Request for Administrative Review of

Golden Gate National Recreation Area

Negotiated Rulemaking to Create a

Section Seven Special Regulation

Pet Management Policy

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Preface

The legacy of Golden Gate National Recreation Area General Superintendent Brian O'Neill is one of duplicity, broken promises, and broken laws. Consider the two contrasting written statements recently made by Superintendent O'Neill:

> ***"Judge Alsup effectively held that the 1979 Pet Policy governs off-leash use until such time as GGNRA completes a process for changing that Policy that is consistent with federal requirements, should that step be taken."*** (GGNRA Superintendent Brian O'Neill letter of December 10, 2005, to Stephen Sayad.)
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> ***"As noted in our December 20, [2005] caucuses, we will not be using the 1979 Pet Policy as a basis for negotiated rulemaking."*** (Quote from Superintendent Brian O'Neill, in correspondence dated January 11, 2006, to Dr. Suzanne Valente.)

The group submitting this petition (Ocean Beach DOG) has been excluded from the Negotiated Rulemaking process by the GGNRA because we allegedly refused to negotiate in "good faith". We merely insisted the rights afforded dogwalkers by the current law in the GGNRA be the basis for the negotiations. Instead, the GGNRA insists good faith negotiation means we must waive ALL our legal rights in order to merely participate. By what legal principle does the GGNRA derive the right to summarily dismiss the current law ***at the inception of*** this NR process?

This Petition is a formal request to higher authority in the Department of Interior, and the Office of Management and Budget, for Administrative Review of the Negotiated Rulemaking ("NR") process for pet management in the GGNRA. The Federal government has failed to honor the legal commitments and promises made by the GGNRA/NPS/DOI to the taxpayers and the City of San Francisco dating back to 1975 with respect to a pet management policy in the GGNRA. These breaches continue with the GGNRA's promulgation of an NR process made illegitimate by the aforementioned illegality and other illegalities designed to manipulate the process to a predetermined outcome. This Petition will demonstrate why NR in its current form must be terminated and the original 1979 Pet Management Policy must be implemented as a Section Seven Special Regulation.

Executive Summary

The Superintendent of the Golden Gate National Recreation Area ("GGNRA") has declared that Negotiated Rulemaking ("NR") shall be employed as the method to create a Section Seven Special Regulation for off-leash pet recreation, if any, within the GGNRA. The fatal flaw is that the NR, currently in the planning process, cannot come to a legally sustainable result, for several reasons. The premise under which the present NR was authorized is inconsistent with the current law governing pet management in the GGNRA. In the period between promulgation of ANPR documents and the official commencement of NR (first quarter 2006), the United States District Court for the Northern District of California reinstated the GGNRA's own "1979 Pet Policy" for off-leash recreation in the GGNRA. (See Attachment A, the Honorable William H. Alsup's June 2, 2005, "Order of Affirmance" in *United States v. Barley, et al.*) The Court found that the GGNRA illegally rescinded the 1979 Pet Policy by refusing to follow its own regulations at *36 C.F.R. Section 1.5(b).* **Despite this significant intervening event, the GGNRA brazenly refuses to revise the NR documents to reflect the critical change in (reinstatement of) the law, thereby creating a legally impermissible premise for NR negotiations, and illegal requirements for NEPA evaluations.**

A fundamental prerequisite for implementation of NR is that the agency is in "need of a rule". *(Negotiated Rulemaking Act of 1996, Section 563, hereafter referred to as the "NR Act".)* The Court's reinstatement of the 1979 Pet Policy has undermined the premise for the use of NR to create a rule. The 1979 Pet Policy has been the rule for pet management in the GGNRA for approximately 25 years, allows off-leash recreation on less than one percent of the GGNRA acreage, and has served the Park and the public well. The 1979 Pet Policy should *now* be implemented by the Superintendent of the GGNRA as a Section Seven Special Regulation because it best reflects the intentions of those who created the GGNRA and the promises made to the citizens in order for them to approve the creation of an urban National *Recreatio*n Area.
As succinctly noted by Judge Alsup in his decision affirming reinstatement of the 1979 Pet Policy in the GGNRA, are his findings regarding the history of pet management in the GGNRA:

> **"In sum, for more than twenty years, the GGNRA officially designated at least seven sites *for* off-leash use. This was not accidental. It was a carefully articulated,**

> **often studied, promulgation. The responsible GGNRA officials in 1978 and thereafter presumably believed they were acting lawfully. Even now, the government concedes that the GGNRA had full authority at all times to relax the general leash rule at the GGNRA but argues it could have done so, *at* least after 1983, only via a "special regulation." In other words, the agency allegedly used the "wrong" procedure back in 1978 (and thereafter) even though a "right" procedure to reach the desired result was available and could have been used. The government has not revealed its internal justification for following the "wrong" process. Whatever it was, the justification was abandoned in 2002 with the two-word explanation that it had been "in error." With this *ipse dixit,* the NPS wiped away two decades of policy, practice, promulgations, and promises to the public."** (*United States v. Barley, Order Of Affirmance, supra, p. 5.)*

Nonetheless, Superintendent O'Neill adamantly refuses to implement the 1979 Pet Policy as a Section Seven Special Regulation, and has steadfastly refused to reveal to the public that such action is even an option for the GGNRA. Instead, the GGNRA intends to force the public to spend at least a half a million dollars (the estimated cost of NR per Christine Powell of the GGNRA) for the GGNRA to remove our privileges in an unlawful NR process. The public has already borne the financial burden of the GGNRA's attempt, through prosecution of three individuals, to obtain judicial approval at both the federal trial and appellate court levels of its illegal activities in rescinding the 1979 Pet Policy. The expense of the GGNRA's defense of its illegal activity added insult to the injury of losing our recreational resources faithfully entrusted to the GGNRA decades ago. Implementation of the 1979 Pet Policy as a Section Seven Special Regulation would preserve our limited recreational access on less than one percent of the GGNRA, and additionally save the taxpaying public both the costs of NR, and millions of dollars in litigation that will almost certainly result from the highly flawed process that is about to be implemented by the GGNRA. The actions by the Superintendent are wasteful of scarce public resources, particularly in light of the holdings of the United States District Court on the issues, and the fact that the Superintendent's rulemaking authority is limited where property law, custom, and judicial precedent have established the "rule." Simply put, Negotiated Rulemaking cannot overrule property law, custom, and judicial precedent.

Ironically, when the ANPR document was published (at a time after the GGNRA believed it had accomplished its illegal rescission of the 1979 Pet Policy yet before the Policy was reinstated by the Court), Superintendent O'Neill maintained that the use of NR was appropriate because "the

time for conflict is over." Now that the 1979 Pet Policy again governs pet management in the GGNRA (encompassing less than one-percent of all GGNRA land), the "conflict" over off-leash recreation is (or certainly should be) over. The GGNRA continues to mandate NR for, *inter alia*, the improper purpose of cutting back or eliminating off-leash recreation in the Park and thereby circumventing the enabling legislation and the agreements made to establish this unique urban National Park.

The evidence that this is the objective of Superintendent O'Neill and the GGNRA can be found in the Situation Assessment Report ("SAR") produced by the NR conveners. In that Report, it is a stated objective of this NR "to avoid creating a national precedent for…off-leash dog–walking in *other* national parks". (Emphasis added.) Indeed, on December 20, 2005, at a pre-NR caucus, Superintendent O'Neill bluntly stated to proposed NR Committee members that any rule resulting from NR (whether by consensus or more likely by the GGNRA after no consensus) will not come anywhere close to providing the miniscule amount of land (less than one percent) in which off-leash recreation is permitted under the 1979 Pet Policy. [1]

This perversion of the premise under which the GGNRA was created (and the premise of NR) will surely lead to one or more legal challenges of any new regulation by the City and County of San Francisco and citizens at large.[2] The GGNRA's constant (and ongoing) harassment of the off-leash community over the last ten or more years, culminating in the GGNRA's illegal rescission of the 1979 Pet Policy, has not endeared the GGNRA to the taxpaying public. There will be substantial public pressure on the City of San Francisco to take back properties from the GGNRA, as the San Francisco City Attorney determined (in 2000) the deeds conveying City property to the GGNRA would allow if the NR results in a cutback in the 1979 Pet Policy.

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[1] This statement additionally demonstrates that the GGNRA will not negotiate in good faith in NR, and that the outcome of NR is predetermined. This has been confirmed in a conversation with a Congressional staff member responsible for assisting in the oversight of our National Parks. In short, the GGNRA is improperly using NR in order to achieve through regulation what it failed to achieve through prosecution of criminal charges.

[2] Much of the GGNRA consists of land donated by the City to the GGNRA, with deed restrictions requiring continued use of the land for *recreational* purposes and reversion provisions should the GGNRA breach, as it has, this land-use mandate. In addition, citizens are considering litigation against the GGNRA for its illegal rescission of the 1979 Pet Policy as well as the massive harassment and ticketing that occurred both before the Court reinstated the Pet Policy and even after the Court's decision became final. Indeed, as of the time this Petition is being presented, the GGNRA continues to illegally harass and cite citizens in areas made off-leash pursuant to amendments to the 1979 Pet Policy. At a minimum, this bad faith and illegal conduct demonstrates that the GGNRA is unfit for participation in the NR.

Indeed, in 2001, a Resolution was approved by the San Francisco Board of Supervisors, detailing the history of the relationship between the City, the public and the GGNRA. The Resolution (and its findings) is so significant that it is quoted in full below:

> **RESOLUTION for S.F. Board of Supervisors Vote [Urging GGNRA to delay leash enforcement -- Passed on December 10, 2001]**
>
> **Resolution requesting the National Park Service to delay enforcing, in the San Francisco parks situated in the GGNRA, 36 C.F.R. 2.15, requiring pets to be on leash in national parks, until the ANPR process has been completed.**
>
> WHEREAS, In 1975, the City and County of San Francisco transferred Fort Funston and other City-owned park lands to the federal government to be included in the Golden Gate National Recreation Area (GGNRA), to be administered by the National Park Service (NPS); and,
>
> WHEREAS, The statute creating the GGNRA (16 U.S.C. Section 460bb) specifically states that the GGNRA was established to provide for the maintenance of needed recreational open space necessary to the urban environment and planning and requires that the Secretary of the Interior "utilize the resources in a manner which will provide for recreation and educational opportunities consistent with sound principles of land use planning and management;" and,
>
> WHEREAS, Former Charter section 7.403-1(a), as approved by the voters, required that the deed transferring any City-owned park lands to the NPS include the restriction that said lands were to be reserved by the Park Service "in perpetuity for recreation or park purposes with a right of reversion upon breach of said restriction;" and,
>
> WHEREAS, When Fort Funston and other City-owned parks were transferred to the federal government, a federal regulation existed requiring all pets to be on leash in federal parks, yet the NPS chose not to enforce this regulation in the San Francisco City parks; and,
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> WHEREAS, In April 1978, the GGNRA stated its position that "the ordinary guidelines outlined in the Code of Federal regulations do not really apply in an urban area," and that "people and their animals have been visiting the park for too long to apply an all-inclusive arbitrary policy;" and,
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> WHEREAS, The Superintendent of the GGNRA in the spirit of this statement developed a draft pet policy and submitted it to the GGNRA Advisory Committee for further review and public hearings; and,
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> WHEREAS, In September of 1978, after extensive public hearings and public surveys, the Advisory Commission proposed guidelines for a pet policy for the San Francisco Unit of the GGNRA, designating Fort Funston, Lands End, Ocean Beach, Fort Miley, Baker Beach, and Crissy Field for continued off-leash recreation; and,
>
> WHEREAS, On October 6, 1978, GGNRA General Superintendent Lynn Thompson accepted these designations with the following comment: "As you know, the Advisory Commission approved the proposed guidelines for a pet policy in the San Francisco Unit of the GGNRA at their September 27 meeting," and she continued, "We are accepting in total the Commission's recommendations for each of these areas;" and,
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> WHEREAS, On February 24, 1979, the GGNRA finalized the pet policy for both San Francisco and Marin County, establishing areas where pets could be exercised off-leash; and,
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> WHEREAS, In 1982, the 1979 Pet Policy was incorporated into the GGNRA Natural Resources Management Plan as Appendix C; and,

WHEREAS, On July 8, 1992, NPS Western Regional Director Stanley Albright assured U.S. Senator John Seymour that "there is no change in the 1979 Pet Policy which provides the visitor of walking one's dog off leash"; and,

WHEREAS, By letter dated July 8, 1992, Western Regional Director Stanley Albright also assured U.S. Senator Cranston that there would be no change in the 1979 Pet Policy; and,

WHEREAS, On February 5, 1999, Pacific Western Regional Director John Reynolds assured U.S. Senator Dianne Feinstein that the "GGNRA has adopted a pet policy that is more liberal than the regulations enforced at other national park sites throughout the United States, where pets are required to be leashed at all times and are, for the most part, excluded from all but developed areas," and the letter continued, "[The] GGNRA has, with the assistance of the park's Advisory Commission, established a pet policy that allows some opportunity for visitors to enjoy a few designated areas as voice control areas where pets are allowed off-leash;" and,

WHEREAS, On March 19, 1999, GGNRA Superintendent Brian O'Neill stated to U.S. Congresswoman Nancy Pelosi, the "GGNRA has adopted a pet policy that is more liberal than pet regulations at other national park sites throughout the country... certain areas of the park have been designated as voice control areas where pets are permitted off-leash;" and,

WHEREAS, In November of 2000, the GGNRA Advisory Committee attempted to revoke the 1979 Pet Policy, but failed due to a point of order; and,

WHEREAS, On January 23, 2001, over 1,500 people attended the GGNRA Advisory Committee meeting to protest revocation of the 1979 Pet Policy, nine San Francisco supervisors spoke, and both Senator Speier and Assemblyman Shelley sent letters to be read by their representatives; and,

WHEREAS, The Advisory Committee recommended that the GGNRA hold meetings with stakeholder groups within the next 120 days to resolve the issue, and to not change leash enforcement for this period; and,

WHEREAS, The Advisory Committee at this meeting did not vote on the Pet Policy; and,

WHEREAS, Rather than hold stakeholder meetings, the GGNRA received permission from Washington for a more formal process called Advance Notice of Proposed Rulemaking (ANPR), but this process has not begun; and,

WHEREAS, In November, 2001, the GGNRA began to aggressively enforce the leash requirement at Fort Funston, sending teams of law enforcement rangers for 2 to 3 hour segments, and issuing tickets for walking dogs off-leash without initiating the ANPR process in good faith with the public; and,

WHEREAS, Off-leash recreational users believe that off-leash recreation is legal at Fort Funston, and they agreed to go through the ANPR process and further rulemaking in order to obtain a special rule for the GGNRA that specifically recognizes that off-leash dog-walking is permissible in certain GGNRA parks; and,

WHEREAS, The Board of Supervisors of the City and County of San Francisco finds that the recent enforcement of 36 C.F.R. 2.15 is in contravention to the representations made to the public at the Citizens Advisory Committee meeting on January 23, 2001; now, therefore, be it

RESOLVED, That the Board of Supervisors of the City and County of San Francisco hereby requests the National Park Service not to enforce, in the GGNRA parks which were donated to the federal government by the City and County of San Francisco, 36 C.F.R. 2.15, which requires that all

> pets be on leash in federal parks, until the ANPR process has been satisfactorily completed; and, be it
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> FURTHER RESOLVED, That the Board of Supervisors of the City and County of San Francisco hereby requests the NPS to advise the Board as to the status of the ANPR process; and, be it
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> FURTHER RESOLVED, That the Clerk of the Board of Supervisors shall send copies of this resolution to the offices of United States Senator Dianne Feinstein, United States Senator Barbara Boxer, Congresswoman Nancy Pelosi, Congressman Tom Lantos, State Senator John Burton, State Senator Jackie Speier, Assemblywoman Carole Migden, Assemblyman Kevin Shelley, GGNRA Superintendent Brian O'Neill and the National Park Service.

Unfortunately, it is not surprising that the GGNRA has entirely ignored the Resolution. Under the reign of Superintendent O'Neill, the GGNRA only acts when it must – in litigation. The Superintendent is ignoring the conditions in the grant deed. Under property law his actions could result in a change of title, a loss of a present right of possession. Members of the Board of Supervisors continue to express concerns with the manner in which NR is being conducted, and the NPS has concealed facts from the political leadership of the City. If this Petition is not granted, and NR proceeds as currently planned, there will be title litigation required by the terms of the grants to enforce the reversion provisions in the deeds under which the GGNRA holds City property.

