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Dogs vs. Birds: 
Negotiated Rulemaking at Fort Funston

Robin McCall*

I. Introduction: A Wildly Popular Park

Throughout the 20th century, the shift from rural living to urban density never ceased. The latest U.S. census found that eighty percent of Americans live in urban areas, with thirty percent of the population living within cities. Along with the increasing geographical density, Americans are under pressure to work longer hours. Without much time or space, people need more than just a sporadic opportunity to backpack in the Sierra or surf the North Shore of Hawaii; they need parks near where they live for convenient relaxation and recreation. Medical studies show that when more open spaces are available, people are more likely to use and benefit from them, reaping improvements to both physical and mental health in the process. The closer a park is to an urban environment, the easier it is for city dwellers to enjoy the natural environment and the more frequently the space tends to be used. However, intense popularity can create its own stress on the park system. When humans also use a park as a place to walk their dogs, the stress can turn into a battle.

* J.D. Candidate 2007, University of California Hastings College of the Law, San Francisco.

2. Id.
5. E.g., the popularity of the Giant Forest in Sequoia National Park hampered the trees' ability to reproduce and interfered with their root systems. The National Park Service (“NPS”) then took aggressive steps to bring the forest back to a pristine state.
This note explores how an especially bitter fight between conservationists and dog walkers at a popular national park in San Francisco evolved into a new and more cooperative process of negotiated rulemaking. It traces the conflicts that led to a bitter lawsuit at Fort Funston, beginning with the National Park Service ("NPS") mandate to protect certain species, the intense public demand for canine recreation in the Bay Area, the resulting stalemate with the NPS, and ending with a negotiated rulemaking solution to the conflict between dogs and birds at Fort Funston.

A. The Golden Gate National Recreation Area and Its Mandate

The San Francisco Bay Area, endowed with natural beauty, is further blessed with outstanding local and national parks. Among them is the Golden Gate National Recreation Area ("GGNRA"), one of the largest urban parks in the world. The GGNRA comprises more than 75,000 acres of land and water, stretching from Tomales Bay in Marin County, across the Golden Gate, and on to Pedro Point in San Mateo County.

Congress established the GGNRA as part of the national park system in 1972. The National Park Service has declared that the park’s purpose is to "offer national park experiences to a large and diverse urban population while preserving and interpreting its outstanding natural, historic, scenic, and recreational values." The NPS has overwhelmingly met the first part of this mandate, as the GGNRA attracts sixteen million visitors each year.

That popularity can make it more difficult to fulfill the second part of Congress’s mandate because the interests of visitors often collide with species protection. The NPS counts more than 80 sensitive, rare, threatened, or endangered species in the GGNRA, including the federally-listed California red-legged frog, Coho salmon, and Mission blue butterfly, as well as the Western snowy plover and the state by removing tourist infrastructure and otherwise controlling human use. Bruce Leonard, Returning the Land to the Giants, NAT’L. PARKS, Jan. 1, 2005, at 18.

10. NPS, Golden Gate National Recreation Area (statistics), supra note 7.
brown pelican.\textsuperscript{12} Despite the political pressure that visitors can impose, the fragile wings of the butterfly may wield more clout. According to GGNRA Superintendent Brian O’Neill, “NPS regulations clearly state that when there is a conflict between recreation and resource protection, conservation is to be predominant.”\textsuperscript{13} In the statute that created the NPS, Congress requires that the NPS keep the GGNRA “unimpaired for the enjoyment of future generations.”\textsuperscript{14}

\section*{B. Fort Funston Land and History}

Fort Funston is a heavily used portion of the GGNRA, attracting more than five percent of park visitors while comprising less than three-tenths of a percent of its acreage.\textsuperscript{15} A former military fort, the park runs along the southwest coastline of San Francisco in a 222-acre strip of dune scrub, unstable bluffs, and isolated beaches.\textsuperscript{16} It attracts horseback riders, hikers, hang gliders, families on weekend outings, and most famously, dogs with their dog walkers,\textsuperscript{17} which may include professionals. It is not unusual to see a well-toned young walker festooned with leashes, followed by a half dozen dogs of various shapes and sizes, barking happily. Because the climate is windy and cool even by San Francisco standards, Fort Funston is especially hospitable to hang gliders, who call the spot one of the world’s best for the sport.\textsuperscript{18} In all, some 750,000 people visit and enjoy this part of the GGNRA every year.\textsuperscript{19}

The military heritage of the GGNRA is pervasive at Fort Funston, especially along the cliffs where Battery Davis once aimed huge cannons at the Pacific Ocean. The now-crumbling battery was built in 1940; following Pearl Harbor, troops used it to protect the West Coast against a Japanese invasion that never came.\textsuperscript{20} The Army later closed

\begin{itemize}
\item \textsuperscript{12} NPS, \textit{Birds of the Presidio} (2006), http://www.nps.gov/archive/prsl/nathist1/wildlife/birds/birds.htm\#a.
\item \textsuperscript{13} NPS, \textit{Fort Funston} (2006), http://www.nps.gov/go/gafa/fofu/news.htm, then follow link to “Habitat Closure, Press Release.”
\item \textsuperscript{14} 16 U.S.C. § 1 (2006).
\item \textsuperscript{17} The author and her dog, Oliver W.H., are frequent visitors to Fort Funston.
\item \textsuperscript{18} Fellow Feathers Hang Gliding Club, \textit{Hang Glide Fort Funston} (2006), http://www.flyfunston.org/.
\end{itemize}
the military base and, in 1972, transferred Fort Funston to the GGNRA. Now a visitor can walk among remnants of artillery, absorbed in history, and be startled by gunfire as National Guard troops practice on their nearby range. It seems appropriate that Fort Funston has finally fulfilled its purpose as a battleground 60 years later, albeit in the form of a legal battle.

