

**Concerns about the Balcones  
Canyonlands Preserve Staff's Plan  
to revise Chapter 12 - Tier II of the  
Land Management Plan,  
Governing Public Access**

Submitted to the BCCP Coordinating Committee  
on November 28, 2017

Prepared by Tomás Pantin

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BCCP Coordinating Committee

Dear Members,

Per your request of September 22, 2017, I am attaching a written explanation of the concerns that I and other stakeholders expressed about the BCP Staff's plan to revise Chapter 12 of Tier II of the Land Management Plan, which governs public access. These concerns are based on the most current version of that draft chapter, which was sent to me on October 18, 2017, and is dated, "October 2017."

We hope this letter will communicate the degree to which we have, for several years, struggled to be heard in our objections to attempts by BCP Staff to exclude us wrongfully from local parkland. The playing field is tilted heavily against stakeholders in this process: we are not professional public servants or lawyers, and so it is difficult for us to match the time and resources that BCP Staff can bring to bear on these issues.

That said, we present here a written version of our objections to the BCP Staff's past and proposed future actions. Given the complicatedness of the issues at stake here, this is not a short document. We do hope, however, that the length of this document reveals the degree to which three minutes of Citizens' Communications speaking-time does not provide an adequate method for receiving stakeholders' input on these issues. Our final proposal in this document (see Point (5)(b), below) includes language that could be added to any revision to future Land Management Plans. The suggested language would right the playing field between stakeholders and BCP Staff, and prevent BCP Staff from running roughshod over stakeholders' rights to access grandfathered tracts, merely because there is no adequate way for stakeholders to check such abuses of power.

All of the relevant documents cited herein are available online, in PDF form, via links contained in footnotes. This document can be found online in PDF form under the title "Concerns - BCP Proposed Policy - Parks Public Access 11-28-17" at BestAustin.com.

We hope you find this document helpful, and we look forward to continuing this conversation with you.

Yours,  
Tomas Pantin

cc Honorable Mayor Adler and Members of the City Council, Austin Texas.  
cc Members of the press.

## EXECUTIVE SUMMARY

This document elaborates upon, and explains, the following six points:

- (1) The BCP Staff is circulating a new draft of the chapter of its Land Management Plan, governing public access, that explicitly revokes prior guarantees not to exclude park users from certain long-established recreational use areas.
- (2) The BCP Staff lacks legal authority to do this. It is acting contrary to its founding documents and contrary to its own past interpretations of those documents.
- (3) The BCP Staff's proposed revisions to the Land Management Plan also violate public promises that the BCCP Coordinating Committee has made to Austin residents in the form of a binding Policy Statement. Stakeholders have relied on this Policy Statement, and the BCP Staff ought not to be able to violate it without requesting a formal revision of the Policy Statement by the BCCP Coordinating Committee.
- (4) The BCP Staff is proposing that it be able to close these established use areas at its sole discretion, without public notice or comment. This is worrying because the BCP has a track record of misrepresenting facts and law in prior attempts to take recreational parkland away from Austin citizens that was explicitly excluded from the BCP Staff's authority to protect wildlife habitat.
- (5) We recommend that any upcoming revision to the Land Management Plan include the following language:
  - (a) "All public access on 'grandfathered' tracts shall continue, notwithstanding any other powers or duties delegated to the BCP Staff, and notwithstanding any language in this document that could be construed to the contrary."
  - (b) "The BCP Staff bears the burden of proving, beyond a reasonable doubt and in writing, that any changes to BCP Staff policies or practices do not infringe upon 'grandfathered' access. BCP Staff shall submit their arguments to this effect to a notice-and-comment review process."

## ***Background***

In 1996, the City of Austin and Travis County submitted the final version of a proposal to the U.S. Fish and Wildlife Service (“USFWS”), requesting an incidental “take” permit under Section 10(a)(1)(B) of the Endangered Species Act. The proposal was titled the “Habitat Conservation Plan and Final Environmental Impact Statement” (“HCP-EIS”).

Several months later, the USFWS granted the request. The permit became known as the Balcones Canyonlands Conservation Plan (“the BCCP Permit”), which created the preserve system known as the Balcones Canyonlands Preserve (“BCP”). The BCCP Permit was granted by the federal government “subject to compliance with, and implementation of” the HCP-EIS.<sup>1</sup> The HCP-EIS therefore governs the implementation of the BCCP Permit.

The BCCP Permit and the HCP-EIS require the City of Austin and Travis County to devise a Land Management Plan (“LMP”), which details more precisely their proposed method of implementing the terms of the BCCP Permit. Once a LMP has been drafted, it must be submitted to the USFWS for approval. If it is approved by the USFWS, the City of Austin and Travis County “are obligated to abide by”<sup>2</sup> it and cannot depart from it without seeking reapproval by the USFWS, or else risk losing the Permit.

Only a small part of the LMP is at issue here: Chapter 12 of Tier II-A of the LMP, which governs public access to lands within the BCP (the “Public Access Chapter”).

### *The 1999 Version of the Public Access Chapter*

The current, governing, version of the Public Access Chapter was approved by the USFWS in 1999.

