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October 17, 2016

Ms. Ann Navaro, Esq. ([ann.d.navaro@usace.army.mil](mailto:ann.d.navaro@usace.army.mil))  
Deputy Solicitor, Parks and Wildlife Division  
Office of the Solicitor, United States Department of the Interior  
1849 C Street, NW, Room 3210  
Washington, DC 20240

Re: Special Regulations: Areas of the National Park Service, Golden Gate National Recreation Area (“GGNRA”), Dog Management (RIN: 1024-AE16, Docket ID NPS-2016-0002)

Dear Ms. Navaro:

On behalf of the Crissy Field Dog Group (“CFDG”), its members and board, I write to request issuance of a revised rule, including additional public comment on the GGNRA’s Dog Management Plan Rule (the “DMP Rule”). The draft DMP Rule has faced strong public opposition. Twenty out of twenty-one local elected officials from San Francisco, Marin County, and San Mateo County have voted to oppose the draft DMP Rule. It also contains fundamental flaws that require reissuance and a new round of public comment on the revised version of the rule.

The basis for the request is that the current draft rule, which was released for public comment on February 24, 2016, fails to provide reasonable notice to the public of the fundamental elements of the proposed rule sufficient to meet the National Park Service’s obligations to provide meaningful public comment under the Administrative Procedures Act, 5 U.S.C. § 500 *et seq.*, and contains numerous additional deficiencies described below and in detail in the attached comments from CFDG and its counsel, K&L Gates, LLP.

Most notably, the rule failed to provide the public with reasonable notice regarding two key issues: (i) the scope of the activity proposed for regulation, which in the draft DMP Rule was referred to via the undefined term “dog walking,” and other problematic, undefined terms; and (ii) the locations where “dog walking” would be regulated within the GGNRA, as follows:

1. The draft DMP Rule lacks a definition of “dog walking” and thus fails to give the public adequate notice of the conduct that would trigger enforcement, or provide a meaningful and workable description of regulated conduct. In addition, the proposal includes overbroad and unsupported definitions of “uncontrolled dog,” “unattended dog,” and “unauthorized persons.” (See, e.g., K&L Gates, LLP Comments Submitted on Behalf of CFDG on Draft DMP Rule, at 2, 4, 18-21 (May 20, 2016) (“K&L Gates Comments”); CFDG Comments on Draft DMP Rule, at 14-15 (May 25, 2016) (“CFDG Comments”) enclosed herewith.)
2. The draft DMP rule fails to define the location the proposed regulated activity would be allowed or restricted. The text of the proposed DMP Rule does not match the maps illustrating the proposed rule, creating fundamental questions about where regulated activity would be permissible, and questions regarding adequate notice to the public, and ineffective enforcement and communication regarding the rule. The enclosed comments prepared by K&L Gates, LLP, on the draft DMP Rule provides a two-page, single spaced detailed description of the discrepancies between the tables and maps published with the DMP Rule. Moreover, the maps themselves misrepresent the areas of the GGNRA open to recreation. (K&L Gates Comments at 9, 22, Appendix B.)

By failing to define these two fundamental elements of the rule -- the regulated activity and where the regulated activity is allowed -- the public comment period from February 24, 2016 to May 25, 2016 was insufficient and ineffective to provide meaningful public review and analysis of the proposed rule. The Administrative Procedures Act (“APA”) requires that federal agencies (1) publish a notice of proposed rulemaking in the Federal Register providing "either the terms or substance of the proposed rule or a description of the subjects and issues involved," 5 USC § 553(b), and (2) "give interested persons an opportunity to participate in the rulemaking for submission of written data, views, or arguments...." *Id.*(c). The purpose of the APA’s notice requirement is twofold: both to allow agency to benefit from expertise and input of parties who file comments with regard to proposed rule, and to see to it that agency maintains a flexible and open-minded attitude towards its own rules, which might be lost if agency had already put its credibility on the line in the form of “final” rules. *National Tour Brokers Ass’n v. United States*, 591 F.2d 896, 902 (D.C. Cir. 1978). An interested party must have been alerted by the notice to the possibility of the changes eventually adopted from the comments, and the notice must be sufficiently descriptive to provide interested parties with a fair opportunity to comment and to participate in the rulemaking. *Chocolate Mfrs. Ass’n of U.S. v. Block*, 755 F.2d 1098, 1104 (4th Cir. 1985) (holding that the proposed rulemaking did not provide adequate notice to the petitioners and the agency declined to reopen the comment period). Without defining the regulated activity issue, or providing notice as to where it may be regulated, the NPS has failed to give the public notice of the “substance of the proposed rule or a description of the subjects and issues involved” within the meaning of the APA, sufficient to allow “a fair opportunity to comment and to participate in the rulemaking.” *Id.* The draft DMP Rule failed to define what activities constitute “dog walking” or the locations of the regulated activities (K&L

Gates Comments at 2, 4, 9, 18-21, 22, App. B; CFDG Comments at 14-15), and to the extent those definitions are developed now, in response to public comment, these issues are so fundamental to the substance of the rule they must be subject to additional public comment.