C. Species Protection at Fort Funston

Fort Funston does not presently harbor any species protected under the federal Endangered Species Act ("ESA"). However the NPS also answers to the State of California in administering the GGNRA and must abide by the California Endangered Species Act ("CESA"). Like the ESA, the CESA takes a sweeping approach. In the opening provision, the state legislature declared:

[Endangered and threatened] species of fish, wildlife, and plants are of ecological, educational, historical, recreational, esthetic, economic, and scientific value to the people of this state, and the conservation, protection, and enhancement of these species and their habitat is of statewide concern.

The CESA is tougher in its application than the ESA. For example, modifying critical habitat can constitute a take under CESA, whereas under the ESA, such modification is not a take unless an animal or plant dies or is directly harmed. Additionally, if a federal agency determines that an action is not likely to jeopardize a species, the agency may grant permits in spite of adverse effects to habitat. By contrast, in California any adverse effect requires an environmental impact review and adequate plans for mitigation, otherwise the state agency must deny the permit or project. Thus, the bar is set particularly high for the NPS when it acts in California.

21. NPS, PROPOSED HABITAT PROTECTION CLOSURE, supra note 19, at 2.
26. Id. at 197.
27. Id. at 199-200.
1. The Threatened Bank Swallow

California lists the bank swallow, *Riparia riparia*, as a threatened species. The bird is small, measuring less than five inches. It nests by burrowing into vertical banks containing fine soils, such as the sandy bluffs at Fort Funston. Bank swallows breed in California from April to August, then winter in South America. Past projects to protect riverbanks along the Sacramento River drastically depleted populations of the swallow, making the coastal colonies all the more precious. According to the NPS, only two coastal colonies remain: one at Fort Funston, the other some 40 miles to the south at Año Nuevo State Reserve. Because of its relative isolation and small range, the Fort Funston colony is particularly vulnerable.

When justifying the 12-acre closure within Fort Funston that triggered *Ft. Funston Dog Walkers Association v. Babbitt*, the NPS summarized its efforts to protect endangered species, including the bank swallow. Fortunately, researchers have been counting bank swallow burrows since at least 1905, giving the NPS a long yardstick with which to measure the birds’ progress. In the mid-1990s, burrows numbered a healthy 500 or more a year. But after severe winter storms in 1997 eroded Fort Funston’s cliffs, the swallows moved to an unprotected area; fewer than 150 burrows were built over the next two years. The NPS installed fences to discourage recreational disturbances in the area, but natural erosion caused the fence to collapse and the NPS found additional erosion due to visitor use near the fence. The increased erosion can affect the swallows’ ability to

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30. Id.
33. See discussion infra Part III.
34. NPS, PROPOSED HABITAT PROTECTION CLOSURE, supra note 19, at 2. The Ft. Funston Dog Walkers Association rebutted many of the environmental assertions made by the NPS; see discussion infra Part II.C.
35. Id. at 3.
36. Id.
37. Id.
38. Id.
burrow. Ironically, the fence posts also gave predators of the swallow a place to lurk.\textsuperscript{39}

In late May of 2006, Golden Gate Audubon Society birder Dan Murphy counted five old and apparently abandoned burrows along with 197 new burrows, with at least 71 burrows in use.\textsuperscript{40} Murphy also observed swallows carrying fecal sacs, implying there were chicks in at least two burrows.\textsuperscript{41} The swallows seem to be recovering, but their status at Fort Funston remains far from secure.

\subsection*{2. The Landscape and Native Plants}

In addition to efforts to sustain bank swallow populations, the NPS strives to preserve the dramatic landscape and restore native plants at Fort Funston. As the shifting reminder of 2 million years’ worth of geologic upheaval, the bluffs are a natural resource in their own right.\textsuperscript{42} The NPS regards concentrated human use as a threat to the bluffs. The bluffs naturally erode about a foot a year, but human activity accelerates the process when stress at the top spreads down, compromising the face of the bluff.\textsuperscript{43} This deterioration can affect the swallows’ ability to burrow.