In addition, if necessary, any citizen of the City has standing to bring this litigation. Certainly, civic minded groups will be in the position to challenge the legality of any new regulation as they did recently in District Court, blocking the illegal rescission of the 1979 Pet Policy. NR, as it is currently framed, has become irrelevant and cannot survive a legal challenge because NR lacks authority to dismiss current law ***at the inception of*** its process, or modify valid and subsisting property rights: those in the deeds and those afforded by the Public Trust Doctrine which protects recreational access to the beaches in the GGNRA. NR is often viewed as a viable alternative when (in addition to a "need for a rule") its purpose is to *avoid* litigation. Here, with the GGNRA's insistence upon an impermissible premise for NR, litigation (in several forms) is virtually guaranteed. Moreover, the conveners/prospective facilitators have shown no ability (or any desire) to convince the GGNRA management to act lawfully, and have acceded to every GGNRA mandate thus far in this highly flawed process. The conveners cannot be expected to rectify the problems in this NR process. As discussed *infra*, they have become a part of the problem, not a balance or a solution.

The numerous "environmental" groups who might be expected to raise a challenge to the implementation of the 1979 Pet Policy as a Special Regulation (most notably the "Center for Biological Diversity") filed an appellate *amicus* brief in the recent litigation that resulted in the reinstatement of the 1979 Pet Policy. Clearly, their argument (that the less than one percent of GGNRA land in which off-leash recreation is allowed is destroying the entirety of the GGNRA), was unpersuasive.[3] It appears almost certain that the CBD was prompted to seek *amicus* status by the GGNRA, which would undermine any claim that they could be considered a disinterested stakeholder. If the GGNRA simply implemented existing law as a Section Seven Special Regulation, it could then terminate the unnecessary NR. Termination of NR would not be subject to legal challenge. *(NR Act, Section 570.)*

Lastly, this is a plea for relief for those who have sacrificed substantial time, money and quality of life time and again to fight for what is rightfully ours. The behavior of the GGNRA with respect to the taxpaying public and the communities within which they reside has been shameful. The documented violations of the law GGNRA management has perpetrated are astounding. The animosity created by the GGNRA is not limited to off-leash dog walking; there is well-documented evidence of the arrogance and unlawful behavior of GGNRA management as it relates to the citizens of West Marin, Sausalito, San Francisco and San Mateo County. Issues involving land development, the killing of flora and fauna the GGNRA deems "non-native", the desecration of buildings and properties the community views as historic, the elimination of access to Park properties for the disabled, and the refusal to allow expansion of children's recreational facilities when no other option is available outside of GGNRA land, are rampant. The GGNRA does not serve the public; it arrogantly serves itself and an agenda that flies in the face of its enabling legislation, its promises to the City, and the law. As a practical matter, if necessary, copies of this Petition will be provided to Senators and Representatives who control funding for the NPS. The NPS decision to proceed with NR is wasteful. Termination of NR will save millions and implementation of the 1979 Pet Policy as the Section Seven Special Regulation

[3] That these groups continue to retain Committee member status notwithstanding their oft-stated position that off-leash recreation should *never* be allowed in the GGNRA is yet another perversity of the NR process by the GGNRA and the biased conveners.

will protect the reasonable expectations and property rights of the interested parties and the public at large.

I. Reinstatement of the 1979 Pet Policy

The residents of the Bay Area (and visitors) have a legitimate, longstanding pet management policy in the GGNRA, commonly referred to as the "1979 Pet Policy". The 1979 Pet Policy ("79PP") was legally implemented by the GGNRA after substantial public input in 1977 and 1978 (including input from organizations such as the Sierra Club), and then illegally rescinded by GGNRA management in 2002. The 79PP was recently reinstated by Magistrate Judge Elizabeth Laporte in December 2004. The GGNRA appealed Judge Laporte's ruling, and the decision was affirmed on appeal by the Honorable William H. Alsup. (See Attachment A.) The GGNRA, in Court documents, maintained that the 79PP was nonexistent and never legitimate because it always was in conflict with National Park Regulations, to wit, *36 C.F.R. Section 2.15(a)(2)*.[4] The United States District Court held to the contrary: the GGNRA Superintendent had the legal authority to implement the Pet Policy during the 1979 to 1983 timeframe, and legally did so. Moreover, the GGNRA's rescission of the 79PP was *both* a "significant change" in use and one of a "highly controversial" nature requiring compliance with *36 C.F.R. Section 1.5(b).* The GGNRA thus acted illegally in rescinding the 79PP without following its own regulations requiring *prior* public notice and comment before engaging in such action.

While Superintendent O'Neill has gratuitously stated that the Court "effectively reinstated the 1979 Pet Policy", the GGNRA refuses to acknowledge the reinstatement of the 79PP in the manner prescribed by law, *36 C.F.R. Section 1.7(b).*[5] There has been no written designation of the reinstated off-leash properties; indeed, the GGNRA has used this murky situation to continue to harass and ticket off-leash dog-walkers in areas that are off-leash pursuant to the 79PP and amendments thereto. In addition, for over a year, GGNRA management has refused to change

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[4] As stated by GGNRA spokesman Richard Weideman, "what dog owners are confused with is that we didn't rescind this policy, because there never really was one to begin with." ("Off-Leash Policy Hitting Dog Owners Hard", Mary Chow, AsianWeek.com (April 11, 2003).)

[5] We recognize that the GGNRA did not reinstate the 79PP by virtue of *36 C.F.R. Section 1.5(a);* however we believe the statute is applicable to this situation in the interest of public safety and proper management practices.

the signage in the Park to reflect the Court's ruling in derogation of *36 C.F.R. Section 1.7(a)(1)(4).* For photo documentation of the illegal signage, see http://oceanbeachdog.home.mindspring.com/id8.html.

This illegal and confusing signage is potentially detrimental to the safety and enjoyment of those visiting the GGNRA. For example, on any given morning at Ocean Beach, one finds visitors with their dogs who come from within and outside San Francisco (including Concord and Pleasant Hill, California -- approximately 40 miles away), and from out of State. Many of these visitors rely upon the signage to determine what activities are allowed at specific GGNRA locations. For the family from out of town who visits Ocean Beach with a child who is fearful of dogs, the current signage will lead them to believe they will only encounter dogs that are on-leash. This problem is easily resolved by the GGNRA. Ironically, in *November 2002*, the Federal Panel recommended that the GGNRA should "[c]learly distinguish between on-leash, off-leash, and no pet areas to avoid management and public confusion." *(Federal Panel Recommendation to the General Superintendent on Proposed Rulemaking for Pet Management at Golden Gate National Recreation Area, Section 4 ("Federal Panel Recommendations"). p. 11 (Revised November 7, 2002).* [See, http://www.nps.gov/goga/pets/anpr/pdf/federal_panel_recommendation.pdf.]

Over three years and a significant Court decision later, the GGNRA continues to flout both recommendations that it solicited and the reinstated law on pet management in the GGNRA.

In addition, the GGNRA, in violation of *36 C.F.R. Section 1.7(a)(4)*, persists in ignoring the Court's ruling and misinforming the public. For example, on the NPS website, under the heading, "Dogwalking Information and Regulations", a statement dated June 8, 2005, proclaims: "Due to the recent court ruling, this information is under review and will be revised shortly." (Attachment B hereto.) A brochure found online at the NPS website entitled, "Enjoying the Park with your Dog", advises readers that, "Where dogs are permitted, Federal law requires that they be on a leash, not to exceed six feet in length, in *all* units of the National Park System." (Attachment C hereto, emphasis added.) It is readily apparent that the GGNRA has nothing but contempt for the Court's decision, a decision that has made NR and its current baseline irrelevant and illegal. (See Attachment M which has highlighted the areas currently allowed for off-leash recreation under the 1979 Pet Policy which the GGNRA has eliminated for consideration for off-

leash recreation in NR without the requisite public notice and process.) It is entirely possible the District Court could find the Superintendent in contempt, should the matter be pressed. There can be no confusion on the part of the Superintendent; he has been served with a copy of the Court's written decision through counsel. The GGNRA seeks to implement NR not because there is any "need for a rule", but solely for the improper and ulterior purpose of setting aside the effect of the Court's decision *at the inception* of the NR process. This conduct should not be countenanced by any agency with oversight responsibility for the GGNRA. It will certainly not be acceded to by the City of San Francisco and Bay Area residents.

II. Why Negotiated Rulemaking Should Be Terminated Forthwith

The Current NR Does Not Comply With the Law

As noted, NR has been proposed as a method to create a regulation for pet management in the GGNRA. The NR that is currently in the planning process cannot come to a legally sustainable conclusion, as the then-extant circumstances and justification under which the NR was authorized are inconsistent with current law. When the ANPR documents were submitted to a Federal Panel for review in 2002, the (erroneous) premise was that there was no off-leash recreation allowed within the GGNRA.

In the period between promulgation of the ANPR documents and the present (when NR is about to commence), the Court's decision has reinstated the 79PP in the GGNRA. This renders the following statements from the Federal Register posting of January 11, 2002 clearly incorrect: "The [GGNRA Citizen's Advisory] Commission's 'voice control" policy did not and can not override NPS regulations prohibiting pets off-leash ….The park, in error, implemented the 'voice control' policy ….. The GGNRA has no authority to avoid or ignore the regulation disallowing pets off leash…." In the now outdated and legally and factually erroneous ANPR document, areas such as Ocean Beach and portions of Crissy Field and Fort Funston that had been subjected to illegal closures are declared to be *excluded* from consideration for off-leash recreation *based*

upon those illegal acts. **Yet despite demands from proposed NR Committee members and the public, the GGNRA refuses to revise the NR process to reflect the current and longstanding status of the law for off-leash recreation in this unique urban National Recreation Area.**

Even the Federal Panel that evaluated the issue of off-leash dog walking in the GGNRA (before the 79PP was reinstated) and recommended rulemaking (including the *possibility* of NR) to establish off-leash dog walking areas in the GGNRA, recognized the following: "*There is longstanding off-leash dog use with tacit acceptance by NPS at certain sites within the GGNRA.* Given the longstanding tacit acceptance, the public has come to expect and rely upon continuation of use in the GGNRA." *(Federal Panel Recommendation, supra, "Federal Panel Findings", p. 7, emphasis added.)* [6]

At a minimum, it is illogical for the GGNRA to ignore the historical usage of areas for off-leash recreation within the NR process. Subsequent to the reinstatement of the 1979 Pet Policy as the controlling law in the GGNRA, this omission of the 79PP is unlawful. Yet, the NOI document, as published in the Federal Register (on June 28, 2005) does just that: no reference whatsoever is made to the 1979 Pet Policy as a legal sideboard to which referral by the NR Committee ("NRC") is allowed. The 79PP is not recognized by the NPS/GGNRA as the law and the logical starting point for NR negotiations and NEPA evaluations.

Superintendent O'Neill declared at the December 20, 2005 caucus and the Federal Register posting of the Notice of Establishment, that existing off-leash areas in the Presidio of San Francisco will not be included for consideration in NR despite their listing (in the ANPR document) as properties to be considered in the NR. No justification has been provided by the GGNRA for this exclusion.[7] The mere fact that the NR will not even deal with the issue of off-leash recreation on a Park-wide basis demonstrates how this NR violates the Secretary of the Interior's Notice of Intent for the NR to consider all of the GGNRA in the NR. *(See Federal*

[6] Of course, this alleged "tacit acceptance" was found by the Court in the recent litigation to be an official policy of the NPS/GGNRA that remains in full force and effect through the 79PP.
[7] As a result of the exclusion and the Presidio Trust's withdrawal from the NR, these areas will remain off-leash unless and until the GGNRA/Presidio Trust engages in *separate* agency rulemaking.

Register; Vol. 70; No. 123; June 28, 2005; Notices.) The Presidio remains part of the GGNRA despite the fact that portions thereof have come under the administrative jurisdiction of the Presidio Trust. *(The Presidio Trust Act, 16 U.S.C. Section 460bb, Appendix, Section 101(4).)* The refusal of the Superintendent to include this GGNRA land within the NR is an unquestionable violation of the mandate of the Secretary of the Interior.

The GGNRA Is Guilty Of Bad Faith Even Before NR Begins

The September 14, 2004 Situation Assessment Report ("SAR") for the proposed NR expressly contemplated that reinstatement of the 1979 Pet Policy would have a profound impact on the NR. The SAR (at page 18) states: "[t]hese lawsuits could prove to have only minor substantive impact on a committee's work, or could have a significant effect on rulemaking *by changing the relevant legal framework for decision making"*. (Emphasis added.) Clearly, the latter is the case. As judicial reinstatement of the 1979 Pet Policy was anticipated in the SAR, that the GGNRA has not even attempted to incorporate this significant change into "the relevant legal framework" for the NR process when the NOI was published on June 28, 2005 (after the appellate court ruling), is compelling evidence of bad faith on the part of the GGNRA in implementing this NR.

Indeed, at the December 20, 2005 NR caucus, Superintendent O'Neill announced that the starting point for the NR negotiations will **not** be the 1979 Pet Policy, despite the fact that it is the controlling pet management policy in the GGNRA. When confronted with the necessity to modify "the relevant legal framework" for decision-making as set forth in the SAR, Superintendent O'Neill stood up at the table and declared, "**I** will **not** start this NR process all over again!" In short, the Superintendent acknowledged that NR as it is presently structured does **not** conform to the law, yet flatly refuses to bring this NR into compliance with the law. The Secretary of the Department of Interior has authority to correct the situation before the Department's NPS representative offends the Court, the City and the citizens again with his contempt for the law.

It is further indication of the GGNRA's bad faith that the GGNRA refuses to accept the Federal Panel's authorizing directive that there **should** be off-leash recreation in the GGNRA. The SAR states that there is no *a priori* commitment made to this (off-leash) outcome by the GGNRA in the current NR. To again borrow the words of Judge Alsup in earlier litigation (also finding a GGNRA closure [at Ft. Funston] to be illegal), Superintendent O'Neill is using NR as a "*fiat accompli*" to eliminate off-leash recreation in the GGNRA. (*See, Ft. Funston Dog Walkers v. Babbitt, 96 F.Supp.2d 1021 (N.D. Cal.2000).)* The conduct of the GGNRA cannot be harmonized with any notion of fairness that must be part of any NR. The GGNRA is using NR to achieve a predetermined outcome in an ill advised attempt to eviscerate controlling, longstanding law on pet management and recreational use of land in the Park.

NEPA Will Be Violated In This NR

National Environmental Policy Act ("NEPA") evaluations are generally required when an agency desires to change the usage of a particular area or property, or to implement a specific project. (*42 U.S.C. Section 4321, et seq.*) NEPA requires a Federal agency to evaluate the "environmental risks and remedies associated with a pending project…*before* a project is approved." (*LaFlamme v. F.E.R.C., 852 F.2d 389, 398 (9th Cir. 1988), emphasis original.*) Accordingly, the areas designated as off-leash under the 79PP should not be subject to NEPA evaluation were the GGNRA to *maintain* their status as allowing off-leash ("voice control") recreation. In the SAR it is stated: "The NEPA process will go on concurrently with the work of a Committee, and it is likely a draft NEPA document analyzing a set of options, perhaps including a consensus recommendation from the Committee, would be published only after the Committee has completed its work". However, in direct contradiction with what was said to justify NR, it has become apparent that through the use of NR, the GGNRA intends to base its requirement for NEPA evaluation on the illegal rescission of the 79PP, thereby requiring a NEPA evaluation in order to qualify *any* area for off-leash use! In fact, there have just been announced meetings to review the Environmental Impact Statement for the GGNRA properties before the Committee has negotiated at all! None of this information had been provided to any

proposed NR Committee member in writing (or to the public at all), prior to the posting of the Notice of Establishment to the Federal Register.

Notice of Intent Comments such as those submitted by Ocean Beach DOG members have not been adequately responded to in the Notice of Establishment as is required by law. There is no legal basis provided for the Superintendent's refusal to acknowledge the current law in NR. Only after specific questioning of Superintendent O'Neill about Ocean Beach have we been able to outline specifically just how the GGNRA intends to handle this area in derogation of current law:

1. The NR process will only consider for off-leash recreation the portion of Ocean Beach the GGNRA has determined to be outside the boundaries of its arbitrarily designated "habitat". This would be Stairwell 21 north to the Cliff House (approximately 1/2 mile in contrast to the 3 miles under the existing 79PP);
2. Users of Ocean Beach will not be starting the NR process with Stairwell 21 north as an off-leash area (as it is under the 79PP). Instead, the GGNRA plans to require a NEPA evaluation to justify allowing off-leash recreation in that 1/2 mile area;
3. The other 2.5 miles of Ocean Beach (an off-leash area under the 79PP) will be handled in a **separate** Agency Rulemaking process.[8] Superintendent O'Neill made clear at the December 20, 2005 caucus that through this **separate** process he intends to require compliance with NEPA in order to *allow* off-leash recreation in *any* area, including *existing* off-leash areas. No announcement has been made of any Rulemaking for this area, and the NR documents (see Attachment M) do not state that Rulemaking is intended in any fashion for this area, it has merely been *illegally* designated as not for consideration for off-leash recreation.

