

The San Francisco Society for the Prevention of Cruelty to Animals
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The People's Park:
Statement to the Citizens Advisory Commission
for the Golden Gate National Recreation Area*

August 29, 2000

In 1973, San Francisco voters were asked to give the National Park Service ("NPS") jurisdiction over local parks. In return, the voters were promised that recreation opportunities would not be limited. In fact, the public was assured no one would even notice the change. To address concerns from city officials and citizens over the release of this land to the federal government, certain unique restrictions were inserted into the enabling statute. In particular, the Golden Gate National Recreation Area ("GGNRA") was established for "maintenance of needed recreational open space necessary to urban environment and planning." (16 U.S.C. Section 460bb.) Relying on this language and representations by city officials that this was merely a "technical resolution" that would not affect "recreational use by all citizens," the people of San Francisco approved in 1973 a Charter Amendment Proposition F, which permitted the transfer of these city parks to the federal government. The use of these parks specifically for off leash recreation was further addressed during the hearings before the United States House of Representatives, and dog walking was an enumerated activity in the U.S. House Report (H.R. Rep. No. 1391 at p. 4854.)

To formalize those needs as to off leash dog walking, extensive public hearings were held, culminating in the 1979 Pet Policy. At that time, the public was assured that off leash dog walking would be respected and preserved. And for well over 20 years, the recreation needs of the community have by and large been honored, with wildlife and recreation coexisting peacefully within what is now the GGNRA. In the early 1990's, to oversee the expansion of the GGNRA with the transfer of control over the Presidio, a new influx of NPS staff arrived. That's when the trouble started...

Since 1991, the National Park Service has closed over forty acres of Fort Funston's best, most coveted recreation space. Combined with unilateral "revocation" of off-leash dog walking at Lands End, Fort Miley, Marin Headlands, parts of Ocean Beach, the Presidio and elsewhere throughout the

* A more detailed analysis of the various pretexts used to justify the proposed closure will be submitted to the National Park Service before its September 18, 2000 comment deadline. A summary of the fundamental historical issues and more general observations about the closure are provided herein. Although the primary focus of this submission details the effect of the proposed closures on off leash dog walking, the arguments apply with equal force to all forms of recreation. The closures would prevent all public access to the area, creating a fenced compound inaccessible to all but the NPS staff assigned to keep the citizens out.

GGNRA (see attached map), NPS staff have not only broken promise after promise with park users, interested parties and even government officials, the NPS has also violated its own regulations, U.S. Department of the Interior policies, federal law and undermined the role of the Citizens Advisory Commission ("CAC").

They now ask the CAC to sanction the closure of an additional twelve acres of recreation space. Combined with earlier closures, the pending proposal would block all access to the cliff bluffs for the northern half of Fort Funston.

The only measures necessary for protection of the Bank Swallow would be a limited closure along the top of the cliffs, as was done in 1990 when the colony was located further north. Since 1990, however, the NPS has—to varying degrees—used protection of the Bank Swallow as a “pretext” to promote native plant habitats at the expense of recreation. Following court rulings and deposition testimony, signs indicating the areas were closed to promote native plant habitats in some sections of the park were quickly removed. (See attached map.) All closures—including those in 1991, 1993, 1995, and 2000 were conducted without public review or environmental analysis as required by law.

In the process, the NPS has ignored its statutory mandate, violated federal law, and has—by its own actions of bulldozing and destroying the ecology, increasing erosion and encouraging predation—decimated the threatened Bank Swallow colony at Fort Funston.

The San Francisco SPCA urges the CAC, on behalf of each of our 91,249 members, to act unanimously and immediately to protect important community rights by rejecting the National Park Service's proposed closure of valued recreation space at Fort Funston. In so doing, we ask that the CAC analyze the current proposed closure in light of the cumulative impact of all the closures which have occurred since 1991. Reasoned decision-making demands a finding that the current proposal, like all the others, is arbitrary and capricious, in direct violation of federal law, and undermines the covenant the government established with the people.

Presented to the Citizens Advisory Commission, Golden Gate National Recreation Area, August 29, 2000 on behalf of Edwin J. Sayres, President, the Board of Directors, and 91,249 Members of The San Francisco SPCA by:

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Since 1992, NPS staff has justified the conversion of recreational park resources to native plant habitats under the guise that such action is the national park mission. The mission of the GGNRA, however, is embodied in statute and legislative history creating the park. Indeed, the NPS's own regulations and management policies underscore the importance of the specific language contained in the enabling legislation establishing each national park. Each park has a specific purpose unique to the cultural and ecological setting where it is located.

In fact, courts look to the enabling statute and legislative history establishing the specific park unit to ascertain the scope of activities permitted in each park. (National Rifle Assoc. of America v. Potter (D.D.C. 1986) 628 F. Supp. 903, 911, reviewing U.S. House of Representatives Report to determine if GGNRA permitted hunting and trapping.)

NPS management policies also specifically provide that, "Congress has stated in the enabling legislation of most units of the national park system that they have their own particular purposes and objectives." (National Park Service Management Policies, at p. 2.)

