Response to the Emergency Petition to the Golden Gate National Recreation Area, National Park Service, U.S. Department of the Interior To Promulgate and Enforce 36 C.F.R. § 2.15(a)(2) At the Golden Gate National Recreation Area

Submitted by Stephen Samuel Sayad

Ocean Beach Dog Owners Group

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BACKROUND AND INTRODUCTION

Respondents Stephen S. Sayad, individually and on behalf of Ocean Beach Dog Owners Group, hereby object to and oppose the "Emergency Petition to the Golden Gate National Recreation Area, National Park Service, U.S. Department of the Interior, To Promulgate and Enforce 36 C.F.R. Section 2.15(a)(2) At The Golden Gate National Recreation Area" submitted by Petitioners Action for Animals, Guide Dogs for the Blind, Coleman Advocates for Children and Youth, Environmental Quality for Urban Parks, The Center for Biological Diversity, Golden Gate Audubon Society, Sierra Club (San Francisco Bay Chapter), California Native Plant Society (Yerba Buena Chapter), San Francisco League of Conservation Voters, and Dune Ecological Restoration Team (hereafter collectively referred to as "petitioners").

Respondents' opposition to the petition is both procedural and substantive in nature. On a procedural basis, the petition is without legal support; it is a novel and unrecognized vehicle proffered in an attempt to subvert the decision of the Federal District Court for the Northern District of California in *United States of America v. Barley, et al. Consolidated Action No. CR 04-0408 WHA (June 2, 2005).* In that criminal prosecution for alleged violations of *36 C.F.R. Section 2.15(a)(2)* for off-leash dog walking citations on the tidelands at Crissy Field in San Francisco, the Court specifically inquired of the prosecution (in the presence of *amicus curiae* Center for Biological Diversity, Action for Animals, Environmental Quality for Urban Parks, Golden Gate Audubon Society, and Coleman Advocates for Children and Youth) whether an "emergency" was being claimed in order to justify the illegal rescission of the Golden Gate National Recreation Area's ("GGNRA") 1979 Pet Policy. The United States Attorney stated that no emergency was being claimed in order to avoid compliance with the requirements of *36*

C.F.R. Section 1.5. (*United States v. Barley, et al., Order of Affirmance, p. 6.)* Counsel for petitioners here and for *amici* in the litigation was present with the prosecution and was afforded an opportunity for oral argument, but did not respond in any way to the Court's inquiry as to whether any exigent circumstance existed such that the National Park Service ("NPS") could rescind the 1979 Pet Policy without public notice and full public comment. The evidence in support of the present petition consists of little more than that presented by petitioners as *amici* on the appeal in *United States v. Barley.* The petition is, therefore, nothing more than a highly irregular attempt to have the very party with whom petitioners sided on the appeal (the NPS/GGNRA) to now find, only a few months after argument on the appeal, that evidence exists to justify an emergency that was explicitly disclaimed by the NPS/GGNRA and implicitly disclaimed by petitioners-*amici* just a short time ago. [1]

The petition should be seen for what it is: a bad faith and administratively impermissible attempt to obtain the relief neither petitioners nor the party to whom the petition is directed claimed entitlement to in the litigation (and which was specifically stated to be non-existent) in which petitioners intervened and presented the very evidence now alleged to justify relief that the NPS/GGNRA represented would be unjustified – a position with which petitioners did not take issue only a few months ago. The petition is clearly insufficient to the extent it seeks implementation of an interim rule during the Negotiated Rulemaking Process, while not demonstrating any specific severe emergency which would allow for the omission of public notice and comment. The petition is moot in that it calls for the general factor balancing that must be based on a conclusion reached only after general public comment which should occur in

[1] The *amici*-petitioners were represented by the same attorney who submitted the present petition.

the upcoming Negotiated Rulemaking Process. As such, there is no basis presented in the petition for the NPS/GGNRA to implement an interim rule in derogation of existing law on off-leash recreation.

In addition, many of the petitioners are currently sitting as committee members in the Negotiated Rulemaking ("NR") process set up by the NPS to determine whether an amendment to the Code of Federal Regulations will be made in order to modify the current policy allowing off-leash dog-walking within some portions of the GGNRA. Rather than see that process through, petitioners instead seek to subvert that process (or gain some advantage in that process) through their petition. All that petitioners have demonstrated is that they are unfit for participation in the NR and will not negotiate in the good faith required for NR participation. Petitioners have not demonstrated the existence of any specific severe emergency that would justify the radical relief they seek.

Beyond its procedural defects, the petition is fatally vague and overbroad. Petitioners appear to be requesting a finding (and relief thereon) that off-leash dog walking throughout the *entirety* of the GGNRA be declared illegal, notwithstanding the Court having made clear that the 1979 Pet Policy was never legally rescinded due to the NPS acting in violation of its own regulations as set forth in *36 C.F.R. Section 1.5*. Respondents are not aware of any person or entity claiming that off-leash dog walking is legal throughout all of the GGNRA. Respondents recognize that the existing 1979 Pet Policy encompasses specific areas within the GGNRA, albeit less than one-percent of the GGNRA. Petitioners cleverly seek to avoid this significant fact in order to attempt to prove that a state of emergency exists within the areas subject to the

1979 Pet Policy by presenting "incident reports" involving areas *outside* those designated as off-leash. As is demonstrated *infra*, the vast majority of the "incident reports" upon which petitioners rely *do not* involve the areas covered by the 1979 Pet Policy; accordingly, the vast majority of the "incidents" are irrelevant to the petition as they occurred in areas where off-leash dog walking is not allowed and which remain subject to citation under *36 C.F.R. Section 2.15(a)(2).* In short, there can be no exigent circumstance for summary implementation of *36 C.F.R. Section 2.15(a)(2)* in areas *already* subject to regulation under the statute. In the same vein, the incidents cited by petitioners that occurred outside the off-leash areas cannot support a finding of an exigent circumstance within the areas subject to the 1979 Pet Policy. The petition is, we submit, deliberately rife with misrepresentation and attempts at confusion. Petitioners have demonstrated that they will go to great lengths to skew the record in order to promote their agenda that off-leash dog walking should not be allowed anywhere within the GGNRA.