During efforts to stabilize the cliffs during the 1930s, the Army planted the invasive ice plant, which grew to cover more than half the dune system. An Executive Order issued by President Clinton in 1999 directed federal agencies to remove invasive nonnative species whenever “environmentally sound.”\textsuperscript{44} The NPS strategy is to remove the ice plant and replace it with native dune plants, such as coyote bush, San Francisco wallflower, and San Francisco spineflower.\textsuperscript{45} In addition to stabilizing the bluff, native plants contribute to the diversity of the ecosystem.\textsuperscript{46} Unfortunately, these native plants also tend to be less tolerant of human and canine use than the hardy ice plant.\textsuperscript{47}

\begin{thebibliography}{99}
\bibitem{39} Id.
\bibitem{40} E-mail interview with Dan Murphy, Golden Gate Audubon Society (May 31, 2006). Severe storms in January of 2006 eroded the cliffs, but Murphy says that is no problem for the swallows, as they just dig new burrows. Id.
\bibitem{41} Id.
\bibitem{42} NPS, Proposed Habitat Protection Closure, supra note 19, at 3.
\bibitem{43} Id.
\bibitem{44} Invasive Species, 64 Fed. Reg. 6183, 6184 (Feb. 8, 1999).
\bibitem{45} NPS, Proposed Habitat Protection Closure, supra note 19, at 5-6.
\bibitem{46} Id. at 5.
\bibitem{47} Id.
\end{thebibliography}
II. Canines in the City: Urban Dogs in the Bay Area

A. Density and a Dog’s Life

A stark contrast from the raw, open beauty of Fort Funston, San Francisco is intensely urban with a dramatic skyline, crowded streets, and noises that range from charming cable car bells to harsh car alarms. According to the 2000 census, San Francisco is second only to New York City in density among major cities, averaging more than 16,000 people per square mile. Downtown office space is projected to top $35 a square foot by the end of 2007.

All that density may be good for business, but it is not good for humans. A University of California study found that people were more likely to die of a heart attack while living in New York City, the densest of all American cities. For those who stay in the city, pets are a popular choice for relaxation and stress relief in the urban environment.

San Francisco is said to have more dogs than children, part of a national urban trend reflecting low birth rates, expensive housing, and longer work hours. The Recreation and Parks Department estimates 120,000 dogs live in San Francisco. That amounts to one dog for every 6.5 people, or 2,570 dogs per square mile.

Their owners (or companions) have reason to regard dogs as more than a best friend. Dogs confer extensive physical benefits on their humans, such as lowering blood pressure, helping heart attack patients recover, and prompting the release of serotonin and other “feel good” hormones. Dogs are used in hospitals to encourage cancer patients to get out of bed. The black-and-white television


50. Ford Fessenden, Health Mystery in New York: Heart Disease, NEW YORK TIMES, Aug. 18, 2005, at I.


antics of Lassie pale in comparison to modern, real life dogs that
serve in rescue operations, sniff out bombs, and help detect biological
threats.\textsuperscript{56} Finally, a human with a dog tends to get more exercise,
even if it is only to run Fido around the block. That benefits both
dogs and humans. However having a dog means needing a place for
that dog to walk and run.\textsuperscript{57}

\textbf{B. The Dark Side of Dogs: the Pit Bull and Presa Canario Attacks}

Though San Francisco’s infamous dog mauling case happened
after the Fort Funston lawsuit, the death of Diane Whipple has col-
ored Bay Area encounters between dogs and people ever since. In
January of 2001, Whipple was carrying groceries in her apartment
building hallway when her neighbors’ Presa Canarios mauled her to
death.\textsuperscript{58} Whipple, a lacrosse coach in excellent condition, suffered
more than 70 wounds.\textsuperscript{59} Marjorie Knoller, who had just taken the 140-
pound male dog for a walk, was convicted of second-degree murder;
her husband, as co-caretaker of the dogs, was convicted of negligent
homicide.\textsuperscript{60} Not only were the dogs extremely large for life in a one-
and-a-half bedroom apartment, they were untrained and known to be
aggressive.\textsuperscript{61}

The Bay Area has also been frightened in recent years by a series
of grisly pit bull attacks. In 2001, three neighborhood pit bulls
ganged up on a 10-year-old Richmond boy, Shawn Jones, lacerating
his face and ears.\textsuperscript{62} The boy recovered, but his scars will never go
away. A similar attack in 2005 disfigured an 8-year-old Santa Rosa
girl.\textsuperscript{63} Also in 2005, two family pit bulls killed 12-year-old Nicholas
Faibish in his own home.\textsuperscript{64} The boy’s mother was charged with felony
child endangerment after she locked the boy in the basement, osten-
sibly so the dogs would not reach him, but he escaped and was attacked.65

The city of Denver banned pit bulls outright after a similar series of attacks.66 Though San Francisco has resisted going that far, it now requires pit bull owners to spay or neuter their pets.67 With 8,000 to 10,000 pit bulls living in San Francisco,68 it will be a decade or more before that population decreases significantly. Meanwhile, encountering a pit bull or other reputedly aggressive dog at Fort Funston tends to give even the most enthusiastic dog advocate a moment’s pause.