Much of the San Francisco unit of what is now the GGNRA was originally city parkland donated to the federal government after the park was established. To address concerns from city officials and citizens over the release of this land to the federal government, certain unique restrictions were inserted into the enabling statute.

In particular, the GGNRA was established for "maintenance of needed recreational open space necessary to urban environment and planning." (16 U.S.C. Section 460bb.) Relying on this language and representations by city officials that this was merely a "technical resolution" that would not affect "recreational use by all citizens," the people of San Francisco approved in 1973 a Charter Amendment Proposition F, which permitted the transfer of these city parks to the federal government.

Legislative history and “land use planning” events developing the general plan and natural resources plan further confirm that the NPS understood that off-leash dog walking was a “recreational” activity “necessary to urban environment.” The use of these parks specifically for off-leash recreation was addressed during the hearings before the United States House of Representatives, and dog walking was an enumerated activity in the U.S. House Report. (H.R. Rep. No. 1391 at p. 4854.)

NPS management policies further advise that,

Park managers should ascertain park-specific purposes and management direction by reading the park’s enabling legislation or proclamation and determine general management direction, not inconsistent with the enabling legislation...

Wide variations exist in the degree to which the laws and proclamations creating the individual units of the national park system prohibit or mandate specific guidance on particular management actions... (Id.)

Other NPS policies mandate the same analysis:

The purpose of a park, program or central office is usually defined in, or derived from, the unit’s enabling legislation and from other legal documents providing for its establishment.... Purpose statements represent the government’s commitment (Congress’ expectation) to the public how an area will be managed for the public benefit...

Purpose statements provide the foundation for everything that a park staff does in a park, and everything that is done by a program or central office. These purpose statements set the parameters for how a park should be managed and used, and provide the standards and rationale against which the appropriateness of decisions can be tested. In other words, purpose statements put sideboards on what activities are appropriate in the park, or for a program or central office, and define how the park’s resources

should be managed and what types of visitor experiences should occur...

Purpose statements are usually presented in the form of an infinitive statement: "To protect..." or "to preserve and interpret..." and "to provide..." Purpose statements are what you would answer a congressional committee if asked "Why does your park (program or central office) exist?" (Field Guide to National Park Service Performance Management, May 1998, emphasis added.)

Why does the GGNRA exist? It is not to create fenced native plant habitats off limits to the public. As evidenced by its name, the Golden Gate National Recreation Area is a recreation center, surrounded by a heavily populated urban environment. And it is the GGNRA's recreational value that was of the utmost importance to the Congress that established this great 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." (H.R. Rep. No. 1391, 92nd Cong., 2nd Session (1972).)

Contrary, therefore, to any allegations by the NPS that dog walking is a "privilege," subject to the "discretion" of the Superintendent which can be "revoked" at any time, public use of the land for recreation generally, and off leash dog walking specifically, is an important community right, which this Commission—like the Courts—can, and should, defend.¹ That mandate is the government's covenant with the people.²

Indeed, the CAC understood this from the beginning. During the public review that established the 1979 Pet Policy, the Pet Policy Committee of the GGNRA Citizens Advisory Commission (Meyer, A., Chairperson) acknowledged the

¹ The NPS adds insult to injury by not only changing the historical use of the land without public hearings, but also criminalizing public access to the land through citations and fines.

² The NPS conducted a study of Fort Funston in 1999. The study revealed that 74% of the public identified "off leash dog walking" as the most important aspect of Fort Funston. The second largest response, 21%, identified the area's breathtaking views and 17% said its beauty. The current proposal strikes at both of these—blocking all public access to the area, and to what the public values most about Fort Funston. Of note, less than 2% identified dogs as a problem and not a single respondent identified native plants as having any importance.

unique circumstances of recreational needs for an urban environment and for the GGNRA specifically:

[T]he ordinary guidelines outlined in the Code of Federal Regulations do not really apply in an urban area. People and their animals have been visiting the park for too long to apply an all-inclusive arbitrary policy. (Emphasis added.)³

After public hearings culminating in the 1979 Pet Policy, the GGNRA Citizens Advisory Commission designated Fort Funston, Lands End, Ocean Beach, Fort Miley, Baker Beach and Crissy Field for continued off-leash recreational activity. These were adopted in total.

³ We address this issue in detail because both the NPS and Golden Gate Audubon Society have taken the position that dog walkers have no standing to protest these closures because there is a general agency regulation, 36 C.F.R. 2.15(a) requiring dogs to be leashed in national parks, unless they are used to kill wildlife where hunting is permitted. (36 C.F.R. 2.15(b).) The federal government, however, recognizes that the general regulations must “comply with the legislative history governing intended public use of these areas” by providing a procedure for developing local rules to amend, modify, or relax restrictions contained in the Code of Federal Regulations in order to conform with legislative intent when the city donated the parks, and when Congress created the GGNRA. (See 36 C.F.R. 1.2(c).) Furthermore, the closures by the NPS for native plant habitat closures without public review affect all recreation users, not just dog walkers.

