

COMMENT ON PROPOSED RULE TO
RESTRICT OFF-LEASH RECREATION AT
OCEAN BEACH

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Executive Summary

This proposed Rule by the GGNRA/NPS for the seasonal closure of parts of Ocean Beach and Crissy Field to off-leash recreation is described by the GGNRA/NPS as a necessary action to protect the threatened Western Snowy Plover. The language of the Endangered Species Act contemplates and supports the position that any loss of these recreational areas for such purpose be balanced by *scientific proof* that such sacrifice will indeed help save the plover from extinction. As of yet, that scientific evidence has not been provided. In fact, as I will establish within this document, the scientific evidence shows that restriction of off-leash recreation will NOT increase the number of plovers at these locations. Further, it is more likely that the restriction of off-leash recreation in these areas will negatively impact the plover population. It is also critically important to note that the enabling legislation for the GGNRA does not support the implementation of this Rule. Therefore, this proposed Rule should be summarily rejected as a clear effort by our Federal Government to unfairly discriminate against taxpaying citizens who are dog guardians.

I. Is The Western Snowy Plover In Danger Of Extinction?

In fact, the best scientific data currently available establishes that the Western Snowy Plover is not threatened or endangered (at risk for extinction) at all. Significantly, a study commissioned by the US Fish and Wildlife Service (USFWS) and the US Geological Service (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.

II. Why Is The Western Snowy Plover Still Considered Threatened With Extinction?

The latest decision by the USFWS to continue to keep the Western Snowy Plover (WSP) on the Endangered Species List (ESL) is a clear example of the violation of the Endangered Species' Act's requirement that decisions be **“based upon the best scientific and commercial data available”**. Traditional tenets of science (the scientific method) have been ignored to justify this conclusion.

The scientific method is the process by which scientists, collectively and over time, endeavor to construct an accurate (that is, reliable, consistent and non-arbitrary) representation of the world. In summary, the scientific

method attempts to minimize the influence of bias or prejudice in the experimenter when testing a hypothesis or a theory.

The scientific method has four steps

1. Observation and description of a phenomenon or group of phenomena.

Based upon monitoring of the movements of the plovers on the west coast (the WSP) and inland plovers, and the perceived decline of the WSP, the USFWS became concerned as they believed the WSP was a species distinct from the large inland population of plovers, and as such required protection from extinction. The Western Snowy Plover was first listed as a threatened species in 1993. Quoting the USFWS (all of their quotes will be italicized):

"The 1993 listing rule stated that the Pacific Coast WSP is ``genetically isolated" from the interior breeding populations (58 FR 12864). We based this conclusion on banding and monitoring data, not genetic data. At the time of listing, we assumed the reproductive separation indicated by the banding data, over time, could lead to genetic differentiation. Genetic data for the western snowy plover was not available in 1993."

2. Formulation of a hypothesis to explain the phenomena.

The hypothesis, as stated above, was: **Because there was little or no breeding observed between the WSP and the inland population of plovers, the WSP was genetically different than the large population of plovers living inland, and being in decline, the WSP required protection.**

3. Use of the hypothesis to predict the existence of other phenomena, or to predict quantitatively the results of new observations.

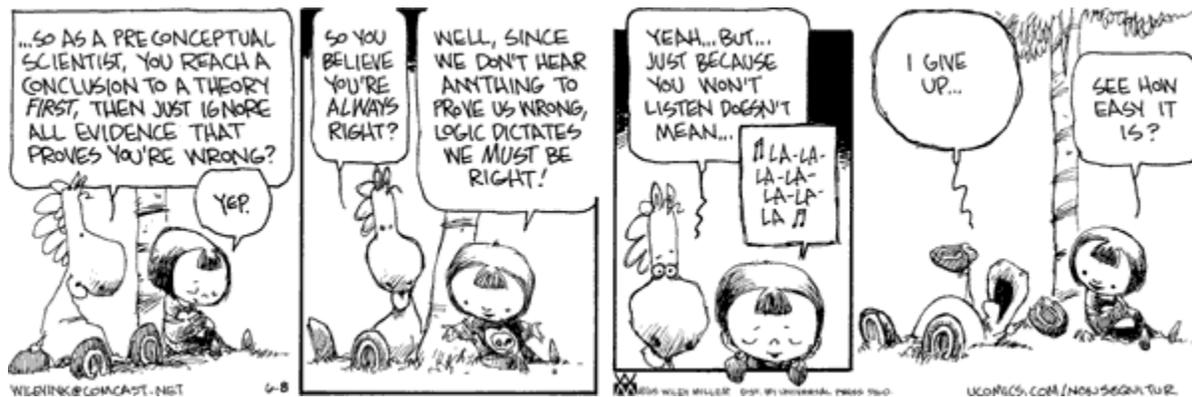
Should genetic testing be performed, the **USFWS expected to see genetic differences between the coastal WSP population and the large inland population, which would confirm the need for protection of the WSP.** The USFWS had no genetic data to confirm their hypothesis. However, apparently the ESA allows the USFWS to move to protect a species first, and investigate to be sure, later. There are timelines specified by law as to how long the USFWS has to test their hypothesis, and it does seem they were abused. In the meantime, measures were taken to protect the WSP, which included most notably for the public, restriction of beach access.

4. Performance of experimental tests of the predictions by several independent experimenters and properly performed experiments.

In fact, a study was done many years later funded and approved by the USFWS and the USGS to test the USFWS hypothesis.

"...a master's thesis (Gorman 2000) that did not find evidence of genetic differentiation between the Pacific Coast WSP and western interior snowy plover populations using mitochondrial DNA (mt DNA)."

The Scientific method concludes: If the experiments bear out the hypothesis it may come to be regarded as a theory or law of nature.... **If the experiments do not bear out the hypothesis, it must be rejected or modified.**



So, now that the USFWS hypothesis had been disproved, and the WSP could not be distinguished genetically from the very large inland plover population did the USFWS move to delist the WSP? NO. In fact, they continued to proceed to implement management policies to protect the WSP, further restricting the public's access to beaches on the Western coast. Several entities (City of Morro Bay and Surf Ocean Beach Commission) who were suffering due to those management policies decided to sue the USFWS to force them to re-evaluate this situation.