C. The Impact of Dogs on Fort Funston

Fort Funston grew in canine popularity after the NPS eliminated off-leash walking in other area parks in 1996, including the Presidio and parts of Ocean Beach, the City’s main beach on the Pacific Ocean.69 According to a 2000 study, 87 percent of visitors to Fort Funston were accompanied by a dog, with a higher concentration of dogs than humans along the trails.70

This density affects the dogs themselves. As more dogs come to Fort Funston, the NPS has had to conduct more rescues as dogs fell from cliffs or got stuck on them.71 In 1998, rangers conducted 25 rescues; in 1999, they conducted 16 rescues.72 During those years, three dogs were injured and one dog died after falling off the cliffs.73 In April of 2006, a missing dog left overnight at Fort Funston had to be rescued the next day off a cliff.74 The rescues tie up a large number of park personnel, leaving significant portions of the GGNRA unprotected.75 Attorney Brent Plater of the Center for Biological Diversity

65. Id. The trial ended in a hung jury; prosecutors decided not to pursue a second trial. Jaxon Van Derbeken, Mother Won’t Face Retrial in Her Son’s Dog-Mauling Death, S.F. CHRON., Sept. 13, 2006, at B10.

66. Jim Erikson, 36 Pit Bulls Confiscated from Man New to Town, ROCKY MOUNTAIN NEWS, May 30, 2006, at 5A.


68. Id.


70. Id.

71. NPS, PROPOSED HABITAT PROTECTION CLOSURE, supra note 19, at 6.

72. Id.

73. Id.


75. NPS, PROPOSED HABITAT PROTECTION CLOSURE, supra note 19, at 6.
believes that off-leash walking imperils the life of dogs at Fort Funston because there is little to stop them once they run loose.\textsuperscript{76}

More dogs usually mean more people as well. The NPS describes the human pressure on the Fort Funston bank swallow colony as “intense,” with documented incidents of cliff climbing, graffiti carving, and even fireworks explosions during Independence Day celebrations.\textsuperscript{77}

Rescues and explosions drive off the birds, while climbing can destroy burrows; additionally indirect effects also contribute to the degradation of bank swallow habitat. Noise and disturbances can interfere with breeding practices, such as bringing food back to the chicks in the burrows.\textsuperscript{78} When burrows are crushed, the young inside can be lost as well.\textsuperscript{79} A mere shadow can adversely affect the swallows; birds may perceive the large shadows cast by hang gliders as looming predators.\textsuperscript{80}

Between the extremes of a lingering shadow and an all-out rescue operation is the pure volume of traffic in the park. Birder Dan Murphy describes the human and canine traffic as apparent overuse, and the most significant problem facing the swallows.\textsuperscript{81} As people and dogs walk on the edge of the cliffs, the swallows see them and may react by flying out of their burrows.\textsuperscript{82} Such stress is worse from above, perhaps because of the shadow factor; Murphy says that activity below the burrows does not seem to impact the swallows as much.\textsuperscript{83} However dogs on the ground have been known to chase shorebirds, dig up areas of restored vegetation, and even destroy the tough ice plant.\textsuperscript{84}

However, the Fort Funston Dog Walkers Association (“FFDWA”) denies that off-leash walking adversely affects the bank swallow. The FFDWA says the decline of swallows at Fort Funston could be the result of any number of factors, such as a simple shift from coastal to riparian habitats.\textsuperscript{85} As mentioned above, one of these factors is presumably weather; the survival of burrows from season to season de-
pends on the severity of winter storms.\textsuperscript{86} Also, the FFDWA cites a California Department of Fish and Game report, which describes bank swallows as relatively insensitive to “moderate” human activity.\textsuperscript{87} As for plant life, the FFDWA notes the environmental irony of trying to keep the dunes stable by removing ice plants, especially with a bulldozer.\textsuperscript{88}

The San Francisco Dog Owners Group (“S.F. Dog”), along with the FFDWA, has implied that the NPS has a more stringent standard for off-leash walking than for other recreational uses.\textsuperscript{89} Because the uses of Fort Funston are so varied and dogs so dominant in terms of numbers and frequency of visits, it would be difficult to objectively measure any disparate impact from dog walking. Dog owners agree, however, that off-leash dog walking requires both common sense and common courtesy on the part of the owner; if a dog will not respond to the owner’s voice command, that dog should be on a leash.\textsuperscript{90}

Lastly, S.F. Dog and FFDWA say that further limiting off-leash dogs will negatively affect San Francisco city parks, as an estimated 10,000 dogs visit the GGNRA every day.\textsuperscript{91} Dog advocates believe the negative impact of thousands more dogs on city parks outweighs any potential negative impact from off-leash dog walking in the GGNRA.

### III. The Howling: \textit{Fort Funston Dog Walkers v. Babbitt}

To protect bank swallows, the NPS closed sections of Fort Funston in 1995 and again in 2000.\textsuperscript{92} The first closure upset members of the FFDWA and S.F. Dog. Perhaps to accommodate, the General Superintendent of the GGNRA stated that the “swallow habitat restoration area . . . will not be expanded southward.”\textsuperscript{93} Unfortunately, the birds disregarded this statement, shifting south to nest and prompting the second closure in 2000.\textsuperscript{94} The 10 acres shut off in the second

