly informed decision whether or not to prepare an EIS.

188 ☐