It bears emphasizing that petitioners represent a clear minority on the issue of the propriety of off-leash dog walking within the GGNRA. The GGNRA's Advanced Notice of Proposed Rulemaking ("ANPR") Public Comment Analysis demonstrates that the public resoundingly supports continued off-leash recreation in the GGNRA. Seventy-one percent (71%) of the public favor off-leash recreation (*Option B*), while only twenty-eight percent (28%) favor enforcement of a leash law in the entirety of the GGNRA *(Option A).* Indeed, Bay Area residents overwhelmingly support off-leash recreation; only the extreme groups represented by petitioners are against off-leash recreation. "Of the 6042 comments received from Bay Area residents, 86 percent favor Option B, while of the 1628 comments received outside the Bay Area, 88 percent favor Option A." (*Golden Gate National Recreation Area Advanced Notice of*

Proposed Rulemaking, Public Comment Analysis, August 2002, p. 5.) Yet even these figures are misleading. The GGNRA notes that fourteen (14) petitions were received but does not present the number of signatories to the petitions. *(Id.)* Respondents have counted the number of comments and petitions. Significantly, one-hundred percent (100%) of the petitions (representing 10,123 individual signatories) support off-leash recreation. In contrast, ninety-six percent (96%) of the comments *from out of state* support enforcement of a leash law. (Sixty-nine percent of *non-Bay Area* comments also supported enforcement.) Of the 2,402 comments supporting enforcement, 1444 came from out-of-state or non-Bay Area residents. This evidence demonstrates that petitioners were unable to mobilize local support for Option A in the ANPR, in part because they represent radical organizations whose members either do not make use of the GGNRA or do not support the extreme position of petitioners or whose membership is *de minimus*. Clearly the petition lacks the support of Bay Area residents -- those who regularly use the GGNRA.

The following sections will demonstrate why, on a substantive basis, the petition is baseless and should either not be considered or should be summarily rejected.

RESPONSE TO PETITION SECTION I

Premise: Dogs Roaming Off-Leash Greatly Impact Other Users of the GGNRA.

Respondents must preface discussion of this portion of the petition by explaining that we do not intend to address each "incident" cited in the petition independently because, despite

repeated requests, counsel for petitioners has refused to provide us with copies of the incident reports referred to in the petition [2], even those allegedly arising since the hearing on the appeal in *United States v. Barley, et al.* at which the NPS/GGNRA, through the U.S. Attorney, disclaimed any notion that an emergency exists in the areas covered by the 1979 Pet Policy – a position with which petitioners did not take issue. Respondents do, however, possess enough information from the descriptions of the incidents to comment constructively.

First, it must be emphasized that approximately ninety-nine percent (99%) of the GGNRA land is not accessible for off-leash dog walking. It is, therefore, manifestly unreasonable for petitioners to claim that off-leash dogs *greatly* impact other users of the GGNRA. In a specific circumstance, an incident involving an off-leash dog (or cat) may have a great impact upon an individual, but in the context of the millions of visitors to the GGNRA annually, the number of incidents is infinitesimal. The number of incidents occurring in the less than one-percent of GGNRA land covered by the 1979 Pet Policy is miniscule.

The petition should be denied because although it may refer to legitimate incidents in the GGNRA, it mischaracterizes the underlying problems. Therefore, the petition presents an ineffective solution to the alleged problems — denying all off-leash access to the GGNRA. Respondents hope to identify the problems properly, and provide realistic solutions that will work, not a draconian mandate that punishes those who have done no harm.

[2] Because these "incident reports" are unauthenticated and unreliable anecdotal documents containing multiple levels of hearsay from unreliable sources, it is inappropriate for the NPS/GGNRA to base any decision upon such selective and unreliable information.

It cannot be overemphasized that many of the reports petitioners cite occurred in areas where dogs are not allowed off-leash. Those individuals who had their dogs off-leash in these areas were in violation of *36 C.F.R. Section 2.15(a)(2),* and should have been warned or cited. In contrast, it is unreasonable to punish dog owners who exhibit proper conduct in the off-leash areas with the transgressions of others who do not respect the distinction between on-leash and off-leash areas. The alleged offenses petitioners report as having occurred in on-leash areas are, therefore, a complete *non-sequitor* – they are irrelevant to determining whether the small amount of off-leash area within the GGNRA is safe.

This same issue relates directly to the reports petitioners cite where children and disabled people with or without service dogs allegedly have been disturbed by off-leash dogs. If an individual fears off-leash dogs personally or their presence around children, it would make sense for them to enjoy the ninety-nine percent (99%) of the GGNRA land at which dogs must be on-leash. It is entirely reasonable for these individuals to enjoy the 99% of the GGNRA that does not allow for off-leash recreation. At the same time, the 1979 Pet Policy provides safeguards (through citations) against individuals with dogs acting inappropriately.

There is one management issue that impacts all people who wish to visit the GGNRA with or without a dog -- the matter of signage. The GGNRA has been derelict in clearly marking on-leash and off-leash areas for the public's information. Proper signage, education, and reasonable enforcement could eliminate conflicts. Despite the recent Court decision reinstating the 1979 Pet Policy, the signage at Fort Funston, Crissy Field, and Ocean Beach still advises the public these are on-leash areas. 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 on-leash. This problem is easily solvable by the GGNRA. As recommended by the Federal Panel in November 2002, 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).)*

Respondents do not understand the petition's complaint that dogs off-leash are an impediment to people who wish to fish at the beach. There are more people fishing on the tidelands than dogs roaming off-leash on any given morning at Ocean Beach when the fish are running. With respect to the subject of education, Ocean Beach users would appreciate the GGNRA spending a little time educating those who fish as to the dangers of cigarette butts, fishing line and hooks to the wildlife we enjoy at the beach.

In addition, an issue not dealt with in the appeal in *United States v. Barley, et al.* and which petitioners do not wish anyone to consider, is the fact that the tidelands at virtually all beaches in the State of California are held in trust (as an incident of State sovereignty) for, *inter alia*, the general recreational usage of the citizens. As was made clear in the appellate briefs of defendants, which are incorporated herein by this reference, the GGNRA neither owns the tidelands within its boundaries nor may, by lease or otherwise, regulate away the long-standing off-leash policy on the tidelands. This is a matter of State regulation, and there exists no such regulation on these tidelands that would permit a granting of the petition in this regard, anymore

than petitioners could seek to ban fishing on the tidelands and swimming in waters adjacent thereto.