Closures Driven by Native Plant Habitat Projects

For well over 20 years, the recreation needs of the community have by and large been honored, with wildlife and recreation coexisting peacefully within what is now the GGNRA.⁴

In October of 1991, the NPS illegally closed approximately seven acres at Fort Funston, by moving the fences designed to protect the Bank Swallow 75 to 100 feet away from the cliffs to implement native plant habitats. (Milestone, J., "Just a Swallow! Habitat Restoration Project.") The closure was conducted without an environmental impact analysis of how the project would impact either recreation or the Bank Swallows, without proper project approval,⁵ and without public hearings in violation of NPS regulations, U.S. Department of the Interior management policies, and federal law.

By early 1992, almost four acres were converted to coastal dune and chaparral. At this time, NPS staff began chainsawing the 24 Monterey Cypress lining a trail leading to the beach, and volunteers pulled four acres of erosion-preventing ice plant.⁶ Bulldozers were used to level hillocks and bury concrete slabs. In a few months, volunteers replaced ice plant with 5,000 native plants in the four-acre area. The entire seven-acre project was designed to take five years to complete with only 75% coverage. The stated goal of the project was to increase "natural" erosion and create "moving sand" ecology.⁷ The impact on the Bank Swallow

⁴ In 1990, the NPS erected fences along the edge of the cliff of the so-called Bank Swallow habitat area, comprising approximately two acres of land. Statements by Biologist Ron Schlorff, California Department of Fish and Game, indicate that fencing along and near the crest of the cliff is all that is necessary to protect the Bank Swallow. (Schlorff, R., California Department of Fish and Game, Personal Communication, March 7, 2000, Declaration of Lydia Owen Boesch in Support of Plaintiff's Complaint for Injunctive Relief: "in some areas, no closure is necessary, and that in other areas, only a few feet of closure is required.")

⁵ In 1992, after the fact, GGNRA General Superintendent Brian O'Neill approved the fenced area, including the destruction of the Cypress trees, again without fulfilling lawful requirements of analysis and public review.

⁶ The U.S. Army planted ice plant in the 1930's to stabilize the dunes and control erosion. (Project Review Form, Ice Plant Removal, North Tip of Fort Funston, June 1994: "Native vegetation was bulldozed and ice plant was planted in its place for defensive reasons and to stabilize the blowing dunes that native vegetation allowed," emphasis added.)

⁷ According to NPS ecologist Ranger Sharon Ferrell, "the park's objective in restoring natural areas is to restore natural process. And that's what processing dune is, moving sand." (Deposition of Sharon Ferrell, Fort Funston Dog Walkers v. Babbitt, No. C00-00877 WHA,

was never analyzed despite winds of up to 100 miles per hour during winter periods.⁸

Almost immediately, an increase in erosion could be seen, with one six-hour windstorm in April of that year moving an entire dune planted from a southwest to northwest orientation. Five hundred native plants were buried. (Milestone, J., "Just a Swallow! Habitat Restoration Project.")

Beginning in 1992, public concern was expressed about the native plant vegetation projects. At a meeting with dog walkers in July, then-Head Ranger James Milestone assured dog walkers that a closure for native plant revegetation would be temporary, limited to one year. (Meeting Minutes of Fort Funston Dog Walkers Association, July 9, 1992.)

By 1993, however, the NPS expanded the native plant project by an additional three acres. Our ongoing review of the documents indicates that the NPS did so without project review by the Superintendent. Clearly, the NPS expanded the project without public review or an environmental impact analysis. (Milestone, J., "Just a Swallow! Habitat Restoration Project.")

hereinafter "Ferrell," 77:7-12.) "Once the ice plant is removed, sand will transport more freely throughout the site..." (Bank Swallow Permanent Closure, February, 1999.)

⁸ NPS documents note winds of "over 50 miles per hour" in March, April and May, having "major impact to the overall landscape geography of Fort Funston," with winter wind storms reaching 100 miles per hour. (Milestone, J., "Fort Funston's Bank Swallow Habitat and Flyway Management Plan and Site Prescription," May 1996.) In direct contravention of Department of the Interior management policies, NPS regulations, and federal law, NPS ecologist Ranger Ferrell admitted no analysis had ever been done:

"Has there at any time been a study of the effect of removal of ice plant on erosion of the cliffs in the bank swallow protection area? A: No." (Ferrell: 78:4-7.)

"Have you made any studies as to whether the removal of the ice plant ecosystem adjacent to the bank swallow nesting areas has harmed the bank swallows? A: No." (Ferrell: 78: 21-24.)

"Have you made any evaluation of whether bank swallows feed off insects in the ice plant? A: No." (Ferrell: 78:25-79:2.)