\begin{itemize}
\item \textsuperscript{86} See \textit{supra} note 40, and accompanying text.
\item \textsuperscript{87} \textit{Ft. Funston Dog Walkers Ass’n}, \textit{supra} note 85, citing \textsc{Barrett A. Garrison, California Partners in Flight Riparian Bird Conservation Plan} (Jan. 26, 2006), available at \url{http://www.prbo.org/calpif/htmldocs/species/riparian/bank_swallow_acct2.html}.
\item \textsuperscript{88} \textit{Fort Funston Dog Walkers Ass’n}, \textit{Native Plants at Fort Funston: Past, Present, Future} (2002), \url{http://www.fortfunstondog.org/chpt5.htm}.
\item \textsuperscript{89} \textit{S.F. Dog, Make Your Voices Heard!} \textit{3} (2006), \url{http://sfdog.typepad.com/sfdog/files/GGNRA_EIS.pdf}; see also \textit{Fort Funston Dog Walkers Ass’n, Fort Funston Update} (2006), \url{http://www.fortfunstondog.org/update.htm}.
\item \textsuperscript{90} Telephone interview with Stephens, \textit{supra} note 57.
\item \textsuperscript{91} \textit{S.F. Dog, supra} note 89. Golden Gate Park, the city’s largest park, has two places for dogs to run. \textit{S.F. Gate, Golden Gate Park Map 1} (2006), \url{http://www.sfgate.com/traveler/acrobat/maps/1999/ggparkmap.pdf}.
\item \textsuperscript{92} \textit{Ft. Funston Dog Walkers, 96 F. Supp. 2d} at 1024.
\item \textsuperscript{93} \textit{Id.}
\item \textsuperscript{94} \textit{Id.}
\end{itemize}
closure were an especially attractive section of the park, between the bluffs and the beach, where children slid in the dunes and adults enjoyed expansive views of the ocean. The NPS planned to construct fences to secure the area and then replant vegetation. Given the deep emotions held by San Franciscans about dogs, birds, and land, perhaps it was only a matter of time before the debate culminated in *Fort Funston Dog Walkers v. Babbitt*.

### A. The Closure Outcry

The NPS was acutely aware that dog walkers would not appreciate a second closure. In July of 1999, a ranger sent a message to seven NPS staff members that a new closure had been approved and funding found to construct a fence. She cautioned the e-mail recipients to be very discreet with the information and told them that “we do not want this to blow up in our faces.” Ultimately, these cautions backfired. The e-mail emerged in the lawsuit as proof that the NPS planned to erect the fence long before it admitted the existence of such plans to the public.

Linda McKay, head of the FFDWA at the time and an individual plaintiff in the lawsuit, first learned of the closure during a walk-through with a ranger. In an ensuing e-mail, she wrote:

> [N]one of us understood that GGNRA is proposing closing the beach side from the trail to the beach[,] all the way north to the current bank swallow flyover. *If this is the case, please be prepared for a huge outcry*. Hundreds of people play on both dunes, hundreds more walk through the valley between the dunes and flyover. It’s a great place to run dogs down the hills, especially when the tide is too high for a beach walk.

The NPS did hold a public meeting to discuss the closure, but sought to minimize the dog walkers’ input. An Assistant Superintendent e-mailed that the meeting should be small, pleading "why would

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95. Id. at 1024-1025.
96. Id. at 1025.
97. Id.
98. Id. at 1026.
99. Id. at 1025.
100. Id. at 1028.
101. Id.
we provide a forum, i.e. meeting with ‘dog walkers’ with regularity[,] for them to beat us up?"

Finally, the NPS planned to conduct public outreach by posting staff at Fort Funston before and during fence construction. However, the court opined that the decision to build the fence was a \textit{fait accompli} and the outreach was a “public-relations campaign to sell the [acreage] closure.”

In this case, good fences did not make good neighbors. As the fences were constructed in early 2000, the FFDWA and S.F. Dog sued the Secretary of the Interior, Bruce Babbitt, for lack of notice regarding the closure, while asking for a preliminary injunction to stop fence construction. One of the members named personally as a plaintiff had been visiting Fort Funston for more than 30 years.

\textbf{B. Requirements for Notice and Input}

As the court noted, the NPS must follow notice and comment rulemaking procedures before highly controversial closures of park areas, or closures that will result in significant alterations in patterns of public use. NPS regulations require that such a closure to be published in the Federal Register. After public input, the NPS makes an independent decision regarding the rule, but that decision may not be arbitrary or capricious in light of the administrative record.

Because the NPS did not publicize the closure in the Federal Register, the court examined whether the closure violated NPS regulations. The government argued that the NPS had made an implicit decision that the closure was not of a highly controversial nature, nor a substantial alteration of public use, and that this decision was entitled to deference. The court strongly disagreed, calling the argument a \textit{post-hoc} rationalization that deserved little or no deference.

102 Id. at 1029.
103 Id. at 1031.
104 Id.
105 Id. at 1032. The Secretary has ultimate authority in supervising the NPS.
106 Id. at 1024.
107 Id. at 1022.
110 Id. at 1032.
111 Id.
1. The Highly Controversial Standard

The “highly controversial” standard in NPS regulations emerged from perhaps the most important federal environmental statute, the National Environmental Policy Act (“NEPA”).

However the court distinguished between a NEPA controversy, which weighs how much impact a federal action may have, and NPS regulations, which require public input before a park closure.