The 1999 version of the Public Access Chapter gives special status to land “units that were pre-existing dedicated parkland or preserve land prior to the creation of the BCP that were

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<sup>1</sup> See Page 2 ¶ C of *Federal Fish and Wildlife Permit*, U.S. Fish and Wildlife Service (1996) ([PDF](#)).

<sup>2</sup> See Page v of *Balcones Canyonlands Preserve Land Management Plan: Tier I* (August 2007) ([PDF](#)). See also page v (“All lands dedicated to the BCP must comply with the ‘Land Management Plans and Guidelines’ . . .”).

brought into the Preserve as ‘grandfathered’ tracts.’<sup>3</sup> It specifies that “[t]hese grandfathered units are allowed to continue public access levels as of adoption of this plan.”<sup>4</sup>

The 1999 Public Access Chapter also contains a table that specifies the particular “parks and preserves in which recreational activities are ‘grandfathered’, *i.e.* may continue at current levels.”<sup>5</sup> These grandfathered uses are then specified in even more detail in subsequent written descriptions. For example, the table lists “Bull Creek District Park” as grandfathered,<sup>6</sup> and the written description provides some more detail: “a small section within the portion of the Bull Creek District Park is a designated ‘off leash’ area for dogs and will remain so.”<sup>7</sup>

### *The Failed Attempt to Revise the Public Access Chapter in 2007*

In 2007, the BCP Staff attempted to revise and update the entire Tier II Land Management Plan—including the Public Access Chapter. Stakeholders objected, however, to proposed changes to the Public Access Chapter—in particular, to changes that would curtail grandfathered uses.<sup>8</sup> Due to these objections, no revisions to the Public Access Chapter were approved by the BCP Coordinating Committee in 2007.<sup>9</sup> All of the other Chapters were

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<sup>3</sup> Page 1 of *Tier II-A, Balcones Canyonlands Preserve Management Handbook, Chapter XII. Public Access Management* (August 1999) (“1999 Public Access Chapter”) ([PDF](#)).

<sup>4</sup> Page 6 of the 1999 Public Access Chapter ([PDF](#)). It also explains that these “tracts have been ‘grandfathered’ from the more stringent requirements placed on other BCP lands.” *Id.* at page 6.

The concept of “grandfathered” tracts used in the 1999 Public Access Chapter is derived directly from the explicit terms of the HCP-EIS, which states for example that “the proposed preserve maintains existing activities in parks incorporated into it and provides additional acreage for specified types of public recreation.” Page 4-104 of City of Austin and Travis County, *Habitat Conservation Plan and Final Environmental Impact Statement* (March 1996) (“HCP-EIS”) ([PDF](#)).

<sup>5</sup> Page 12 of 1999 Public Access Chapter ([PDF](#)). This table is clearly based on two similar tables included in the HCP-EIS. See Table 18 at HCP-EIS pages 3-90 through 3-92, and the table at HCP-EIS at page 4-78 ([PDF](#)).

<sup>6</sup> Page 12 of 1999 Public Access Chapter ([PDF](#)).

<sup>7</sup> Page 16 of 1999 Public Access Chapter ([PDF](#)).

<sup>8</sup> See 2009 Trail Master Plan at page 4 ([PDF](#)) (“The general comment from the public hearings [on the proposed revisions to the Land Management Plan in 2007] was that the public wanted new trails and did not fully support the BCP staff recommendations in Chapter 12 . . .”).

<sup>9</sup> See U.S. Fish and Wildlife Service, *Letter to William Conrad* (Mar. 4, 2008) ([PDF](#)) (“With these revisions, we approve the Land Management Plans except Tier II, Chapter 12 [*i.e.*, the Public Access Chapter]. We look forward to working with you to complete this chapter.”).

successfully revised, however, and were subsequently approved by the USFWS.<sup>10</sup> This is why the current version of the Public Access Chapter still dates from 1999.

In light of the failure of the 2007 Draft of the Public Access Chapter to receive approval from local stakeholders, the BCCP Coordinating Committee passed a one-page Policy Statement in November 2007 in which it “directs” that “all public access that currently exists on Travis County and City of Austin PARD/BCP ‘grandfathered’ tracts *shall* continue.”<sup>11</sup>

### *The 2009 Trail Master Plan*

As directed by the BCCP Coordinating Committee, in 2008 the BCCP Secretary initiated a process to devise a “Trail Master Plan”—a document designed to govern trail creation in the Preserve system.

As it pertains to pre-existing trails and recreational uses, the Trail Master Plan provides only a vague set of “Recommendations.” Among them is a recommendation that “where grandfathered uses are provided for, those uses shall continue for any redefined public access recommended in this plan.”<sup>12</sup>

The Trail Master Plan, to the extent that it includes any concrete proposals, must be implemented by reference as part of an approved revision of the Public Access Chapter.

### *The 2017 Proposed Revisions to the Public Access Chapter*

The BCP Staff is now attempting to revise the Public Access Chapter again—and thereby to include by reference the entire 2009 Trail Master Plan. These proposed revisions are problematic, for the reasons described below.

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<sup>10</sup> See U.S. Fish and Wildlife Service, *Letter to William Conrad* (Mar. 4, 2008) ([PDF](#)).

<sup>11</sup> Balcones Canyonlands Conservation Plan Coordinating Committee, *Policy Statement Supporting Public Access Trails on the Balcones Canyonlands Preserve* (Nov. 28, 2007) ([PDF](#)) (emphasis added).