In fact, as early as 1960, a study of the Bank Swallows "confirmed the use of ice plants for nesting materials." (Cutler, B., "A Bank Swallow Colony on an Eroded Sea Cliff," 1961, pp. 56-57, p. 59, tbl. 6, fig. 47.) And Bank Swallow observations by NPS volunteers confirmed use of ice plants for nest building even after they fled the north cliffs. (May 4, 1998, May 7, 1999.)

In June of 1994, an additional expansion/closure of fifteen acres was proposed without analysis or public hearings. The NPS was not shy about the land grab. The report confirmed the project was “naturally expanding into areas beyond our previously agreed to perimeter... Project originally called for removal of all ice plant (a noxious exotic species) from the ten acre Bank Swallow habitat area. This is now complete and new area outside of Bank Swallow habitat area are now within our grasp.” (Project Review Form, Ice Plant Removal, North Tip of Fort Funston, June 1994, emphasis added.) The goal: destroying 15 acres of erosion-preventing ice plant, using chainsaws to destroy all “exotic” trees and bushes, and using bulldozers where possible.

In 1995, approximately ten acres were closed at Battery Davis under the pretext of erosion control, as well as an additional fifteen acres for native plant habitats. (Hillslope Closures-Fort Funston, March 1, 1995.) Following these closures, in a letter dated March 14, 1995, Superintendent O'Neill assured Richard Avanzino, then-President of The SF/SPCA that the habitat was nearing its completion and would not be expanded south. The NPS also indicated that the Battery Davis area closure was an approximately 5-year temporary closure during which time it would be revegetated. Signs indicating that the area was closed for native plant revegetation were subsequently placed along the affected areas.⁹

Approximately one year later, Ranger Milestone held a meeting on April 10th, 1996, with dog walkers. He advised that 200 volunteers would be meeting at the Bank Swallow site at the north end of Fort Funston to pull ice plant beginning April 20th, at a time when the Bank Swallow begin building nests in the cliffs. He estimated that the project would take two more years, but promised there would be no additional fences. (Newsletter, Fort Funston Dog Walkers Association, April 1996.)

That promise would not be honored. Nor was the failure to uphold public promises and public review principles an isolated practice. The NPS also took unilateral actions at Baker Beach and the Presidio where similar closures were

⁹ In a videotape of a 1995 meeting with angry dog walkers, Head Ranger Milestone reiterated that promise: “W ith [respect to] the Bank Swallows, we want to protect the cliffs, we don't want people carving into the cliffs, that causes erosion. We want to restore the flyway to Lake Merced, only the Flyway. We are not expanding the Bank Swallow site further south, we're going to complete this last section, this corner across from the existing fence to Skyline. So the Park Service doesn't have an intention, we're not going to expand this thing, further south, we're not going to take more of the area, that you can walk in.” (Newsletter, Fort Funston Dog Walkers Association, April 1996.) Ranger Milestone also indicated that “[w]e want to make it a temporary fence, but when we are talking temporary here, we're talking at least five years.” (Id.)

occurring without public review. As noted in a November 6, 1997 article in the San Francisco Chronicle: 'Hikers and picnickers have found their favorite vistas, woods and sand dunes roped off without notice, and many trees have been cut down to create pseudo-native habitats without public review.' (Fimrite, P., "Presidio Dogfight," San Francisco Chronicle, p. A11.)

By February 1999, the NPS approved the current closure as a part of its overall "vegetation stewardship program." (See GGNRA Project Review/Environmental Compliance Form, Vegetation Stewardship Parkwide Program, 1999 Workplan, February 3, 1999.) The project appears as a byline for "ice plant removal" in an attachment of, ongoing, list of projects throughout the entire GGNRA. (Agenda for Next Presidio/Parkside Project Review Committee Meeting, January 26, 1999.) In an e-mail from NPS ecologist Ranger Sharon Ferrell to several staff members including Tracy Fortmann, Chris Powell, and Mary Petrilli among others, Ranger Ferrell admits there had "not been proper project review in February." Rather, she says, the "significance of the project seemed to have been buried..." (Ferrell e-mail dated September 1, 1999.) After public controversy surfaced at the January meeting of the CAC, Ranger Ferrell further admits in another e-mail that "Brian [O'Neill, GGNRA Superintendent] wants to ensure that we are in and out as quickly and professionally as possible..." (Ferrell e-mail to Janet Gomes dated January 26, 2000; See also Fort Funston Dog Walkers v. Babbitt, No. C00-00877 WHA, Findings of Fact and Conclusions of Law, dated April 26, 2000: "intent on the part of the National Park Service to railroad through the closure, to maintain secrecy, to unleash the fencing with lightning speed, and to establish a fait accompli.")