Once again, the Superintendent is ignoring the current law in his proposed implementation of NEPA requirements. We were advised by the Superintendent that he intends to handle other areas which allow off-leash recreation by virtue of the 79PP in a similar manner, yet the public

[8] Any reduction in off-leash recreation at any of the beaches that are encompassed within the 79PP will surely result in taxpayer litigation as these tidelands (whether owned by the State of California, the City, the federal government, or even managed by permit by the GGNRA) remain subject to traditional recreational uses under the" public trust" doctrine. Such traditional recreational uses cannot be legally altered or taken away through federal NR or federal Agency Rulemaking. This will thus be yet another source of litigation that NR, in theory, is designed to eliminate but that the current NR will undoubtedly spawn.

has been given no specifics. The Superintendent is acting contrary to the Secretary of the Interior's direction that this NR consider pet management throughout the GGNRA, not just portions thereof.[9] The land in question was conveyed with one deed and thus is subject to the same grant restrictions (and reversion provisions) administrative convenience notwithstanding.

The ESA Will Be Violated By the GGNRA in NR

In the pre-NR caucuses, it has also come to light that the GGNRA intends to misuse the Endangered Species Act ("ESA") as a means to restrict off-leash recreation.

Under the ESA: ***"The Secretary [of the Interior] may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying that area as critical habitat, unless he determines, based upon the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in extinction of the species concerned."***

As of October 31, 2005, Ocean Beach is no longer designated as a critical habitat for the Western Snowy Plover. This change in status should allow for continued off-leash recreation at Ocean Beach. However, both Superintendent O'Neill and Christine Powell stated to potential NRC members on December 20, 2005, that the GGNRA plans to make absolutely no distinction between critical habitat, habitat, the habitat the GGNRA has arbitrarily created, or potential habitat. It is not relevant to the GGNRA whether this "habitat" under consideration supports threatened or endangered species. All will face recreational restrictions in violation of the deed and the requirements of the Public Trust Doctrine. As a most extreme example, the proposed NRC members were advised that the West end of the tidelands at Crissy Field (the purported "waterfowl protection area") will not be considered for off-leash recreation in NR, even though the GGNRA created this "potential habitat" and both the GGNRA and the conveners readily acknowledge there are no threatened or endangered species there. This area was designated for off-leash recreation under the 79PP. The ESA requires consideration of the nature of the

[9] This *ultra vires* parsing out of portions of the GGNRA from NR has been brought to the attention of the conveners, but the theoretically "neutral" conveners have done nothing to bring the GGNRA into compliance with the mandate of the Secretary of the Interior and, despite requests from the public, have not cited any legal authority for acting in derogation of the directive of the Secretary.

“habitat” as well as the “best science available” in determining whether to impose a restriction that might be appropriate to an area. The GGNRA does not intend to implement the ESA as required by law. (*See,* Section IV, Part C, *infra*.) In this area of Crissy Field there is scant evidence that the beach is “habitat”. This is an urban beach on fill. There can be no valid contention that the tideland in question was ever a natural habitat.

There are a number of other properties in addition to Ocean Beach that will be inappropriately omitted from NR, subjected to illegal NEPA evaluations, and dealt with (in derogation of the Secretary’s Notice of Intent for NR) in a *separate* form of Agency Rulemaking. These include portions of Fort Funston, Crissy Field, Muir Beach, and some trails in the Marin Headlands. In these circumstances as well, the explanation as to why this is the case involves yet more GGNRA attempts to distort the purpose of the ESA. The piecemeal approach adopted by the Secretary’s local representative is arbitrary and contrary to the general requirement that valid administrative action on land use be in conformity with uses established by custom, usage, deed conditions, and by the State Constitution insofar as the tidelands are concerned.

NR Is Neither Mandatory Nor Necessary

Superintendent O’Neill has acknowledged that there is no *requirement* for NR in the GGNRA at this time. As a fundamental purpose for NR is the “need for a rule”, the Superintendent is correct in recognizing that NR is not required in order to deal with the issue of pet management in the GGNRA. (*NR Act, Section 563*). It is further acknowledged in the SAR (at page 13), that were there no “need for a rule”, the conveners could recommend that NR not proceed. In light of the Court’s ruling, there presently exists a reinstated, longstanding rule for pet management in the GGNRA. This significant fact is being intentionally ignored (indeed, concealed) by the GGNRA and the conveners who insist that this NR continue, and that the public foot the bill for this flawed process that is neither necessary nor legal as implemented.

Superintendent O’Neill has additionally acknowledged that he possesses the legal authority to institute the 1979 Pet Policy as a Section Seven Special Regulation for the GGNRA. However,

the Superintendent stated that he will never institute the 79PP as a Section Seven Special Regulation. **He**, personally, has decided that the public only has the choice between NR and Agency Rulemaking. **He** further declared, at the December 20, 2005 caucus, that NR will never give the dog-walking community anything close to the less than one-percent of GGNRA land encompassed under the 79PP. This conduct cannot be reconciled with the law or with any notion of "good faith" that must be part of any NR. *(NR Act, Section 563(a)(3)(B).)* Such a predetermined outcome to NR is illegal, and the failure/refusal of the conveners to rectify the illegal mandates of the GGNRA demonstrates their inability (or unwillingness) to act in a neutral fashion and in the best interests of the public.

One need only refer to the NPS Director's Order 75A (Attachment D hereto) to see that all that was mandated was significant *public input* in the establishment of a Section Seven Special Regulation. Yet, in another misrepresentation, Superintendent O'Neill asserted that the Director's Order "strongly suggested" the use of NR to deal with off-leash recreation in the GGNRA. The Director's Order did no such thing, and simply listed NR as one of the possible solutions to a now outdated state of affairs when the GGNRA believed it had accomplished its illegal rescission of the 79PP. In demanding that the current NR proceed, the Superintendent has flouted the existing law on pet management in the GGNRA, the recommendations of the Federal Panel sought out by the GGNRA itself, the SAR, the Director's Order, and the very mandate of the Secretary of the Interior authorizing the NR for the entirety of the GGNRA. Should the NR proceed to cutback or eliminate the 79PP, the Superintendent will, in addition, violate: (1) the deed restrictions under which the GGNRA holds City land, and (2) the "public trust" uses (and law regarding their alienation) impressed on the GGNRA's tidelands by the Constitution of the State of California and the opinions of Federal and State Courts. Contrary to the purpose of NR, the current NR (as implemented) will only serve to foster additional litigation to rectify these violations of the law.

The Conveners Have Been Ineffective and Biased

In the NR process, conveners/facilitators are employed in order to provide some balance and fairness in the process. *(NR Act, Section 566(d).)* They are, at least in theory, the unbiased, neutral referees. The conveners in this instance, Greg Bourne and Mike Harty, have woefully failed to execute their task and demonstrated an unwillingness to act in a manner even approximating the requisite "impartial[ity]" required by the NR Act. *(Id.)*

The conveners state, in the SAR, that the "GGNRA and NPS leadership are committed to addressing this issue *in keeping with legal mandates.*" (Emphasis added.) Yet the conveners have not insisted that the NR be revamped to reflect (or even mention) the current pet management law in the GGNRA. To the contrary, the conveners attempted to convince the OBDOG alternate representative that the omission of the 1979 Pet Policy in the legal sideboards for NR was insignificant.[10] Failure to recognize the current pet management policy sets up an illegal premise for NEPA evaluations, and, as demonstrated, the GGNRA intends to implement the ESA in an unlawful manner. The conveners have acquiesced to all these legal transgressions.

The GGNRA stated to the conveners (per the SAR) that it intends to provide access to beaches and water for off-leash dog walking. This was most likely in response to the Federal Panel's second conclusion: "*GGNRA manages the majority of recreational waterfront in San Francisco and Marin Counties. These waterfront recreation sites, which include most of the available ocean beaches, are popular areas for off-leash dog walking. There are few non-GGNRA managed alternatives for beach access.*"[11] An examination of the "Nature in the City" map (Attachment E; Parts 1 and 2) that was produced by the San Francisco Park and Recreation Department in collaboration with the GGNRA, Native Plant Society, Golden Gate Audubon Society, and the Sierra Club (among others), demonstrates that all the significant beach/tideland areas have been designated as "habitat" by the GGNRA. In this NR, "habitat" is arbitrarily

[10] The omission is highly significant in light of the Superintendent's declarations that: (1) the 79PP will not be used as the baseline for negotiations; and (2) NR will never provide the dog-walking community with even the small amount of land under the 79PP.

[11] These tidelands remain subject to State "public trust" uses and may not be have their longstanding recreational usage turned into purely conservation areas without violating State law and the terms of the permit under which the GGNRA manages some of these tidelands. The GGNRA's position that the public trust doctrine goes into "dormancy" while it manages these tidelands is without any legal support. The 1987 permit specifically allows for enforcement of federal regulations on these State-owned tidelands *only* to the extent they are not inconsistent with State law. The "public trust" doctrine has been significant State law since California's admission into the Union in 1850. The general recreational uses of these tidelands are not subject to federal rulemaking of any type. Should the NR result in a proposed rule alienating the tidelands from general recreation, taxpayer litigation will surely follow.

excluded from consideration for off-leash dog walking. The conveners have not confronted the GGNRA regarding this irregularity or the GGNRA's refusal to adhere to the Federal Panel Guidelines and to Secretary of the Interior's Notice of Intent that the NR deal with the issue of off-leash recreation throughout the GGNRA.

One of the objectives (the GGNRA has for NR) that the conveners blithely mention in their SAR (at pages 7 and 9) and do not object to, is to avoid creating a national precedent for off-leash dog-walking in other National Parks.[12] We submit, in contrast, that the criteria should be the ability to allow recreation without damage to the Park itself and nothing more. Significantly, the 1979 Pet Policy and the 1996 Compendium Amendment contain built-in protections for people and the environment in off-leash areas such that it is entirely appropriate that these off-leash designations be made a Special Regulation.[13]

The SAR states that there is broad support for NR as opposed to traditional NPS Rulemaking. However, the Report did not acknowledge that an intervening ruling by the Court would allow for a third option -- acceptance of the current law as a Section Seven Special Regulation. We firmly believe the third option would be the first choice of the taxpaying public. However, Superintendent O'Neill refuses to offer the third option to the public, telling them instead (informally) that NR is mandatory. This is not the law; it is the Superintendent's personal decision and agenda. NR, as implemented here is, in fact, an attempt to circumvent the law. It is inappropriate for the conveners to condone this deception.

The conveners also have no qualms about disseminating misinformation. When discussing the effective differences between NR and Agency Rulemaking (since the GGNRA now plans to use

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[12] The circumstance under which the GGNRA's 1979 Pet Policy came into existence has not manifested itself in any other National Park, and there is no reason to believe it will do so. The Court found that the GGNRA Superintendent's discretion to create the 79PP was limited to the time period 1979 to 1983, and thereafter constrained by national regulations.

[13] In "voice control" areas (less than one percent of GGNRA land), the follow conditions apply: (1) the person responsible for the pet must have a leash available at all times; (2) pets must respond to voice control or be leashed; (3) pet excrement must be cleaned up by the person responsible for the pet; (4) pets are not allowed to dig holes, chase wildlife, or destroy vegetation; (5) pets displaying any aggressive behavior towards people or animals must immediately be leashed; (6) pets may not enter any fenced enclosures, ponds, creeks or lagoons; and (7) pet owners are discouraged from playing with their pets on steep slopes in order to prevent erosion and vegetation trampling. *(Golden Gate National Recreation Area, Code of Federal Regulations, Title 36, Chapter 1, Compendium Amendment (1996).)*

both in contravention of the Secretary's NOI), the conveners claimed that Agency rulemaking as well as the NR process are both subject to judicial review. The NR Act states, however, that issues such as Committee makeup are not subject to judicial review *(NR Act, Section 570)*, and there remain substantial questions as to whether Committee members have standing to contest any regulation resulting from NR even assuming the existence of judicial review. *(See, Center for Law and Education v. Department of Education, 396 F.3d 1152 (D.C. Cir. 2005).)*

The conveners seem to be to the liking of the GGNRA, but are not doing their job as unbiased, neutral intermediaries in the NR process. The GGNRA, anticipating the possibility that the conveners may not be ratified as facilitators by the NRC, has been rather dishonest in its manipulations of the process. For example, at the December 20, 2005 caucus, Christine Powell of the GGNRA stated that the first meeting of the approved NRC would be scheduled 3 to 4 weeks after the date of actual naming of the Committee. When it was pointed out that the NRC would need to approve or disapprove the conveners as facilitators within 10 days of the Committee being established, Ms. Powell argued that participants had somehow already approved the conveners for that facilitator role *prior* to the first NOI. When it was pointed out to Ms. Powell that the law still provided for the assembled Committee to agree or disagree to their choice of facilitators, she finally acceded and stated that the first meeting of the NRC would be within the 10 day period. The conveners said nothing. One can only conclude they are ignorant of NR procedure, or content to bend the rules to suit their purpose. In either case, their management of the NR will jeopardize the ability of any rule promulgated by this process to withstand judicial review. We would point out, that the Notice of Establishment was published in the Federal Register with no notice as to the date of the first meeting. It would appear the GGNRA has deliberately reneged on its promise to schedule the first meeting in a timely manner so as to allow the NRC to voice their approval or disapproval of the conveners as facilitators in this NR process.

The Make-Up of the NRC Is Highly Questionable

The conveners noted in their SAR that “[t]he question of ‘whether’ dogs should be allowed off-leash in GGNRA under any circumstances implicates a number of core values for different groups. For those who believe the answer should be ‘no’, the decision to participate in a potential discussion of ‘how’ dogs might be allowed off-leash may be difficult and appear inconsistent with other interests.” (SAR, p. 6) In point of fact, the proposed Committee has been assembled in such a biased way that there is no likelihood of any consensus being reached. Indeed, six of the proposed participating groups on the NRC (Center for Biological Diversity (“CBD”), Sierra Club, Coleman Advocates, SF League of Conservation Voters, Golden Gate Audubon Society, and California Native Plant Society), filed an Emergency Petition with the GGNRA/NPS/DOI proclaiming that any and all off-leash recreation in the GGNRA should be abolished because off-leash dog walking in less than one-percent of the GGNRA is destroying *the entire* Park. This inherently incredible argument is essentially the same position advanced by many of these groups as *amici* in *United States v. Barley*. The Court did not expressly consider this argument. Moreover, this argument is in fundamental conflict with the findings of the Federal Panel, which concluded that off-leash recreation *can and should* be allowed in the GGNRA, and is the authorizing premise for this entire exercise. It is inconceivable that the conveners still fight for the inclusion of these groups on the NRC who refuse to acknowledge the authorizing premise put forth by the Federal Panel. **What is most telling, however, is that the GGNRA itself also refuses to accept the Federal Panel’s authorizing premise, as there is no *a priori* commitment being made to this outcome by the GGNRA.** The composition of the proposed NRC virtually guarantees that no consensus will be reached on a proposed rule. This is yet another reason why the use of NR is inappropriate. *(NR Act, Section 563(a)(4).)*

In contrast, Ocean Beach DOG has endured longstanding criticism and discrimination both from the GGNRA and the conveners. When our primary representative resigned for personal reasons, the GGNRA and its conveners refused to bring the alternate representative into the primary representative’s position. The first reason given was that the OBDOG alternate representative (Dr. Suzanne Valente) was too “vitriolic”. The example provided of this “vitriol” was her characterization of a decision made by a group (not in NR) to support the aforementioned Emergency Petition, as being “ignorant”. Not surprisingly, the “evidence” proffered in support of the Emergency Petition (as demonstrated in our Response thereto) actually undermines its

outlandish premise. Yet when Dr. Valente pointed out to the GGNRA and conveners a highly offensive incident involving the CBD primary representative (an attorney) publishing an inflammatory letter to an animal law group (in which he stated that "the OBDOG group espouses the extremist theories of the Pacific Legal Foundation…PLF is a racist, property rights law firm"), the conveners did nothing to sanction the CBD representative. (See, Attachment F, hereto.) The GGNRA also cited as objectionable the posting on the OBDOG website of a suggested NOI Comment letter which pointed out the fact that the current law in the GGNRA is not reflected in the guidelines for the NR process.[14] Of course, comment on the NOI is a legally mandated, constructive method to provide for effective government process. **The fact that the GGNRA objects so strenuously and has failed to adequately respond to the NOI Comments as required by law indicates that the GGNRA does not have a sincere desire for this NR process to be fair, legal and effective.** Ultimately, there were still no answers at the December 20, 2005 caucus as to why OBDOG was relegated to alternate status under a primary representative for another group. Christine Powell (GGNRA) and Greg Bourne (convener) made the following excuses:

1. They had done this in other circumstances (but ***not*** to a group who originally had a primary representative and was a major stakeholder);
2. It was expedient due to the approval process that had already begun. However, they did not respond to the OBDOG representative's comment that the group they proposed to be above OBDOG was not even in the original submission to DOI/NPS, and never made application to be on the NRC during the comment period as is required;
3. Ms. Powell stated that the rule regarding replacement of the primary representative only applies *after* the NR actually started. In point of fact, the rule states that if the primary representative must drop out, the alternate should take their place if possible. The rule does not, however, specify the time frame for the substitution. (See, Attachment H – p. 5, item 4b);
4. Greg Bourne maintains that there is no difference between the alternate and primary representative in these dual roles. Again, however, when the OBDOG representative

[14] In contrast to that truthful statement, the CBD representative (an attorney) appeared at a meeting of the San Francisco Police Commission, at a time when his clients were *amici* in *United States v. Barley,* and blatantly lied to the Commission in stating that the *defendants* in that criminal prosecution had actually sued the GGNRA in order to expand off-leash recreation in the Park. This intentional misrepresentation by the CBD attorney-representative has had no effect on its participation in the NR.

asked why both groups could not be listed independently with each having a primary representative and no alternate, no answer was forthcoming and none has ever been provided.