The announcement to retain the WSP's listing as a threatened species on April 21, 2006 is the USFWS response to this lawsuit. It appears that **the USFWS, not wishing to delist the plover, refused to reject their hypothesis or modify their hypothesis that the WSP was genetically different**, even though it had been reliably disproved. It is not revealed in the announcement how this came about, but it *appears* that the USFWS authorized another study in an attempt to refute this first study that disproved their hypothesis. USFWS stalled the court proceedings, possibly because they were counting upon the results of this second study using another method of DNA testing to substantiate their original hypothesis that the WSP was genetically different from the large inland population. The second study confirmed the results of the first.

"...a more recent study by Funk et al. (2006) includes analysis of microsatellite DNA markers. Funk et al. (2006) found no statistically significant genetic differentiation between Pacific Coast WSP and western interior snowy plover populations using mtDNA and microsatellite DNA markers."

Did the USFWS at this point acknowledge their hypothesis was incorrect and move to delist the WSP because it is the same creature as the large population of plovers who live inland and whose numbers require no protection from extinction? NO.

Perhaps most telling is the general opinion of Daniel Funk who provided the second DNA study, and whom the USFWS certainly chose to rely upon: "... it is important to use data from a wide range of criteria—interbreeding, nuclear DNA, behavior, morphology, ecology, etc.—not just mtDNA, when delimiting species boundaries."

This is indeed a disturbing concept, because this indicates Mr. Funk and the USFWS are quite comfortable setting public policy that restricts public access to thousands of miles of beach property based upon their personal definition of a species which may ignore verifiable hard DNA data in deference to intangible and/or incomplete data which is subject to bias. The USFWS chose to rely upon outdated, observational data regarding the lack of interbreeding of the WSP and the larger inland population to conclude that these two populations are separate and distinct and that the WSP should therefore, still be protected.

"In this finding, we rely primarily on the banding and resighting efforts conducted during the period of 1984 through 1993, as this is the period when banding efforts were underway at several areas on the Pacific coast and in the western interior, and nest monitoring studies and breeding season surveys were underway at many

locations when banded birds could be detected. Interior populations have not been banded since 1993 (L. Stenzel, in litt. 2005)."

Furthermore, the USFWS ignored yet another fundamental of the Scientific Method in the interpretation of this outdated data. The USFWS recruited four heavily biased researchers in favor of protection of the snowy plover to examine the banding data. All four are associated closely with the Audubon Society or Point Reyes Bird Observatory (PRBO). The Audubon Society formally opposed the delisting of the plover and officials at PRBO are in large part responsible for the initial listing of the plover as threatened. Not surprisingly, their conclusions were as follows:

"...we conclude that the Pacific Coast WSP is markedly separate from other populations of the subspecies due to behavioral differences and that it, therefore, meets the requirements of our DPS policy for discreteness. Banding studies and resighting efforts demonstrate that during breeding, the Pacific Coast WSP segregates geographically from other members of the subspecies, even those that also winter on the Pacific coast. Although not absolute, this segregation is marked and significant."... This behavioral difference tends to set Pacific Coast WSP individuals apart from the interior birds with which they may mix during the winter."

The USFWS has chosen to deviate from established scientific method, ignore incontrovertible, tangible, and specific data such as the two DNA studies, and rely instead upon clearly biased assumptions regarding the behavior and breeding of the WSP to justify their decision. The decision requires the USFWS to assume that there is little or no interbreeding between the populations. The decision requires the USFWS to assume that should the coastal plover population be lost, the inland population could not recolonize the coast. Neither of these assumptions has the benefit of reliable, incontrovertible data.

Therefore, since 20% of the plovers have decided they prefer to "hang out" on west coast beaches rather than with the rest of the genetically identical plovers inland, the general public will not be allowed that privilege.

For those unfamiliar with the genetic lexicon, consider how it is the Courts and the medical community determine the father of a child when it is in doubt. DNA tests are the standard test utilized, to the exclusion of all others. It would be a gross injustice for the Court to disregard DNA evidence that confirms the child's father is Mr. A, and instead conclude the child's father is Mr. B simply because the child behaved more like Mr. B.

Decisions made based upon intangibles, and without deference to hard, reliable scientific data are subject to abuse of discretion; and are the antithesis of the established "scientific method" which goes to great lengths to minimize the influence of bias or prejudice in the experimenter when testing an hypothesis or a theory. The Endangered Species Act requires decisions to be based upon science's best evidence, not ideology or politics as it has been in the case of the Western Snowy Plover.

While I and others 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.

III. Will Restricting Off-Leash Dogs At Ocean Beach Help Protect The Plover From Extinction?

Putting aside the controversy as to whether the Western Snowy Plover is threatened with extinction or not, the United States Fish and Wildlife Service (“USFWS”) Draft Recovery Plan for the Western Snowy Plover can answer this question. The Recovery Plan states that the Western Snowy Plover does not nest or breed at the Ocean Beach location. **The Draft Recovery Plan also indicates that despite implementation of best management practices, this location (Ocean Beach) 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 (a central contributor to the USFWS Draft Recovery Plan) 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. This is consistent with the conclusions of a UK study (specifically identified in the new studies section of this comment) which states, “Sites that are highly disturbed are not used by breeding birds, and therefore any increase in disturbance levels on these sites will not alter population size”. Thus, the state of the evidence is that the survival/extinction of the Western Snowy Plover population will not be impacted by the management of Ocean Beach.

And in fact, 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 first Hatch Report regarding the WSP and dogs at Ocean Beach 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.” (1996 Hatch Report, p. 10, *emphasis added*.) Further, Daphne Hatch’s 1996 study for the GGNRA documented that since the off-leash policy was officially sanctioned in 1979, there has been an increase of more than 100 percent in the number of snowy plovers frequenting Ocean Beach. Even dog “rush hours” don’t seem to faze the plovers—at least, GGNRA observers and analysts couldn’t find any negative relationship between the number of dogs on the beach at any given time and the number of plovers on the beach at the same time (pg. 10, 13). 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. Despite this finding, the 1996 Hatch report still recommends the restriction of off-leash recreation at Ocean Beach.