Respondents agree that it would make sense to consider reasonable precautions for interaction between off-leash dogs and their owners who utilize horse trails. Educational programs such as have been undertaken in the City of San Francisco would allow for limited interaction between the two park users to be safe. This can be accomplished without usurping the requirements of *36 C.F.R. Section 1.5.*

The petition also raises the issue of dog owners not picking up after their dogs. Respondents make no excuses for this misbehavior, and owners guilty of this transgression can and should be cited wherever such misconduct occurs. Indeed, the 1979 Pet Policy, as the current state of the law, provides for citing those who do not pick up after their dogs. It must be kept in mind, however, that dogs necessarily defecate whether on or off-leash. They do not enjoy the luxury of flushing a toilet and never worrying about the consequences thereof. In this regard, most of the incident reports regarding owners who did not pick up after their dogs related more to a bad attitude on the part of the owner, not the fact that the dogs were off-leash or that they were unaware of their dog's defecation. There was one instance at Fort Funston where a dog owner did not see his off-leash dog defecate. Again, such conduct is subject to citation under the 1979 Pet Policy and no reason exists to void a Policy that contains such protection. In addition, it should not go without mention that Fort Funston users have a well-organized monthly cleanup in an effort to ameliorate this potential problem as well as the pollution caused by humans wholly unrelated to off-leash recreation and never mentioned by petitioners.

One report regarding a dog owner's failure to pick up after a dog at Ocean Beach reminds us of a very successful educational program the GGNRA conducted at Ocean Beach some years ago. This individual merely covered the dog feces with sand. Some uncaring dog owners erroneously believe this is an appropriate way to deal with their dog's feces at the beach. The GGNRA dealt with this problem by posting rangers at the most frequently utilized entrances to the beach intermittently over several weeks. The rangers questioned each and every dog owner as to whether they had a bag to pick up their dog's refuse. If they had no bag, they were not allowed on to the beach. This program worked very well. It educated some dog owners in need of such education to the necessity of picking up their dog's refuse, and let them know that the GGNRA would cite anyone who did not do so. The amount of dog feces on the beach declined dramatically thereafter, and has stayed much lower for many years. It would be prudent for the GGNRA to educate the public as to the behavior they expect on a regular basis. This is, however, not a new idea. At one time, there were informative brochures distributed regarding the snowy plover, as well as advising park visitors that it was not acceptable to harass any wildlife. (Children, too, chase birds.)

These are constructive ways to eliminate conflicts in use at the park: education, proper signage to eliminate conflicting uses, and reasonable enforcement. In short, all the precautions set forth in the 1979 Pet Policy (after considerable public input in 1977 and 1978) continue to exist in the less than one-percent of GGNRA in which off-leash dog walking is permitted. Petitioners have completely failed to demonstrate that the restrictions built in to the existing Pet Policy are insufficient to deal with the problems they believe exist. To the contrary, the petition

fails to take these safeguards into account and otherwise relies upon incidents outside the areas covered by the Policy and that are irrelevant to the issue at hand. No exigent circumstances exist for the NPS/GGNRA to obliterate the 1979 Pet Policy in order to further the political and social agenda of petitioners and their attorney -- agendas completely at odds with the desires of Bay Area residents.

RESPONSE TO PETITION SECTION II

Premise: Running Dogs Off-Leash at the GGNRA Puts the Welfare of Dogs at Great Risk.

Petitioners spend considerable time discussing injuries sustained by dogs falling off steep cliffs in the GGNRA. Some of the areas involved are off-leash areas, while others are on-leash areas of the GGNRA. However, the issue is not whether off-leash dogs are able to read signs. Children often cannot read signs, either. Once again, petitioners have mischaracterized the alleged problem. The fact is these cliffs are a *public* safety issue for adults and children as well as dogs. There are incident reports of adults and children being injured in these areas when no dogs were present. The solution of eliminating off-leash recreation in these areas may serve to protect dogs, but petitioners offer no solution for the same dangers encountered by adults and children. Respondents suggest a more reasoned solution would be to plant a bramble barrier, repelling any human or canine creature from approaching the edge of these cliffs. This would protect all park users, without necessitating the limitation (or as petitioners would have it, the elimination) of off-leash recreation in these areas.

Petitioners' assertion that it is too dangerous to allow dogs off-leash in the GGNRA is a breathtaking failure of logic. Petitioners purport to advocate a ban on off-leash dog walking in the GGNRA *for the safety of the dogs*. Since the petition is in part submitted on behalf of the Coleman Advocates for Children and Youth, respondents find this conclusion curiously hypocritical. Attention must be brought to the following statistics from the National SAFE KIDS Campaign and the American Academy of Pediatrics:

- More than 3.5 million children ages 14 and under are annually injured playing sports or participating in recreational activities.
- Sports and recreational activities contribute to approximately twenty-one percent (21%) of all traumatic brain injuries among American children.
- More than 775,000 children, ages 14 and under, are treated in hospital emergency rooms for sports-related injuries each year.

In spite of this evidence, child participation in sports and recreational activities has not been abolished *for their safety*. To the contrary, communities are still constructing and maintaining children's playgrounds and skateboard parks, as well as encouraging children to participate in organized sports. We, as a society, recognize that the value of exercise and the social and life skills developed by participation in sports activities is beneficial to children. The benefits outweigh the risks.

The same holds true for off-leash dog walking. A local veterinarian, when questioned about off-leash exercise, said the following: "It's very important for dogs to get out and get exercise. The one thing that I know for certain is that dogs do live longer and are healthier and happier if they are socialized, if they get out and get activity and they get exercise. It's good for the dogs and it's also good for the community. Dogs that are socialized with people and other dogs are not really a risk to the community. The dogs that attack other dogs and people are usually the dogs that have been confined in their home, in a backyard, and they have had no contact. It's important for the dog's health and happiness, but also for the community as well that they get out."

