THE CITY OF SAN DIEGO

# REPORT TO THE CITY COUNCIL

DATE ISSUED: September 3, 2010 REPORT NO: 10-111

ATTENTION: Budget & Finance Committee
Agenda of September 15, 2010

ORIGINATING DEPARTMENT: Park and Recreation

SUBJECT: Budget Reallocation for Open Space Division Projects 1472

COUNCIL DISTRICT(S): Citywide

CONTACT/PHONE NUMBER: Stacey LoMedico, (619) 236-6643

REQUESTED ACTION:
Approval of resolutions:
1. Authorizing the Chief Financial Officer to transfer $434,813 of appropriations from the General Fund Allocated Reserve (Department 9915) to the Park and Recreation Department (Department 1714) within the General Fund (Fund 100000); and
2. Authorizing the Chief Financial Officer to transfer $159,813 from the General Fund, Park and Recreation Department (Department 1714, Fund 1000000) to the Carroll Canyon Vernal Pool Management Fund (Fund 200407); and
3. Authorizing the Chief Financial Officer to appropriate and expend $159,813 in the Carroll Canyon Vernal Pool Management Fund (Fund 200407) for the purpose of providing management, maintenance and preservation of the Carroll Canyon vernal pool preserve; and
4. Authorizing the Chief Financial Officer to transfer $275,00 from the General Fund, Park and Recreation Department (Department 1714, Fund 100000) to the Vernal Pool Preservation Program Fund (Fund 200400); and
5. Authorize the Chief Financial Officer to transfer $25,000 from Developer Contributions-Non CIP (Fund 400268) to the Vernal Pool Preservation Program (Fund 200400); and
6. Authorizing Chief Financial Officer to appropriate and expend $300,000 in the Vernal Pool Preservation Program Fund (Fund 200400) for the purpose of purchase, research, and maintenance of vernal pools and implementation of the vernal pool habitat conservation plan.

STAFF RECOMMENDATION: Approve requested action.

ALTERNATIVES

1. Recommend approval of the Budget Reallocation for Open Space Division Projects 1472
2. Do not approve the Budget Reallocation for Open Space Division Projects 1472

EXECUTIVE SUMMARY/BACKGROUND:
The City's Park and Recreation Open Space Division has been tasked with the ongoing maintenance and preservation of the Carroll Canyon Vernal Pool Preserve and other vernal pools citywide as part of the Vernal Pool Preservation Program. Funding is required to allow continued management, maintenance and preservations of the sites.

The Vernal Pool Preservation Program (VPPP) was adopted by City Council on June 17, 1980 (R-252015, see attachment A) in an effort to balance conservation of the federally endangered San Diego mesa mint with public and private development concerns. An account was established for the purchase, research and maintenance of vernal pools and their associated habitats. The City is required, as part of the Multiple Species Conservation Program (MSCP) agreement with the resource agencies, to manage vernal pools in perpetuity. As part of the upcoming vernal pool Habitat Conservation Plan, the City must demonstrate that it has a secure funding source. This fund was created for and may be used for that purpose. On March 26, 1991, the City Council approved a development agreement with Bob Baker Enterprises (R-277584, see attachment B) that included the conservation of a 19.1 acre parcel, known as the Carroll Canyon Vernal Pool Preserve, as mitigation for the project. Additionally, the agreement provided $100,000 to establish a fund for the establishment and maintenance of the parcel as a vernal pool preserve.

The addition of settlement funding from the Southview Project Settlement Agreement to the VPPP would provide for implementation of the vernal pool Habitat Conservation Plan in accordance with the agreement (see attachment C).

FISCAL CONSIDERATIONS: With this action the Carroll Canyon Vernal Pool Fund, Fund 200407, will be $159,813. The Vernal Pool Preservation Fund, Fund 200400, will be $300,000.

EQUAL OPPORTUNITY CONTRACTING INFORMATION (IF APPLICABLE): N/A

PREVIOUS COUNCIL and/or COMMITTEE ACTION: The VPPP was adopted by the City Council on June 17, 1980, (R-252015) in an effort to balance conservation of the federally endangered San Diego mesa mint (P. abramsii) with public and private development concerns. This account was designated for the purchase, research, and maintenance of vernal pools and their associated habitats in the City of San Diego. On March 26, 1991, the City Council approved a development agreement with Bob Baker Enterprises that included the conservation of a 19.1 acre parcel, known as the Carroll Canyon Vernal Pool Preserve, as mitigation for the project. Additionally, the agreement provided $100,000 to establish a fund for the establishment and maintenance of the parcel as a vernal pool preserve.

COMMUNITY PARTICIPATION AND PUBLIC OUTREACH EFFORTS: N/A

KEY STAKEHOLDERS AND PROJECTED IMPACTS: Restoration of funding is required to meet obligations of the Multiple Species Conservation Program Implementing Agreement and MSCP Subarea Plan with the U.S. Fish and Wildlife Service and California Department of Fish and Game.