The document entitled, "GGNRA Dog Management Negotiation Rulemaking Good Faith Participation Standards: December 2005" (see attachment G) lays out the proposed rules for NR Committee participation. As can be seen, the transgressions which have been documented to date are essentially ignored. Items #5, #6, and the subsequent threat to members of removal from the NRC in the final paragraph, appear to be the government (GGNRA) threatening to punish a group for the exercise of First Amendment rights. In particular, these threats are directed at the Ocean Beach DOG website.

On the OBDOG website, we have documented the continued, illegal (post-decision) harassment of Park users with off-leash dogs in the GGNRA, and the fact that the GGNRA continues to refuse to modify the signage to reflect the current state of the law as is required by *36 C.F.R. Section 1.7(a)(1).* Most recently, OBDOG posted a sign-on petition on its website for the public to indicate its desire to institute the 1979 Pet Policy as a Section Seven Special Regulation and then terminate the NR. This action was only taken after repeated attempts by the OBDOG representative and an OBDOG attorney to convince the GGNRA that "good faith" on their part in the NR process would necessitate changing the relevant legal framework and NEPA requirements to conform to the existing pet management policy (the law) in the GGNRA.[15] The GGNRA sees this as undermining NR; we see it as an attempt to force the GGNRA out of an unlawful process that has an unjustifiable, predetermined outcome. The primary objection was not to NR, which would have been acceptable had the issues of the illegal premise in the NOI, poor Committee selection (designed such that no consensus will be reached), and biased conveners been resolved. The following excerpts from an email OBDOG alternate representative Dr. Suzanne Valente sent to Superintendent O'Neill, and his response, are revealing:

As stated in Dr. Valente's email:

[15] Remarkably, GGNRA Head Ranger and Superintendent O'Neill stated at the December 20, 2005 caucus, "The 1979 Pet Policy is a policy upheld by the Court, but it is not the law. We have a law—no off-leash in the GGNRA".

"With respect to the OBDOG website, your demand that I censor the communications of the leadership of the group to the members of the group is unreasonable. You cannot obligate me to support the aspects of the NR process which are unlawful. If you refuse to proceed with NR in a lawful manner, you cannot demand that the members of my group be prohibited from petitioning the government or the courts for the redress of their grievances. This violates our First Amendment rights. However, this is not simply a violation of First Amendment rights, but an illegal "prior restraint" on free speech that cannot be sustained except under the most extraordinary of circumstances not present here. I wonder what the legal justification would be for punishing a participant for exercising their First Amendment rights, not to mention, for not exercising control over the First Amendment rights of others."

Superintendent O'Neill's response states:

"Your assertion of illegality lacks a foundation. Participation by a group or individual in the negotiated rulemaking process is voluntary, not a right. It is GGNRA's choice to use the negotiated rulemaking process and determine the appropriate makeup of the committee. And it is expected as a sign of good faith that organizations commit their resources to supporting, not undermining, the negotiated rulemaking process. If OBDOG, or any other group, has a stronger interest in continuing to criticize the process, on the web or elsewhere, certainly you are free to follow that path, but not as a committee member."

Superintendent O'Neill sees the NR process as requiring Committee members to relinquish their First Amendment rights. According to the Superintendent, the truth must be suppressed in order for the NR process to function properly. The Superintendent continues to mock the Director's Order that this process be "public". He continues to conceal from the public his illegal manipulations of this NR, and threatens punishment for any Committee member who brings such significant information to public light. OBDOG has in effect become a "whistleblower", and retribution for such has been elimination from the NR process.

Moreover, all government agencies, with the exception of the GGNRA, have been removed from the NRC. The governmental bodies that have a stake in the process include the City and County of San Francisco. When questioned about the participation of the City of San Francisco, Christine Powell (GGNRA) stated that she had communicated with "someone" from the City and "they" approved the decision not to have a representative, but to only send an advisor to serve on a technical subcommittee that does not yet exist. When asked to elaborate, Ms. Powell said it was "someone" in the San Francisco Park and Recreation Department, but she did not know the identity of the person. Ms. Powell promised to send the OBDOG representative an email with

the name of the San Francisco Park and Recreation Department advisor, as well as the name of the City official who allegedly approved this action. Ms. Powell has not done so. Of course, this lack of participation would allow the City of San Francisco to challenge a Rule from NR in the Courts – action that the City may be considering taking shortly in light of the fact that the baseline for the NR will not be the 79PP and will, therefore, violate the "recreation" mandate in the deeds under which the GGNRA holds a substantial amount of City land.

Negotiated Rulemaking Here Will Virtually Assure Litigation

Superintendent O'Neill claims this NR is being considered as a "model for future NRs". If that is the case, this NR should be immediately terminated so that others do not repeat the mistakes itemized here, all of which are rather clearly going to result in litigation against the GGNRA/NPS.

It bears reiterating that the original ANPR document is fatally flawed due to the significant change in the legal circumstances surrounding off-leash recreation in the GGNRA. The SAR put out by the conveners for the prospective Committee members acknowledged that certain outcomes of litigation then in progress would have a "significant effect on rulemaking by changing the relevant legal framework for decision making". Now that the GGNRA has been found to have illegally rescinded the 79PP, the GGNRA and the conveners refuse to change "the relevant legal framework" and insist on proceeding with NR as premised during the period between 2002 and 2004 when it was believed its illegal rescission of the Pet Policy had been accomplished with impunity. The SAR has "evaporated" in this regard.

The December 20, 2005 caucus was shrouded in secrecy despite the fact that the agenda included the GGNRA's long-awaited "response" to the Court's decision. Both Stephen Sayad and Don Kieselhorst (defendants in *United States v. Barley*) were denied entry to this meeting (under threat of arrest for trespassing), which was allegedly by invitation only for proposed NRC members. However, in attendance were Sally Stephens (she is neither) and Yvette Ruan (head Park Ranger). Mr. Sayad and Mr. Kieselhorst were met at the door to the GGNRA Headquarters

at Fort Mason by Ranger Marybeth McFarland (Badge #923) and another Ranger armed with a gun and a police dog who threatened them with arrest should they attempt to attend the meeting. Mr. Sayad (who provided advance notice of his intention to attend) was told he could not attend this meeting as it did not involve NR (which is by law open to the public).[16] However, the agenda for the meeting was entitled, "GGNRA Dog Management Negotiation Rulemaking" (see Attachment I hereto). It is obvious that the use of the police power threatening arrest for trespass on public property at a public meeting is arbitrary and has a chilling effect on the right of citizens to participate in the public process. Such conduct reflects the poverty of intellect of the Department's management representatives, or alternatively, an agenda which they believe supersedes the law. Clearly, this Superintendent and his subordinates are acting beyond their scope of legal authority and seem to have no consideration for the prudent utilization of scarce government resources.

The OBDOG alternate representative (our only representative) had also asked that Mr. Sayad be allowed to attend as counsel. Moreover, both Mr. Sayad and Mr. Kieselhorst had vested interests in hearing, first hand, the GGNRA's announcement of its interpretation as to how the Court's ruling was to affect not just NR but also off-leash recreation in the GGNRA unless and until the GGNRA legally alters the 1979 Pet Policy. Stephen Sayad is also the attorney who drafted the "Response to the Emergency Petition" which was to be addressed at this meeting. **Because the GGNRA had never addressed these critically important matters in any definitive way publicly (not in the media, not in writing of any form or on their website as prescribed by *36 C.F.R. Section 1.7*), there has been great confusion as to what the GGNRA perceives the rules to be** (see discussion of the West Pacific area of the GGNRA, *infra*). We wanted someone present with a legal background to interpret the GGNRA's conclusions. In retrospect, we were correct to be concerned about the legality of the GGNRA's plans to proceed, as it has become evident that the GGNRA's actions and intentions with respect to pet management in the GGNRA remain unlawful. In an attempt to conceal this, the GGNRA expressly violated the requirement for public access to NR proceedings, as well as the NPS Director's Order 75A, which emphasizes in the strongest terms the need for *public* involvement in NPS decisions. The

[16] Remarkably, the notice of the meeting was sent out via e-mail by NR convener Greg Bourne. If the meeting was not for NR purposes, then the question must be pondered as to why Mr. Bourne, theoretically an unbiased NR intermediary, was sending out correspondence *on behalf of* the GGNRA not involving the NR.

exclusion of a stakeholder's lawyer under threat of arrest is clear and convincing evidence of the arbitrary and capricious activities perpetrated by the GGNRA within this NR process that ignore its purpose and legal background.

To add to this shroud of secrecy over its illegal actions, the GGNRA demands that the NR participants withhold comment on the process from the public.[17] At the December 20, 2005 caucus, the GGNRA stated it did not plan to act on the Emergency Petition (of the CBD, et al.) at that time. This is rather absurd. The "Emergency" petition was presented to the DOI and GGNRA on August 16, 2005. The petitioners (many of whom remain NRC participants) issued a press release and the media covered the petition aggressively. If the GGNRA believed that an emergency indeed existed, surely the GGNRA would have felt compelled to act on the petition some time within the more than 4 months between its filing and their December 20, 2005 caucus announcement. However, if there is no emergency (and there certainly is not), the petition should be denied, and the petitioners notified (pursuant to *5 U.S.C. Section 555(e)*). The public is entitled to some notification on how the GGNRA perceives the "merits" of the Emergency Petition. Why would the GGNRA choose not to act on the petition rather than deny it? Do they intend to resurrect it at some time should it suit them?[18]

Remarkably, Superintendent O'Neill asserted during the December 20, 2005 caucus, that areas such as trails along West Pacific Avenue in the Presidio are now under the administrative jurisdiction of the Presidio Trust and as such will not be subject to NR or any pet management policy promulgated by the GGNRA. The Presidio, in its entirety, unquestionably remains a part of the Golden Gate National Recreation Area, in accordance with Public Law 92-589. *(The Presidio Trust Act, 16 U.S.C. Section 460bb, Appendix, Section 101, subsection 4.)* Furthermore,

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[17] In fact, this is the only reason given by the GGNRA as to why it has arbitrarily chosen to disenfranchise the Ocean Beach DOG organization by eliminating OBDOG's primary role in the NR process (even though it was published in the Federal Register that OBDOG would have a primary role). Notwithstanding the fact that OBDOG is a major stakeholder in the NR process, because OBDOG has chosen to avail itself of its First Amendment right to communicate to its membership and the public the legal and procedural wrongdoings of the GGNRA in NR through its website, OBDOG was first demoted to an alternate role in the process, and later eliminated from the process entirely.

[18] At the May 31, 2005 hearing on the appeal in *United States v. Barley,* the Court asked counsel for the government whether an emergency was being claimed such that the NPS/GGNRA could avoid compliance with *36 C.F.R. Section 1.5(b).* The answer was a clear and unequivocal "no." *(See, United States v. Barley, Order Of Affirmance, supra, p. 6, lines 17-18.)*

in the ANPR document published in the Federal Register, the Presidio of San Francisco is specifically listed as a part of the GGNRA to be considered in the NR deliberations regarding a pet management policy. There is significant historical use of the West Pacific Avenue area of the Presidio for off-leash recreation. In 1996, Superintendent O'Neill made the West Pacific Avenue area of the GGNRA off-leash (through the 1996 Compendium Amendment) *due to its "traditional" use* for off-leash recreation. In this regard, Superintendent O'Neill, in correspondence to Dr. Suzanne Valente on January 9, 2006, admitted:

> "*His* [Judge Alsup's] *decision stated that the NPS could not initiate enforcement of the pet regulation in areas where voice-control dogwalking was previously allowed without first going through rulemaking [36 CFR 1.5(b)]*".

The Presidio Trust has undertaken no Rulemaking process. Accordingly, the current aggressive ticketing and harassment of dog walkers (with dogs under "voice control") in the West Pacific Avenue area remains the responsibility of the GGNRA Park Police, and such activity is illegal. **The arbitrary exclusion of this area from NR further undermines the credibility of the process, and violates the Secretary of the Interior's Notice of Intent for this NR to deal with the GGNRA in its entirety.** Despite public requests, neither the GGNRA nor the conveners have cited any legal authority for the exclusion of the Presidio from the NR. On January 27, 2006, we were informed that the United States Attorney (for the Northern District of California) will not prosecute the citations issued in the West Pacific Avenue of the Presidio. It is apparent that the ticketing is illegal and cannot withstand judicial scrutiny. One would think off-leash areas in the Presidio would retain that status because the GGNRA has inappropriately parsed out this area from NR. However, the GGNRA intends to subject these areas to NEPA evaluation and presumably utilize their findings to terminate off-leash recreation there without officially including this area in the requisite public process. Surely they recognize this is not legal.

During the December 20, 2005 caucus, Superintendent O'Neill also indicated that all new GGNRA properties, by definition included in the ANPR document, will not be considered for off-leash recreation in NR (or at all). This will be a major issue for San Mateo County residents who recently have allowed the GGNRA to take over control of some 6,500 acres of their land, with no expectation that off-leash recreation would be banned entirely from these areas. Litigation over GGNRA promises of "recreation" in this area is inevitable, as the County of San

Mateo has no representative in the NR proceedings which would properly allow the County to challenge any Rule resulting from this NR process.

Lastly, based upon the history of the relationship between the GGNRA and the City of San Francisco and its citizens, an unpalatable result to NR will be challenged in the Courts. Superintendent O'Neill stated during the December 20, 2005 caucus that he will *never* institute the 1979 Pet Policy as a Section Seven Special Regulation. Based upon Superintendent O'Neill's discussion as to which properties are even to be considered for off-leash recreation in NR, it is clear the GGNRA does not intend to allow off-leash recreation in any significant or traditional areas of the GGNRA. This predetermined outcome is clearly inconsistent with the very purpose of NR, as well as the promises made and the deeds under which the GGNRA accepted this property.[19] NR, as it is currently framed, cannot come to consensus and cannot survive the inevitable legal challenges that will result.