IV. The USFWS Declines To List Ocean Beach Or Crissy Field As Critical Habitat For The Western Snowy Plover

As stated before, the fate of the purportedly threatened Western Snowy Plover (“WSP”) at Ocean Beach and Crissy Field will have no impact upon the overall survival of the species. 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.”*

In concurrence, effective October 31, 2005, the United States Fish and Wildlife Service (“USFWS”) excluded all areas in the City and County of San Francisco as critical habitat for the WSP. 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 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 help save the WSP from extinction. Clearly, the decision not to include Ocean Beach or Crissy Field as critical habitat demonstrates that such scientific evidence cannot be provided.

V. Daphne Hatch’s 1996 Study Is Fatally Flawed

Because the data do not support a conclusion that restricting off-leash recreation at Ocean Beach will increase the number of plovers, Daphne Hatch chooses to instead to focus on the “disturbance” of the plover at Ocean Beach. **However, no published study of a breeding bird quantifies the population consequences of disturbance. This is despite the fact that disturbance has been implied as a factor causing population**

decline for a wide range of species (Birdlife International 2000). Not surprisingly, it is postulated by Ms. Hatch that the energy expended by the plovers to avoid the disturbing dog is detrimental to their overall health and ability to breed, and as expected, no evidence is cited for such a conclusion. It is merely stated in the study, “little research has been conducted on the energetic effects of disturbance and whether individuals can compensate for this lost energy intake and the increased energy expenditure” (p.13). 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.

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.

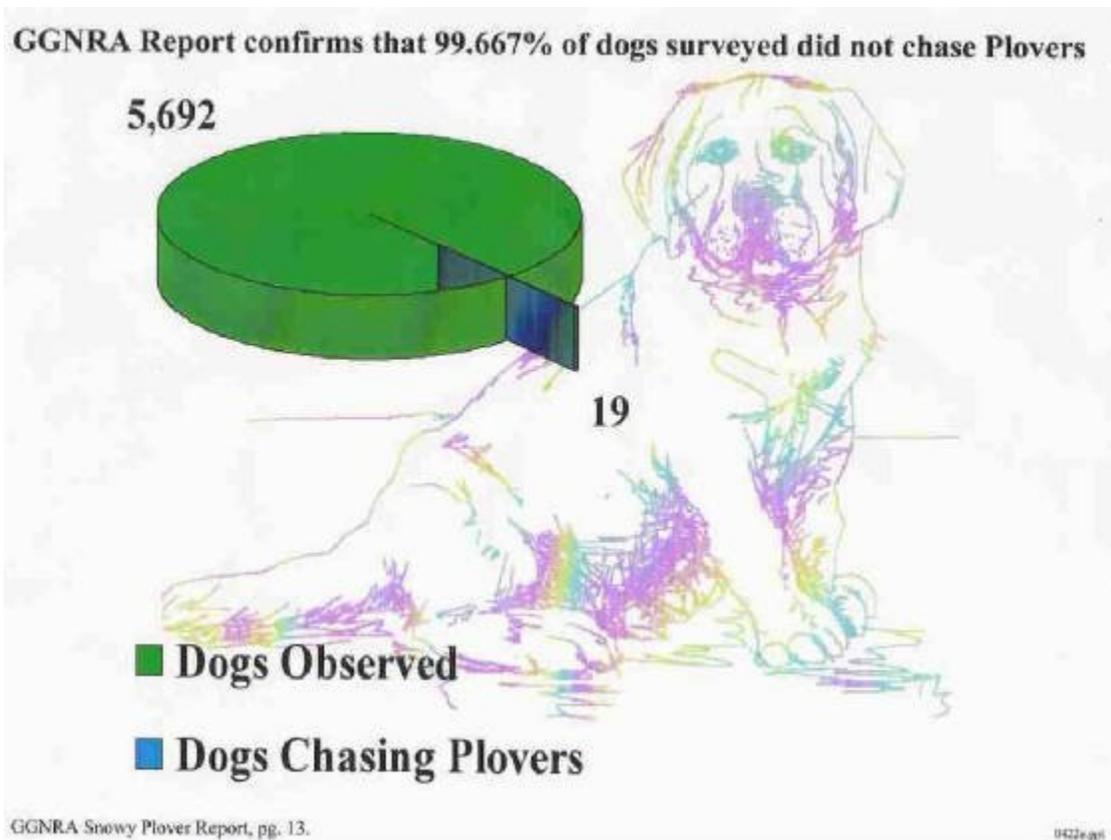


FIGURE 1

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.