Stacey LoMedico
Park and Recreation Director
Originating Department

Jay M. Goldstone
Chief Operating Officer
Deputy Chief/Chief Operating Officer

Attachments: A - R-252015, Vernal Pool Preservation Program
B - R-227584, Bob Baker Agreement for Carroll Canyon Vernal Pool Fund
C - Southview Settlement Agreement and Amendment

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CLERK'S FILE COPY

# RESOLUTION No. R-252015 (R80-2481)

Adopted on JUN 17 1980

BE IT RESOLVED, by the Council of The City of San Diego as follows:

The City Council of The City of San Diego does hereby approve and adopt the City of San Diego Vernal Pool Preservation Program, a copy of which is on file in the Office of the City Clerk as Document No. RR-252015, and directs all City departments to implement its provisions.

APPROVED: JOHN W. WITT, City Attorney

By _____
John K. Riess
Deputy City Attorney

JKR:lco:605
6/16/80

CC-1265-B (REV. 12-76)

CITY OF SAN DIEGO VERNAL POOL PRESERVATION PROGRAM

APPROVAL

The City Council of The City of San Diego does hereby approve and adopt the City of San Diego Vernal Pool Preservation Program, a copy of which is on file in the Office of the City Clerk as Document No. RR-252015, and directs all City departments to implement its provisions.

The United States Army Corps of Engineers in coordination with the United States Fish and Wildlife Service does hereby approve and adopt the aforementioned program and pledges the cooperation of the Army Corps of Engineers and the Fish and Wildlife Service in its implementation and operation.

Dated this 17th Day of June, 1980.

Pete Wilson

PETE WILSON
Mayor
The City of San Diego

Gwynn A. Teague

GWYNN A. TEAGUE
Colonel
United States Army
Corps of Engineers

R-252015

# CITY OF SAN DIEGO

# VERNAL POOL PRESERVATION PROGRAM

June 16, 1980

## OBJECTIVES

The objective of the City's Vernal Pool Preservation Program is to preserve representative groups of vernal pools to assure the survival of this habitat type and its associated biological contents, including the endangered Mesa Mint, while meeting the growth and development plans and goals of The City of San Diego.

## SUMMARY

Approximately 800 acres of vernal pool habitat have been identified on land under City jurisdiction. This program recommends that approximately 270 acres of vernal pool habitat under City jurisdiction be protected by the federal permit review process. An individual Corps 404 Permit and Section 7 Consultation with the U.S. Fish and Wildlife Service will be required prior to disturbance of vernal pools in particular areas. All other properties will be released from individual 404 review because of their nationwide permit status. The disturbance of all pools in areas under City jurisdiction will be subject to City of San Diego review under the requirements of the California Environmental Quality Act.

The federal review process could potentially preserve over 1,300 acres of vernal pool habitat on land under City, County, and Navy jurisdiction. Approximately 1100 acres of vernal pool habitat occur on NAS Miramar and Section 7 Consultation with the U.S. Fish and Wildlife Service could potentially preserve some of these pools. Approximately 190 acres on private property under City jurisdiction will be required to obtain an individual Corps 404 Permit prior to disturbance of vernal pools.

## Program Elements

CITY PROPERTY - Disturbance of vernal pools on Montgomery Field necessitated by runway extension or installation of other facilities under FAA control will require an individual Section 404 Permit and Section 7 Consultation with the U.S. Fish and Wildlife Service. The City commits to preserve and manage 80% of the vernal pools and their drainage areas on Montgomery Field. The City also commits to preserve and manage at least 35 acres of vernal pool habitat on City-owned land east of Lower Otay Reservoir.

PRIVATE PROPERTY UNDER CITY JURISDICTION - The property owners of 8 areas determined by U.S. Fish and Wildlife as necessary for consultation under federal law will be required to obtain individual 404 Permits from the Army Corps of Engineers prior to development. All other privately owned property will be considered to be under the Section 404 nationwide permit by the Army Corps of Engineers. All property will continue to be subject to environmental review by The City of San Diego under the California Environmental Quality Act.

## Other Jurisdictions

The City's preservation program is necessarily limited to vernal pool areas in the City's jurisdiction. However, vernal pools also occur on Navy property, in the County of San Diego, and in the Cities of San Marcos, Chula Vista, and Carlsbad.

Approximately 1,100 acres of vernal pool habitat have been identified on the Miramar Naval Air Station and over 500 of these acres are considered to be of high priority for preservation. Under the provisions of the federal Endangered Species Act (1973), any federal action on federal property which would impact the Mesa Mint or its critical habitat will require Section 7 consultation with U.S. Fish and Wildlife and a Section 404 Permit. Therefore, this major portion of the resource outside the jurisdiction of The City of San Diego would require consultation with the U.S. Fish and Wildlife Service.