The San Francisco SPCA has been consistent in its advocacy of off-leash dog walking, citing it as "a vital component of responsible pet ownership." The SPCA additionally recognizes that "San Francisco's Ocean Beach is among the few remaining places in our densely populated urban environment where dogs can socialize freely and run off the energy they've built up from having been confined in houses and apartments. Tens of thousands of dog owners throughout the San Francisco Bay Area depend on Ocean Beach to provide for the health and well-being of their pets. In return, dogs enrich — even protect — our lives". [3]

Ken White, director of the Peninsula Humane Society, has stated: "PHS believes that there ought to be off-leash areas. I don't think there is a humane society that would disagree…. It is a fraction, a fraction of our animal control complaints and concerns that come from the off-leash areas… Problems most typically come when people ***don't*** have an off-leash area to go to and find themselves trying to create one on their own." Mr. White notes, however, that: "I absolutely believe having been in this issue around the country, that you will not come up with a solution that pleases everybody."

The fact is that off-leash dog walking does not serve the agendas of petitioners, and petitioners are blinded by their zealous advocacy from considering the best interests of dogs. And that is the long and short of it. However, the NPS/GGNRA must continually consider that

[3] Petitioner Guide Dogs for the Blind should readily recognize this fact, as the organization breeds dogs for the very purpose of assisting humans with disabilities and enabling them to live far more completely than if left to their own. However, the participation of that organization in the petition is in stark contrast to the actual attitude of those who are blind and utilize a guide dog. In our experience, these individuals are keenly aware of their dog's need for time to play and often visit off-leash areas with sighted friends so that their dog might be afforded recreational relief. Unlike their human graduates, this organization is only concerned about what dogs can do for man, and not what is best for man's best friend.

the transfer of property from the City and County of San Francisco to the GGNRA was specifically predicated upon continuation by the GGNRA of historical recreational usage – usage independently protected by State law. The Federal Panel that reviewed the history of off-leash dog walking in the GGNRA, and recommended Negotiated Rulemaking to establish off-leash dog 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.)* [4]

Moreover, the public trust under which the tidelands are held by the State does not allow for regulation in contravention of the public's right to use the beaches for recreational activities. Petitioners must learn to live with the law. Clearly they have not done so, as the petition itself seeks to flout the decision in the very litigation in which they participated.

Respondents recognize that dog fights occur in the GGNRA. So too does people-on-people violence, car accidents, biking accidents, and the like. Petitioners claim that some 70 dog-related incidents were recorded in the last five years. According to the GGNRA's incident reports, some 40% of the dog bites reported occurred in either residential areas of the GGNRA (the Presidio) or areas of the GGNRA that require dogs to be on-leash. Once again, petitioners have mischaracterized the evidence and the problem, and thus propose a faulty solution. Incidents occurring in on-leash areas are irrelevant to the question whether any exigent circumstance exists in the one-percent of GGNRA lands in which off-leash recreation is

[4] Of course, this alleged "tacit acceptance" was found by the Court in the recent litigation to be an official policy of the GGNRA that remains in full force and effect through the GGNRA's 1979 Pet Policy.

permitted by law. Moreover, the evidence from the local veterinarian and the Director of the Peninsula Humane Society directly contradicts petitioners' conclusion that leashing dogs in the GGNRA would reduce dog bites and fights in the GGNRA. The fact is that access to off-leash recreation minimizes any danger dogs present to other dogs and the public in general. And, just as significantly, the statistics support the conclusion that the number of dog bites and fights that occur in the off-leash areas of the GGNRA are very low, considering the millions of visits to the GGNRA annually.

Respondents recognize that there is no single solution to the dog management issue that will please everyone. However, designating approximately 1% of the GGNRA for off-leash recreation (after considerable public comment in 1977 and 1978) is a more than reasonable solution to the relatively insignificant problem, considering that 40% of the population in the San Francisco Bay Area own dogs. The ultimate-solution petitioners propose is clearly unreasonable given the urban nature of the community within which the GGNRA resides. Indeed, the 2002 study conducted at the behest of the GGNRA demonstrates that the impact of dogs off-leash on visitors to the GGNRA is a far cry from the dramatic state of affairs posited by petitioners. In the four-county region encompassing Alameda County, Marin County, San Francisco County, and San Mateo County, 27% of GGNRA visitors stated that the impact of observing off-leash recreation added positively to the visit; 49% of the visitors were not affected by off-leash recreation; and only 22% responded that off leash recreation detracted from their visit to the GGNRA. (*See Golden Gate National Recreation Area: Public Opinion Research Telephone Survey & Public Comment Analysis, p. 11 (August 15, 2002).*) This evidence alone wholly undermines the petition.

RESPONSE TO PETITION SECTION III

Premise: Running Dogs Off-Leash at the GGNRA Puts the Welfare of Wildlife at Great Risk.

The petition specifically proclaims that the welfare of the purportedly threatened Western Snowy Plover at Ocean Beach is jeopardized by dogs running off-leash. The most specific data regarding the plover at Ocean Beach is contained in a study produced by Daphne Hatch in 1996. Daphne Hatch is a GGNRA Wildlife Specialist and her report is attached hereto as Exhibit A.

The GGNRA is well aware that the number of plovers on Ocean Beach is not directly related to the number of people or dogs present on the beach. Indeed, the Hatch Report concluded: "Factors *other* than number of people or dogs, possibly beach slope and width, appear to exert greater influence over Snowy Plover numbers on Ocean Beach." (*Hatch Report, p. 10, emphasis added.*) Faced with this evidence, GGNRA officials twice acknowledged, at a December 16, 1996 "informational meeting" for San Francisco beachgoers, that banning off-leash recreation at Ocean Beach would have no effect on the number of plovers on Ocean Beach.[5]

[5] The GGNRA apparently never thought to question whether the ban could actually have a negative impact on the plovers, although several factors were brought to its attention to suggest that they might. The presence of dogs may, for instance, serve to keep other predators at bay. As U.S. Fish and Wildlife Service experts explained at the "informational meeting," the red fox has had a serious impact on plover populations south of San Francisco, but has apparently not been a presence on Ocean Beach. Furthermore, the GGNRA's own study showed that at least some dogs chased gulls, which are also known predators of plover chicks. Dog walkers further testified to daily efforts at cleaning trash off the beach — *human* trash that attracts crows, ravens, foxes, and more gulls. These and other factors have been ignored when considering the plight of the plover, in spite of the compelling evidence that the coexistence of dogs and plovers has been a harmonious and possibly beneficial one for the plovers.