<sup>12</sup> Page 20 of *Trail Master Plan for City of Austin Balcones Canyonlands Preserve Lands* (February 18, 2009) ([PDF](#)).

***(1) The BCP's new draft of its Land Management Plan explicitly revokes prior guarantees not to exclude park users from certain specific and long-established recreational use areas.***

Although BCP staff have claimed otherwise<sup>13</sup> *the proposed revisions to the Public Access Chapter would significantly shrink the protections afforded to grandfathered tracts in the current version of the Public Access Chapter.* For example, the 1999 Public Access Chapter states that “grandfathered units are allowed to continue public access at levels as of adoption of this plan.”<sup>14</sup> The proposed 2017 Draft of the Public Access Chapter rolls-back this protection, by stating that land managers may “proactively increase management and access restrictions [in grandfathered tracts] when monitoring or observation indicate this is needed for the benefit of the species and their habitats protected by the permit.”<sup>15</sup> The 2017 Draft also states that “the number of existing roads and trails on these ‘grandfathered’ tracts may be decreased.”<sup>16</sup>

Certain currently-grandfathered uses are also *explicitly clawed back* in the 2017 Draft of the Public Access Chapter. For example, the currently-governing version of the Public Access Chapter states that, “[i]n a part of [Emma Long Metropolitan Park] known as the ‘Motorcycle Park,’ motorcycle and mountain-bike riding is allowed year-round.”<sup>17</sup> The currently-governing Public Access Chapter further specifies that “[t]he Motorcycle Park . . . is grandfathered . . . and may continue at current levels.”<sup>18</sup> By contrast, the 2017 Draft of the Public Access Chapter claims that these uses are *only* grandfathered “during the non-nesting season.”<sup>19</sup> The non-nesting season is six months long,<sup>20</sup> so this effectively cuts the grandfathered-use protection *in half*.

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<sup>13</sup> See BCCP Coordinating Committee Meeting Sept 22, 2017 ([Audio recording online](#)) at 44:40. (Secretary Kimberlee Harvey stating: “The new Public Access Chapter that will be out for review, minus the Trail Master Plan appendix is less than 20 pages, out of those 20 pages 4 or 5 are verbatim language from the Habitat Conservation Plan, so *there is not much to review and the majority of the rest of the pages are exactly as it’s written in 1999*, our current and approved plan.” (emphasis added)).

<sup>14</sup> Page 1 of 1999 Public Access Chapter ([PDF](#)).

<sup>15</sup> Page 8 of *Balcones Canyonlands Preserve Land Management Plan, Tier II A, Chapter 12, Public Access* (DRAFT October 2017) (“2017 Draft Public Access Chapter”) ([PDF](#)).

<sup>16</sup> Page 8 of the 2017 Draft Public Access Chapter ([PDF](#)).

<sup>17</sup> Page 18 of 1999 Public Access Chapter ([PDF](#)).

<sup>18</sup> Page 9 of 1999 Public Access Chapter ([PDF](#)).

<sup>19</sup> Page 15 of 2017 Draft Public Access Chapter ([PDF](#)).

<sup>20</sup> See *Draft Balcones Canyonlands Conservation Plan (BCCP) Rules Governing Public Use and Recreation on the Balcones Canyonland Preserve (BCP)*, available at

The 2017 Draft also includes new language that qualifies the protections currently granted to every tract that is grandfathered in the 1999 Public Access Chapter. An example of this language is highlighted below:

UNIT	TYPE	PRIMARY MANAGEMENT RESPONSIBILITY	TYPE OF PUBLIC ACCESS AND USE
Barton Creek Greenbelt (East and West)/ Wilderness Park/ Friesenhahn	park	Austin Parks and Recreation Department Operations*, Austin Water Utility – Wildland Conservation Division	Grandfathered uses include hiking, swimming, tubing, mountain biking, rock climbing, picnicking, and spelunking. Redefined public access may be proposed for hiking, hiking with dogs on leash, running, and experimental mountain biking as provided for in the BCP Trail Master Plan.

Source: 2017 Draft of the Public Access Chapter, page 13

This language (“Redefined public access . . .”) is cryptic insofar as the Trail Master Plan does not seem to provide for “redefined public access” on grandfathered tracts.<sup>21</sup> We have asked the BCP Staff for an explanation of what this language means, and they have so far provided none. However, the language clearly contemplates a “redefin[ition]” of grandfathered uses—which unambiguously signals an intent to use the Trail Master Plan to encroach upon grandfathered uses.

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<https://austintexas.gov/sites/default/files/files/Water/Wildlands/bccprulesonbcppublicuseandrecrreation.pdf> and [\(here\)](#) at ¶ 4.4.3. This is the most official statement we are aware of of the GCW “nesting season.”

<sup>21</sup> See page 20 of 2009 Trail Master Plan (“where grandfathered uses are provided for, those uses *shall* continue for *any* redefined public access recommended in this plan” (emphases added)) ([PDF](#)).