The 1979 Pet Policy should have been codified as a Section Seven Special Regulation many years ago. The responsibility for the failure to do so lies at the doorstep of the GGNRA.[20] The public deeply resents the fact that they have spent over 15 years fighting Superintendent O'Neill and his management team in the GGNRA because the GGNRA has chosen to renege on the agreements it made and the rules it promulgated. The quote from the decision of the Court in the Executive Summary of this document confirms all of the above. **The GGNRA will continue such illegal action in NR unless the agencies that supervise it take action to terminate this NR.**

[19] As further confirmation of this predetermined outcome, a conversation with Robert Howarth, Chief of Staff for the House of Representatives Resources Subcommittee on National Parks, revealed that the legislators and attorneys of the Federal government have been assured by Supt. O'Neill that off-leash recreation in the GGNRA will be confined to isolated "fenced in areas or pens" where dogs will not harm the public.
[20] As stated by the Court, "[e]ven now, the government concedes that the GGNRA had full authority at all times to relax the general leash rule at the GGNRA but argues it could have done so, at least after 1983, only via a 'special regulation.'" *(United States v. Barley, Order Of Affirmance, supra, p. 5.)*

NR Will Be Expensive And Will Not Produce A Rule

NR, as currently implemented, is based upon unjustifiable premises. Beyond that, the NR process requires consensus among its participants. The current NRC has no reasonable likelihood of reaching consensus, and in fact, that is a primary criticism of this NR process. Whether or not consensus is reached, ultimately, the decision about a Section Seven Special Regulation is entirely in the hands of the GGNRA. (See NPS Director's Order 75A – Attachment D.) Christine Powell of the GGNRA estimated at the December 20, 2005 caucus that the costs of NR would be approximately $500,000. The taxpayers have the right to know that NR is not mandatory, but the GGNRA has concealed this important fact from the public. Common sense dictates that there is no point in spending at least $500,000 (in addition to the untold costs of the previous litigation) to go through a process that will further damage public relations and result in even more litigation that will likely overturn any Rule that emerges from this NR.

III. Legalities of a Section Seven Special Regulation

Superintendent O'Neill has the legal authority and the **legal obligation**, to institute the 1979 Pet Policy as a Section Seven Special Regulation. The 2001 National Park Service Management Policies state:

> **1.4.3 The NPS Obligation to Conserve and Provide for Enjoyment of Park Resources and Values**
>
> The "fundamental purpose" of the national park system, established by the Organic Act and reaffirmed by the General Authorities Act, as amended, begins with a mandate to conserve park resources and values. This mandate is independent of the separate prohibition on impairment, and so applies all the time, with respect to all park resources and values, even when there is no risk that any park resources or values may be impaired. NPS managers must always seek ways to avoid, or to minimize to the greatest degree practicable, adverse impacts on park resources and values**. *However, the laws do give the Service the management discretion to allow impacts to park resources and values when necessary and appropriate to fulfill the***

> ***purposes of a park, so long as the impact does not constitute impairment of the affected resources and values.*** (Emphasis added.)

The key issue here is the management discretion allowed the Park Service to fulfill the purposes of a park. Congress included two "specific provisions" in the enabling legislation for the GGNRA that are unique to this Park. First, the Park was established "to provide for the *maintenance of needed recreational open space necessary to urban environment and planning."* (Emphasis added.) Second, the GGNRA statute imposes a unique limitation on the NPS's discretionary power for "management of the recreation area" by providing that the "Secretary of Interior...**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." (Emphasis added.)

The NPS recognized at the outset that a special regulation would have to be created to bring their regulations into compliance with the GGNRA enabling statute requiring it to provide "recreational open space necessary to an urban environment." And, in fact, NPS Regulations anticipate such circumstances. For example, *36 C.F.R. Section 1.2(c)* provides: *"The regulations contained in part 7 and part 13 of this chapter are special regulations prescribed for specific park areas. Those regulations may amend, modify, relax or make more stringent the regulations contained in parts 1 through 5 and part 12 of this chapter."* These regulations allowed for the creation of the 1979 Pet Policy. By the summer of 1979, the GGNRA had initiated the process to bring federal regulations into compliance with the GGNRA's enabling legislation and the 1979 Pet Policy. A draft special regulation (7.97(b)) was submitted to the Western Regional Director of the NPS for approval. Department of Interior Solicitor Ralph Mihan reviewed the draft proposed regulation and found "the proposed regulation to be legally acceptable", but advised that the formal request should include an "authorship statement or a statement of significance" which "must be included within the rulemaking package before its transmittal to Washington." (Ralph Mihan, Solicitor, to Western Regional Director, Re: Proposed Rulemaking Golden Gate National Recreation Area (Pets), 7/23/79.) The draft proposed regulation in fact contained a statement of significance: the Section Seven Amendment was being proposed "because large portions of land formerly used as pet exercise areas have been included with Golden Gate National Recreation Area." (1/9/80 Regional Director Memo to

Superintendent GGNRA: Re: Proposed Special Regulation – Pets, USPROD00386-8.)[21] The proposed regulation also called for public comment "within 30 days of the publication of this notice in the Federal Register."

Although the 1979 Pet Policy was consistent with the statutory mandate for the GGNRA to provide "needed recreational open space necessary for urban environment" and required by the promise made to San Francisco when City property was donated to the Park, officials in Washington D.C. did not finalize the special regulation to bring their regulations into compliance with the GGNRA enabling statute.

The Court noted this oversight and the question whether it was intentional or otherwise, in its recent decision:

> **"In sum, for more than twenty years, the GGNRA officially designated at least seven sites *for* off-leash use. This was not accidental. It was a carefully articulated, often studied, promulgation. The responsible GGNRA officials in 1978 and thereafter presumably believed they were acting lawfully. Even now, the government concedes that the GGNRA had full authority at all times to relax the general leash rule at the GGNRA but argues it could have done so, *at* least after 1983, only via a "special regulation." In other words, the agency allegedly used the "wrong" procedure back in 1978 (and thereafter) even though a "right" procedure to reach the desired result was available and could have been used. The government has not revealed its internal justification for following the "wrong" process. Whatever it was, the justification was abandoned in 2002 with the two-word explanation that it had been "in error." With this *ipse dixit,* the NPS wiped away two decades of policy, practice, promulgations, and promises to the public."**
> (*United States v. Barley, Order Of Affirmance, supra, p. 5.)*

Moreover, the Federal Panel, after reviewing (in 2002) the applicable authorities, policies, planning guidelines, and information on Park setting, natural and cultural resources, and public safety, concluded that it was appropriate for the GGNRA to create a Section Seven Special Regulation for pet management in the GGNRA that would specifically allocate areas for off-leash recreation. In short, there can be no doubt that a Section Seven Special Regulation for pet management in the GGNRA is within the legal discretion of the Superintendent. Indeed, Superintendent O'Neill has recently acknowledged that he has the authority to designate the

[21] The production number for this document (and others) indicates it was produced through discovery by the government in *Ft. Funston Dog Walkers v. Babbit, supra, 96 F.Supp.2d 1021 (N.D. Cal. 2000).*

1979 Pet Policy as a Section Seven Special Regulation, yet refuses to do so notwithstanding his pre-litigation announcement that "the time for conflict is over."[22] It is readily evident that Superintendent O'Neill plans to accomplish through NR what could not be accomplished through prosecution.

It is also clear from the enabling legislation for the GGNRA that the NPS has a legislatively authorized **management responsibility** to provide for appropriate recreation in the GGNRA. As set forth in *36 C.F.R. Section 1.5(a):*

> *Consistent with applicable legislation and Federal administrative policies, and based upon a determination that such action is necessary for the maintenance of public health and safety, protection of environmental or scenic values, protection of natural or cultural resources, aid to scientific research**, implementation of management responsibilities, equitable allocation and use of facilities, or the avoidance of conflict among visitor use activities, the superintendent may: (2) Designate areas for a specific use or activity.***

In order for the NPS to fulfill its legal obligations to the public, it can and must designate specific areas of the GGNRA for off-leash recreation, and codify this action in the form of a Section Seven Special Regulation. When considered against the backdrop of (1) the Court's reinstatement of the 1979 Pet Policy; (2) the irrelevance of NR now that there is no longer a "need for a rule" (except by codification); (3) the horribly flawed NR that is only in its planning stage; and (4) the avoidance of future litigation and expenditure of millions of dollars, the only proper course of action at this time is to implement the 1979 Pet Policy as a Section Seven Special Regulation. The time for conflict is indeed over.

IV. Why the 1979 Pet Policy Should Be a Section Seven Special Regulation

The 1979 Pet Policy would be appropriately instituted as a Section Seven Special Regulation because it best reflects the intentions of those who created the GGNRA and the promises made to the citizens in order for them to approve the creation of an urban National *Recreatio*n Area.

[22] Superintendent O'Neill affirmed that he had the authority to implement the 1979 Pet Policy as a Section Seven Special Regulation at the NR caucus on December 20, 2005 when questioned by a proposed NRC member.

Part A is a historical review of the 1979 Pet Policy which serves to document the previous assertion.

Part B will document the inherent illegality of all attempts the GGNRA (through Superintendent O'Neill) has made to limit off-leash access subsequent to the institution of the 1979 Pet Policy.

Part C will outline the environmental considerations which establish that the areas included in the 1979 Pet Policy are environmentally able to withstand the minimal impact of off-leash recreation in the extremely small amount of land at-issue, and that Park resources will not be impaired by implementation of the 1979 Pet Policy as a Section Seven Special Regulation. In the interest of brevity, we will address three of the primary areas of concern: Ocean Beach, Crissy Field and Fort Funston. Similar arguments can be made for the remaining areas in San Francisco and Marin County that are a part of the 1979 Pet Policy.

Part A: History of the 1979 Pet Policy

The GGNRA was established, in part, through a campaign in 1970 by Secretary of Interior Walter Hickel "to bring parks to the people", putting the National Park Service in a movement to increase outdoor recreation in urban areas. (*U.S. Department of Interior News Release, September 14, 1970.)*

Congress established the GGNRA on October 27, 1972, "to preserve for public use and enjoyment certain areas of Marin and San Francisco Counties, California possessing outstanding natural, historic, scenic, and recreational values." (*16 U.S.C. Section 460bb*.) In addition to this generic statement of purpose appearing in most national park statutes, Congress included two "specific provisions" that are unique to the GGNRA.

1. The Park was established "to provide for the *maintenance of needed recreational open space necessary to urban environment and planning."* (Emphasis added.)
2. The GGNRA statute imposes a significant limitation on the NPS' discretionary power for "management of the recreation area" by providing that the "Secretary of Interior...**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."

While composing a list of enumerated recreational activities contemplated for the new urban park would be virtually impossible, legislative history reveals what Congress meant by "needed recreational open space necessary to urban environment." "It is a well-recognized principle of statutory construction that contemporaneous interpretations of dated legislation are ordinarily given considerable deference when its meaning is later questioned." (*National Rifle Association of America v. Potter 628 F. Supp. 903, 911 (D.C. Dist. Col. 1986).)* In addition to sun bathing, picnicking, horse riding, swimming, hiking and fishing, off-leash dog walking was specifically addressed during Congressional hearings. For example, a letter by a seven year old child from San Francisco petitioned the Chairman for a dog park where she could play and socialize her dog: "Dear Congressman Roy Taylor: I want a park so I can play in the park and my sister wants a park too and so my dog can play with other dogs and my Mom wants a park so she could take my dog out to play. I hope you will make a park. Elizabeth Linke." (*Hearings Before the Subcommittee on Interior and Insular Affairs, House of Representatives, p. 414.)*

At the time, all municipal beaches and adjacent city parks considered for inclusion in the Park were dedicated to off-leash recreation.[23] When voting for Charter Section 7.403-1(a) authorizing the transfer of the City parks to the GGNRA, the citizens of San Francisco were told that "the transfer of these lands is a technical resolution allowing the City and County of San Francisco to transfer city lands to the Golden Gate National Recreation area…a national urban park established in 1972 by Congress to preserve 34,000 acres of land and water in San Francisco and Marin for recreational use by all citizens." Aware that certain unique restrictions were included in the enabling statute requiring the NPS to maintain "recreational open space necessary for urban environment and planning", San Francisco adopted the "technical resolution" authorizing the transfer of City parks for "recreational use by all citizens." Allaying concern over the transfer of City property, the NPS promised the City that "historical recreational use" would be continued. Pursuant to this promise to maintain historical recreational usage, the GGNRA developed new regulations to reflect "the actual Management practices which have become

[23] As noted, it has been the law of the State of California since its inception in 1850 that the State holds the tidelands in trust for its citizens. In decisions from both the United States and California Supreme Courts, the uses encompassed by the public trust doctrine have been held to include "general recreational" activities. NR cannot legally alter public trust uses of tidelands; the tidelands in the GGNRA continue to be held in trust by the State as an absolute incident of the State's sovereignty.

established in park areas, either through legislative requirements or policy decision." (Memo from Associate Director, Management and Operations to Directorate and Field Directorate, 12/22/77). If a general regulation "adversely affects only one or a few parks, it may be better for these parks to establish special regulations rather than to weaken or further complicate the general regulation. It should be kept in mind that these special park regulations can relax, make more stringent, or otherwise modify any general regulation." The NPS recognized at the outset that a special regulation would have to be created to bring their regulations into compliance with the GGNRA statute requiring it to provide "recreational open space necessary to an urban environment."

Before the transfer occurred, an Agreement/ Memorandum of Understanding ("MOU") between San Francisco and the Federal Government gave the City Planning Department jurisdiction to review NPS plans within formally owned City lands after their incorporation into the GGNRA. The 1975 MOU "provides that the national recreational area will formally notify and consult with the city on all planning matters relating to these parcels, future transit system proposals, and planned construction on all national recreation area lands within the boundaries of the city." (Final General Management Plan Amendment Environmental Impact Statement for Presidio of San Francisco, July 1994, p. 6). The GGNRA General Plan (1980) also notes that "[a] memorandum of understanding between the city and the National Park Service ensures their review of park proposals, particularly those related to transit systems, proposed construction, and sand incursion upon roadways adjacent to the park." (Id., at 220). Finally, the enabling statute imposes this duty on the NPS, mandating that "the Secretary of the Interior *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." (*16 USC Section 460bb, emphasis added*).

Acting on the promise to the City and the mandate to manage park resources "consistent with sound principles of land use planning and management" for the "maintenance of needed recreational open space necessary to urban environment and planning", the NPS developed the 1979 Pet Policy through the auspices of the Citizens Advisory Committee which designated certain areas for "voice control" in San Francisco and Marin counties. The development of this

Policy was initiated "because the ordinary guidelines outlined in the Code of Federal Regulations do not really apply in an urban area. People and their animals have been visiting the park for too long to apply an all-inclusive arbitrary policy."

Documents reflecting the development of the Pet Policy leave no question that the NPS and not the Citizens Advisory Commission developed the off-leash policy for GGNRA. In October 1977, Rolf Diamont, "GGNRA Environmental Coordinator", prepared a memorandum proposing a "Draft Dog Policy for San Francisco Unit." His memo enumerated the following guidelines:

1. "No regulation, verbal or written, should be attempted that cannot be reasonably and consistently administered."
2. "Dog regulations should be different for different areas of the park reflecting public needs and attitudes as well as urban geography and our capabilities."
3. "When we discourage or restrict dogs in any area, whenever possible, an alternative site where dogs are allowed should be suggested."
4. "Ocean Beach: no rules should be enforced here. Ocean Beach is too large and too accessible to control dogs. It would be a logistical nightmare for the Park Service to try. Also lifestyles are such on Ocean Beach, that an inflexible NPS here could hurt our improving relations with visitors."

To facilitate public review of the proposed policy, the Citizens Advisory Commission established a Pet Policy Committee to conduct hearings on the proposed policy. A briefing memorandum for the record prepared by the Staff Assistant to the General Superintendent, dated April 3, 1978, acknowledged that the federal leash law was "applicable to all properties of GGNRA." The NPS realized that a special regulation would have to be prepared: "A deviation from this regulation will require the writing of a special regulation specific to GGNRA". The federal on-leash regulation *(36 C.F.R. Section 2.15(a)(2))* was not enforced while the new policy was being developed: "Enforcement of the CFR has been non-existent until a dog policy and possibly a special regulation is established."

The memorandum confirmed the following off-leash areas were being used in San Francisco: "Fort Mason, Crissy Field, Baker Beach, Ocean Beach, Sutro Park, and Fort Funston."

Community concern over the future of Fort Funston was specifically addressed: "Many dog owners are concerned about the possibility of losing Fort Funston as an area where dogs can be exercised off leash."

In Marin County, several areas were also listed as off-leash. Particular problems were noted at Stinson Beach where the GGNRA had banned dogs. Although off-leash recreation was permitted on the portion of the beach owned by the county, NPS efforts to enforce the ban met predictable resistance from the community. Between May 1977 and February 1978, there were 15 citations issued, 5,660 written/oral warnings, 2 dog bites, and 200 dogs captured and returned to owners. The memorandum warned that community resistance could be heated: "The no pet policy is a major problem area, consuming a large portion of routine ranger patrol time to enforce. Visitors for the most part choose to ignore plainly-posted-no pet signs within the park. The majority of dog owners are cooperative; however, some are most unhappy with the policy to point of being verbally, and in one case, physically abusive to rangers attempting to enforce no-pet regulations."