It is, in addition, important to consider the United States Fish and Wildlife Service ("USFWS") Draft Recovery Plan for the Western Snowy Plover. This publication states that the Western Snowy Plover does not nest or breed at the Ocean Beach location. Contrary to the petition's assertion, the Draft Recovery Plan indicates that despite implementation of best management practices, this location holds no promise for the plover to nest or breed there in the future. (*Table B-1, p. B-11*.) Conversations with Gary Page of the Point Reyes Bird Observatory ("PRBO") reveal that this conclusion was drawn primarily because the level of *human* activity is too high on some California beaches to ever support a breeding population of the plover. (Gary Page was a key contributor to, and is cited extensively, in the USFWS Draft Recovery Plan for the Western Snowy Plover.) Thus, the state of the evidence is that the survival of the Western Snowy Plover population will not be impacted by the management of Ocean Beach unless plovers succumb to predation or are so traumatized at Ocean Beach that they are unable to subsequently breed elsewhere.

With this in mind, Ms. Hatch chose to focus on the "disturbance" of the plover at Ocean Beach. However, it is not established in her study, *or in any study*, that disturbance of the plover results in significant harm to the bird. While it is postulated by Ms. Hatch (and others) that the energy expended by the plovers to avoid the disturbing dog is detrimental to their overall health and ability to breed, no evidence is cited for such a conclusion. There is no documented scientific basis for Ms. Hatch's assumption. The NPS/GGNRA must consider the fact that the plover is known to annually migrate over 1,000 kilometers. In proportion to their size, this is the equivalent of a 6-foot human running 290 marathons. Does the energy expended when a plover moves 20 or 30 yards to avoid a roaming dog amount to anything significant? Common sense

would indicate that the "disturbance" issue has been substantially overblown, and no scientific study exists to contradict such common sense. It is just as easy to postulate that the disturbances have a beneficial cardiovascular effect upon the plover! Out of 5,692 dogs observed during the one-and-a-half year study by Ms. Hatch, less than one-third of one-percent chased plovers, and none ever caught or harmed one. An even smaller number "inadvertently" disturbed plovers, causing them to walk, run or sometimes fly out of reach. (*Id., at 11-13.)* See Figure 1 below.

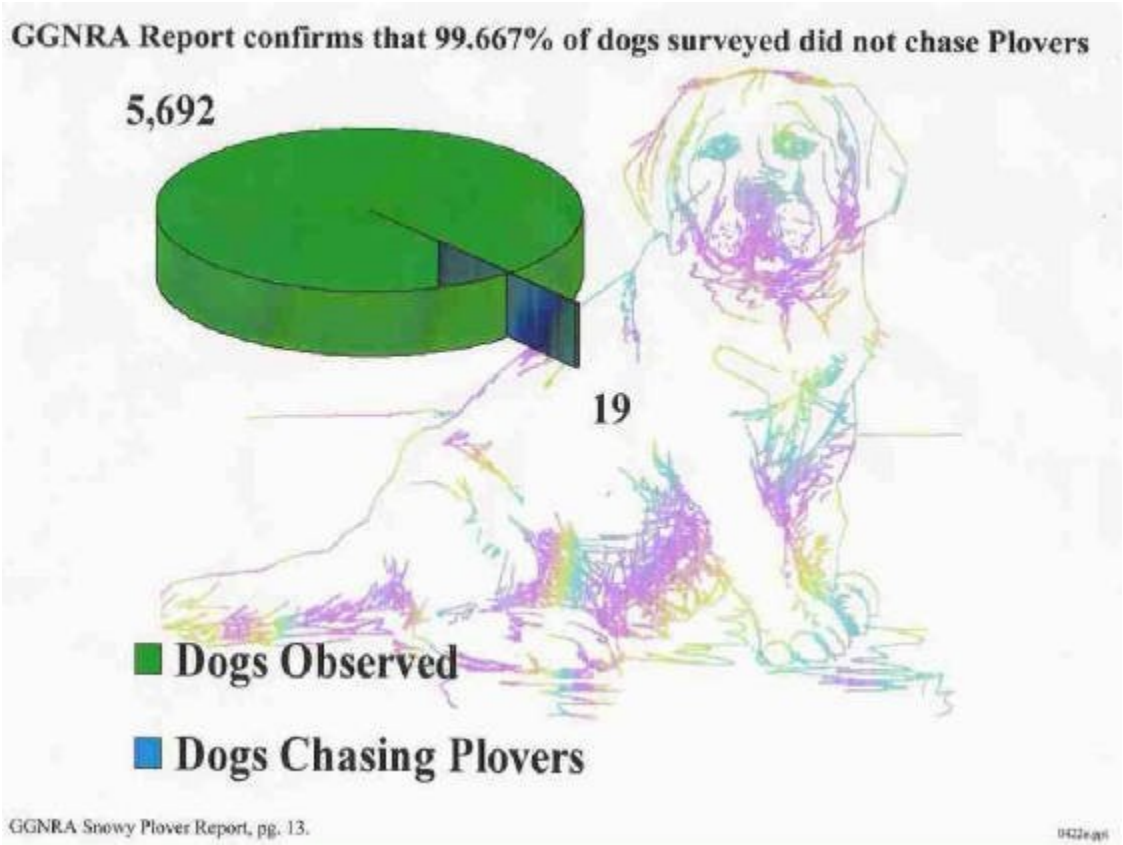

FIGURE 1

On the other hand, Ms. Hatch did not document the more significant matter of the deaths and disturbances of plovers perpetrated by predators such as the gull, raven, and crow. The gull, raven, and crow are documented predators of the plover, while dogs are not. Ravens are black, cousins of the crow, and larger than crows - generally about two feet long. Federal officials, who

attribute the soaring numbers of ravens to sharp increases in road-kill and garbage from fast-food restaurants, admit that the population explosion is troubling, given the bird's intelligence.

The Hatch Report is an excellent example as to why scientific studies vary in reliability. Based upon the standards set forth in the scientific community, Ms. Hatch's study qualifies as "junk science", that is, "a publication that has the tone and trappings of science, but is so fundamentally and demonstrably flawed as to lack any serious claim to credibility."

