

CITY OF SAN DIEGO

RIGHT OF ENTRY PERMIT

THIS CITY OF SAN DIEGO RIGHT OF ENTRY PERMIT ("Permit") is entered into by and between THE CITY OF SAN DIEGO, a California municipal corporation ("CITY"), and U.S. DEPARTMENT OF THE INTERIOR, U.S. GEOLOGICAL SURVEY (PERMITTEE), to be effective as of the date of execution by CITY (the "Effective Date") when signed by the parties and approved by the San Diego City Attorney, as follows:

RECITALS

- A. CITY is the owner of certain real property (the "City Property") consisting of approximately a six (6) mile corridor along the Santa Ysabel Creek located in City of San Diego, San Pasqual Valley, San Diego County, California, and comprised of portions of APN 272-131-07, 272-131-08, 271-081-02, 241-100-31, 241-100-34, 242-100-10, 242-130-27, 242-110-06, 242-131-08, 242-131-07, 242-140-11, 244-071-02, as shown in **EXHIBIT A: Permit Area**, attached hereto.
- B. Under the terms and conditions of this Permit, CITY will allow PERMITTEE to use the Permit Area for the sole purpose of conducting post fire burn riparian bird and vegetation surveys during the 2008 field season. In addition, PERMITTEE will require access in February and March of 2009 to establish bird point count and vegetation transects as shown in **EXHIBIT B: Request Document**, attached hereto.

NOW, THEREFORE, FOR VALUABLE CONSIDERATION, the sufficiency of which is acknowledged, the parties agree as follows:

- 1. **Right to Enter.** Subject to the terms and conditions of this Permit, CITY hereby grants permission to PERMITTEE, its employees, agents, and contractors to enter upon the Permit Area solely for the purpose to conduct riparian bird, toad and vegetation studies and restoring the City Property as required by this Permit (the "Permit Use"), and for no other purpose whatsoever.
- 2. **Use of Permit Area.** PERMITTEE may use the Permit Area on a non-exclusive basis solely for the purposes of the Permit Use. PERMITTEE shall obtain all related permits and comply with all applicable environmental laws, rules, and regulations related to the Permit Use.
- 3. **Permit Fee.** PERMITTEE shall provide CITY copies of all reports, surveys, or other information gathered from this study. Information shall be provided to the CITY Real Estate Assets Department upon time of completion.
- 4. **Term.** The term of this Permit ("Term") shall commence on the Effective Date, and shall expire on December 31, 2010.
- 5. **Revocable License.** This Permit is not a lease. It is a non-exclusive license to use CITY property, and may be revoked at will by CITY, in its sole discretion. CITY shall not be

obligated for any loss, financial or otherwise, which may be incurred by PERMITTEE as a result of such revocation or the termination of this Permit. PERMITTEE expressly waives any claim for expense or loss which PERMITTEE might incur as a result of CITY'S termination of this Permit. CITY may at all times enter upon the Permit Area.