Approximately 570 acres of vernal pool habitat have been identified on land under County of San Diego jurisdiction, including 65 acres of City-owned land east of Lower Otay Reservoir. Thirty-five of these acres will be preserved by the City. Most of the vernal pool habitat under County jurisdiction occurs on Otay Mesa, but vernal pools are located near Ramona and Rancho Bernardo. The County is developing a separate but compatible program for the unincorporated areas of San Diego County.

It is recommended that the cities of San Marcos, Chula Vista, and Carlsbad also develop ways to protect the vernal pools under their jurisdiction.

# BACKGROUND

## Statement of the Problem

Vernal pools are depressions in the soil that fill with water during the winter rainy season, creating a unique habitat which contains several rare and endangered plant species. One species, the San Diego Mesa Mint (*Pogogyne abramsii*) has been placed on both the state and federal endangered species lists.

Vernal pools in San Diego County are found on level or gently sloping coastal terraces which are highly developable for either housing, industrial, or commercial use. The vernal pool habitat in San Diego covers approximately 2,500 acres of land. The rapid development of the coastal mesas has threatened several vernal pool plant species, including the Mesa Mint, with extinction. The listing of the Mesa Mint as an endangered species by both the federal and state government requires protection of this plant and its critical habitat. Adequate protection of this resource requires that positive steps be taken by The City of San Diego, the County of San Diego and the U.S. Navy at N.A.S. Miramar.

The U.S. Army Corps of Engineers has jurisdiction over isolated wetlands, and vernal pools have been defined as isolated wetlands. Under the Corps' jurisdiction, a nation-wide permit exists to fill wetlands not impacting rare or endangered species. However, the Corps must review each project individually if a rare or endangered species is involved, and the Corps may issue an individual 404 Permit when it is satisfied that the critical habitat has not been impaired. This process requires consultation with the U.S. Fish and Wildlife Service. The City of San Diego has initiated the development of a preservation program so that all vernal pool areas would not require an individual 404 Corps Permit, which would result in federal review of a project in addition to the City's review.

The City of San Diego recognizes the scientific importance and resource value of the vernal pool habitat. In July of 1979, the City agreed to develop a vernal pool preservation program so that vernal pools and their associated rare plants could be protected and preserved while allowing for orderly development of the region. The acceptance of this program by the Army Corps of Engineers will eliminate the need for individual, federal 404 Permits on all land except for the specific areas recommended in this program.

## Planning Procedures

Development of the Vernal Pool Preservation Program included an intensive joint planning effort organized and sponsored by The City of San Diego. The planning work was carried out by a Vernal Pool Advisory Committee which in turn consisted of a Biology Committee and a Legal/Financial Committee. The membership of the two committees consisted of representatives of federal, state, and local agencies, private consulting firms, and property owners.

The Biology Committee evaluated the preservation priorities of the vernal pool areas in the San Diego region. This committee consisted of biologists from U.S. Fish and Wildlife, the California Department of Transportation, the California Department of Fish and Game, the California Native Plant Society, and local consulting firms.

The Biology Committee reviewed all available data on the pools in the San Diego region. Most of the data available was in the form of two surveys. One survey was conducted by the California Department of Fish and Game by R.M. Beauchamp and T. Cass (1979) and the other was prepared for Pardee Construction Company by Recon (Villasenor and Riggan, 1979). Research conducted for the California Department of Transportation by Zedler, Ebert, Balko, and Beauchamp (1979) provided some theoretical information, and data on Otay Mesa vernal pools was provided by T. Oberbauer (1976) and T. Cass (pers. comm. 1979).

Pool areas were rated as being of high, moderate, or low preservation priority. The preservation priority of each group of pools was determined by four factors: the natural physical qualities, the presence and frequency of sensitive plants species including the Mesa Mint, the degree of disturbance, and the defensibility of the area from future disturbance. In this evaluation, an emphasis was placed on the physical qualities and plant species. However, the location of a pool area adjacent to or in the midst of development could reduce an otherwise highly valuable pool area to one of only moderate or low preservation priority. The evaluation of pool areas in the San Diego region and the manner in which they are evaluated are contained in the report "The Biological Evaluation of Vernal Pools in the San Diego Region" (Balko, 1979). This report contains recommendations on which pool areas should be preserved. The City's preservation program would preserve many but not all of the areas recommended for preservation by the Biology Committee for those areas under the City's jurisdiction.

The Financial/Legal Committee consisted primarily of individuals with legal expertise and interest in the developments affected by vernal pool preservation. This Committee explored alternative means of preserving vernal pools including purchase with private funds, donations, the use of easements, and the transfer of development rights. The Committee also examined legal aspects of preservation procedures.