Several public hearings were held in 1978 for the purpose of developing an off-leash policy for San Francisco. By September 1978, the Citizens Advisory Commission had approved proposed guidelines for the San Francisco Pet Policy, designating Fort Funston, Ocean Beach, Baker Beach, Crissy Field, Lands End, and Fort Miley as official “voice control” parks. Later, the Great Meadow at Fort Mason was added as an official "dog run" area in the 1980 General Plan. In October 1978, Lynn Thompson, General GGNRA Superintendent, accepted in total the Advisory Commission's recommendation. "As you know the Advisory Commission approved the proposed guidelines for a pet policy for San Francisco Unit at their September 27 meeting. We are accepting in total the Commission's recommendation." (Lynn Thompson Memo to San Francisco Unit Manager, 10/6/78.)

The NPS issued press releases publicizing the official off-leash policy. (Lynn Thompson Memo to Coalition for San Francisco Neighborhoods, 10/17/78.) Consistent with the GGNRA’s enabling legislation, the NPS again told the City that this Policy was developed because the "[e]xisting federal regulations” were not "a viable situation in an urban area."

By the summer of 1979, the GGNRA had initiated the process of bringing federal regulations into compliance with the GGNRA's enabling legislation and the off-leash policy. A draft special regulation (7.97(b)) was submitted to the Western Regional Director of the NPS for approval. Department of Interior Solicitor Ralph Mihan reviewed the draft proposed regulation and found "the proposed regulation to be legally acceptable", but advised that the formal request should include an "authorship statement or a statement of significance" which "must be included within the rulemaking package before its transmittal to Washington." (Ralph Mihan, Solicitor, to Western Regional Director, Re: Proposed Rulemaking Golden Gate National Recreation Area (Pets), 7/23/79.) The draft proposed regulation in fact contained a statement of significance: the Section Seven Amendment was being proposed "because large portions of land formerly used as pet exercise areas have been included with Golden Gate National Recreation Area." (1/9/80 Regional Director Memo to Superintendent GGNRA: Re: Proposed Special Regulation – Pets, USPROD00386-8).[24] The proposed regulation also called for public comment "within 30 days of the publication of this notice in the Federal Register."

Although the 1979 Pet Policy was consistent with the statutory mandate for the GGNRA to provide "needed recreational open space necessary for urban environment" and required by the promise made to San Francisco when City property was donated to the park, officials in Washington D.C. did not finalize the special regulation to bring their regulations into compliance with the GGNRA's enabling statute.

Initially, the transfer of all municipal beaches and adjacent parkland to the NPS created no problems for San Francisco. The NPS honored its statutory mandate to maintain "recreational open space necessary for an urban environment" and the promises to the City to continue historical use of City donated property.[25]

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[24] As noted in footnote 17, the production number for this document indicates it was produced through discovery by the GGNRA in *Ft. Funston Dog Walkers v. Babbit, supra, 96 F.Supp.2d 1021 (N.D. Cal. 2000).*

[25] Again, the tidelands remain subject to the public trust and thus cannot, whether through NR or traditional federal rulemaking, have their "general recreational" use changed absent some compelling reason and through proper California legislative legal process.

Part B: Illegal Modifications to the 1979 Pet Policy

Since 1989, a new anti-recreation ideology has pervaded GGNRA policy. In fact, the GGNRA experimented with changing its name to "Golden Gate National Park" ("GGNP") in an effort to convince citizens of the Bay Area that the paramount mission of the NPS is to bring the wilderness to the City.[26] This ran counter to the intentions of the City of San Francisco and its citizens who had been promised that the GGNRA would remain an urban recreation area. As minutes of the San Francisco City Planning Commission, dated December 5, 1974 confirm, the resolution to transfer City property to the GGNRA was approved on that day because the Commission was told: "the deed transferring jurisdiction over the parcel to the Federal Government would specify that the property should be used for Open Space and Recreational purposes only."

In stark contravention of the City's mandate and the GGNRA's promises, the following exemplifies the newfound position of the NPS/GGNRA: ***"Ocean Beach without the people is an incredible habitat. But people think of it as a sandbox or their backyard."*** (Daphne Hatch, Chief of Natural Resources Management and Science for the GGNRA.) [27]

This statement by GGNRA Chief Hatch epitomizes the conflict of ideologies we are currently experiencing over the GGNRA. The citizens of San Francisco **do** consider the GGNRA as their backyard, and Ocean Beach as their sandbox. This is because many urban dwellers have **no** backyard, and no space for their own sandbox! That was the purpose of establishing an "urban *recreation* area." The historical references presented here should clarify the source of the perspective of San Franciscans. Beyond that, the Federal Panel that (in 2002) reviewed the applicable authorities, policies, planning guidelines, and information on Park setting, natural and cultural resources, and public safety concluded, *inter alia*: *"GGNRA parkland is immediately*

[26] On August 28, 2001, the GGNRA Advisory Commission meeting was opened by Chair Richard Bartke as a regular meeting of the Advisory Commission to the National Parks in the Golden Gate Area. Mr. Bartke was asked to correct that reference by a concerned citizen, Michael Goldstein. Mr. Goldstein stated publicly in his comments to the Commission that this was not the first time he had addressed the Commission on this topic and that this practice of omitting the word "recreation" from the Park's name had become a matter of public concern.

[27] Ms. Hatch's quote is taken from the article, "After the Crowds Have Gone…"; San Francisco Chronicle, September 7, 2005, authored by Patricia Yollin.

adjacent to San Francisco, one of the most densely populated urban centers in the United States of America, and manages a significant portion of recreational open space in the city. Most residents do not have 'backyards' or access to private open space to exercise their pets off-leash. Residents rely on the close proximity of GGNRA open space for this purpose." (*ANPR Decision Documents; Federal Panel Recommendations, supra, Section 3, emphasis added.*) It was for this reason, in part, that the Federal Panel recommended that the GGNRA proceed to establish appropriate NPS sanctioned off-leash recreation areas in the GGNRA.

Hiding behind an ill-conceived, single minded mandate to protect the natural resources in the Park at all costs, local GGNRA management has decided they want to make the GGNRA solely a habitat for wildlife and native plants, not a recreational area. They resent the fact that the citizens of the Bay Area continue to desire to use the GGNRA for recreation, and attempt to blame off-leash recreation in less than one-percent of the GGNRA for purported damage to the *entire* Park.

Yet it is the GGNRA's recreational value that was of the utmost importance to Congress in establishing this unique urban park. In their words, the GGNRA was to be a "new national urban recreation area which will concentrate on serving the outdoor recreation needs of the people of the metropolitan region." The GGNRA's mandate is to "expand to the maximum extent possible the outdoor recreation opportunities available in this region." (*1-1. R. Rep. No. 1391, 92nd Cong., 2nd Session (1972).)*

In stark contrast to the recreation mandate, local GGNRA management has moved to *create* habitat in areas most heavily utilized by the populace for recreation, especially off-leash recreation. For example, in 1989 the GGNRA, under the supervision of Brian O'Neill, signed on to a biosphere habitat program entitled "Man and Biosphere Habitat Programme" ("MAB" or "MAP"). This act, in and of itself, is in direct violation of the enabling legislation for the GGNRA. One would be hard pressed to find a philosophy in greater conflict with the recreational purposes of the Park than that of Peter Bridgewater, Secretary of the MAB/MAP Programme, who has said, "Earth would be a better place if we had no people."

This movement by the GGNRA to reinvent the purpose of the Park is not simply theoretical. A biosphere reserve, by definition, has a core protected area which is to be undisturbed by human activity, except for scientific research. The May 1996 planning documents for Ft. Funston state in part: “This plan would basically split Fort Funston down the middle using the Sunset Trail and Horse Trail as the dividing line.” Accordingly, a portion of the Park would be completely eliminated from public use. This specific plan has never been communicated to public users of the park. (An article outlining the implications of the Biosphere Habitat Designation at Fort Funston in the GGNRA is appended hereto as Attachment J.)

Moreover, the principles of the MAB/MAP program directly conflict with the GGNRA’s requirement to notify and obtain permission from the City of San Francisco when any modifications to GGNRA property are planned. Congressional attempts to pass legislation that would outlaw the implementation of the MAB/MAP Biosphere Habitats are grounded in the legislative acknowledgement that MAB/MAP programs circumvent and /or eliminate public input in the use of public lands. (Chronicled briefly in Attachment J.) The requirements for notification, consultation, and approval from the City for any substantial alteration of the natural environment of the transferred lands is outlined in a letter from then San Francisco City Attorney Louise Renne dated December 19, 2000. (Attachment K). It is pointed out in this letter that the GGNRA did not fulfill any of these contractual responsibilities in 1995 and 2000 when substantial areas of Fort Funston were closed to the public under the pretense of habitat protection for the endangered Bank Swallow. These closures were **not** preceded by the requisite environmental review (NEPA) to ensure the efficacy of the measures to achieve the stated purpose. Furthermore, once the habitat project was completed, it proved to be detrimental to the Bank Swallow. Yet the GGNRA proceeded to close off even more property and repeat the process, once again negatively affecting the Bank Swallow. The premise of these closures to create habitat clearly was not protecting the Bank Swallow. The closures were, in reality, unlawful biosphere habitat projects.

The conflict of ideologies regarding Park use is ever increasingly being resolved by the GGNRA unilaterally and illegally in favor of habitat creation, not recreation. For the time being, only a Court Order has slowed this process (in less than one percent of the GGNRA). **It has become**

apparent that the pattern and practice of the GGNRA, in a broad scope, is to *create* habitat adjacent to historic off-leash recreational areas, then utilize the proximal existence of habitat to justify the elimination of off-leash recreation. The map entitled "Nature in the City" (Attachment E; Parts 1 and 2) produced by SFRPD, GGNRA, Sierra Club, Yerba Buena Chapter of the California Native Plant Society, Golden Gate Audubon Society, the Presidio Trust, Golden Gate National Parks Conservancy (most of whom are proposed NR Committee members) demonstrates that these organizations intend to take essentially **all** of the GGNRA 1979 Pet Policy off-leash areas and designate them as "habitat", rendering them unfit for traditional recreation enjoyed by humans and their pets. Major portions of the GGNRA may well turn into fenced compounds -- off limits to all but the NPS service staff assigned to keep the rest of us out. This is **not** what San Franciscans bargained for, and were promised by the NPS/GGNRA so many years ago, and is clearly inconsistent with the very purpose for which the Park was created.

Part C: Environmental Issues in Areas Designated By the 1979 Pet Policy

There are several areas where off-leash recreation is allowed by virtue of the 1979 Pet Policy that have issues of environmental concern. The question at hand is whether those environmental issues are legitimate barriers to implementing the 79PP as a Section Seven Special Regulation. We do not believe so, and will examine the environmental issues for each of these areas in detail in this section.

OCEAN BEACH

The purportedly threatened Western Snowy Plover ("WSP") roosts at Ocean Beach seasonally. Effective October 31, 2005, the United States Fish and Wildlife Service ("USFWS") re-evaluated the critical habitat for the WSP, and declined to list any area in the City and County of

San Francisco as critical habitat for the WSP.[28] In the text of the explanation of their decision, USFWS made the following findings:

> *"Our current designation of critical habitat is different from the 1999 rule in two primary ways. In this designation, we utilized a different methodology for determining essential areas, and we relied upon additional scientific information which was not available in 1999. Thus, this rule, while similar in many respects to that in 1999, is a new designation, and does not designate the same areas."*

With respect to Ocean Beach, the following is stated:

> *"We have decided not to include the suggested additional areas because they do not meet our three criteria from the Methods section: They do not support either sizeable nesting populations or wintering populations, nor do they provide unique habitat or facilitate genetic exchange between otherwise widely separated units. Although we do not consider these areas essential for recovery, we do consider them important, and will continue to review projects in these areas that might affect WSP as required by sections 7 and 10 of the Act."*

Allowing humans and off-leash dogs to enjoy Ocean Beach is not a new project; it is an activity that has persisted on Ocean Beach for well over 50 years. The GGNRA might find their best management practices later in the text of the new USFWS designation:

> *"Nest exclosures, predator-proof trash receptacles, aversion conditioning, and both lethal and non-lethal control of predators have been successful in reducing the impacts of predators on plover reproduction and survival. We believe that these actions implemented to reduce the impact of predators on plover nesting, and other management measures designed to reduce the potential impacts of humans (e.g. use of symbolic fencing, public education, and enforcement of regulations), are responsible for the increases in plover breeding success documented at many locations."*

[28] Federal Register: September 29, 2005 (Volume 70, Number 188.) http://www.fws.gov/policy/library/05-19096.html

We refer you again to OBDOG's extensive evaluation of and recommendations for management of the plover at Ocean Beach in our Response to the Emergency Petition (Attachment L hereto). In short, proper control of beach fires and camping in the areas where the plover roosts, exclosure fencing of roosting areas (where appropriate), control of the litter and the ravens (predators of the plover) the litter draws, and issuance of citations to the owners of the less than one-half of one-percent of dogs that have chased plovers (this data comes from the GGNRA's own report), would adequately quell any environmental concerns. All these measures are appropriate to protect the plover from predators and humans (as well as dogs) at Ocean Beach. However, year-round leashing of dogs on the entire 3.5 mile stretch of Ocean Beach is not a rational, measured response to the plover's seasonal presence on approximately 0.4 miles of Ocean Beach, and it does not address the hazards that both humans and predators present. The GGNRA's predetermination that only ½ mile of Ocean Beach will be considered for off-leash recreation in NR demonstrates how ill-conceived and unlawful this NR has become. The conveners show no knowledge of the history of the Park, the contracts governing Park use, and the public trust impressed on the tidelands encompassed by the 1979 Pet Policy.

The language of the ESA contemplates and supports the position that any loss of these recreational areas be balanced by *scientific proof* that such sacrifice will indeed save the WSP from extinction. Clearly, the decision not to include Ocean Beach as critical habitat demonstrates that such scientific evidence cannot be provided. In fact, the best scientific data currently available establishes that the WSP is not threatened or endangered at all. Significantly, a study commissioned by the USFWS and the USGS in June of 2000 noted: "**Coastal and inland populations of Snowy Plovers in the western United States are currently being managed separately; coastal populations are protected as a Distinct Population Segment under the U.S. Endangered Species Act, while inland populations are not listed. Our study provides *no evidence* of genetic differentiation between coastal and inland populations.**" (Emphasis added.)[29] These findings demonstrate that the WSP population is far greater than previously believed, and so large as to no longer qualify the WSP as either threatened or endangered. While we recognize that the GGNRA cannot choose to ignore management of the

[29] Population Differentiation among Snowy Plovers (Charadrius alexandrinus) in North America; Leah R. Gorman, June 6 2000. Abstract at: http://www.californiastatehorsemen.com/Enviro_Plover.htm

WSP unless and until the USFWS formally delists the plover, this evidence should temper the decision-making when it will result in depriving the public of valuable recreational resources, as expressed in the language of the ESA.

CRISSY FIELD

"The 1988 Crissy Field Site Improvement Assessment evolved from concepts present in the 1980 General Management Plan. The Crissy Field plan recommends native planting, preservation and enhancement of the site's natural qualities, and preservation of views of the bay while recognizing the needs of existing and future visitors." (Final General Management Plan, Amended Environmental Impact Statement, Presidio of San Francisco, July 1994, p. 5.)

Public concern over the impact of the plan on recreation surfaced in 1994. Wind surfers and dog-walkers were concerned that the new Crissy Field proposals did not address future use of the area for these recreational activities. On November 28, 1994, the Crissy Field project team met with representatives of boardsailors and Rich Avanzino, then President of the SF SPCA, to discuss "the direction [they] were going." (USPROD00684.)