6. Restoration. Immediately upon the expiration or earlier termination of this Permit, PERMITTEE shall promptly remove any and all improvements it installed in, on, under, or above the Permit Area and restore the Permit Area to its original condition, all at PERMITTEE'S sole cost and expense.
7. CITY'S Consent, Discretion. Whenever required under this Permit, CITY'S consent or approval shall mean the written consent or approval of the Mayor of San Diego, or his or her designee ("Mayor"), unless otherwise expressly provided. CITY'S discretionary acts hereunder shall be made in the Mayor's discretion, unless otherwise expressly provided.
8. Governmental Approvals. By entering into this Permit, neither CITY nor CITY'S City Council is obligating itself to any other governmental agent, board, commission, or agency with regard to any other discretionary action relating to the Permit Area or PERMITTEE'S use of the Permit Area. Discretionary action includes but is not limited to re-zonings, variances, environmental clearances, or any other governmental agency approvals which may be required for the PERMITTEE'S use of the Permit Area.
9. Hazardous Substances. PERMITTEE shall not allow the installation or release of hazardous substances in, on, under, or from the Permit Area or the City Property. PERMITTEE and PERMITTEE'S agents and contractors shall not store, utilize, or sell any hazardous substance on the Permit Area or the City Property without CITY'S prior written consent. For the purposes of this provision, a release shall include but not be limited to any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leeching, dumping, or otherwise disposing of hazardous substances. "Hazardous substances" shall mean those hazardous substances listed by the Environmental Protection Agency in regularly released reports and any other substances incorporated into the State of California's list of hazardous substances. A copy of the presently effective EPA and the State lists is on file in the Office of the City Clerk as Document 769704 and by this reference is incorporated into this Lease.
 - 9.1 Remediation. If PERMITTEE'S occupancy, use, development, maintenance, or restoration of the Permit Area results in a release of a hazardous substance, PERMITTEE shall pay all costs of remediation and removal of the hazardous substance in accordance with all applicable laws, rules, and regulations of governmental authorities.
 - 9.2 Indemnity. PERMITTEE shall protect, defend, indemnify, and hold CITY harmless from any and all claims, costs, and expenses related to environmental liabilities resulting from PERMITTEE'S occupancy, use, development, maintenance, or restoration of the Permit Area, including but not limited to costs of environmental assessments, costs of

remediation and removal, any necessary response costs, damages for injury to natural resources or the public, and costs of any health assessment or health effect studies.

- 9.3 Notice of Release. If PERMITTEE knows or has reasonable cause to believe that a hazardous substance has been released on or beneath the Permit Area or the City Property, PERMITTEE shall immediately notify CITY and deliver a written report thereof to CITY within three (3) days of receipt of the knowledge or cause for belief. If PERMITTEE knows or has reasonable cause to believe that such substance is an imminent and substantial danger to public health and safety, PERMITTEE shall take all actions necessary to alleviate the danger. PERMITTEE shall notify CITY immediately of any notice of violation received or initiation of environmental actions or private suits related to the Permit Area or the City Property.
- 9.4 Environmental Assessment. Upon reasonable cause to believe that PERMITTEE'S occupancy, use, development, maintenance, or restoration of the Permit Area or the City Property ("PERMITTEE'S Operations"), resulted in any hazardous substance being released on or beneath the Permit Area or the City Property, CITY may cause an environmental assessment of the suspect area to be performed by a professional environmental consultant registered with the State of California as a Professional Engineer, Certified Engineering Geologist, or Registered Civil Engineer. The environmental assessment shall be obtained at PERMITTEE'S sole cost and expense, and shall establish what, if any, hazardous substances have more likely than not been caused by PERMITTEE'S Operations on, in, or under the Permit Area or the City Property, and in what quantities. If any such hazardous substances exist in quantities greater than allowed by city, county, state, or federal laws, statutes, ordinances, or regulations, then the environmental assessment shall include a discussion of such substances with recommendations for remediation and removal necessary to effect compliance with those laws or statutes, and estimates of the cost of such remediation or removal. PERMITTEE shall cause, or if PERMITTEE fails to do so within a reasonable period of time, CITY may cause, the remediation and/or removal recommended in the environmental assessment such that compliance with environmental law is achieved, and PERMITTEE shall pay all costs and expenses therefor.
10. Relocation. CITY may relocate the Permit Area if, in CITY'S opinion, PERMITTEE'S use of the Permit Area unreasonably interferes with CITY'S present or future use of the City Property. CITY shall provide to PERMITTEE a substitute for the Permit Area reasonably suited to PERMITTEE'S needs at no cost to PERMITTEE. PERMITTEE shall pay for all costs related to the first such relocation of the Permit Area, and CITY shall reimburse PERMITTEE for all reasonable costs incurred for any subsequent relocation.
11. Noninterference. PERMITTEE shall not materially interfere with CITY'S use, operations, and activities on the City Property, and PERMITTEE shall use such routes and follow such procedures on the City Property as shall result in the least damage and inconvenience to CITY and other users of the City Property.