***(2) The BCP Staff lacks legal authority to do this. It is acting contrary to its founding documents and contrary to its own past interpretations of those documents.***

The BCP Staff are administrative agents charged with following the terms of the BCCP Permit. The BCCP Permit, as an implementation of the HCP-EIS, explicitly carves-out specific tracts as not within the Permit’s scope.<sup>22</sup> The BCP Staff therefore lacks authority or discretion to restrict public access to these “grandfathered” tracts.<sup>23</sup> Of course, the City of Austin and Travis County could, within their broader and more general powers, regulate the grandfathered tracts. Doing so would, however, require going through a more inclusive and democratic process.

It makes sense, moreover, that the grandfathered tracts would be protected from encroachments by the BCP Staff. During the negotiation process of the 10(a)(1)(B) Permit that took place in the 1990s, Austin citizens required their representatives to strike a deal with USFWS that did not cut into established recreational uses. A permit was therefore proposed to the USFWS in the form of the HCP-EIS that explicitly provided that certain pre-existing land uses would be protected from requirements of the the BCCP Preserve System. The USFWS granted the permit request on those terms. And the citizens of Austin have continued to assert their interest in preserving grandfathered use-rights thereafter—most starkly, in 2007, when the last round of revisions to the Public Access Chapter were rejected.

The BCP Staff have attempted to legitimate their moves to encroach upon grandfathered uses by citing extremely general provisions from the HCP-EIS. For example, the proposed 2017

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<sup>22</sup> See below for specific citations to these carve-outs.

<sup>23</sup> The Interlocal Agreement, which was included as an appendix to the HCP-EIS and creates the BCCP Coordinating Committee as well as its staff, provides: “The City of Austin and Travis County shall jointly apply for and hold a permit under Section 10(a) of the Act (‘the Permit’) and *shall be* jointly responsible for implementing the conditions of the Permit *as granted by the USFWS . . .*” Interlocal Agreement, section 1.5 (See Appendix A of HCP-EIS available at [PDF](#)). Looking at the text of the USFWS Permit, it is clear that it is premised on the proposal specified in the HCP-EIS. See Page 2 ¶ C of *Federal Fish and Wildlife Permit*, U.S. Fish and Wildlife Service (1996) ([PDF](#)) (“The authorization granted by this permit is subject to compliance with, and implementation of, the terms and conditions of the Environmental Impact Statement/Habitat Conservation Plan, Biological Opinion, and all specific conditions contained in this permit.”). As explained below, the HCP-EIS explicitly carves out certain grandfathered tracts. It is therefore not faithful to the Permit’s terms to purport to regulate these tracts under the terms of the Permit.

Draft of the Public Access Chapter<sup>24</sup> quotes from a provision (see bolded sentence below) from the HCP-EIS section on “Land Management Plans and Guidelines” (HCP-EIS pages 2-31 through 2-44) which states the following:

Because individual tracts will have varying types of habitat and may offer varying degrees of public access, each preserve manager will be required to obtain Coordinating Committee Secretary approval of a land management plan for each tract within one year after issuance of the Permit . . . .

Tract Land Management Plans. A tract’s Land Management Plan will describe both short-term and long-term management objectives and will serve as the primary document for reference and justification for all operations on that preserve. . . . **Management plans for existing parks and preserves which will be included in the BCCP preserve system will need to conform with BCCP management guidelines, goals and policies.**<sup>25</sup>

The BCP Staff use the highlighted provision of the HCP-EIS to legitimate their claim that, “These guidelines direct land managers to proactively increase management and access restrictions . . . . It also specifies that the number of existing roads and trails on these ‘grandfathered’ tracts may be decreased.”<sup>26</sup>

The BCP Staff’s claim is incorrect, for two reasons:

First, the quoted provision of the HCP-EIS does not apply to grandfathered tracts and *even the BCP Staff’s own prior interpretations of this provision say so*. In a published interpretation of the HCP-EIS, the BCP Staff interpreted this same provision in the following way:

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<sup>24</sup> See page 8, ¶ 4.1 of 2017 Draft Public Access Chapter.

<sup>25</sup> HCP-EIS at page 2-32.

<sup>26</sup> See page 8, ¶ 4.1 of 2017 Draft Public Access Chapter.

The “Land Management Plans and Guidelines” lists the requirements for managing all preserve tracts including grandfathered tracts, *with implied exceptions for activities previously allowed on grandfathered tracts if there are conflicts between activities allowed on grandfathered tracts and some of the [Land Management Plans and Guidelines] requirements ([HCP-EIS pages] 2-31 through 2-44).*<sup>27</sup>

This interpretation is clearly correct, moreover, because the HCP-EIS provides that “the proposed preserve *maintains existing activities in parks incorporated into it* and provides additional acreage for specified types of public recreation.”<sup>28</sup> The HCP-EIS further states that the “[c]reation of a preserve system . . . does not have a detrimental effect on the existing recreational resources in the permit area . . . [because] improved recreational facilities and active recreational opportunities will continue to operate.”<sup>29</sup> The HCP-EIS listed the relevant “grandfathered” tracts in three separate places: first, in Table 18;<sup>30</sup> second, in Table 26;<sup>31</sup> and third, in individual written descriptions of each grandfathered tracts on HCP-EIS pages 3-93 through 3-101. For these reasons, it is clear that the BCP Staff’s attempts to cherry-pick a general provision from the HCP-EIS, in order to justify their attempts to encroach on specific grandfathered tracts, are in vain.