There are several reasons for so relegating the Hatch Report to "junk science". First, it is merely an observational study. This means its conclusions are not based upon specific, quantifiable measurements, but instead upon observations. Observations alone allow for the participant's natural biases and subjectivity to influence the results. A credible scientific study to determine the success of, for example, a hair growth product, would dictate that the same person would observe the patients at the beginning and end of the treatment to assess the patients' baseline and subsequent hair growth (or lack thereof). This would eliminate the differences inherent in the observations of different people. The evaluator should have no affiliation with any of the manufacturers of the different products tested, and would not know which patient used which product. This is necessary to eliminate an evaluator's desire (even if it is subconscious) to favor a particular product. In contrast, the evaluators in the Hatch study consisted of several different volunteers; accordingly, there was no consistency as to the observations. Some evaluators may have characterized plover movement as a disturbance; others might have believed the plover moved on its own. Moreover, the volunteers were all bird enthusiasts, and the specific focus of their study was humans and dogs**.** As a result, **the very premise of the**

study would lead the volunteers to subjectively and/or subconsciously expect and desire to document disturbance of the plover by dogs and their owners.

The effects of other wildlife and other possible interferences with the plover's daily activities were given but brief mention and not factored into the study in any meaningful way. These issues include the following: beach cleaning, off-road vehicles driven at night, activity of specific predators, non-native vegetation, shoreline erosion control projects (bulldozers), the actual width of the beach available to the plover, weather, helicopters, airplanes, bicycles, vehicles used during the day by Park staff, kites, and an oil spill. An evaluator cannot distinguish the reason or reasons why a plover flies away to another spot given the presence of a dog 40 feet away, a raven 50 feet away, and a plane flying overhead. Yet in the Hatch study, it seems clear the dog would be identified as the factor that disturbed the plover. The Hatch study is one that does not compensate for participant bias, and is not able to effectively associate cause and effect because too many variables are unaccounted for. Hence the study is indeed "junk science". Daphne Hatch's conclusions are without merit, and perhaps worse, led to action which may have *harmed* the plover at Ocean Beach.

These facts raise the other problem with the operative hypothesis in a study concluding that off-leash dogs are detrimental to plovers. Because the Hatch study at Ocean Beach ignores gulls, ravens and crows entirely, there is no data to determine whether the presence of dogs protects the plover from birds of prey. The statistics in Daphne Hatch's own study indicate that during the period prior to this study, the number of plovers at Ocean Beach was increasing, even though there was no requirement for dogs to be on-leash. The maximum Snowy Plover counts

for the 1979 to 1985 period ranged from 4 to 16, compared to maximum counts (since 1988) of from 38 to 85 birds (*Hatch Report, p. 8*). See Figure 2 below.

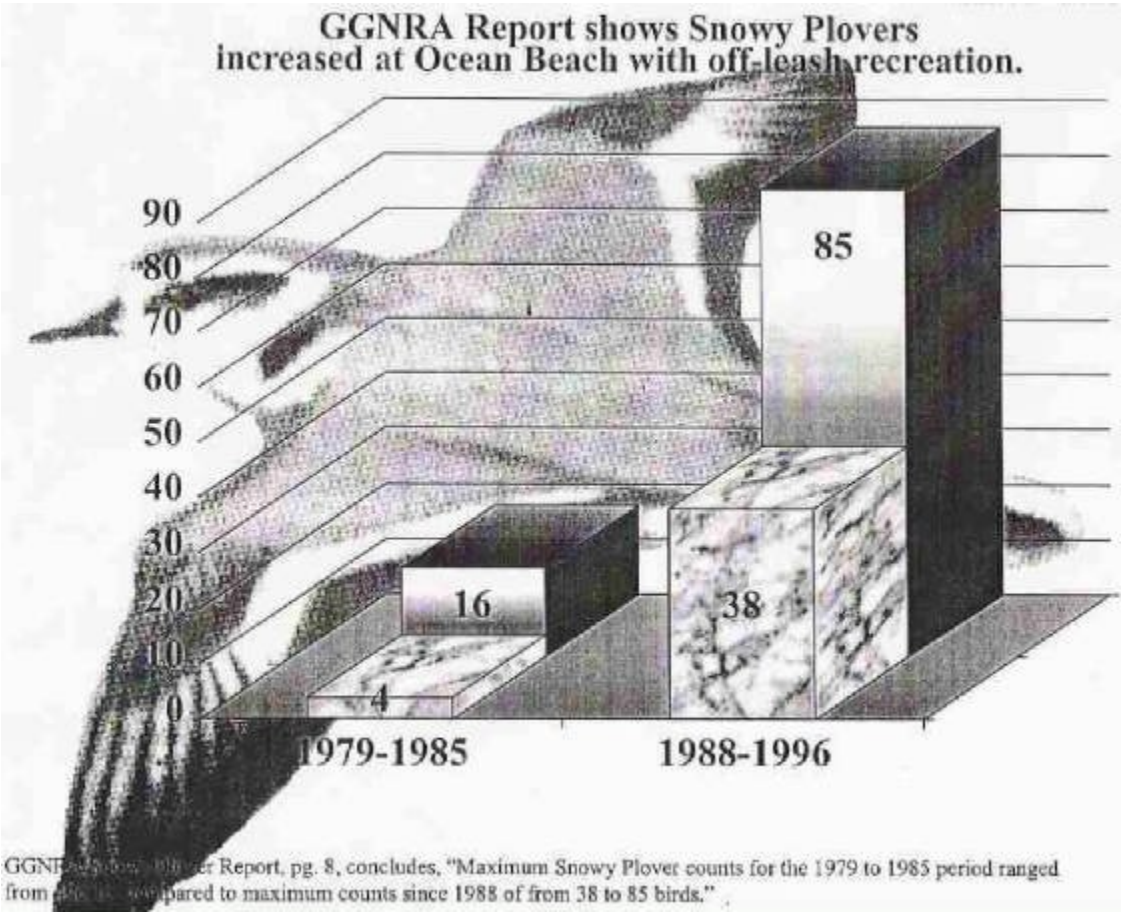

FIGURE 2

Respondents (and others) believe that it is mischaracterizing the problem to attribute the "disturbance" of the plover exclusively (or even significantly) to off-leash dogs. The data do not support this conclusion. It follows, therefore, that addressing off-leash dogs *only* will not effectively protect the plover. Respondents maintain, based upon the data, that proper protection of the plover would encompass the effect of humans, predators, and other wildlife as well. A far more thoughtful and scientific solution has been proposed by a reputable wildlife biologist, yet

the GGNRA has chosen to ignore it. Respondents suggest the GGNRA implement the solution as outlined below. The goal should be to solve any problem — effectively.