The court noted the record was replete with evidence that the NPS was aware the closure was controversial; the NPS e-mails had essentially backed the government into a legal corner. Additionally, the court placed the controversial standard in the context of Fort Funston, rather than the entire GGNRA. A 10-acre closure significantly affects a 220-acre park, but in a multi-site park, the court said that small a closure might never be considered controversial. Moreover, the court took into account the combined effect of similar closures, ensuring that piecemeal closures would not escape judicial review.

2. A Substantial Alteration in Public Use

When contemplating whether there had been a substantial alteration in public use, the court again distinguished Fort Funston as separate from precedent. In one case, no substantial alteration in the public use pattern existed because the restrictions objected to merely added specifics to a general rule about snowmobiles in a National Forest. By contrast, the Fort Funston closure changed regulations by banning off-leash walking where it had previously been allowed. The NPS did not support the Fort Funston closure with a concurrent letter and thus, the court said, no deference was due.

112 Id. at 1036 (citing NEPA, 42 U.S.C. 4332 (2006)).
113 Ft. Funston Dog Walkers, 96 F. Supp. 2d at 1036.
114 Id. at 1037.
115 Id. at 1038.
116 Id.
117 Id.
118 Id. (citing Mausolf v. Babbitt, 125 F.3d 661 (8th Cir. 1997) (snowmobilers objected to National Forest Service failure to publish specific restrictions)).
119 Ft. Funston Dog Walkers, 96 F. Supp. 2d at 1038.
120 Id. (citing Spiegel v. Babbitt, 855 F. Supp. 402 (D. D.C. 1994) (mooring restrictions entitled to deference)).
121 Id.
A comment in the NPS regulations explains that "substantial alteration" means changing or disrupting use by a substantial number of park visitors. The court found little in the record about public use patterns from either side, but noted the closure restricted the last large bluff area of Fort Funston, and cut off one of the few routes to and from the beach.

Finally, though the closure only affected three percent of the land at Fort Funston, the court held that the quality of the closed land affected the pattern of public use, due to the relative popularity and distinctive features of the bluffs. The opinion did not depend solely on the record for this conclusion; instead the court visited the site and examined it first hand. That day, Judge William Alsup shed his robe for khakis and hiking boots.

C. Injunctive Relief and Emergency: Fences Torn and Raised

The court found that the NPS had either violated a procedural rule or that such a violation was probable, showing a likelihood of success on the merits for the plaintiffs. According to the court, deprivation of a source of personal satisfaction and tremendous joy may constitute irreparable harm; in this case, some of the dog walkers enjoyed the park twice daily. Injunctive relief was found appropriate as the plaintiffs were not seeking money damages. Potential harm to the NPS was prevented by a provision allowing closures in an emergency. Thus the court held that the dog walkers were entitled to a preliminary injunction.

It was spring and the bank swallows were returning. To protect them in light of the court’s ruling, the NPS immediately declared an emergency until the swallows’ annual departure at the end of the summer. To satisfy the public notice requirement, the NPS held additional hearings in February of 2001 regarding the closure. Judge Alsup subsequently allowed the closure, the fences returned, and dog

122. Id. at 1039 (citing General Regulations for Areas Administered by the National Park Service, 47 Fed. Reg. 11599-11600 (March 17, 1982)).
123. Id. at 1039.
124. Id. at 1039 n.6.
125. Id. at 1039.
128. Id. at 1040.
129. Id.
130. Id.
walker protests with it. Promises to negotiate leash policies went nowhere. In 2002, the NPS announced that leashes were required in all areas of the GGNRA, resulting in a complete ban of off-leash recreation.

The legal issue arose again when a dog walker using a different part of the GGNRA, Crissy Field, went to court to defend a ticket given for off-leash walking. Judge Alsup found again the NPS had not gathered public input before imposing the leash requirement. In a 2005 unpublished decision, he reiterated that the NPS had flouted the law by trying to bypass notice requirements required by the highly controversial and substantial alteration standards.

While enforcement kept shifting, the bitter aftermath seemed permanent. Dog walkers continually stressed that dogs have been frolicking at Fort Funston for decades, and have done nothing wrong. But birders were equally passionate. Birder Dan Murphy said, “it drives me nuts [that the NPS cannot] preserve a wildlife and geologic resource [that people] willfully destroy” for their pets.

IV. Barking Up a New Tree: Negotiated Rulemaking

In a statement calling for public input on an Environmental Impact Statement (“EIS”), the NPS explained that

A history of dog management inconsistent with NPS regulations and increased expectations for use of the park for dog recreation have resulted in controversy, litigation, and compromised visitor and employee safety, affecting visitor experience and resulting in resource degradation. The conflicts would likely escalate if not addressed in a comprehensive dog management plan.

133. Id.
134. Id.
135. Id.
136. Pence, supra note 131.
137. E-mail interview with Murphy, supra note 40.
While an EIS is normally part of the NEPA process, the rationale applies equally well to the quest to negotiate a new and successful dog management rule at Fort Funston.