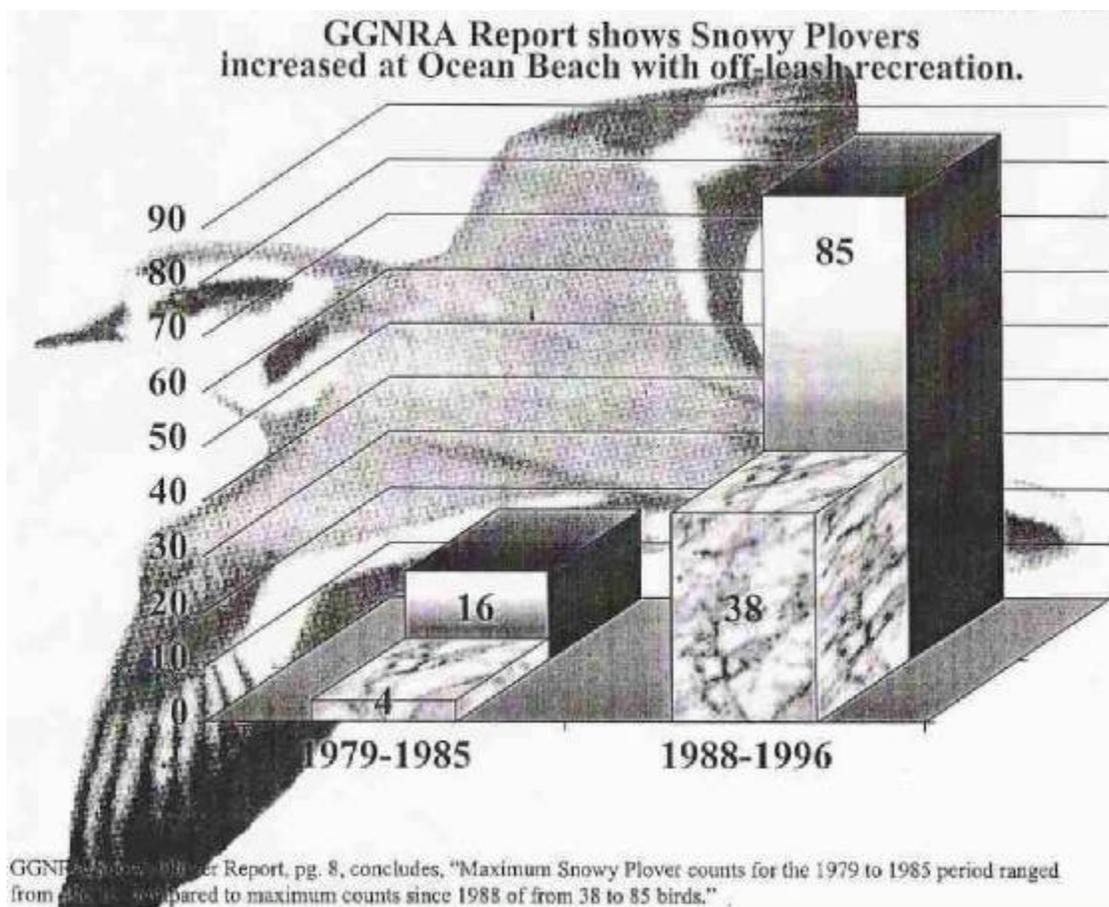


FIGURE 2

We 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. We maintain, based upon the data, that proper protection of the plover would encompass the effect of humans, predators, and other wildlife as well.

VI. The GGNRA Refuses To Implement Any Other Measures To Protect The Plover

Leashing of dogs on a 2.2 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.

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. The GGNRA has refused to consider the option of constructing a fence to protect the Ocean Beach plovers.

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.¹

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

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 are left indefinitely on the beach to attract ravens and other plover 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.

VII. The GGNRA Has No Protocol For The Rescue Of Injured Or Sick Birds Or Mammals In The Park

The response of Federal officials to the oiling of wildlife after the Cosco Busan oil spill was slow and inadequate in the eyes of the citizens who live in the communities affected. However, to those of us who frequently utilize GGNRA properties for recreation, the poor response came as no surprise. Below are my

¹ 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.

personal notes from my conversation with a GGNRA Wildlife Ecologist regarding my attempted rescue of a bird that morning—sent by email to OBDOG members Thursday September 13, 2007:

Bill Merkle

Dispatch # 415-561-5505

Acknowledges it is unfortunate there are no signs for the public to be advised as to whom to call if a bird, marine mammal or other wildlife is injured or requires assistance.

GGNRA will not necessarily make every attempt to help an injured bird should you bring it to their attention. It will depend upon three factors: 1) type of bird 2) type of injury 3) location of bird

If it is a shorebird (a common bird), they are much less likely to help. He was noncommittal as to what injuries they would address. As to location, if I bring the bird to their personnel, what is that all about? It was explained to me that if the injury occurred in an undeveloped area, then they would be unlikely to rescue the animal or bird. When asked whether Ocean Beach was developed or undeveloped, he said the parking lot would be developed, but the beach would be undeveloped. He went on to explain that in undeveloped (natural) areas, they allow nature to take its course. Disease is a natural process, and predation is a natural process. As for letting nature take its course, what about dogs chasing birds is not natural? I asked how the GGNRA rationalizes that a dog chasing a common shorebird warrants a ticket (we must protect park resources), yet if the same shorebird is brought to them because it is injured, they are satisfied to let it die? I asked then why is it that since they choose (and I believe erroneously) to define dogs as predators of birds, why are they then not considered part of the natural process at the beach and ignored just like every other predator?

He responded that if they received a report that a dog was attacking an injured bird they would most certainly respond. He advised me the GGNRA considers dogs to be an unnatural part of the park as they are associated with human use of the park (which is also by inference an unnatural intrusion into the park areas). Those of us who thought this park was created for our recreational use had better get used to the idea that the Park Service regards us as unwelcome intruders into their “wildlife protection area”.

I went on to point out to him that I did not want to hear him defining dogs as predators or complaining about dogs attacking birds as my dog helped me rescue this bird this morning and has done the same numerous other times. My dog has alerted me to hypothermic birds that are still alive, and he won't leave until I pick them up and take them to safety. My dog will chase off ravens that are attacking an injured bird who is unable to effectively defend itself and actively chase those ravens away while I pick up the injured bird. Earlier this year we rescued a grebe, today it was a common shorebird. I told him I cannot just run by when an injured bird is actively being attacked by ravens and is screaming for help. He didn't have a lot to say in this regard.

The GGNRA claims the purpose of limiting the activities of dogs and their guardians is to “protect the resources” of the park. What resources exactly is the GGNRA protecting? The same resources you are content to let die because you don't care to make the effort to transport injured birds to WildCare in San Rafael? When I asked why they would not transport every injured bird brought to them for care, Mr. Merkle indicated the GGNRA preferred to “manage habitats and work on population levels”. I am afraid to contemplate exactly what that means, except that the fallow deer in Marin probably have a pretty good idea. Or perhaps it means they want to work on limiting our human population levels in the Park. Or both.

I am disgusted by the hypocrisy of the GGNRA yet again. Their record of park management policy is abysmal. They neglect to assist injured birds even when they are brought to them, they are slaughtering over a thousand deer in Marin merely because they are non-native.

The proposed rule which sacrifices recreational access to protect the plover cannot be justified when GGNRA management has failed to implement the most basic of plans to ensure their well-being.