Peter Baye (U.S. Fish and Wildlife Service Biologist) noted the presence of the Snowy Plover, which roosts, but does not nest, on Ocean Beach, and made recommendations to the GGNRA for its protection. The plovers are present seasonally and relocate from year to year. Mr. Baye recommended: "Exclosures, in concert with educational signage, have been very effective in areas of concentrated usage where beaches are large (e.g. Cape Cod National Seashore). There are no unique impediments inherent at San Francisco's Ocean Beach which would render these measures infeasible here. They should be implemented at least on an experimental full-scale basis." (*Memo to USFWS, 15 March 1995*). Rather than establishing these flexible, seasonally rotated exclosures to protect plovers against humans, pets, and wild predators, the NPS chose the fixed and narrow measure of (illegally) banishing off-leash recreation. Mr. Baye's recommendation of a temporary, seasonal fence to be removed when the plovers leave the area and repositioned when they return *could still be* adopted. This solution would allow off-leash dogs on Ocean Beach but keep dogs out of the roosting area. Better yet, Mr. Baye's solution would protect the plovers from the predators, campers, runners, children, kite-flyers, etc., who now invade the roosting area under the GGNRA's current plan. Mr. Baye's recommendation clearly shows that off-leash recreation on Ocean Beach is compatible with protection of the Snowy Plover.

This suggestion becomes all the more important because the GGNRA has made no concerted effort to alleviate the activities that are currently prohibited by law, pose a hazard to

the plover, and occur in the vicinity of the plover's roosting. Table A, below, summarizes the current GGNRA record of citations for fireworks, littering, camping, and beach fires on the portion of the beach where the snowy plover may roost. On an average Saturday or Sunday morning in the area the plovers roost you will find (by personal report):

5 beach fires (3 unattended)

7 campsites (2 had fires)

Extrapolating, if only weekend offenders were cited, there should have been 520 citations/year for fires, and 720 citations/year for camping. The GGNRA's dismal record of enforcement is reflected below in Table A. Moreover, it should be pointed out that litter is generally left at camp sites and the sites of beach fires. This litter attracts ravens and other predators to the area where the plovers are potentially roosting. The number of citations for littering is grossly inadequate. [6]

CITATIONS	2003	2004	2005 (Jan.-Apr.)
Fireworks	17	19	5
Camping	73	104	24
Beach Fires	30	131	18
Littering	12	32	4

Table A. Record of Citations in Plover Area of GGNRA

[6] In an article published in The San Francisco Examiner; September 26, 2005; by Marisa Lagos; entitled "Residents Irked by Ocean Beach Parties" (please refer to the original online version located at: http://www.sfexaminer.com/articles/2005/09/27/news/20050927_ne01_fires.txt or an online, printable copy located at: http://OceanBeachDOG.home.mindspring.com/GGNRA_Ocean_Beach_NonEnforcement.htm), it is confirmed that the GGNRA's failure to enforce fire and litter policies has led to untold damage in the GGNRA's arbitrarily designated snowy plover habitat at Ocean Beach.

If the GGNRA is unable to utilize enforcement to protect the plover from the public and their activities, it would make a great deal of sense to provide the exclosures as a refuge for the plover as suggested by Mr. Baye.

In addition, dead wildlife such as seals, sea lions and birds are not being promptly removed from the beach. The rotting carcasses of these dead creatures (often the result of human activity) are left indefinitely on the beach to attract ravens and other predators. Recently, a carcass of a cow washed up on Ocean Beach where it sat for almost a week before officials removed it. The dead body was literally covered with ravens, ripping and eating the dead animal's flesh.

The GGNRA's refusal to consider genuine steps to protect the plover only serves to cast further doubt on the effectiveness and integrity of its efforts to protect these birds and manage park resources without discrimination or bias. The sole remedy proposed by petitioners (and in the GGNRA historically) has been to ban off-leash recreation at Ocean Beach. It bears mention that the federal panel convened by the NPS to study this issue concluded: *"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."

Consider that the language of the Endangered Species Act ("ESA") itself states: ***"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."

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 plover from extinction. As of yet, that scientific evidence has not been provided. In fact, the best scientific data currently available establishes that the Western Snowy Plover 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.) These findings demonstrate that the Western Snowy Plover population is far greater than previously believed, and so large as to no longer qualify the Western Snowy Plover as either threatened or endangered. While respondents understand that the GGNRA cannot choose to ignore management of the Western Snowy Plover unless and until the USFWS formally delists the plover, we believe 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. Once again, the solution offered by Peter Baye would provide maximum protection for the plover while minimally interfering with the public right to use and enjoyment of the beaches.

RESPONSE TO PETITION SECTION IV

Premise: Allowing Dogs to Roam Off-Leash at the GGNRA is Inconsistent With the Purposes and Goals of this National Park.

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. Sec. 460bb.*) In addition to this generic statement of purpose appearing in most national park statutes, Congress included two "specific provisions" unique to the GGNRA which the petition ignores.

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 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."

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 another 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. (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.) When voting for Charter

Section 7.403-1(a) authorizing the transfer of the City parks, 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 the property, the NPS promised the City that "historical recreational use" would be continued.

Since 1992, however, a new anti-recreation ideology has pervaded Park Service policy. In fact, the GGNRA experimented with changing its name to “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.[7] This runs counter to the intentions of the City of San Francisco and its citizens who have been promised that the GGNRA will remain an urban recreation area. As minutes of the San Francisco City Planning Commission, dated December 5, 1974 confirm, the resolution to transfer the property 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.”

[7] On August 28, 2001, the GGNRA Advisory Commission meeting was opened by Chair Rich 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.