GGNRA does not have absolute discretion for limiting public use or developing native plant habitats.¹⁰ Since 1991, however, GGNRA has imposed conditions and restrictions on visitor use over areas of Fort Funston under the pretext of creating native plant habitats. Each step of the way, controversy arose as more parkland became fenced. By 1995, GGNRA understood that any additional appropriation of the land for native plant habitat would be "highly controversial" and promised that the so-called Bank Swallow habitat would not move south and there would be no more fences. Despite these assurances, GGNRA approved

¹⁰ Legislation establishing the GGNRA contained unique restrictions on a Superintendent's discretionary powers. In particular, 16 U.S.C. Section 460bb provides: "In the management of the recreation area, the Secretary of the Interior...shall utilize the resources in a manner which will provide for recreation and educational opportunities consistent with sound principles of land use planning and management." (Emphasis added.)

the current project in February, 1999 and began implementing the controversial plan without prior notice or an opportunity for public comment.¹¹

Realizing that the project may be thwarted if promoted as a native plant expansion project, in September of that year, NPS officials sought after the fact justification as a Bank Swallow protection measure. NPS Biologist Daphne Hatch and California Fish and Game Biologist Ron Schlorff were consulted after project approval. (Deposition of NPS Biologist Daphne Hatch, Fort Funston Dog Walkers v. Babbitt, No. C00-00877 WHA, hereinafter "Hatch," 53:23-54:8.)

Following the filing of the pending litigation, Fort Funston Dog Walkers v. Babbitt, No. C00-00877 WHA, NPS staff further downplayed the native plant habitat plan and insisted that the entire closure was required to protect the Bank Swallows. NPS staff removed signs posted five years ago along the Battery Davis closure justifying the closure on grounds of "native plant restoration." Signs posted since 1998 along the coastal bluff area below the hang glider platform indicating the area was "closed for revegetation" were also taken down after questioning of NPS staff in depositions. (Ferrell: 87:20-88:21 and personal observation of dog walker.)

¹¹ Indeed, promising a new era of working together in the spirit of trust and openness, NPS staff were meeting with representatives from The San Francisco SPCA and the San Francisco Dog Owners Group on an ongoing basis regarding a dog owner education program at the GGNRA. While discussing off leash issues at Crissy Field, NPS staff deliberately withheld information about the pending closures at Fort Funston. (See enclosed letter to Chris Powell, GGNRA from Edwin J. Sayres, President of The San Francisco SPCA, dated July 13, 2000.)

NPS Actions, Not Dog Walkers, Decimate Bank Swallows

Protection of the Bank Swallow appears to be a pretext seized upon by the NPS to proceed with their native plant restoration project at the expense of recreation, in violation of the statutory mandate that created the GGNRA.

For decades, the Bank Swallow population has been thriving at Fort Funston, with their population increasing steadily even as off leash dog walking increased. In 1982, there were 229 burrows, it rose to 417 in 1987, and 550 in 1989—proving that dogs and Bank Swallows co-exist and thrive. In fact, despite increases in visitor use, a continuous and stable Bank Swallow colony nested for 16 years along the north cliffs of Fort Funston.

A 1995 Ocean Beach study by NPS Biologist Daphne Hatch reaffirmed the lack of nexus between dogs at Fort Funston and disturbance of the Bank Swallow. The Hatch study found that only six percent of all dogs chased birds, and none was ever reported catching or harming one. (Hatch, D., "Western Snowy Plover (A Federal Threatened Species): Wintering Population and Interaction with Human Activity on Ocean Beach, San Francisco, Golden Gate National Recreation Area, 1988-1996, November 15, 1996, p. 29, fig. 13.)

Fences have been placed on the bluffs ostensibly to prevent erosion from human presence on the edge of the cliffs. A government geologist, however, indicated that human recreation-caused erosion at Fort Funston was de minimus. (Notes of M. Alvarez, personal communication with Geologist Clyde Wahrhoftic, U.S.G.S.: "man caused erosion is probably negligible compared with nature," 1989.)

Ironically, it appears that the NPS native plant restoration projects have negatively impacted the Bank Swallows. Beyond protection of the crest of the cliff which is all that is necessary as a Bank Swallow protection measure, the NPS began transforming the ecology of the area in 1991 by cutting down trees and removing ice plant. In 1995, the effort was expanded when the NPS closed 23 acres by fencing off the area, bulldozing more ice plant and chopping down more trees to create coastal chaparral of moving sand and native plants. No attempt was made to analyze the relationship between the Bank Swallow colony and the existing ecology at Fort Funston before it was upset.¹²

In 1995, after the ten-acre closure at Battery Davis and the additional fifteen acres for native plant habitats, the number of Bank Swallow burrows plummeted. The

¹² See footnote 8.

number continued to decline as the NPS continued to upset the area, until 1998, when the colony simply left the area to an undisturbed location.

No study was conducted to evaluate any environmental impact the projects were having on the surrounding ecology. The 1980 General Plan commented on the importance of trees for blocking wind, and the Army specifically planted ice plant to control erosion. The NPS—without public review and an environmental impact analysis as required by department policy, federal regulations and federal law¹³—has destroyed ice plant and bulldozed all but two Cypress trees, all Eucalyptus trees and has planned to remove the remaining wind/erosion protecting trees and bushes within the closure. Indeed, the GGNRA General Management Plan describes the importance of these trees for protecting against erosion in San Francisco:

Currently, strands of Monterey pine, Monterey cypress and eucalyptus exist in areas that provide protection to the interior of the city from high winds. The trees are mature; some are dying. The loss of trees on the perimeter leaves interior trees vulnerable to wind. Dense thickets of shrubs, many exotics, provide habitat for birds and small animals...