Meanwhile, the GGNPA encountered problems obtaining donations for the project because of these concerns. Toby Rosenblatt was responsible for raising funds on behalf of the GGNPA for the restoration project. He became alarmed in 1994 upon discovering that NPS officials were not honoring the "voice control" 1979 Pet Policy established when the City donated Park lands to the GGNRA. In December 1994, Mr. Rosenblatt wrote a letter to Superintendent O'Neill and Presidio Manager Robert Chandler, protesting reports that Rangers and Park Police were approaching people in the Presidio, Crissy Field, Upper Fort Mason and Ocean Beach "telling them about a leash law and enforcing the law." Mr. Rosenblatt disagreed with the change in enforcement and warned "[i]t will raise a very major reaction, as you know, in the community and will seriously impact relations with lots of people". He also noted that the enforcement was impacting fund raising efforts for Crissy Field: "I know that a change which implements such a law will hurt our fund raising efforts for Crissy and elsewhere - in fact that is beginning to happen already." Copies of the letter were sent to Greg Moore, Executive Director GGNPA, and Amy Meyer of the GGNRA Citizens Advisory Committee. (USPROD00694.)

Nevertheless, the NPS refused to include off-leash recreation in official plans for Crissy Field.

In February 1995, Richard Avanzino met with Superintendent O'Neill, Presidio Manager Chandler and GGNPA Director Moore in order to address concerns "about the continued lack of official acknowledgment and recognition for this vital recreational activity." In a letter summarizing these discussions, Mr. Avanzino noted that the NPS was refusing to provide official recognition because federal regulations require dogs to be leashed**, and many NPS staff and powerful environmental groups who want a wetlands established at Crissy Field are opposed to off-leash dogs. NPS also threatened to retaliate if dogwalkers pushed for official recognition during the planning process: "[I]f we advocate publicly for official recognition and status, our efforts will be frowned on and may well be greeted with retaliatory action."** The SF SPCA responded by demanding official recognition: "We want the National Park Service to officially acknowledge and preserve off-leash dog walking as it exists today at Crissy Field. We want this acknowledgment to be reflected in the legal and other documents pertaining to Crissy Field, as well as in the official design plans for the site." Copies of the letter were sent to Senators Feinstein and Boxer and Representatives Pelosi and Lantos. (USPROD00666-7.)

Public pressure continued to build. On March 28, 1995, a public debate over the issue of a wetlands and its potential impact on off-leash dog-walking was held at the Commonwealth Club. A flyer for the lecture, entitled "Wetlands at Crissy Field - Is this a Good Idea?" identified the speaker as James F. Kirkham, Advisory Partner, Pillsbury Madison & Sutro, Native San Franciscan and Outdoorsman.” Summarizing the issue up for debate, the flyer noted: "this habitat could include up to half of the entire acreage of Crissy Field, which could drastically reduce the amount of space left for recreational activities, including off-leash dog exercise." (USPROD00681.) A few days later, on April 1, 1995, a massive Presidio “dog-in” was held to show support for off-leash dog walking at Crissy Field. (USPROD00679-80.)

In April 1995, Mr. Avanzino met with Superintendent O'Neill and Citizens Advisory Commission members Amy Meyer, Jacqueline Young, and Trent Orr to discuss the status of the

1979 Pet Policy and the issue of inclusion of officially designated off-leash areas in the Crissy Field Plans. A letter memorializing the meeting indicates the following issues were resolved:

1. The "NPS will again honor the Pet Policy";
2. “Legal counsel for the NPS has advised" that the Superintendent has "discretionary authority to reinforce through the Compendium mechanism the principles expressed in the Pet Policy";
3. "This is permitted even though there is some conflict with the Code of Federal Regulations";
4. The NPS agreed to include "site-specific plan that clearly delineates off-leash dog walking areas";
5. The NPS agreed "to public review and participation at the level of the Golden Gate National Recreation Area Advisory Commission of any future changes to the agreed upon off-leash dog walking areas." (Richard Avanzino letter to Brian O'Neill, April 27, 1995.)

Subsequently, the NPS reassured the public (in newspaper articles) that off-leash dog walking would continue after the wetlands were constructed. "The National Park Service announced it 'has no intent' to forbid off-leash, even if a large wetlands area is restored along the northern waterfront....Superintendent O'Neill reassured the public, ‘All plans either maintain or expand off-leash dog walking. Under ***any*** future scenario, more generous areas of the Presidio's northern waterfront will be available to dogs.’" (Steve Rubenstein, San Francisco Chronicle, "Canine Lovers Win Fight Over Off-Leash Walking", emphasis added, USPROD00678.)

Superintendent O'Neill issued the Compendium Amendment on July 8, 1996, which (like the 79PP) included Crissy Field as a “voice control” area: "On beach proper, beginning at the West Gate of the Promenade and old Airfield, to the eastern park boundary adjoining the Marina Green, bounded on the south by the southern edge of the Promenade and the old Airstrip north to

San Francisco Bay." The Compendium Amendment confirms these areas (including West Pacific Avenue in the Presidio) were used for off-leash recreation predating establishment of the park: "The park areas designated for this use are sites where this activity has occurred for many years predating the establishment of the park." (“*Golden Gate National Recreation Area, Code of Federal Regulations, Title 36, Chapter 1, Compendium Amendment”,* GG1 000067-81.)

On October 2, 1996, the GGNRA issued a “Finding of No Significant Impact” (“FONSI”) for the Crissy Field project. Included in this document were notes about the comments and concerns voiced during the Comment period for the Environmental Assessment (“EA”). One letter, from an individual, enclosed petitions circulated prior to release of the EA. Although there were 3 separate petition texts, over 2,700 stated: “We, the undersigned, oppose the creation of an artificial Crissy Field wetland that would cause conflicts with traditional recreational uses, including off-leash dog walking. We strongly support expanded opportunities for off-leash dog walking at Crissy Field, and consider it essential that this activity be officially preserved, and protected in the design plans for Crissy Field.” Over 800 additional signatures were collected on petitions which were silent on the issue of a wetland, addressing only the support of continued opportunities for off leash dog walking at Crissy Field and other sites.

The FONSI addressed these concerns as follows: “The Crissy Field Plan addresses the concerns raised in these letters. The plan also addresses the concerns raised by the petition. It includes ***expanded opportunities*** for off leash dog walking, and the marsh design, as noted in the EA, incorporates features to avoid conflict between other recreational activities, such as off leash dog walking, and wildlife. These comments do not raise issues beyond those already addressed in the EA.” (Emphasis added.)

In letters to the public, the NPS once again reassured Bay Area residents that the off-leash policy permitted recreation in areas where it predated creation of the Park. On November 16, 1996, Superintendent O'Neill sent a letter to "Friends of the National Park Service" confirming that off-leash recreation is permitted in GGNRA despite a federal regulation prohibiting it: "The National Park Service's federal regulations prohibit off-leash dog walking in the National Park Systems areas. However, at GGNRA we recognize that off-leash dog walking predates the creation of this national park and is a valued privilege in this community. Consequently, we

work closely with the community to identify creative ways to allow off-leash dog walking." (USFW 00696.)

As promised, the Crissy Field Environmental Assessment explicitly recognized continued off-leash dog walking. Section 2.1.2.10 ("Dog Use Areas") provides: "Dog walking is a popular activity at Crissy Field, and both alternatives provide for the continued enjoyment of that activity. An approximately 70 acre area would be available for dog activities. Walking dogs off leash under voice control would be permitted on the Promenade and beach east of the U.S. Coast Guard station, on the restored airfield, and in the East Beach area." Indeed, the Crissy Field Plan Summary confirmed that the proposed plan includes 70 acres for "off-leash dog walking." (Id., p. 10)

Construction began in 1998 and the project was completed in 2001. The restoration project cost between $32 and $34 million dollars of private funds raised by the Golden Gate National Park Association. Significantly, the additional acreage promised by the GGNRA for off-leash recreation at Crissy Field *never* materialized. Again, the NPS/GGNRA failed to make good on its promises to the public.

In 2002, the GGNRA illegally rescinded the 1979 Pet Policy, banned all off-leash dog-walking in the GGNRA, and commenced a massive campaign of harassment and ticketing of off-leash dog walkers in areas specifically designated as "off-leash" under the 1979 Pet Policy. As set forth in the Court's June 2, 2005 decision, this rescission was illegal.

If the GGNRA's own environmental studies, and their promises to the SF SPCA and the public are to be believed, there will be no problem at Crissy Field should the 1979 Pet Policy be implemented as a Section Seven Special Regulation. Instead, the NR as currently envisioned by Superintendent O'Neill (in derogation of the Secretary of the Interior's "Notice of Intent"), excludes the "waterfowl protection area" (artificial wetland and its vicinity) from consideration for off-leash recreation. Even though the FONSI clearly states the design will avoid conflict, and although the GGNRA acknowledges there are no protected species in this area, the restriction has nevertheless been mandated in this NR. Once again, the GGNRA has violated its requirement to preserve and enhance recreation in this "urban recreation area". And once again

the GGNRA is violating the "general recreation" use of the tidelands at Crissy Field that is part of the State's public trust obligation to its citizenry.

With respect to protected species, the issue of vegetation is also addressed in the FONSI as follows: "The decision to avoid the introduction of special status species in the restoration was made recognizing the high level of recreational use at Crissy Field anticipated to continue in the future and the concern expressed by many individuals that special status species could cause a change in management of the site that would restrict recreational uses." However, to our dismay, we understand the GGNRA/NPS once again has violated the mandate of the Park. From Jake Sigg's newsletter, (California Native Plant Society-Yerba Buena Chapter [Mr. Sigg is the alternate representative for this group in NR]), the following is stated: "Jake, FYI, I observed …on Crissy Field Beach…As far as plants go, NPS did in fact replant the federally endangered California sea-blite (*Suaeda californica*) that drowned out during the prolonged inlet closures/non-tidal lagoon flooding phases, and some transplants are thriving."

Once again, the GGNRA/NPS has "said" the right things, but later reneged on their promises by choosing to plant protected species which were not previously present. We expect the presence of these plantings will be utilized to justify the restriction of recreation in the area. The GGNRA has, yet again, violated the mandate under which this Park was created, violated its promises to the City, reneged on the promises made in the FONSI, and made clear that NR has a predetermined outcome to cutback or eliminate off-leash recreation in areas used for this purpose before the Park ever existed.

FORT FUNSTON

Beginning in 1991, the GGNRA/NPS began destroying the Fort Funston ecosystem with the premise being protection of the California state-threatened Bank Swallow. The GGNRA/NPS maintained that that recreational activity and "exotic" plants were having a profound negative impact on the Bank Swallow. The GGNRA/NPS never conducted an environmental impact analysis as required by Federal law before beginning this ecological destruction.

For decades, the Bank Swallow population had been thriving at Fort Funston, with their population increasing steadily even as off-leash dog walking was legally permitted and visitor

use increased. In 1982, there were 229 burrows, 417 in 1987, and 550 in 1989--providing anecdotal evidence that dogs and Bank Swallows co-exist and thrive.

In October 1991, the GGNRA/NPS closed approximately seven acres at Fort Funston by moving fences designed to protect the Bank Swallow 75 to 100 feet away from the cliffs in order to construct native plant habitats. (Milestone, J. "Just a Swallow Habitat Restoration Project".) By early 1992, almost four acres were converted to coastal dune and chaparral. At that time, NPS staff began chain sawing twenty-four (24) Monterey Cypress trees lining a trail leading to the beach, and volunteers pulled up erosion-preventing ice plant. Bulldozers were used to level hillocks and bury concrete slabs. In the course of only a few months, volunteers replaced ice plant with 5,000 native plants in the four acre area. The entire seven acre project was designed to take five years to complete with only 75% coverage of plants. The goal of the project was to increase "natural" erosion and create "moving sand" ecology. With the closures at Fort Funston, the GGNRA/NPS embarked on a unilateral course that was illegal under its own management policies, the MOU Agreement with the City, and the GGNRA enabling statute.

At Fort Funston, the GGNRA/NPS pursued a strategy of repressing dog-walking each time it expanded its closures. Concomitant with the native plant expansion, Park Rangers began telling dog-walkers, in late 1991 and 1992, to leash their dogs. In May 1992, Mark Scott Hamilton, Chairperson for San Francisco Commission of Animal Control and Welfare, sent a letter to Superintendent O'Neill expressing concern over "NPS Ranger announcements that GGNRA's longstanding ‘voice control’ policy at Fort Funston was to be changed effective May 1." Mr. Hamilton pointed out that such action would have serious impact on "overall dog-walking policies within San Francisco's geographic boundaries" and questioned how it could be done without public hearings: "It seems inconsistent with GGNRA's past policies (and perhaps violative of applicable regulatory law) that this change would even be contemplated until after public input hearings."

Public outcry over this action was overwhelming. In response, Western District Director Stanley Albright reassured both U.S. Senator Cranston and Senator Seymour that the GGNRA would continue to abide by the 1979 Pet Policy: "At this time, there is no change in the 1979 Pet Policy

which [currently] provides the visitor the privilege of walking one's dog off leash."

Addressing public concern over the closures at a meeting that summer, Head Ranger Jim Milestone, in July 1992, assured citizens that the fences would be in place only one year and the native plants would be compatible with recreational use of the area. (Meeting Minutes of Fort Funston Dog Walkers Association, July 9, 1992.) The next year, GGNRA/NPS expanded the native plant habit an additional three acres beyond the initial seven acre project, again without public review or project approval.

In June 1994, an additional expansion/closure of fifteen acres was proposed without analysis or public hearings. The GGNRA report confirmed that the project was already "expanding into areas beyond our previously agreed to perimeter. Project originally called for removal of all ice plant (a noxious exotic species) from the ten acre Bank Swallow habitat area. This is now complete and new areas outside of Bank Swallow habitat area ***are now within our grasp***." (Project Review Form, Ice Plant Removal, North Tip of Fort Funston, June 1994, emphasis added.) The project goal was to destroy 15 aces of ice plant, using chainsaws to destroy all "exotic" trees and bushes, and using bulldozers where possible. The map attached to this project limited the expansion to the asphalt coastal trail. In fact, this project also was "expanded beyond agreed perimeters" to encompass areas east of the trail, covering the entire Boy Scout Bowl.

In 1995, Rangers began warning dog-walkers at Fort Funston, Crissy Field, and Ocean Beach that they were going to start enforcing the general leash regulation, *36 C.F.R. Section 2.15(a)(2).* At the same time, GGNRA/NPS announced plans to close ten acres adjacent to Battery Davis under the pretext of erosion control. Ranger Jim Milestone admitted to the public at a meeting in March 1995 protesting the proposed closures that this area was very popular with children for playing Lawrence of Arabia on the steep slope. Dogs loved to chase balls and frisbees at the bottom of slope.

Following these closures, by letter dated March 14, 1995, Superintendent O'Neill promised Richard Avanzino, then-President of the San Francisco SPCA, that the habitat was nearing completion and would not expand south. The GGNRA/NPS also promised that the Battery

Davis closure was an approximately 5-year closure during which time it would be revegetated. Signs indicating both areas were closed for native plant revegetation were subsequently placed along the affected areas.

In 1995, the number of Bank Swallow burrows plummeted from 924 to 713. A simple review of the scientific literature confirms that Bank Swallows are very tolerant of "human disturbance" at nest sites. Indeed, "many colonies are in human-made sites…such as sand and gravel quarries and road cuts." (Garrison, B., "Bank Swallow," The Birds of North America, No. 414 (1999), at p. 6.) Mr. Garrison is a California Department of Fish and Game Biologist and an expert on the Bank Swallow. In fact, the only GGNRA/NPS study to evaluate the dramatic drop in numbers of the Bank Swallow concluded that increased predation, *not* recreational activity, was negatively affecting the birds. (Chow, N., "1994-95 Bank Swallow Annual Report", US04906-32.)

In 1996, the GGNRA/NPS failed to document the colony size, and claims to have lost all data for 1997. In 1998, the number of burrows had dropped to 140, and the GGNRA/NPS closed off the entire slope of coastal bluffs below the hang gliders.

In 1998, the Bank Swallow colony fled the "Bank Swallow Protection Area," to the "exotic" ecology and recreational activity along the south cliffs of Fort Funston. As a general rule of survival, birds leave areas where they are under stress. Despite the obvious devastation to the Bank Swallow colony, the GGNRA/NPS failed to analyze the impact of unleashed dogs on controlling predators of the Bank Swallow. (Hatch Report, p. 85, lines 10-16.) NPS Head Ranger J. Milestone indicated the dogs might have protected the Bank Swallows by impacting the weasel population. (US03944.) Additionally, observations indicate that the very habitat the GGNRA/NPS was destroying was the habitat most suitable for the Fort Funston Bank Swallow. Such observations confirm that ice plant rootlets are used by Bank Swallows to construct nests. (US04062-3.)

In January 2001, the NPS closed twelve additional acres to public use and the Bank Swallow colony *again* fled further south away from the new closure.