In stark contravention of the City's mandate and the GGNRA's promises, the following exemplifies the newfound position of the NPS: ***"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.) [8]

This statement by GGNRA Chief Hatch epitomizes the conflict of ideologies we are currently experiencing with respect to 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. Clearly, the historical references presented here should clarify the source of the perspective of San Franciscans and further demonstrate the misrepresentations of petitioners. Beyond that, the Federal Panel that reviewed the applicable authorities, policies, planning guidelines, and information on Park setting, natural and cultural resources, and public safety developed the following observation (among others): *"GGNRA parkland is immediately 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 the GGNRA proceed with Negotiated Rulemaking to establish appropriate NPS sanctioned off-leash recreation areas in the GGNRA.

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

Hiding behind their mandate to protect the natural resources in the Park, local GGNRA management have decided they want to make the GGNRA a habitat for wildlife and native plants, not a recreational area. They resent the fact that the people of San Francisco and the Bay Area continue to desire to use the GGNRA for recreation, and join forces with the likes of petitioners to attempt to blame off-leash recreation in less than one-percent of the GGNRA for purported damage to the *entire* park. The complicity of the GGNRA and petitioners was never more evident than on the appeal in *U.S. v. Barley, et al.* The very arguments made in petitioners' *amicus* brief on appeal did not carry the day then and do not demonstrate any right to the relief now sought by petitioners.

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," and its objective was 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).)*

On the other hand, local GGNRA management has moved to *create* habitat in areas most heavily utilized by the populace for recreation, especially off-leash recreation. Creating habitat was ***not*** a stated purpose for the establishment of the GGNRA. Respondents and many others have tolerated substantial closures in Fort Funston to create native plant habitats. The rationale for these areas was to allegedly enhance the environment for the endangered bank swallow. However, these closures to create habitat were not preceded by the requisite environmental review. After the habitat 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 public has accommodated the GGNRA's desire to create wetlands, and even funded their project at Crissy Field based upon the GGNRA's (unfulfilled) promise of 70 acres for off-leash recreation at Crissy Field. At the same time, the GGNRA issued a "Finding of No Significant Impact" ("FONSI") with respect to both the improvements to be made at Crissy Field *and* the continued existence of the 1979 Pet Policy. (This finding is tellingly absent from the petition.) However, the conflict of ideologies regarding Park use is ever increasingly being resolved by the GGNRA unilaterally (even illegally), and in favor of habitat protection, not recreation. Indeed, notwithstanding the FONSI, after completing the wetlands at Crissy Field, the GGNRA banned off-leash recreation throughout the GGNRA, including Fort Funston and Crissy Field. Only a Court Order reversed this process. It seems clear that the pattern of practice in the GGNRA is to create habitat adjacent to off-leash recreational areas, then utilize the proximal existence of habitat to justify the elimination of off-leash recreation. If what we have seen and heard so far is a picture of what is to come, we fear that 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.

The issue that is perhaps *most* disturbing is the GGNRA's treatment of the petition. On May 31, 2005, counsel for the NPS/GGNRA was specifically asked by the Court whether an emergency was being claimed in order to justify the rescission of the 1979 Pet Policy. The answer was a clear and unequivocal "no". Nothing since that date has occurred that would have justified seeking reconsideration of the Court's ruling, and nothing presented by petitioners

justifies a highly irregular attempt to trump the Court's Order. Clearly, on that basis, the GGNRA should immediately have rejected the petition.

Additionally, petitioners' assertions are in direct conflict with the six conclusions the Federal Panel specified as its basis for authorizing the GGNRA to proceed with Negotiated Rulemaking. Briefly, those six conclusions were:

1. *GGNRA parkland is immediately 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.*

2. *GGNRA manages the majority of recreational waterfront in San Francisco and Marin Counties.*

3. *There is a significant expression of demand from the visiting public for off-leash dog use at locations within GGNRA.*

4. There is longstanding off-leash dog use with tacit acceptance by NPS at certain sites within GGNRA.

5. Locations exist within GGNRA that appear to be suitable for off-leash dog use without causing unacceptable impacts.

6. Public safety and user conflict issues involving off-leash dog walking in GGNRA may be adequately mitigated through appropriate measures.

The GGNRA should have immediately rejected the petition due to its flagrant disregard for the recommendations of the Federal Panel. It is entirely irrational to entertain a petition whose purpose is to undermine the NR process. At the most recent NR meeting for proposed members of the Committee, GGNRA management advised the participants the GGNRA was giving serious consideration to the petition. Furthermore, six of the ten organizations presenting the petition are organizations currently slated to be on the NR Committee! Local GGNRA management has advised the Ocean Beach DOG proposed representative for the NR Committee that other groups supporting the petition may be put on the Committee. How is it that these groups could participate in a process designed to designate areas in the GGNRA for off-leash recreation when it is clear they believe there is no room in the GGNRA for off-leash recreation? Why is the local GGNRA management leaving these groups on the NR Committee?

The apparent answers to these questions may be even more disturbing. At the most recent NR meeting for proposed members of the Committee, the proposed representatives for the dog owners groups were asked, as a prerequisite for participation, to acknowledge that no off-leash recreation being allowed in the GGNRA would be a satisfactory conclusion to the NR process. Respondents do not see this requirement as being consistent with the federal objective for NR or the conclusions of the Federal Panel authorizing NR. It appears that the local GGNRA management agrees with the proponents of the petition. If we are correct, it is clear the NR process has been irreparably damaged even before it is to begin. We can only hope that those in Washington responsible for oversight of the NR are watching this process carefully, and have a true desire to ensure that their intentions are executed faithfully.

CONCLUSION

The petition is an unrecognized and improper vehicle for petitioners to fulfill their extreme agendas. The petition does not demonstrate the existence of any exigency caused by the less than one-percent of the GGNRA in which off-leash recreation is permitted. Accordingly, the petition must be denied.

Respectfully submitted this 28th day of September, 2005.

Stephen Samuel Sayad

Stephen Samuel Sayad
P.O. Box 330100
San Francisco, California 94133
415-331-5856

Ocean Beach Dog Owners Group
http://OceanBeachDOG.home.mindspring.com (website)
OceanBeachDOG@mindspring.com (email)

EXHIBIT A