The vegetation management program will develop and implement management guidelines for the protection and maintenance of the

¹³ According to NPS Natural Resources Management Guideline, NPS-77 at p. 289, "Management plans for exotic species will be developed at the park level in accordance with NPS resource management planning procedures, including provisions for public comment." (Emphasis added.) Furthermore, NPS Management Policies (1988) require, "Scientific information that identifies the exotic status of species, demonstrates its impact on park resources, and indicates alternative management methods and their probabilities of success." The policies further require "public review and comment," and mandate that "[c]are will be taken that programs to manage exotic species do not result in significant damage to native species... or historic objects." (NPS Management Policies (1988), 4:12-13, emphasis added.) See also 36 C.F.R. Section 1.5(b); 16 U.S.C. Section 460bb ("In the management of the recreation area, the Secretary of the Interior...shall utilize the resources in a manner which will provide for recreation and educational opportunities consistent with sound principles of land use planning and management"); Director's Order #2 Section 3.1.2 ("The National Park Service will use planning to bring logic, analysis, public involvement and accountability into the decision-making process," emphasis added); Director's Order #2 Section 3.3.1.4 ("General management planning will be conducted by an interdisciplinary team, including park managers and technical experts who will consult with other knowledgeable persons inside and outside the agency and with the general public. Decisions will be based on a scientific and scholarly understanding of the park ecosystems and cultural contexts.... If information is inadequate, planning and decision making will be deferred until adequate information is available for the type of decisions to be made.")

San Francisco coastline. In order to determine changes that have occurred and will continue to occur, detail mapping and community analysis will be done. Tree rings will be used to evaluate forest protection of native plant communities will be determined. Soils will be examined and soil maps will be developed. Continued literature review of methodology and life history characteristics for each species will be carried out. Programs will be designed to minimize cost of implementation and maintenance. Cooperation and coordination will be developed with neighboring agencies to provide continual protection to interior plant communities.

Instead of careful analysis as required, the NPS unilaterally began clear cutting trees, removing bushes, and uprooting several acres of existing plants.

After the 1995 native plant expansion, the number of burrows began to decline—from 924 in 1994 to 713 in the first year. (See attached graph.) They dropped again to 511 in 1996. In 1997, the NPS lost the data. In 1998 the number of burrows dropped to 140 and the birds abandoned the area adjacent to the native plant project and moved south to an undisturbed area along the cliff. About that time, starlings, hawks, kestrels, ravens and other birds began competing with and even preying on the Bank Swallows. In fact, starlings began to take over the Bank Swallow burrows in the mid-1990s, the public began to note a higher incidence of hawks as evidence by public statements in meetings with NPS staff, and the NPS's own study concluded that kestrel predation had played a substantial role in reducing the number of Bank Swallow breeding pairs from 340 to just 200 in one year alone. (Chow, N., 1994-95 Bank Swallow Annual Report.)¹⁴

The only changes in the Fort Funston environment are the very actions by NPS create fenced-off native environments—under the pretext of protecting the Bank Swallow—that has resulted in increased soil erosion destroying burrows on the cliff face, as well as increases in predator wildlife that are displacing and killing the Bank Swallow.¹⁵

¹⁴ This compares to Betsey Cutler's 1960 study that found no incidents of successful predation. (Cutler, B., "A Bank Swallow Colony on an Eroded Sea Cliff," 1961, p. 46.)

¹⁵ The NPS alleges increasing recreational activity may have contributed to the abandonment of the north cliffs. No study was conducted to measure recreational impact. In fact, there has been a decrease in access to the beach adjacent to the cliffs because of the closure of the parking lots located north on the Great Highway.

In the end, it appears that the NPS's own actions are decimating a threatened species.¹⁶ The destruction of the current plant ecology, and as a result the Bank Swallow nesting area, was done without any environmental impact analysis or public hearings, as required by law.

In fact, contradicting the NPS's claim that the closures are necessary to protect the Bank Swallow, closing only the cliff face and the top of the cliffs is necessary to protect the Bank Swallows—a fact no one disputes. (Schlorff, R., California Department of Fish and Game, Personal Communication, March 7, 2000, Declaration of Lydia Owen Boesch in Support of Plaintiff's Complaint for Injunctive Relief: "in some areas, no closure is necessary, and that in other areas, only a few feet of closure is required.")