A. The "Reg-Neg" Process

Traditionally, when an agency makes a rule, it accepts public input and then makes the rule under its own discretion. The agency does not sit down and hammer out a consensus with members of the public, regardless of the importance of their interests. This hands-off approach stems from the rationale that agencies exist to supply expertise and to work out the technical details of a given congressional directive. As long as the rule is not unreasonable on the face of the record, courts will generally uphold the rule.

A quiet revolution during the past few decades has been transforming this process. In negotiated rulemaking, nicknamed "reg-neg," agencies share the table with concerned members of the public, or stakeholders. Congress prefers agencies to use reg-neg when it "enhances the informal rulemaking process." Congress found that reg-neg can "increase the acceptability and improve the substance of rules, making it less likely that the affected parties will resist enforcement or challenge such rules in court." Professor Ashutosh Bhagwat regards reg-neg as especially suited to managing public property, because under such circumstances expertise may be irrelevant to most of the issues raised, and there are fewer technical concerns where the potential for agency capture could pose a threat.

Given the American passion for land and particularly for national parks, public input in these areas is especially meaningful. Although agencies ultimately decide exactly what rules should be promulgated, reg-neg can help frame the issues by creating the proposed rule as a basis for negotiation.
patory democracy, reg-neg is a golden opportunity to exercise influence over the rulemaking process, especially if the interested parties are savvy, organized, and patient. One look at a reg-neg flow chart shows that the process requires considerable dedication from volunteers. Creating a reg-neg committee entails hiring a convener (an objective outsider), interviewing potential committee members, publishing committee names in the Federal Register, and waiting through a public notice period. The committee then receives funding for two years of meetings, which are open to the public. Consensus is the guiding principle and the goal.

Perhaps aware that only extraordinary people would undertake such a daunting task, the federal government does more than preach about the value of consensus in this sphere, it practices it. NPS guidance states that reg-neg is the “one form of administratively established committee that both the President and Congress actually encourage.”

B. Artful Compromise: Reg-Neg in Other Parks

The EPA frequently relies on negotiated rulemaking to help create practical and effective rules, but reg-neg is relatively new to the NPS. It used the process only twice before the GGNRA dog management issues, to craft rules at Fire Island and Cape Cod National Seashores.

1. Cape Cod National Seashore

Thoreau wandered the beaches of Cape Cod, so perhaps it is appropriate that the NPS first tried the peaceful approach of reg-neg on that spectacular shoreline. More than 43,000 acres of beach comprise Cape Cod National Seashore; additionally, the park displays unusual freshwater ponds and cultural features such as lighthouses. In 1995, the NPS needed to revise a 10-year-old rule that

149 Id.
150 Id.
151 Id.
155 Id.
established an off-road vehicle corridor in the park.156 Ironically, residents were satisfied with the old rule. Revision was necessary because the local piping plover population had increased by more than 800 percent.157

To promote consensus, each of 23 parties at the negotiating table had the power to veto any committee decision.158 If the committee failed to reach a consensus, the NPS planned to use the ideas, information, and creativity generated by the group to form the new rule.159 As it turned out, the committee made swift progress, arriving at a compromise in six days of negotiation during a four-month period.160 The group decided to close the off-road corridor between April 1 and July 20, to give the plover a place to nest and feed.161 The committee also capped the number of off-road vehicles allowed to drive in the corridor.162 The NPS published the final rule on February 24, 1998.163

2. Fire Island National Seashore

An escape for weary New Yorkers, Fire Island National Seashore stretches 26 miles on a barrier island near Long Island.164 Like Fort Funston, the park harbors rare species, quiet beaches, and high dunes.165 Unlike Fort Funston, people live on Fire Island and drive vehicles in the park; they must use off-road vehicles as the island is a designated roadless area.166 In spite of such limitations, traffic grew steadily worse every year; by 1999, no one was happy with the situation. The NPS was stuck with the thankless task of issuing and trying to enforce driving permits.167 According to anonymous interviews, the NPS either enforced the permits too strictly or too loosely, and the

157. Id.
158. Id.
159. Id.
162. Id.
163. Id.
165. Id.
167. Id.
NPS itself did not like playing the role of traffic cop. In spite of this frustration, initial assessments predicted success for negotiated rulemaking in order to decide how to regulate driving on the pristine seashore.

The initial predictions of success were accurate. The negotiating committee was made up of more than 20 stakeholders, including residents, visitors, police, businesses, utilities, environmental organizations, and the NPS. Yet in five meetings the group managed to create a framework for new traffic reduction rules. Driving is restricted by time, frequency, and in areas where species may be threatened. The final rule has yet to be issued, but is near completion.

C. Reg-Neg at the GGNRA: Not a Straight Path

“"The time for conflict is behind us. No one wants to continue this way." With those words, GGNRA Superintendent Brian O’Neill announced that the GGNRA would try negotiated rulemaking as a way to solve conflicts between dogs, birds, and people. The NPS explained the three- to four-year process in steps: an assessment to evaluate the feasibility of a committee, the establishment of a committee, and committee meetings to form consensus, all to help create a rule that will be both fair and final.

1. Assessment and Establishing the Committee

The GGNRA consulted with the United States Institute for Environmental Conflict Resolution, then hired experienced mediators to conduct the assessment. During the summer of 2004, the assessment team interviewed more than 40 people in order to identify key interests and how those interests could be balanced by the commit-
Ultimately, the team concluded that a consensus could be reached.