12. Property Damage. PERMITTEE shall pay for all damage to the City Property, CITY'S personal property on the City Property, and the personal property of third parties on the City Property resulting from PERMITTEE'S exercise of the rights granted by this Permit, including without limitation soil erosion, subsidence, or damage resulting thereby. PERMITTEE shall promptly repair and restore to its original condition all such property.
13. Indemnification. PERMITTEE shall protect, defend, indemnify, and hold CITY and its elected officials, officers, employees, representatives, and agents harmless from and against any and all claims asserted or liability established for damages or injuries to any person or property, including injury to PERMITTEE'S officers, employees, invitees, guests, agents, or contractors, which arise out of or are in any manner directly or indirectly connected with this Permit or PERMITTEE'S occupancy, use, development, maintenance or restoration of the Permit Area, and all expenses of investigating and defending against same, including without limitation attorney fees and costs; provided, however, that PERMITTEE'S duty to indemnify and hold harmless shall not include any claims or liability arising from the established active negligence, sole negligence, or sole willful misconduct of CITY and its elected officials, officers, employees, representatives, and agents. CITY may, at its election, conduct the defense or participate in the defense of any claim related in any way to this indemnification. If CITY chooses at its own election to conduct its own defense, participate in its own defense, or obtain independent legal counsel in defense of any claim related to this indemnification, PERMITTEE shall pay all of the costs related thereto, including without limitation reasonable attorney fees and costs.
14. Taxes. PERMITTEE, alone, shall pay any and all taxes, charges, and use fees levied by any governmental agency against PERMITTEE or against any of the City Property as a result of PERMITTEE'S occupancy, use, development, maintenance, or restoration of the Permit Area or the City Property.
15. Encumbrances. PERMITTEE shall keep the City Property free from all encumbrances and liens of any nature which arise out of or are in any manner directly or indirectly connected with this Permit or PERMITTEE'S use of the Permit Area. PERMITTEE shall protect, defend, indemnify, and hold CITY harmless from and against any and all such encumbrances and/or liens, and from and against any claim, liability, cost or expense, including without limitation all attorney fees and costs, relating to or charged against the City Property, including without limitation PERMITTEE'S failure or the failure of any contractor or subcontractor hired by PERMITTEE to pay any person or persons referred to in Section 3181 of the California Civil Code or other applicable sections thereof.
16. No Discrimination. PERMITTEE shall not discriminate in any manner against any person or persons on account of race, color, religion, gender, sexual orientation, medical status, national origin, age, marital status, or physical disability in PERMITTEE'S use of the City Property, including but not limited to the providing of goods, services, facilities, privileges, advantages, and accommodations, and the obtaining and holding of employment.
17. PERMITTEE'S Risk. PERMITTEE shall bear all risks and liability arising out of or in any manner directly or indirectly connected with PERMITTEE'S use of the City Property and any

damages to the improvements on, under, or in the vicinity of the City Property resulting directly or indirectly thereby.