VIII. The GGNRA Condones Other Disturbances To The Plover

To further compromise the GGNRA's argument that the restriction of off-leash recreation is necessary to protect the plover, the GGNRA has taken the plover's alleged summer hiatus as an opportunity to begin bulldozing of the "Plover Protection Area". In October of 2005, when United States Fish and Wildlife Service (USFWS) declined to designate Ocean Beach as critical habitat for the plover they stated the following: *"Although we do not consider these areas [Ocean Beach and Crissy Field] 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."* The USFWS is previously on the record as stating, *"Activities that may adversely affect plovers include sand deposition or spreading, beach cleaning, construction of breakwaters and jetties, dune stabilization/restoration using native and nonnative vegetation or fencing, beach leveling and off-road vehicles driven in nesting areas or at night."*



Ocean Beach Plover Protection Area (July 31, 2007)

When OBD OG principals first observed the bulldozers in the Plover Protection Area, we made a Freedom of Information Act Request of the GGNRA, to determine the purpose of the bulldozing, as well as determine whether USFWS had approved this drastic action.

The GGNRA responded to our request, but failed to answer our questions about the bulldozing. We were later advised verbally that there was no correspondence with USFWS to obtain approval for bulldozing, as the plover was not then present. Internal GGNRA records show the GGNRA bargained with USFWS in 1996, sacrificing our off-leash recreational opportunities in order to get USFWS to agree to allow bulldozing in this same area of Ocean Beach. The ESA is very clear that it is not permissible to modify the habitat of an endangered or threatened species when they are not present, but expected to return. One example would be the prohibition of the removal of trees that hold an eagle's nest, even when the eagle is not present or utilizing the nest.

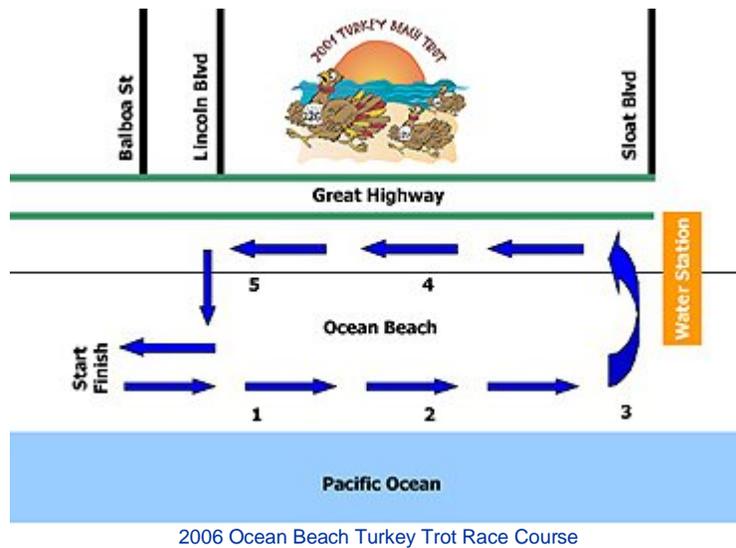
We understand the GGNRA is modifying the beach in this area to minimize the effects of erosion and the drifting of sand on to the Promenade and Great Highway. The GGNRA has refused to acknowledge in any significant fashion that erosion and the progressive collapse of the shoreline limits the areas where the plover can roost and forage, as well as the quality of foodsource for the plover at Ocean Beach. The narrowing beach puts the plover in closer and closer proximity to all users of the beach, thereby increasing the disturbance to the plovers. These conditions will progress despite the GGNRA's move to eliminate off-leash recreation.

We agree the GGNRA needs to deal with erosion at Ocean Beach. However, it seems unlikely that the GGNRA will admit the obvious: the erosion itself and the GGNRA activities designed to deal with erosion adversely affect the plover to a much greater degree than four dogs who allegedly "disturbed" plovers in the last six years. The restriction of off-leash recreation to purportedly protect the plover is a complete ruse.

GGNRA personnel routinely drive off-road vehicles through the plover habitat in order to enforce the leash law at Ocean Beach. Certainly the GGNRA's "solution" is far more dangerous to the plover than the perceived "problem" (pictures of this activity on file).

In 2006, the Fourth Annual Ocean Beach Turkey Trot was an event sanctioned by the GGNRA (and SFRPD) for 1000 participants. Certainly the GGNRA recognized there would be additional participants who had not officially registered. I and other members of Ocean Beach DOG who witnessed the race estimated 1500 participants. The course for the race was charted directly through the *Snowy Plover Protection Area*. This was also during a time period where the GGNRA declared an "emergency" warranting the restriction of off-leash recreation in this same area in order to minimize "disturbance" to the plover. The GGNRA, by granting permits

for the Ocean Beach Turkey Trot, established that their ban of off-leash recreation is arbitrary, capricious and discriminatory-therefore unlawful.



IX. The Study Upon Which This Proposed Rule Is Based (The 2006 GGNRA Status Report For The Western Snowy Plover) Is Also Fatally Flawed

This is the second report Daphne Hatch (Chief of Natural Resource Management and Science for the Golden Gate National Recreation Area) has produced for the GGNRA to justify the closure of most of Ocean Beach to off-leash recreation due to the transient presence of the Western Snowy Plover (WSP). The first was produced in 1996. The second report, dated November 2, 2006, is the subject of this analysis. Reading Ms. Hatch's report brings to mind an article I recently read from the *Journal of the American Dental Association October 2006 Special Supplement*. The article was entitled, "Challenges in Interpreting Study Results—The conflict between appearance and reality". It seems that the GGNRA and Ms. Hatch have endeavored to manipulate the data so as to reach a predetermined outcome. Their conclusions falsely give the reader the appearance that the threat to the WSP from off-leash dogs is great. The reality is there is no credible threat to the WSP from off-leash dogs within the GGNRA.

Bias: The 2006 Hatch report presents itself as an "observational study". Observational studies have the least reliability of any type of scientific study because their results can be distorted by many factors. The first of those factors is bias. Bias generally stated is a "systematic error in the design, conduct, or analysis of a study that results in a mistaken estimate of an exposure's effect on the risk a subject faces". Bias is the basis of our skepticism of research to determine the efficacy of a medication when the research is conducted by a clinician who stands to gain financially if the medication is shown to be effective.

Ms. Hatch clearly has an ideological bias against people and their dogs recreating in any manner at Ocean Beach. She was quoted on September 7, 2005 in the S.F. Chronicle as saying, "*Ocean Beach without the people is an incredible habitat. But people think of it as a sandbox or their backyard*". This is an incredible admission from a high ranking GGNRA official considering the enabling legislation of the GGNRA.