An agency's final rule can differ from the proposed rule, but only to the extent that the modifications are a "logical outgrowth" of the proposed rule. In order for a final rule to be a "logical outgrowth" of a proposal, however, the agency first must have provided proper notice of the proposal. The "necessary predicate ... is that the agency has alerted interested parties to the possibility of the agency's adopting a rule different than the one proposed." *Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C.Cir.1994) (finding a proposed rule defective because it contained nothing, "not the merest hint," to suggest that it might restrict the activity at issue). "There can be no 'logical outgrowth' of a proposal that the agency has not properly noticed." *Sprint v. FCC*, 315 F.3d 369, 376 (D.C. Cir. 2003) (relying on *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1323 (D.C.Cir.1988), where the court found that the proposed rule "would not have alerted a reader to the stakes" and noting that the "notice requirement [was not supposed to be] an 'an elaborate treasure hunt.'"). By failing to define "dog walking" the NPS has required the public to engage in guesswork and speculation as to what would constitute regulated activity under the DMP Rule. This deficiency, combined with inadequate notice of the locations where this undefined activity would be allowed or restricted, would force the public to comment on a proposal that has not been properly noticed. The public has not been "alerted a reader to the stakes" of what would fall under the purview of the DMP Rule. See *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d at 1323. A superficial reading of the rule suggests that "dog walking" would be restricted within areas illustrated by the maps, however, without defining the meaning of dog walking, and creating maps that accurately represent proposed restrictions, a reader is left without notice of the behaviors and locations proposed for regulation. Moreover, it is impossible to determine what would constitute a "logical outgrowth" where the regulated activity itself is undefined and absent the words "dog walking" the public is left without clear information as to how the NPS will interpret the scope of its regulatory authority. See *See Kooritzky v. Reich*, 17 F.3d at 1513.

Once the NPS has provided a workable and meaningful definition of the activity it seeks to regulate, that definition must be subject to public review and comment. Merely invoking the words "dog walking" is vague and insufficient, and fails to give reasonable notice to the regulated community on what behaviors would be allowed under the rule as currently drafted. Moreover, the public must be provided with clear information regarding the location of the proposed regulated activity. The draft DMP Rule failed on both counts, and must be reissued for public comment to at minimum correct these fundamental issues, as well as the numerous other deficiencies described in the enclosed comments.

Another defect in the draft DMP Rule must be addressed in a revised rule to achieve a basic level of legal sufficiency. The adaptive management plan proposed in the draft rule would appear to allow NPS to impose additional closures without notice and

comment, and lacks standards for additional management options, a range of management alternatives, and mechanisms for future stakeholder engagement. (K&L Gates Comments at 12-14, 16.)

Additional public comment is also necessary to ensure compliance with the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* (“NEPA”). As noted in the attached comments, the NPS has failed entirely to analyze potential significant adverse environmental impacts of the DMP Rule with respect to the topic of Urban Quality, as is required under NEPA. Therefore, when the NPS does in fact produce an Urban Quality analysis, it must be subject to public comment to comply with NEPA. (K&L Gates Comments at 24; CFDG Comments at 6-7.) Similarly, the draft DMP Rule reduces acreage for dog walking beyond the Preferred Alternative in the Draft Supplemental Environmental Impact Statement. (K&L Gates Comments at 10-11.) This unexplained reduction must be clarified and subject to additional analysis in both the NEPA context and in public comment on the draft DMP Rule.

These flaws in the draft DMP Rule and discrepancies described above must be addressed and given thorough opportunity for public comment. Failure to do so will only compound the legal deficiencies in the proposed DMP Rule, and create further confusion amongst the communities that will be subject to the rule. We trust that the Department of the Interior will meet its responsibility to produce a legally sound regulation that can earn credibility in the regulated community.

Very truly yours,

*Martha Walters*

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cc: Associate Solicitor Barry N. Roth, Esq. (barry.roth@sol.doi.gov)  
National Parks Assistant Solicitor Robert Eaton, Esq. (robert.eaton@sol.doi.gov)  
Hon. Sally Jewell, Secretary of the Interior  
Jon Jarvis, Director, NPS  
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Democratic Leader Nancy Pelosi  
U.S. Senator Dianne Feinstein  
U.S. Senator Barbara Boxer  
Congresswoman Jackie Speier  
Congressman Jared Huffman  
GGNRA Acting Superintendent Aaron Roth  
San Francisco Mayor Ed Lee

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San Francisco Supervisor Scott Wiener  
San Francisco Supervisor Katy Tang  
Marin County Supervisor Kate Sears  
Marin County Supervisor Judy Arnold  
San Mateo County Supervisor Don Horsley  
Jennifer Scarlett, Co-President, San Francisco SPCA  
Nancy McKenny, CEO, Marin Humane Society

Encls.

CFDG Comments on Draft DMP Rule (May 25, 2016)  
K&L Gates, LLP Comments on Draft DMP Rule Prepared on Behalf of CFDG  
(May 20, 2016)