18. Insurance. Insurance. Permittee shall certify that it is self-insured for public liability and property damage claims in an amount of not less than Two Million Dollars (\$2,000,000). Upon request from the City, a letter verifying such coverage shall be filed with the City Real Estate Assets Department. Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 et seq. "The U.S. Geological Survey shall be liable, to the extent allowed by the Federal Tort Claims Act, for claims for personal injuries or property damage resulting from the negligent or wrongful act or omission of any employee on the United States while acting within the scope of his employment".
19. Compliance with Law. PERMITTEE shall, at its sole cost and expense, comply with all laws and the requirements of all municipal, state, and federal authorities now in effect or which may hereafter be in effect, which pertain to the Permit Area and PERMITTEE'S Operations on the Permit Area.
20. Signs. No signs may be displayed on the Permit Area without CITY'S prior written consent.
21. Maintenance of the Permit Area. PERMITTEE shall maintain the Permit Area, at PERMITTEE'S sole cost and expense and to CITY'S satisfaction, in a decent, safe, healthy and sanitary condition.
22. Grading. PERMITTEE represents and warrants that any grading and compaction operations shall be done in such a manner that will not disrupt the existing surface drainage pattern and the final grades will not interfere with the existing flow pattern.
23. Inspection. CITY may, at any and all times, enter and inspect the Permit Area.
24. Waiver. CITY'S failure to insist upon the strict performance of any of PERMITTEE'S obligations under this Permit, in one or more instance, shall not be construed as a waiver of any such obligation, and the same shall remain in full force and effect. The property constituting the Permit Area is publicly-owned and held in trust for the benefit of CITY'S citizens. CITY'S failure to discover a breach of any obligation of this Permit or to take prompt action to require the cure of any such breach shall not result in an equitable estoppel, but CITY may at any and all times require the cure of any such breach.
25. Survival. Any obligation which accrues under this Permit prior to its expiration or termination shall survive such expiration or termination.
26. Entire Permit. This Permit contains the entire agreement between the parties relating to the rights granted hereby and the obligations assumed herein. No modification of this Permit shall be valid unless in writing and signed by the party to be charged.
27. Legal Proceedings. In the event of any controversy, claim, or dispute relating to this Permit, the prevailing party shall be entitled to recover from the non-prevailing party all reasonable

costs and expenses thereof, including without limitation attorney fees and costs.

28. Notices. Any notice, request, payment, demand, or other communication required or permitted to be given under this Permit shall be in writing and deemed received upon personal service, delivery by a reputable overnight service, or delivery by United States registered or certified mail, return receipt requested, postage prepaid, and addressed to the parties as follows:

CITY: THE CITY OF SAN DIEGO

Real Estate Assets Department
Attention: Department Director
1200 Third Avenue, Suite 1700 (MS 51A)
San Diego, California 92101
Re: San Pasqual Valley, Post Fire Bird and Vegetarian Survey

With a copy by First Class mail to: SAN DIEGO CITY ATTORNEY
Attention: Real Property Section
1200 Third Avenue, Suite 1100
San Diego, California 92101-4106

PERMITTEE: U.S. DEPARTMENT OF INTERIOR

U.S. Geological Survey
Biological Resources Division
San Diego Field Station
4165 Spruance Road, Suite 200
San Diego, CA 92101

29. Authority. Each individual executing this Permit on behalf of another person or legal entity represents and warrants that he/she is authorized to execute and deliver this Permit on behalf of such person or entity in accordance with duly adopted resolutions or other authorizing actions which are necessary and proper and under such legal entity's articles, charter, bylaws, or other written rules of conduct or governing agreement, and that this Permit is binding upon such person or entity in accordance with its terms. Each person executing this Permit on behalf of another person or legal entity shall provide CITY with evidence, satisfactory to CITY, that such authority is valid and that such entity is a valid, qualified corporation, limited liability company, partnership, or other unincorporated association in good standing in its home state and that such entity is qualified to do business in California.

IN WITNESS WHEREOF, this Permit is executed to be effective as of the Effective Date.

Date: 3/6/2008

U.S. DEPARTMENT OF THE INTERIOR, U.S.
Geological Survey

BY: Barbara E. Kus

Name: Barbara E. Kus

Title: Research Ecologist

Date: 3/13/08

THE CITY OF SAN DIEGO, a California municipal
corporation

BY: James F. Barwick

Name: James F. Barwick, CCIM

Title: Director, Real Estate Assets

ENVIRONMENTAL ANALYSIS SECTION ENVIRONMENTAL CLEARANCE:

This activity is statutorily exempt from CEQA pursuant to State
CEQA Guidelines, Section 15262.