Boosted by the assessment’s positive outlook, Secretary of the Interior Gale Norton announced her intention to form the reg-neg committee in June 2005. The committee consists of NPS representatives, off-leash advocates, professional dog walkers, environmental organizations, visitor groups, and representatives from local governments, including the city of San Francisco. The first set of meetings focused on establishing protocol, but as of fall 2006 members had begun looking at maps and discussing where the dogs might be walked.

2. A Civil Tone

Face-to-face contact along with a set agenda helped established a civil tone during the meetings. Chris Powell, spokeswoman for the NPS, says emotions ran high over dog walking in past years because no process existed to resolve the issues, but with reg-neg, “everybody’s been civil so far.” The process forces conflicting parties to deal with each other, instead of making the NPS bear the brunt of the dispute.

Sally Stephens, chairwoman of S.F. Dog, agrees, saying “people talked at each other for years, not to each other.” She adds that previous discussions were set up to be confrontational, and what started as talk often ended up as yelling. This hostility drove out what she termed the “silent middle”: dog walkers who are environmentalists, birders who own dogs, and anyone else who did not want to turn their relaxation time into a political battle. Though Stephens says one faction regards reg-neg as a farce and was kicked off the committee, most members seem to want to find common ground, quite literally.

From the outset, the NPS advocated a compromise approach. Even if some people did not want any off-leash walking, the NPS said all participants in the reg-neg process “must be willing to consider in good faith the potential for designating some areas for off-leash

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175 Id.
177 Id.
178 Telephone interview with Chris Powell, NPS, in Montara, Calif. (June 2, 2006).
179 Telephone interview with Stephens, supra note 57 (emphasis added).
180 Id.
181 Id.
182 Id.
This stance was bolstered by the assessment team, which found broad support for some off-leash walking. Chris Powell cautioned, however, that "no matter what the committee comes out with, new rule or not, it is imperative to carry out the recommendation so as not to harm the wildlife." Indeed, as stated above, the NPS has no choice in the matter and must follow the ESA, the CESA, and the GGNRA mandate.

Stephens is wary that the resulting rule might be consistently applied across the whole GGNRA. "We are not asking for the entire GGNRA, we never have. We just want the one percent" for walking. Stephens was referring to the original scheme of designated areas for off-leash walking that was set up in 1979, lasted for 20 years, and was revived by the Crissy Field litigation. The land is mostly beaches, and she adds, "most people want the beaches for what they want it for," whether it’s dog walking, hiking, playing in the waves, or watching the birds.

D. Concurrent NEPA Compliance

One complicating factor in the negotiation process is that the NPS is conducting the NEPA process concurrently with negotiated rulemaking. The final EIS will look at the effects of dogs on the environment and will examine compromises, such as seasonal bans of off-leash recreation when swallows are nesting.

Ideally, the NEPA and the reg-neg processes combine synergistically; at the least, they are simultaneous avenues for public input. As the reg-neg committee meets, the NPS is conducting public scoping to present criteria for the final rule and to gather comments. Analysis from the NEPA process feeds the committee discussion, and in turn, consensus reached by the committee will be incorporated in the dog management plan and at least one of the alternatives developed in the EIS. No one can accuse the NPS of not taking public input in this round of decision making.
V. Conclusion

A. A New Rule: A Peaceful Coexistence?

The NPS promises to the “maximum extent possible consistent with its legal obligations” to use the consensus of the committee as the basis of its proposed rule. The double process of NEPA and reg-neg continues through the final stages of the rulemaking process. The draft EIS and the proposed rule will be publicized at the same time and when the final EIS is published, the final rule will be sent to Washington for approval. The NPS anticipates a final rule by June 2007.

That may be optimistic, as the committee has a two year budget that would extend beyond 2007. However meetings have gone smoothly so far. Stephens pins success on removing emotions from the dialogue. “If that can happen, maybe people can see we’re not enemies and that we all want the same thing. We all want to enjoy our parks.”

Is there room at Fort Funston for a threatened species, passionate birders, thousands of dogs, and their equally passionate owners? To be fair, to honor the longstanding canine presence, to encourage the swallows to thrive, to let city-bound people enjoy the outdoors, and to follow the law, a workable rule must encompass all of these possibilities, in time if not in space. What once was a contest of snarling and backbiting is now emerging as a model of cooperation. The Bay Area has a chance to inspire the rest of the country, if not the world, by creating a peaceful coexistence within Fort Funston.

Human nature being what it is, there are no guarantees. It will take time to evaluate the success of the rule once it is in place. Meanwhile, as NPS spokeswoman Chris Powell observes, “reg-neg is not a straight path from A to Z.” Appropriately, the process resembles the geography it’s trying to support. Nature rarely draws rigid routes. At Fort Funston especially, the landscape meanders, the better to show off the breathtaking views.

191. NPS, Public Scoping Workshops Project Information, supra note 138, at 4.
192. Id.
193. Id.
194. Telephone interview with Stephens, supra note 57.
195. Telephone interview with Powell, supra note 178.