Because of a total failure to study causal effects of various activities on the Bank Swallow, the GGNRA/NPS has no evidence linking recreational activity with the Bank Swallow decline at Fort Funston. Indeed, the best evidence that recreational activity does not impact the Bank Swallow negatively is the swallows' departure from the fenced off northern cliffs to their present location -- an area of continuous recreational activity. The overwhelming evidence indicates that the GGNRA/NPS native plant projects have negatively impacted the Bank Swallow colony.

In fact, NPS documents confirm that Bank Swallow experts do not agree with the NPS/GGNRA contention that the creation of native plant "flyover" habitat is necessary for the Bank Swallows. Notes of a March 16, 2000 phone conversation with Barry Garrison from the California Fish & Game Department, one of the nation's foremost experts on California Bank Swallows, confirm that he "doesn't feel need flyover" (USPRO01625)....."doesn't necessarily agree that they need a flyover to persist." (USPROD01624). William Shields, Professor of Biology at SUNY, elected fellow of American Ornithologist's Union, leader of SUNY's Conservation Biology concentration (in letter to GGNRA re: closures at Fort Funston, October 2000), reiterates the Bank Swallow's tolerance of human and pet presence and their lack of appreciation for "native plants." "The poor arguments presented in their (GGNRA) plans make little sense to me. The Bank Swallow like other swallows is quite suited to live with humans and their pets" and "… I do not understand or condone what I believe are their misrepresentations about the needs and safety of the Bank Swallows breeding in the cliffs. … the notion that the swallows would do better by having more species of insects or even more insects on the short flyway between their breeding burrows and their main foraging sites at the nearby lake is a major stretch and smacks of special pleading to me."

The GGNRA's dune conversion destroyed the Bank Swallow colony nesting site that the birds had used since 1905.

It is rather clear that implementing the 1979 Pet Policy as a Special Section Seven Regulation in the GGNRA will not impair the Bank Swallow population or the native plant habitat at Fort Funston. GGNRA/NPS officials have consistently maintained that after some five years, these "habitat" areas would be reopened for public use. Five years have passed for many of these

closures, yet to date, no fences have been removed. The new Special Section Seven Regulation should specify that the habitat fences be taken down, so that all the area originally designated by the 1979 Pet Policy as accessible for off-leash recreation will again be accessible for off-leash recreation. We would recommend a bramble-type shrubbery barrier along the cliffs, so as to deter dogs and small children (neither of whom can read) from the cliff edge and preclude accidental falls off the cliffs for all park users.[30]

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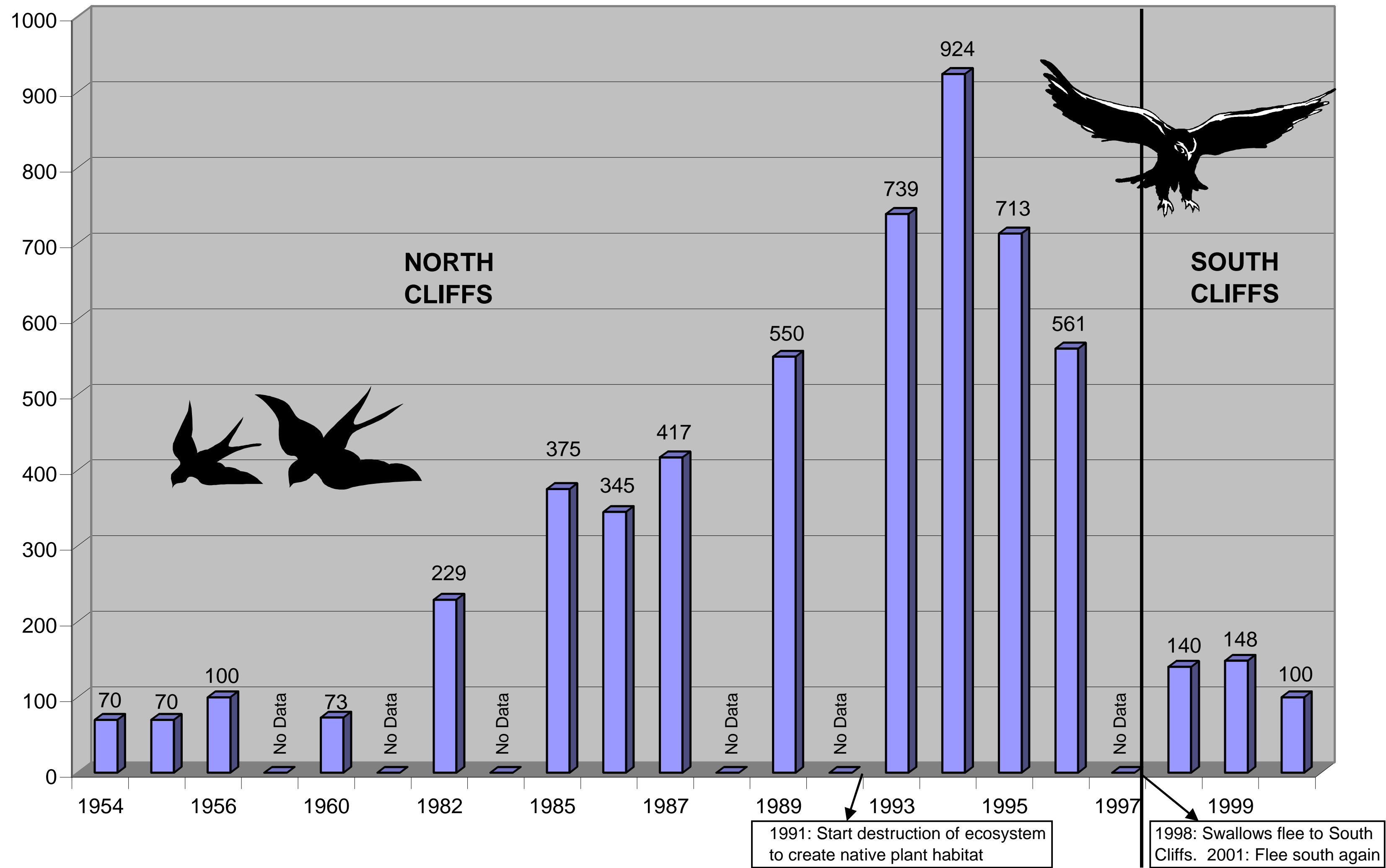
[30] Data included in this section has been culled from the Comments for ANPR as submitted by Ken Ayers, as well as the Comment to the NPS/GGNRA as submitted by the San Francisco Society for the Prevention of Cruelty to Animals Re. The Proposed Year-Round Closure at Fort Funston (dated October 6, 2000).



Total Number of Bank Swallow Burrows at Fort Funston
1000
900
800
700
600
500
400
300
200
100
0
70
70
100
No Data
73
No Data
229
No Data
375
345
417
No Data
550
No Data
739
924
713
561
No Data
140
148
100
NORTH
CLIFFS
SOUTH
CLIFFS
1954
1956
1960
1982
1985
1987
1989
1993
1995
1997
1999
1991: Start destruction of ecosystem
to create native plant habitat
1998: Swallows flee to South
Cliffs. 2001: Flee south again

V. Plea for Relief

The citizens residing in communities adjacent to the GGNRA have been subjected to years of abuse. ABUSE OF PROCESS, ABUSE OF THE LAW, ABUSE OF POWER. This is not just about off-leash dog walking. It is about arrogance; an attitude of being above the law that permeates the GGNRA/NPS. According to City government officials (past and present), the GGNRA routinely violates the law and its contractual agreements, and only responds to litigation or threats thereof. In both the *Ft. Funston Dog Walkers* and *United States v. Barley* actions, the GGNRA was found to have acted illegally in closing off areas to recreation.

When the GGNRA rebukes citizens' desire to recreate off-leash (in a miniscule amount of land), the Park Service brazenly and erroneously attempts to convince us (indeed, to misrepresent to the public): "The fundamental purpose of *all* units of the Park Service is to *conserve* the scenery and natural historic objects and wildlife therein, and to provide for the enjoyment of the same in such manner and by such means that will leave them unimpaired for the enjoyment of future generations." (Emphasis added.)

This was precisely what the City of Sausalito relied upon when it turned over Fort Baker to the GGNRA. Fort Baker was selected for inclusion in the GGNRA because it is a spectacular location that boasts an extraordinary assemblage of fish and wildlife species (26 species of special concern) and it is a location of historical significance where the land meets the sea, with commanding views of San Francisco Bay. It was the city of Sausalito's belief that turning the property over to the GGNRA would provide for restoration and preservation of the open space, wildlife, and historical buildings there. Instead, the NPS has prepared an environmental impact statement proposing Fort Baker be developed to include: a hotel, convention center, parking for more than 895 cars, a 200 seat wedding chapel, a ballroom, a swimming pool, tennis courts, a fitness center, concession stands, NPS offices and recreational equipment outlets. Alternative plans proposed by Sausalito to maximize natural resource restoration have been dismissed by the NPS with the excuse: "This alternative would not have sufficient relevance to the NPS mission." The City of Sausalito sued the GGNRA.

In contrast to the "new" mission statement of the GGNRA/NPS, Congress stated that the GGNRA was to be a "new national urban *recreation* area which will concentrate on serving the *outdoor recreation* needs of the people of the metropolitan region," and its objective was "to expand to the maximum extent possible the *outdoor recreation* opportunities available in this region." (H.R. Rep. No. 1391, 92nd Cong., 2nd Session (1972), emphasis added.)

Quoting from a letter written by the Stinson Beach Village Association to Supervisor Steve Kinsey: "Although the GGNRA gives lip service to the concept of community involvement in its planning and decision making procedures, this simply does not happen…their decision making has been consistently unilateral and dictatorial…Because the "park" completely surrounds our town, we have no room to expand for such amenities such as softball, soccer, equestrian needs and other forms of active community recreation…the SBVA submitted a proposal to the GGNRA to create these community facilities in a field adjacent to our public school…in a local newspaper the Superintendent publicly called our community's proposal "ludicrous". That was that…no further dialogue…NPS states they "have no other choice but to be as aggressive as possible in achieving" their objective…It is incongruous that the GGNRA has "recreation" in its organic name."

To bolster fundraising for wetlands restoration at Crissy Field, the NPS announced (in the San Francisco Chronicle) that it "has no intent to forbid off-leash, even if a large wetlands area is restored along the northern waterfront…all plans either maintain or expand off-leash dog walking. Under **any** future scenario, **more generous areas** of the Presidio's northern waterfront will be available to dogs." (Emphasis added.) Thereafter, the $35 million in funds were raised, the restoration completed, and subsequently, off-leash recreation was illegally banned at *all* GGNRA properties, and massive ticketing and harassment of dog walkers commenced. This directly violated the following agreements between the GGNRA and San Francisco: *1975 Memorandum of Understanding; 1979 Pet Policy; 1980 General Plan; 1982 GGNRA Natural Resources Plan; 1995 EIR for the Crissy Field Plan, and the 1996 Compendium Amendment*. The only redress for these actions by the GGNRA was for three citizens to spend ten of thousands of dollars of their own funds to defend themselves in a criminal proceeding

challenging the tickets they were illegally issued. The GGNRA was found to have acted illegally when it rescinded the 1979 Pet Policy and began ticketing citizens for engaging in legal activity.

The GGNRA has embarked on a mission to create native plant habitats. This is in violation of their authorizing directive, as the establishment of native plant areas requires the exclusion of **humans** from the site, eliminating all recreational activity in the area. Closures at Fort Funston were conducted without a NEPA required environmental impact analysis with regards to recreation or the Bank Swallows, without proper project approval, and without public hearings in violation of NPS regulations, U. S. Department of Interior management policies, and federal law. The GGNRA has implemented similar closures at Baker Beach, Lobos Creek, and in the Presidio. Concerned citizens were unable to obtain specific vegetative plans for the Presidio. Eventually plans to cut down approximately 4,000 trees in order to plant a native "vinegarweed" came to light and were opposed vigorously.

Non-native species, in the eyes of the GGNRA/NPS, seem to include humans. In West Marin, the Bolinas Public Utility District directors are considering suing NPS over plans to change historic Rancho Baulines from a horse ranch and residence utilized by equestrians and hikers to institutional use. Stephen Simac writes in the Coastal Post: "Park officials brought the headache of an aroused citizenry on themselves by their failure to communicate with the residents of West Marin about their imperious decisions, leasing a historic ranch to the Bird Observatory, their unwillingness to deal with transportation problems caused by their attractive nuisance, the arrogance of some of their officers, and the reduction of affordable housing caused by the park…. They'll airlift excess elk to a new habitat…the Bolinas lagoon renters just get notice… It seems as if in their view humans are some non-native species."

Wildlife does not escape this NPS philosophy of "nativism". Scores of the ethereal, heart-stoppingly beautiful white ("Fallow") deer were shot by the Park Service because they were non-native. Thinking the fallow deer are beautiful is apparently the wrong kind of wilderness experience. But "native" tule elk (which were imported from elsewhere in California after being hunted to extinction on the Point Reyes Peninsula) are dosed with contraceptives or flown

around dangling in slings from helicopters to other parts of the Park to control the size of the herd.

The disabled are given no special consideration by the GGNRA/NPS. As stated by San Francisco City Attorney Louise Renne (in a letter dated December 19, 2000): *"In addition to receiving numerous complaints regarding the closures at Fort Funston, members of the Board of Supervisors have been contacted by members of the public protesting the removal of pavement from the Sunset Trail, which was closed in November 1999 and reopened in March, 2000. Organizations such as the Golden Gate Senior Services have complained that a major portion of the trail is no longer paved and is therefore inaccessible to persons with limited mobility. We are writing to request a written response from the GGNRA explaining how this diminution of recreational opportunities is consistent with the GGNRA's responsibilities under the Section 504 of the Rehabilitation Act of 1973 (9 U.S.C. 794). Please include in your response a description of the GGNRA's plan to make its programs accessible to persons with disabilities, including those with mobility impairments"*. The Sunset Trail is still inaccessible to those with disabilities. At Sweeney Ridge in Pacifica stands the Portola Monument, considered to be the most historic site in the GGNRA. When the GGNRA took control of this property, it closed the access road off to cars, thereby preventing the disabled or mobility impaired from accessing this site. The hike from the current parking spot is 2.5 miles to the Monument, with an elevation rise of some 1,000 feet. The GGNRA has made no legitimate effort to remedy this situation, despite complaints from the City Council in Pacifica.

Conclusion

Under the management of Superintendent O'Neill, the GGNRA has developed a cavalier attitude that it may violate the law and the Park's enabling legislation. Consistent with its illegal anti-recreation philosophy, the GGNRA has knowingly instituted a process for Negotiated Rulemaking that does not comply with existing law. The NR process leaves the sponsoring agency as the final decision-maker as to the Regulation that will be promulgated. With the

GGNRA's new, illegal mandate in mind, no reasonable person would trust the GGNRA/NPS, an agency with this record of decision-making, to create an equitable rule. If NR were to be properly utilized in this circumstance, the 1979 Pet Policy would be the baseline for NR negotiations and NEPA compliance. If no consensus were reached among participants, the Regulation would default back to the 1979 Pet Policy. The overriding fact remains that the premise for NR is to establish a "rule". We already have one. Hence, alternatively, we request that the NR be terminated and the 1979 Pet Policy be instituted as a Section Seven Special Regulation for pet management in the GGNRA.

Beyond the fact that this action would bring the GGNRA into compliance with the law, it would additionally save the taxpaying public millions of dollars that will be spent on the NR and the inevitable litigation over the Regulation promulgated by the NR as it is now envisioned by Superintendent O'Neill.

It cannot be overemphasized that much of this controversy has arisen from the GGNRA's unwillingness to fulfill the promises made in order to obtain its properties for this Park in the first place. The Superintendent and the NPS are determined to fulfill their own private agenda in the GGNRA. Should the DOI overrule the GGNRA/NPS and demand the 79PP be instituted as a Section Seven Special Regulation, there could be the beginning of a cautious level of trust. But trust must be earned. The GGNRA has not proven worthy of our trust.

We suggest a change in management in the GGNRA would help to ease the tensions between the communities, the public and the GGNRA. It is apparent that current NPS management is not philosophically suited to manage urban recreation areas. The idea for an urban recreation area is to maximize public use and not deem the land off limits to public use because of habitat policies derived from the management of National Parks such as Yosemite, Yellowstone or McKinley.

The GGNRA and its management must be brought back in line with the Park's statutory purpose. Terminating this NR and implementing the 1979 Pet Policy as a Special Regulation would be one small step in the right direction for this unique urban Park.