Second, the HCP-EIS also explicitly states that certain tracts *are not even within the Preserve system* and therefore cannot be regulated under provisions governing the Preserve system. For example, the HCP-EIS states in crystal-clear terms on page 3-100 that the “active use areas” within Emma Long Metropolitan Park are not within the BCP system:

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<sup>27</sup> This draft is available on the City of Austin website. See *Draft Balcones Canyonlands Conservation Plan (BCCP) Rules Governing Public Use and Recreation on the Balcones Canyonland Preserve (BCP)*, <https://austintexas.gov/sites/default/files/files/Water/Wildlands/bccprulesonbcppublicuseandrecreation.pdf> (also [here](#)) at ¶ 9.6. We are unsure of the date of this document, but it is was clearly written after 2003, because it cites a study from 2003 in ¶ 8.0. The date, of course, does not matter; the correctness of its interpretation of the HCP-EIS is self-evident.

<sup>28</sup> HCP-EIS at 4-104 ([PDF](#)) (emphasis added). See also *Draft Balcones Canyonlands Conservation Plan (BCCP) Rules Governing Public Use and Recreation on the Balcones Canyonland Preserve (BCP)*, ([here](#) and [here](#)) at ¶ 9.4, citing the same provision and interpreting it in the same way.

<sup>29</sup> HCP-EIS pages 4-77 through 4-49 ([PDF](#)).

<sup>30</sup> HCP-EIS pages 3-90 through 3-92 ([PDF](#)).

<sup>31</sup> HCP-EIS page 4-78 ([PDF](#)).

***Emma Long Metropolitan Park.*** This is Austin's largest district park. Most of this regional park is within the preserve. **However, acreage along the lake and other active use areas is not included in the preserve system.** The park offers a variety of activities, among the most diverse offered in a City or County park. Activities not offered at other facilities include archery and a motorcycle track. The facility also includes boat ramps, a dock, and a handicapped-accessible boathouse. Many other improved areas are part

Source: HCP-EIS page 3-100.<sup>32</sup>

Despite this, the BCP Staff is now attempting to claim authority to regulate these tracts as part of the Preserve System. We assert that *even if* the BCP Staff had the power to regulate grandfathered tracts that *are* within the Preserve system, the particular tracts within the Emma Long Park are outside the Preserve system and therefore *not* within the BCP Staff's putative regulatory power.

In sum, the BCP Staff lacks authority under its authorizing documents to encroach upon the active recreational uses that existed in 1996—*i.e.*, the “grandfathered” tracts. It also lacks authority to regulate several of these tracts for the additional reason that they are also not even within the Preserve system. The BCP Staff's attempts respond to these arguments have, thus far, been inadequate.

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<sup>32</sup> Compare this passage, from HCP-EIS p. 3-100, with a passage from HCP-EIS p. 3-101, which states that “The active use areas of [the Zilker Metropolitan Park/Barton Creek Greenbelt] system have *not* been removed from the preserve.” (Emphasis added.) ([PDF](#)) The HCP-EIS thus made very specific provisions for which tracts and uses are carved-out from the Preserve, and which are not. The BCP Staff, in its 2017 Draft of the Public Access Chapter nonetheless attempts to regulate these same areas of Emma Long Park as part of the Preserve system. See 2017 Draft Chapter 12 at 15 ([PDF](#)).

***(3) The BCP Staff’s proposed draft revisions to the Land Management Plan also violate public promises that the BCCP Coordinating Committee has made to Austin residents in the form of a binding Policy Statement. Stakeholders have relied on this Policy Statement, and the BCP Staff ought not to be able to violate it without requesting a formal revision of the Policy Statement by the BCCP Coordinating Committee.***

In its 2007 Policy Statement, the BCCP Coordinating Committee “directes” that “all public access that currently exists on Travis County and City of Austin PARD/BCP ‘grandfathered’ trails shall continue.”<sup>33</sup> The words “directed” and “shall” indicated that the Policy Statement is mandatory and binding upon BCP Staff. Moreover, as the BCP Staff stated in the preamble to the Trail Master Plan, this “Policy Statement changed how the Coordinating Committee approaches the policies set forth in previous policy documents.”<sup>34</sup>

The directives in the Policy Statement were the result of an intense and widely participated-in public debate, during which many stakeholders expressed their strong interest in preserving grandfathered uses. The Coordinating Committee acknowledged these concerns of numerous Austin residents, and made an explicit Policy Statements that allowed stakeholders to feel safe that the BCP Staff could not encroach upon grandfathered uses in the future without a revision of this Policy Statement. The Policy Statement has never been revised.

The plain language of the 2017 Draft of the Public Access Chapter (see Point (1), above) clearly violates the directive in the BCCP Coordinating Committee’s 2007 Policy Statement. The BCP Staff have not explained how the Draft of the Public Access Chapter is consistent with the Coordinating Committee’s 2007 directive that all grandfathered uses “shall” continue.

If the BCCP Coordinating Committee has changed its mind regarding the future fate of grandfathered tracts, the citizens of Austin and Travis County deserve a clear statement from the Coordinating Committee of such a change in its policy on this point. Otherwise, the entire purpose of the Policy Statement—to clearly enunciate predictable policies going forward in a manner that all parties involved, including stakeholders, can rely upon—has been violated.