Rulemaking and a Partial Hearing Before the Citizens Advisory Commission Does Not Satisfy NPS Policies and Regulations, Federal Law, or Common Sense

Legislative history demonstrates that public review over development and administration of the park was an important consideration. The CAC was created to provide a buffer so that the bureaucrats would not "run over" the people. (Statement of U.S. Senator Alan Bible, Hearings before the Subcommittee on Parks and Recreation, United States Senate, Senate Rpt., p. 101.) In supporting the creation of a citizens commission, then California Assembly Member Willie Brown expressed concern that "[t]oo often, the people only know of their government's plan after the fact, when it's too late to participate with the decision making process." (Testimony of Willie Brown, Hearings before the Subcommittee on Natural Parks and Recreation, United States House of Representatives, House Rpt. 92-21, p. 13.) He went on to note that "[t]he people who will enjoy the park are going to be consulted." (*Id.*) After noting that San Francisco taxpayers had the foresight to protect the parks, including paying for their care and upkeep, San Francisco Mayor Joseph Alioto reminded the congressional representatives that "our people naturally wish to retain some voice in their operation...." (*Id.* at pp. 398-399.) Government actors, citizens, and numerous community groups echoed this sentiment.

¹⁶ NPS mismanagement of the Bank Swallow colony may not be an anomaly. The San Francisco Chronicle reported that mismanagement by the NPS of the Crissy Field restoration project is decimating East Beach. As a result, one of the premier windsurfing beaches in the world and a popular recreation spot for others has suffered one hundred years of erosion in just one year. (McHugh, P., "Leach of East Beach," San Francisco Chronicle, July 31, 2000 at p. A17.)

However, the CAC is considering the closure after the fact, and has only scheduled a partial hearing. As noted by one public commentator, “In the Bicycle Trails Council of Marin case, GGNRA staff held four public hearings and three individual user group workshops, in addition to the comments solicited at Advisory Commission meetings.” (Letter to Michael Feinstein, GGNRA from Lydia Boesch, Esq., dated August 18, 2000, emphasis added.) Compared to a five year public review process establishing a bicycle recreation trail plan in Marin County, logic would demand that San Francisco—the most concentrated urban environment in the United States with the exception of Manhattan—with its grant of the land for purposes of recreation and its continuing reliance on the area for needed recreation space, would require more public input, not markedly less.

While rulemaking additionally begins to address the public participation requirement of federal law, it does not resolve all of them. In particular, the NPS has:

- (1) Violated the public review requirement under the statutory mandate and NPS regulations regarding all the closures at Fort Funston and throughout the GGNRA since 1991. NPS is under a statutory mandate to employ reasonable land use principles in planning in addition to their own regulations concerning public input for park planning and “exotic” plant control. They have utterly failed to do so.¹⁷

- (2) Violated the National Environmental Policy Act (“NEPA”), 42 U.S.C. Section 4321 *et seq.*, requiring environmental impact analysis for the native plant habitat/erosion control closures impact on the Bank Swallow colony and recreational activities at the park. Violations would include closure of recreation trails and beach access, thwarting aesthetic enjoyment, the destruction of park resources such as ice plant, trees, and bushes, as well as the wildlife that depended on them, controversy over size, nature and impact of the native plant projects, and consideration of the cumulative impact of all the closures since 1991, as well as actions taken in the face of lack of analysis as to cause for the decline of the Bank Swallow population.¹⁸

¹⁷ See fn. 13.

¹⁸ NEPA requires a federal agency to evaluate the “environmental risks and remedies associated with [a] pending project ... before a project is approved.” (LaFlamme v. F.E.R.C., (9th Cir. 1988) 852 F.2d 389, 398, emphasis in original.) Accordingly, agencies are obligated to “make relevant environmental information—including ‘[a]ccurate scientific analysis’ and ‘expert agency comments’—‘available to public officials and citizens before decisions are made and before actions

- (3) Violated the public's due process rights to intelligently comment on the proposed closure. The closure is predicated, in large part, based on conclusions reached from "personal communications" with twelve individuals in an unspecific time frame spanning three years. With respect to the individuals cited, NPS staff have not responded to two requests to provide copies of the minutes, tape recordings, summaries, raw notes, and any other memorialization of the communications including dates of the communications, who was present, what was discussed, conclusions reached, and the basis for those conclusions. (See enclosed letter to Brian O'Neill, GGNRA Superintendent from Kenneth D. Ayers, Esq., Hancock, Rotherth & Bunshoft, LLP., attorneys for The San Francisco SPCA, dated August 4, 2000, and Letter to Chris Powell, GGNRA from Nathan J. Winograd, The San Francisco SPCA, dated August 22, 2000.)
- (4) Violated principles of equitable estoppel and fair play. Aware that The San Francisco SPCA and the public could file a lawsuit over the illegal 1995 closures, the NPS promised that the native plant habitat project would not move south and that the Battery Davis closure would be limited to five years.¹⁹

Reasoned Decision-Making within NPS Grasp? 1996 "Milestone Plan"

In May of 1996, then-GGNRA Head Ranger James Milestone proposed what appears to be a rational mix of recreation and "restoration" for Fort Funston:

A long-range restoration plan ... would basically split Fort Funston down the middle using the Sunset Trail and Horse Trail as the dividing line. Typical visitor use activities such as hang gliding and dog walking would continue to occur in the western portion of Fort Funston. Restoration in the eastern portion would extend from the Olympic Club boundary to the Bank Swallow site along Fort Funston's eastern slope and plateau. Within this zone, the large

are taken." (Northwest Environmental Defense Center v. BPA (9th Cir. 1997) 117 F.3d 1520, 1541 (Reinhardt, J., concurring, emphasis in original.) The purpose of these requirements is to ensure that agencies do not use the NEPA process to "rationalize or justify decisions already made," or take action prior to the NEPA analysis that "limit the choice of reasonable alternatives." (Save the Yaak Committee v. Block (9th Cir. 1988) 840 F.2d 714, 718, See also 40 C.F.R. 1500.1(b), 1502.5, 1506.1(a), fns. 8, and 20, and text, supra.)