Design: Daphne Hatch's bias is apparent in the design of this study. The objective of this study is to prove her assumption that the present management which allows off-leash dog use of Ocean Beach and Crissy Field is

inadequate to protect the WSP from harassment/disturbance and other detrimental effects of chasing by dogs. We learn nothing about the relative harassment/disturbance of the plover from any other source in this study. If plovers are harassed/disturbed 50 times in 5.5 hours by ravens, and one time in that same time period by a dog, is the harassment/disturbance by the dog even relevant? A comparative study model would have been more informative with respect to actually determining what management actions, if any, should be taken to protect the plover from harassment/disturbance in general. Frankly, this comparative study should have been undertaken in 1993 when the WSP was first listed as a threatened species, before the decision was made (and later reversed by the Federal Court) to require the leashing of dogs to protect the plover. However, it could have been undertaken at any time. **A comparative study is designed to remove one variable in a situation at a time, and observe the change, if any.** An initial period of observation would document the presence of predators (ravens) and their numbers, as well as the frequency of harassment/disturbance from all sources absent any management action. Next, the predators (ravens) being the most serious source of potential disturbance/harassment are removed as much as possible. Rather than killing all the ravens, the GGNRA could have begun a campaign to reduce and remove litter at the beach as a conservative method to reduce the number of ravens. This would entail aggressive ticketing of those who are observed leaving litter at the beach, and resources would be deployed to clear the beach of litter and dead wildlife daily. No one would be adversely affected, and in fact most beachgoers would welcome a cleaner, safer beach. Indirectly, the lack of litter/foodstuff for the ravens would have been expected to reduce their numbers. After the new management practice has been implemented for a reasonable period of time, a second period of observation is conducted. In this second data collection period, we could assess whether the litter reduction has reduced the number of ravens, and has the reduction in ravens reduced the frequency of harassment/disturbance to the WSP. If the ravens are not reduced, or the frequency of harassment/disturbance is still unacceptable, the next management measure is implemented. Exclosure fencing could have been placed in the areas where the WSP is observed roosting. This would serve to provide some protection for the WSP from the ravens and any other predators, as well as humans and dogs. Education of the public to give the exclosure fencing a wide berth would be appropriate. After a reasonable period of implementation, a third period of observation would be conducted to determine what effect, if any, this latest management method had upon the frequency of harassment/disturbance of the WSP. There also should be the implementation of an aggressive ticketing policy for all dog owners whose dogs were observed chasing plovers at some point within this process. **All of these management measures should have been implemented and assessed for their effectiveness in reducing the frequency of WSP harassment/disturbances before a leash restriction was even considered.** This would have been consistent with the mandate to maintain recreational opportunities in the GGNRA.

Conduct: This study exhibits bias in its conduct as well. Clearly, the participants who performed the surveys either had a pre-existing bias to construe the activity of dogs as harassment, or the training provided by Daphne Hatch and her staff created that bias in the participants. Most likely it is a combination of both, as those individuals who volunteered to do these surveys are identified as Golden Gate Audubon Society members. (We should point out that the Golden Gate Audubon Society is on the record as opposing any off-leash recreation in the GGNRA). Ms. Hatch, in her introduction, spells out the definition of harassment per the Endangered Species Act (ESA). Harassment is “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering”. Ms. Hatch seems to use the terms harassment and disturbance interchangeably in this report, so we will generally refer to it as harassment/disturbance. Harassment/disturbances are not well defined in the portion of the study where they are enumerated for Ocean Beach. However, in the Crissy Field portion, there is more description provided for the harassment/disturbances observed. In one case, harassment/disturbance of a plover by a dog was described as “alert posture – stood up and increased vigilance” (in other words, the plover lifted his head up and looked around). Compare this “disturbance” that was classified by a volunteer and the authors of this study as an incident of harassment to the definition of harassment as provided by the ESA. They are clearly inconsistent. In this study, the authors and participants classified activity as harassment/disturbance that does NOT meet the

definition of harassment provided by the ESA. **This is a classic example of examiner bias in the conduct of this study.** This is more precisely identified as “misclassification” and serves to invalidate the data collected and conclusions drawn in this study.

Analysis: Analysis of this data is compromised because the data itself is in question. Another factor that makes analysis of this data practically impossible is “confounding” in the design of this study. In this case, “confounding” refers to the fact that this study is not designed to isolate the effect of each component of the beach environment that can affect the plover adversely. For example, an off-leash dog is running at the waterline with its owner and they are some 20 feet from a plover. There is additionally a raven 30 feet and closing from the plover. The plover flushes, and it is recorded as a “disturbance”. How is it apparent to the observer whether the dog, the owner or the raven was the source of the disturbance? Practically, it could be any combination of all three. Based upon the premise of this study, it is reasonable to assume the disturbance/harassment would be attributed to the off-leash dog. Is that legitimate? There does not appear to be any attempt made to isolate all other activities within the Park that may adversely affect the plover—they are merely given mention. These would include: Beach patrols in vehicles on the beach, equestrian use of the beach, people walking or jogging, kite flying, littering which attracts predators, the predators (usually ravens) themselves, and removal of kelp or driftwood which are sources of food. No mention is even made of bonfires, camping, litter such as cigarette butts, or the shadows surfboards cast.