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<sup>33</sup> Page 1 of Balcones Canyonlands Conservation Plan Coordinating Committee, *Policy Statement Supporting Public Access Trails on the Balcones Canyonlands Preserve* (Nov. 28, 2007) ([PDF](#)). See page 1 of 1999 Public Access Chapter ([PDF](#)).

<sup>34</sup> Trail Master Plan at 6 ([PDF](#)).

***(4) The BCP Staff is proposing that it be able to close these established use areas at its sole discretion, without public notice or comment. This is worrying because the BCP has a track record of misrepresenting facts and law in prior attempts to take recreational parkland away from Austin citizens that was explicitly excluded from the BCP Staff's authority to protect wildlife habitat.***

The 2017 Draft of the Public Access Chapter gives BCP Staff the new power “to proactively increase management and access restrictions when monitoring or observation indicate this is needed for the benefit of the species and their habitats protected by the permit.”<sup>35</sup> Under plain terms of this language, BCP Staff would be able to restrict access to grandfathered tracts at their sole discretion, and without any process that would include input from stakeholders. Such a broad grant of discretionary power opens the door to arbitrary and capricious action on the BCP Staff's part. Unfortunately, the BCP Staff has demonstrated on at least three past occasions that it is willingness to act in such a manner, insofar as it has willfully misrepresented facts and law in attempts to encroach upon grandfathered tracts.

These episodes are documented in more detail in pages 50 through 132 of a report published by stakeholders in April 2016, and [available online here](#). The rough details of each episode are, for ease of reference, reproduced below:

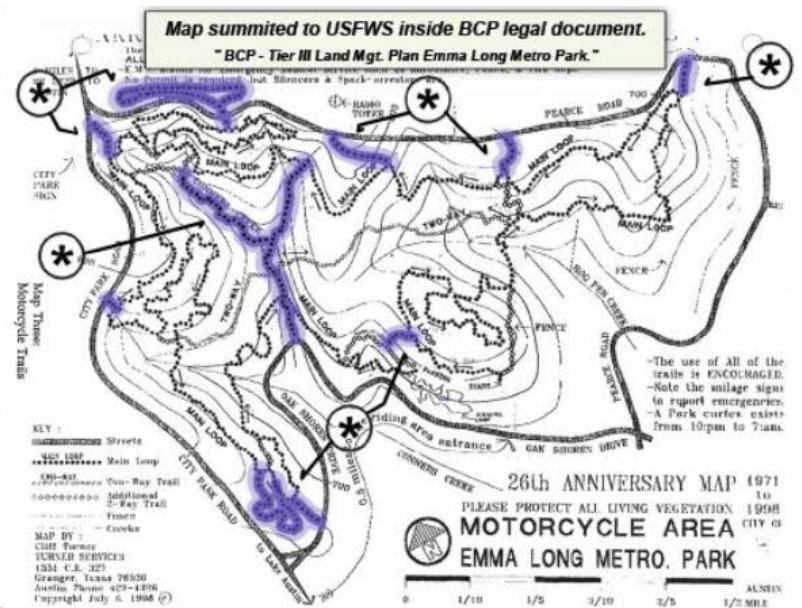
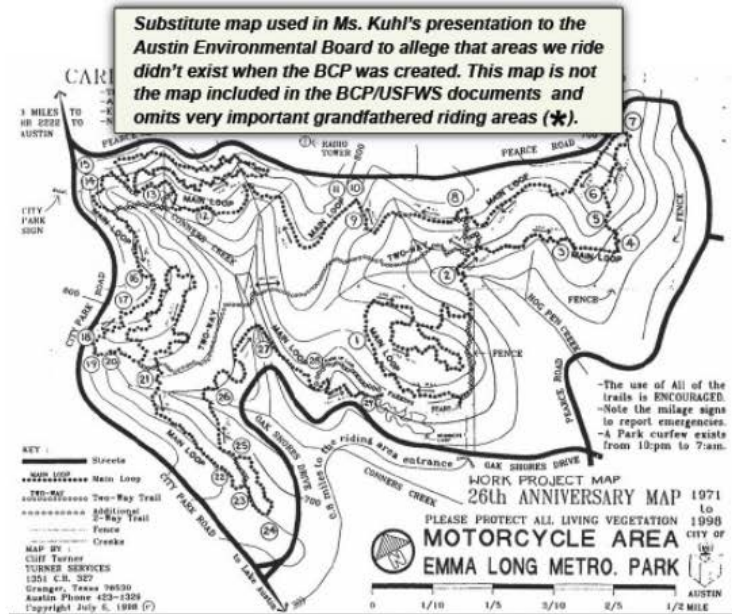
*(a) November 7, 2012: BCP Staff's Use of Incorrect Trail Maps*

In 2012, the BCP Staff began arguing that stakeholders in Emma Long Metropolitan Park were riding on non-grandfathered trails, and announced plans to close those trails. The stakeholders proved that the maps that BCP Staff were using to determine which trails existed in 1996 (*i.e.*, when the BCCP Permit was issued) were incorrect. Stakeholders found maps in the BCCP archives that showed that the disputed trails were, in fact, grandfathered.