Date: 3/12/08

BY: Nicole A. McGinnis

Name: NICOLE A. MCGINNIS

Title: SENIOR PLANNER

APPROVED AS TO FORM AND LEGALITY:

Date: 3/17/08

MICHAEL J. AGUIRRE, City Attorney

BY: Tom Brasher

Name: Tom Brasher

Title: Deputy City Attorney

EXHIBIT A: Permit Area

USGS Post-burn study in San Pasqual Valley
-to survey the riparian habitat

The colored lines show our survey routes, with each color signifying a days work. We will be walking along the survey routes. The points counts not shown on the map, will be along the survey routes.

- 1) Ysabel Creek Rd to park car on side of road and access riparian habitat
- 2) Ysabel Creek Rd to park car on side of road and access riparian habitat
- 3) Nursery along San Pasqual Valley Rd, which we will only be walking along the property for the survey. Although access with a vehicle will be helpful in our set-up, but not necessary.
- 4) Access at bridge to park car. Not sure if we need access to the agriculture land or not, or if we need access to both sides for the road. Your input would help with it. We just need a spot to park a car and get access into the riparian habitat.
- 5) Gate access off of Highland Valley Rd to park car and access riparian habitat. It would be great if we could get a key for the gate or a permit to park along the road.
- 6) Nursery in corner of the Pomerado and Highland Valley to park car and walk to survey.

EXHIBIT B: Request Document



U. S. Department of the Interior
U. S. GEOLOGICAL SURVEY
BIOLOGICAL RESOURCES DIVISION
WESTERN ECOLOGICAL RESEARCH CENTER
San Diego Field Station
4165 Spruance Road, Suite 200
San Diego, CA 92101
Phone (619) 225-6456 Fax (619) 225-6436



Subject: Request for Access to the San Pasqual Valley along the San Dieguito River

Dear Jeff Pasek:

We are requesting access to the San Pasqual Valley along the San Dieguito River to conduct post-burn riparian bird and vegetation surveys during the 2008 field season (April – August). In addition, we will require access in February and March to establish bird point count stations and vegetation transects.

The purpose of the proposed research is to document the effects of the 2007 fires in San Diego County on endangered riparian birds, in particular, the Least Bell's Vireo, and to monitor post-fire recovery of the entire riparian breeding bird community. We propose a multi-year study during which we will assess the riparian bird community annually in terms of species richness, abundance, and diversity, and relate these measures to changes in habitat structure as vegetation recovers from the burn. We will compare results from burned areas along Dulzura Creek, San Dieguito River and Las Flores Creek to an unburned reference site along the Sweetwater River.

Proposed Activities:

- 1) Conduct riparian bird and vegetation surveys.
- 2) Study set-up: Locate and mark point count stations in riparian habitat along San Dieguito River with 1.5 m rebar and plastic flagging (anticipate approximately 10-15 point count stations). Locate and mark the upland end of vegetation transects running across and perpendicular to the creek with rebar and flagging and mark sampling points along each transect with 0.5 m wooden stakes.

USGS Personnel: Barbara Kus, Kimberly Ferree, Mike Wellik, Scarlett Howell, Melanie Madden-Smith, and Brian Gibson; only one personnel will require access during point count surveys while 2-6 personnel will require access during study set-up and vegetation sampling.

Location of Proposed Activities: San Dieguito River, San Pasqual Valley

Specific Dates:

Feb 13 – March 21 (5:00 am to 3:00 pm) (exact dates to be determined): Approximately 2-4 days to set up bird point count stations and vegetation transects.
April 14 – May 2 and May 19 – June 6 (5:00 am to 3:00 pm) (exact dates to be determined): 3 day during each three-week period to conduct bird surveys.
July 14 – August 22 (5:00 am to 3:00 pm) (exact dates to be determined): Approximately 4-5 days to conduct vegetation sampling.

Contact Information: Mike Wellik, mwellik@usgs.gov, (619) 225-6453

Sincerely,

Michael Wellik
Biologist