Perhaps the most egregious omission in this report is that there is no mention made of beach width. The beach width at Ocean Beach has been decreasing due to erosion. Daphne Hatch’s 1996 report concluded on page 10: “Factors other than the number of people or dogs, possibly beach slope and width, appear to exert greater influence over Snowy Plover numbers on Ocean Beach”. The GGNRA is quite aware that the number of plovers on Ocean Beach is not directly related to the number of people or dogs present on the beach. However, in this 2006 Daphne Hatch report there is some discussion on page 8 that the plover numbers have leveled off since 2003, and have never matched the level they reached of 85 in 1994. Concurrently, this report discusses repeatedly that since the reinstatement of off-leash recreation, the number of dogs at Ocean Beach has increased dramatically. The report directly asserts the increase in dogs at Ocean Beach is responsible for a greater number of plover disturbances and it is inferred indirectly responsible for the diminished number of plovers. Had Daphne Hatch been intellectually honest, she might have drawn the following conclusion from this data and a study she cites in this report, “Disturbance to wintering western snowy plovers”, by K.D. Lafferty. This Lafferty report states “The distance between human activity and the roost peaked at about 30 meters and relatively few people or dogs beyond this distance disturbed plovers”...presumably because a narrow beach increased the potential overlap between beach users and snowy plovers”. Ocean Beach suffers from serious erosion, and hence the beach width has narrowed dramatically, especially during high tides. It could more reasonably be concluded that the narrowed beach width is directly responsible for both the lower plover numbers and the increased frequency of perceived harassment/disturbance of the plover, not the greater number of dogs or their activities on or off of a leash. The narrowed beach width has both eliminated much of the potential habitat for the WSP at Ocean Beach (this is consistent with USFWS critical habitat designation in 2005), and forced all occupants of the beach into closer proximity to the plover, thereby perhaps causing greater harassment/disturbance levels (especially if you construe lifting your head and looking around as a disturbance).

How great are the harassment/disturbance levels really? The way the data is presented in this report is misleading. To put the data in its’ simplest form, in 2004 when dogs were required to be on-leash at Ocean Beach, one dog was observed harassing/disturbing a plover in 5.5 hours of observation on weekdays, and one dog was observed harassing/disturbing a plover every 2.5 hours on the weekends. In 2005, when dogs were legally allowed off-leash on Ocean Beach, (and there were many more dogs present) 1 dog harassed/disturbed a plover in 2.4 hours of observation on weekdays, and fewer than 2 dogs harassed/disturbed a plover every hour on weekends. Is this really significant? This report gives us no data regarding the rate of disturbance from any other source, however, the number of ravens far exceeds the number of dogs out at Ocean Beach, and it can

easily be concluded the harassment/disturbances due to dogs are dwarfed by the number of harassment/disturbances from the plover's natural predator, the raven.

It is difficult for me to do further analysis of the data, because the GGNRA has illegally withheld the raw data from me. In April of 2006, I requested, by means of a Freedom of Information Act request, all of the data/reports/Environmental Assessments the GGNRA had to substantiate their claim that there were resources in the Park that required protection. The GGNRA responded in writing that such data did not exist. Based upon the representations made in the November 2, 2006 Memorandum from Daphne Hatch and GGNRA Head Ranger Yvette Ruan, the last of the data for this report was collected in February and March of 2006. The data could and legally should have been provided to me in April of 2006. I subsequently appealed this FOIA request to the DOI, and it has not been acted upon despite the fact that the time allowed by law for response has long since expired. The DOI tells me I can sue them for it.

Conclusion: Rational analysis of the situation would suggest that the GGNRA is really not trying to solve a problem. The GGNRA is merely interested in restricting dogs to leashes throughout the GGNRA. Additionally, when taking into account Ms. Hatch's above comments to the S.F. Chronicle in 2005, one must question the future of both humans and dogs in the GGNRA. Taking into account the data regarding the numbers of dogs chasing either shorebirds or plovers in context of the frequency of the behavior over time, it seems ticketing of the miniscule number of offenders would be appropriate rather than punishing all for the transgressions of a very few. It is a bit like forcing all cyclists in the GGNRA to ride with training wheels because a very few speed through the park.

If GGNRA management complains that they do not have the resources to adequately police Ocean Beach then it provides an appropriate reason to move for reversion of this property. I remind you again of Rolf Diamont's (GGNRA Environmental Coordinator circa 1975) conclusions when the GGNRA had just accepted possession of Ocean Beach from the City of San Francisco—"*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*".

The Hatch report does not meet the criteria for a valid scientific study. It is more appropriately classified as "junk science"— "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". **Junk science should never be used as the basis for establishing public policy.**

X. The GGNRA Has Chosen To Ignore Recent Scientific Studies Whose Findings Do Not Serve Their Purpose

1) Our first example would be a U.C. Berkeley Environmental Sciences study presented by Megan Warren on May 7, 2007 that concludes within the GGNRA that the feeding of the Western Snowy Plover does not appear to be negatively affected by human and pet recreation. This is highly significant. Because the WSP does not breed at Ocean Beach or Crissy Field, its primary essential activity is foraging and feeding. If human and pet recreation does not negatively affect those activities, there is no need to restrict recreation in these areas. The abstract is as follows:

Recreation Disturbance Does Not Change Feeding Behavior of the Western Snowy Plover

Abstract The Western Snowy Plover (*Charadrius alexandrinus nivosus*) is a small shorebird that has many scattered wintering populations along the Pacific Coast of the United States, including several in the Bay Area. This species has been listed as threatened since 1993 under the federal Endangered Species Act of 1973. For

this study I measured disturbance rates, types, plover responses and feeding time in three different sites in the San Francisco Bay Area to explore the link between recreation disturbance and feeding behavior. I predicted that as frequency of disturbance increased, the birds would spend less time actively foraging and more time alert. However, data showed no significant relationship between feeding behavior and direct disturbance by human recreators. Instead, I now predict that recreation has a more indirect effect on the western snowy plover feeding behavior. Future research should focus on indirect effects of recreation, such as habitat disturbance and food source quality.

2) Our second example is a study, “**Predicting the population consequences of human disturbance for Ringed Plovers *Charadrius hiaticula*: a game theory approach**” by Durwyn Liley and William J. Sutherland. This study originates from the School of Biological Sciences, University of East Anglia, Norwich, Norfolk NR4 7TJ, UK. This study clarifies the following three pertinent facts:

- Sites that are highly disturbed are not used by breeding birds, and therefore any increase in disturbance levels on these sites will not alter population size
- **No** published study of a breeding bird quantifies the population consequences of disturbance. This is despite the fact that disturbance has been implied as a factor causing population decline for a wide range of species.
- We think of individuals [birds] as deciding not to breed rather than being prevented from doing so. Such individuals ‘queue’ for good quality territories rather than adopting a poor quality territory (such as Ocean Beach).

3) The third study originates from the School of Biological Sciences, University of East Anglia, Norwich, Norfolk NR4 7TJ, UK., and was authored by Jennifer A. Gill, published in *Ibis* (2007) 149(Suppl. 1), 9-14. It is entitled, “**Approaches to measuring the effects of human disturbance on birds**”.