The map on the left is the map that the BCP Staff was using as a *complete* record of all grandfathered trails. The map on the right shows the correct map, with trails that are grandfathered but were omitted from the BCP's map highlighted in purple.

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<sup>35</sup> Page 8 of 2017 Draft Public Access Chapter.



To be clear, the purple trails were the trails that BCP staff was incorrectly claiming were not grandfathered, based on its incorrect maps. (See [Full Report](#) pp. 50-51 for additional information.) The BCP Staff wrongfully attempted to excluded stakeholders from these grandfathered trails.

*(b) Spring 2014: Incorrect Interpretation of GCW Data*

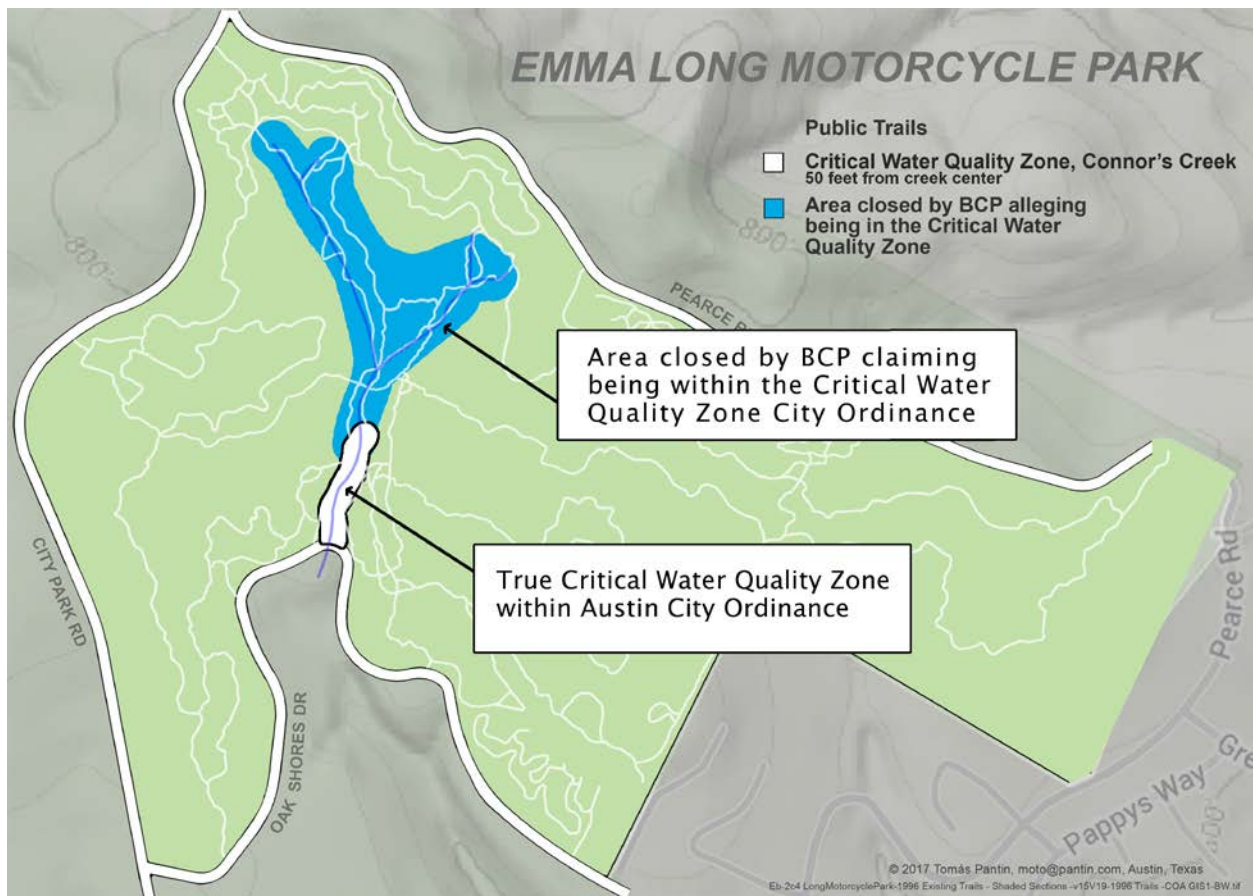
In the Spring of 2014, the BCP Staff began attempting to justify closures of grandfathered trails on a new argument: that recreational use was detrimental to the warbler population there.

Using the BCP Staff's own data, however, stakeholders demonstrated that after 45 years of steady use, the warbler population in the area remained above-average when compared with similar BCP tracts. The analysis of the BCP's reports showed thirteen material errors, including conclusions not supported by the data, and data that did not match definitions shown by the relevant text. Once these errors were rectified, it became clear that the relevant tracts were better-than-average in terms of GCW population and productivity. (See [Full Report](#), pp. 87-104, for additional documentation)

(c) Fall 2014-Fall 2015: Incorrect Application of the Critical Water Quality Zone

After the above attempts to justify closures to grandfathered trails had failed, the BCP Staff attempted to argue that many grandfathered trails in Emma Long Park were within the Critical Water Quality Zone, and therefore must be closed.