¹⁹ See fn. 9, and text, supra.

stand of eucalyptus and Monterey Cypress would be left alone, but all ice plant would be removed. Isolated trees and young sprouting trees would be removed from perimeter areas around the existing tree stands. Native coastal chaparral would be planted and encouraged to recolonize throughout the area.

The western side of Fort Funston, with the exception of the Battery Davis hillside Erosion Control Closed Area, would be left in its present condition covered in ice plant. This plan would be compatible with the needs of the dog walkers, hang gliders and most day use visitors using Fort Funston. People would be encouraged to stay on the designated trails in the restored eastern half of Fort Funston, while the western recreation side would be left relatively open and unrestricted. The proposed restored areas are low visitor use areas, and retain large stands of native coastal chaparral. The final product of this project, would be to create a wildlife corridor from the Olympic Club easement lands to the Bank Swallow flyway.

Instead, the NPS has struck at the core recreation area of Fort Funston, erecting fences not only to keep dogs and dog walkers out, but everyone—the children who play on Joey Hill (the only such recreation hill in the entire GGNRA)²⁰, the relatives of the service men and women who were stationed in the area, the military historians, the joggers, the hang gliders, the tourists, even the romantics. It is time to restore balance and equity and reject the proposed closure.

Whose park is it anyway? The NPS has taken the position that off leash dog walking is a “privilege” subject to the “discretion” of the Superintendent and can be “revoked” at any time.

²⁰ Joey Hill receives its name from a long-standing sign: “In Loving Memory of my Brother Joey, I name this hill Joey Hill.” In her deposition testimony, NPS ecologist Ranger Ferrell admits that Joey Hill is the only sand dune in the GGNRA where children can slide. (Ferrell: 61:8-15.) Ranger Ferrell also admits that no analysis was done of the impact the closures would have on recreational activities. (Ferrell: 58:21-62:12.) She admits she never saw any documents regarding the impact of the closures on recreation (Id. at 62:16-24). She also acknowledges that no one in her conversations ever considered the impact of the closures on recreation. (Id. at 62:25-63:2.) In light of the statutory mandate that the GGNRA was created for “maintenance of needed recreational open space,” 16 U.S.C. Section 460bb, this is extremely disturbing. Moreover, no archaeological analysis was conducted to authorize the closure of the area comprising the gun club, a fascinating ruin located at the base of Joey Hill.

To the contrary, the GGNRA belongs to the citizens. Off leash dog walking and other recreation activities had been occurring for over a decade prior to the grant of parkland to the federal government, and the voters were told that the grant of land would not affect recreation. San Francisco voters were told the change was jurisdictional only—a “technical” resolution. In the enabling statute that created the GGNRA, the people were told that recreation would be expanded to the maximum extent possible with dog walking listed as an enumerated activity in the legislative history. And the people would still have say over how the parks are managed. The CAC endorsed off leash recreation and the NPS assured San Franciscans that it would not be limited.

Under these circumstances, dog walking is not a “privilege” but an important community right. Off leash dog walking is not subject to the “discretion” of any appointed official. Neither can dog walking be “revoked” at will.

In 1999, the NPS commissioned a study to determine what people liked most about Fort Funston. The survey asked two general questions: (1) what is the special significance of this park? and (2) is there anything else you would like to tell us?

Seventy-four percent of those surveyed identified 'dogs' as the best thing about the park. Another 21% spoke of the breathtaking views. Less than 2% said dogs were a problem. Not a single respondent identified native plants as having any significance; a few respondents criticized the projects. The CAC represents the people. The people have spoken. And it is, after all, the people's park.

Attachments:

- Maps/Graphs Depicting Closures at the GGNRA and Bank Swallow Burrow counts.
- Letter and Attachments to Chris Powell, GGNRA, from Edwin J. Sayres, President, The San Francisco SPCA, dated July 13, 2000.
- Letter to Brian O'Neill, GGNRA Superintendent, from Kenneth D. Ayers, Esq., Hancock, Rothert & Bunshoft, LLP., attorneys for The San Francisco SPCA, dated August 4, 2000.
- Letter to Chris Powell, GGNRA, from Nathan J. Winograd, The San Francisco SPCA, dated August 22, 2000.
- NPS, Fort Funston Public Study, 1999.