This study clarifies a concept that helps to explain the apparent inconsistency of plover behavior at Ocean Beach and Crissy Field. On one hand, Ocean Beach is a highly disturbed, poor quality beach area (in large part due to erosion). Crissy Field is another highly disturbed beach environment at which the plover does NOT feed or breed (per the first study listed here). The GGNRA maintains that the plover is highly susceptible to disturbance by humans and off-leash dogs. This is why the proposed Rule has been promulgated. However, one must ask the question: if the plover is highly disturbed by human and canine off-leash recreation, and the plover does not feed at Crissy Field, why are any plovers there at all? Likewise, although the food source may be a bit better at Ocean Beach, why would the plover choose to roost there and endure the disturbance?

This study opines, “The principal way in which human presence can impact upon wildlife is by altering the ability of animals to exploit important resources. This can operate either through directly restricting access to resources such as food supplies, nesting sites or roosting sites, or by *altering the actual or perceived quality of these sites*. Direct restriction of access to resources can occur through animals avoiding areas where humans are present. **Changes in the quality of sites as a result of human presence could occur, for example, if predators were attracted to areas with humans, or if the presence of humans reduced the presence of prey species.**”

For the plovers observed roosting at Ocean Beach and Crissy Field, humans and off-leash dogs are not restricting their access to resources because the plovers are indeed there. The second alternative is that humans and off-leash dogs are altering the actual or perceived quality of these sites. The most logical conclusion is the presence of humans and their off-leash dogs reduces the presence and/or activity of prey species. This theory has been brought up by others such as the SF SPCA (Objections to the Federal Government’s Ban on Off-leash Dogs at Ocean Beach- Jan. 9, 1997, page 4), but was summarily dismissed by the GGNRA wildlife biologists. It is disturbing that the subsequent 2006 Hatch study at Ocean Beach intentionally ignores gulls, ravens and crows entirely, so there is no data available that might confirm the presence of off-leash dogs may protect the plover from birds of prey.

However, the statistics in Daphne Hatch's own 1996 study support this theory. 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*).

This UK study also evaluates the methodology of studies like the 2006 Hatch study, which attempt to assess the distribution or behaviour of animals in the presence or absence of disturbance. "A limitation of these types of approaches is that the numbers of animals that would use these sites in the absence of disturbance is generally not known. For example, if the sites with higher levels of disturbance also have lower levels of resource availability (e.g. food or nest-sites) or higher risk of predation, then removing the source of disturbance may have no effect on the numbers of animals in the area."

In actuality, because it is acknowledged by the GGNRA that removal of off-leash dogs will not *increase* the number of plovers at Ocean Beach, the question becomes, will the restriction of off-leash dogs *decrease* the number of plovers at Ocean Beach? There is evidence to confirm this is probable, as a similar scenario has already occurred in the GGNRA-- in an area directly adjacent to Ocean Beach, i.e., 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 the off-leash recreational activity and "exotic" plants were having a profound negative impact on the Bank Swallow. 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. After four years of closures of areas adjacent to the Bank Swallow burrows to off-leash recreation and vegetation revision, in 1995 the number of Bank Swallow burrows plummeted from 924 to 713. 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.

4) The fourth study was peer-reviewed and accepted on November 12, 1999, and published in *Biological Conservation* 97 (2001) 265-268. The authors are Jennifer A. Gill, Ken Norris and William J. Sutherland. The study is **entitled "Why behavioural responses may not reflect the population consequences of human disturbance"**.

The authors contend, "The effect of human disturbance on animals is frequently measured in terms of changes in behaviour response to human presence. The magnitude of these changes in behavior is then often used as a measure of the relative susceptibility of species to disturbance; for example, species that show strong avoidance of human presence are often considered to be in greater need of protection from disturbance than those which do not...By contrast, species which do not avoid disturbed areas are often considered as requiring little or no protection from disturbance...From a conservation perspective, human disturbance of wildlife is important only if it affects survival or fecundity and hence causes a population to decline."

What becomes clear after reading this study is that in the GGNRA, Daphne Hatch is defining avoidance behavior and what constitutes a "disturbance" in a very different manner than do other researchers. (This is consistent with my criticism of the 2006 Hatch study). According to this study, avoidance behavior or moving

constitutes an activity where the plover actually leaves the site. The 5, 10 or 20 foot flight Daphne Hatch is utilizing as her most severe evidence of disturbance may be relevant in breeding/nesting areas, where movement of that scale can take a plover away from its nest and eggs. In the circumstance where plovers are roosting in an area, this is not classified by other researchers as a “disturbance”. **From the perspective of these authors, the plovers roosting at Ocean Beach and Crissy Field require little or no protection from disturbance because they stay at these sites.**

XI. This Proposed Rule Violates The Enabling Legislation For The GGNRA

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.

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.*)

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).*)

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.² 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

² 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.

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: *"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.)³

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 the GGNRA. 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.

Conclusion

The sole remedy proposed by the GGNRA in this situation 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."* Accordingly, the GGNRA should be making every effort to protect the plover and still maintain off-leash recreation at Ocean Beach and Crissy Field. Clearly, this document illustrates that the GGNRA has done quite the opposite—made NO effort to protect the plover from

³ Ms. Hatch’s quote is taken from the article, “After the Crowds Have Gone...”; San Francisco Chronicle, September 7, 2005, authored by Patricia Yollin.

any peril *except* to outlaw off-leash recreation. To single out one sector of the multitude of park users, i.e., off-leash dog walkers, and to discriminate against their rights to enjoy their form of historically accepted recreation in this federally declared recreation area, utilizing unscientific and highly biased studies as justification, flies in the face of the very enabling legislation responsible for the existence of the GGNRA in the first place. If the GGNRA is unwilling to take less dramatic steps with respect to mitigation of their perceived problem with the plover (e.g., voice control enforcement, exclosure fencing) and subsequently measure the success/failure of these methods, adhering to generally accepted scientific principles, then they have no business managing the properties that the taxpaying residents of the City of San Francisco deeded to their jurisdiction in the 1970s.