When stakeholders studied the actual text of the Critical Water Quality Zone Ordinance, however, it became clear that only 8% of the relevant area was in the Zone. To be clear, the BCP Staff misinterpreted the Ordinance to cover a particular area—but 92% of that area was not actually within the area specified by the Ordinance. The following map shows, in white, the areas actually covered by the Ordinance. The blue portion is area that the BCP Staff falsely claimed was covered by the Ordinance.



In sum: The BCP Staff has, unfortunately, demonstrated an inability to faithfully interpret laws and facts that bear on the limits of its own power. Given this track record, we find it worrying that the 2017 Draft of the Public Access Chapter would give it the power to close grandfathered trails at its sole discretion.



**(5) We recommend that any upcoming revision to the Land Management Plan include the following language:**

**(a) “All public access on ‘grandfathered’ tracts shall continue, notwithstanding any other powers or duties delegated to the BCP Staff, and notwithstanding any language in this document that could be construed to the contrary.”**

**(b) “The BCP Staff bears the burden of proving, beyond a reasonable doubt and in writing, that any changes to BCP Staff policies or practices do not infringe upon ‘grandfathered’ access. BCP Staff shall submit their arguments to this effect to a notice-and-comment review process.**

Proposal (a) reaffirms the long-standing commitment to preserving grandfathered uses of recreational areas, as articulated in (i) the HCP-EIS, (ii) the 1999 Public Access Chapter, and (iii) the 2007 Policy Statement.

Regarding Proposal (b):

For years now, stakeholders have dealt with repeated attempts by BCP Staff to restrict access to grandfathered trails. As demonstrated above, stakeholders often have demonstrated—using both facts and law—that the BCP Staff’s actions are illegitimate.

However, current administrative processes tilt the playing field heavily in favor of the BCP Staff, and against stakeholders. Stakeholders are not lawyers or professional bureaucrats, and so they must spend a great deal of personal time and money familiarizing themselves with various complicated administrative regimes. Stakeholders in public parks defend their right to enjoy those public parks using their private time and money; they cannot be expected to hire lawyers and lobbyists to defend themselves against regulatory overreach, the way the various moneyed interests do.

When stakeholders *are* eventually able construct an argument in opposition to BCP Staff’s decisions, such an argument is necessarily quite technical and complicated. It is therefore unfair to stakeholders to require them to present their entire response to BCP Staff’s decisions in the three minutes allotted to speakers at Citizens’ Communications hearings.

We request that the Public Access Chapter be revised to require the BCP Staff to meet a heavy burden of proof that any change to their policies, rules, guidelines, or practices do not

encroach upon grandfathered uses. Placing this burden on BCP Staff rather than stakeholders makes sense, insofar as the BCP Staff is the best-situated party to explain why its own actions comport with facts and law. It may make sense to defer to BCP Staff's discretionary decisions that do not affect grandfathered tracts; but the same deference ought not to be given to actions that encroach upon the grandfathered access that the Coordinating Committee has stated "shall continue."<sup>36</sup>

Requiring the BCP Staff to proactively explain and justify why their decisions do not encroach upon grandfathered access would make it easier for stakeholders to point out errors in the BCP Staff's arguments. Under this regime, if stakeholders can raise a reasonable doubt as to whether the BCP Staff have met their burden, the proposed action would not be allowed.

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<sup>36</sup> Balcones Canyonlands Conservation Plan Coordinating Committee, *Policy Statement Supporting Public Access Trails on the Balcones Canyonlands Preserve* (Nov. 28, 2007) ([PDF](#)).

## ***Conclusion***

As a cheeky young reporter for the Austin Chronicle once put it, the BCCP is “a contorted, complicated, suspicious-looking paper chase that few, if any, understand completely.”<sup>37</sup> When the Preserve was created the 90s, it was “one of the biggest real estate deals in Austin history,”<sup>38</sup> but it also included assurances to Austin residents that the deal would not encroach on citizens’ right to continue to use their parks as they had always done. Those assurances have been repeated, in writing, ever since.

Austin residents deserve to be given the benefit of the doubt when it comes to their right to continued use of grandfathered tracts. Currently, the reverse is true. We believe that the language we have suggested above—language that would place the burden of proof on BCP Staff that they are not wrongfully encroaching on grandfathered tracts—should be adopted in order to rectify this imbalance of power. It is unreasonable to ask ordinary citizens, using their personal time and money, to navigate the mess of law and facts that have since grown up around the BCCP Preserve in order to constantly check the BCP Staff’s illegitimate attempts to seize grandfathered tracts.

We do not object to the existence of the Preserve. Nor do we object to the Secretary’s continued execution of her duties to ensure that the 10(a) Permit is not revoked. But we do object to the BCP Staff’s repeated attempts to encroach upon grandfathered uses in the name of what is, at its core, a real estate deal. Commitments that have been made and remade to Austin citizens that these few grandfathered trails will remain ours should be honored. Otherwise, nearly all of the documents that created the Preserve, as well as all of the documents and policy statements that were painstakingly written thereafter to govern it, will be “for the birds.”

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<sup>37</sup> Daryl Slusher, “BCCP Funding Goes to County Voters: This Plan is for the Birds (Really),” *Austin Chronicle*, (Oct 22, 1993) ([PDF](#)).

<sup>38</sup> *Id.*