The City staff, with the aid of the Advisory Committee, examined the conflicts between vernal pool preserves and development plans of the City. The Preservation Program presented here represents The City of San Diego judicious, balanced integration of a complicated series of potentially conflicting environmental, societal, economic and legal needs.

## PRESERVATION PROGRAM - PRESERVE LOCATIONS

### Private Property under City Jurisdiction

The program identifies 6 privately-owned areas in the northern part of The City of San Diego and two privately-owned areas in the southern part of the City which would be subject to federal review by the Army Corps of Engineers. Property owners in these areas will be required to obtain an individual 404 Permit before disturbing the vernal pools. These areas are listed and described below and are mapped on Figures 1 & 2.

Ha, Hb, Hc, Hd - This northernmost group of pools occupy roughly 115 acres on a mesa north of Penasquitos Canyon. The pools are in an area designated for Future Growth by the City's General Plan.

Bab - These pools are located on roughly 20 acres of land on Lopez Ridge in Mira Mesa. This portion of the ridge is surrounded by the Penasquitos Regional Park and is designated for residential development in the Mira Mesa Community Plan.

Ca - These pools, located on the Lyon's Mira Mesa residential project, are also designated for residential development in the Mira Mesa Community Plan. Approximately 2.2 acres of vernal pool habitat will be subject to an individual 404 Permit. The remaining vernal pool habitat will have a nation-wide permit.

PI, PII - These pools are located south of Carroll Canyon on property owned by Fenton Materials and Chillingworth. This area is designated for industrial development in the Mira Mesa Community Plan. An individual 404 Permit will be required for all of the pools on Fenton Materials property and for 1.5 acres of pool habitat on Chillingworth property as identified by the Army Corps of Engineers.

iII - This area is located northeast of Eastgate Mall and Miramar Road. All of the pools in this 23-acre area would be required to obtain an individual Section 404 Permit.

Db - This area contains approximately 15 acres of vernal pool habitat on the north side of Carroll Canyon. The site is designated for industrial development in the Mira Mesa Community Plan and will be subject to the individual Section 404/Section 7 consultation process.

Jb, J13 - The two areas occupy approximately 25 acres southwest of Brown Field. Area Jb has poor soil stability and is designated as open space in the draft Otay Mesa Community Plan. The other area is designated for low density residential development. Both areas will be subject to the individual Section 404 Permit process.

Protection of the vernal pools in the above identified areas will be accomplished by the Corps' exercise of individual permit authority over these specific sites and Section 7 consultation with U.S. Fish and Wildlife.

City Property

The City of San Diego will commit to preserving all of the vernal pools on Montgomery Field except those eliminated by the proposed runway extension and associated landing equipment. The draft Airport Master Plan includes a runway extension which would not directly impact any vernal pools. However, associated landing equipment, such as approach lights and minimal

service roads, would have an impact on the vernal pool area and the runway extension could indirectly impact some pools. The proposed runway extension project will require that the FAA consult with the U.S. Fish and Wildlife Service according to Section 7 of the Endangered Species Act.

The draft Airport Master Plan has been constrained to preserve vernal pool resources. At least 80 percent of the pools will be preserved on Montgomery Field.

Over 60 acres of City-owned vernal pool habitat is located on the mesa east of the Lower Otay Reservoir. No plans for this area presently exist and the land is now leased for cattle grazing. At least 35 acres will be preserved under any future development plan.

PRESERVATION PROGRAM - IMPLEMENTATION

The following steps will be taken to protect vernal pools in The City of San Diego:

1. The U.S. Army Corps of Engineers will exercise individual permit authority only for those private properties identified above and for Montgomery Field. Property owners in the identified areas will be required to obtain an individual 404 Permit prior to the disturbance of vernal pools (Ha, Hb, Hc, Hd, Bab, Db, PII, iII, J13, Jb, and the indicated portions of PI and Ca).

2. The City of San Diego will not issue any permits for grading, brushing, or clearing on the above identified lands before the Army Corps has issued a 404 permit. The City will retain its present definition and restrictions on land development so that premature clearing and grubbing of vernal pools will not be allowed without a permit.

3. The City of San Diego will review all proposed development plans through the environmental review process under the California Environmental Quality Act with the objective of mitigating impacts on vernal pools and their biological resources. Mitigation will include either: a) preservation of resources on-site, or b) off-site preservation through the mechanism of applicant donation of $4,000 per vernal pool habitat acre (includes drainage area) not to exceed $500.00 per gross project ~~area~~ acre. These donations will be retained in a Vernal Pool Trust Fund administered by The City of San Diego for purchase, research, and maintenance of vernal pools and associated habitat.

4. Penasquitos properties will donate approximately 7 acres of land on Lopez Ridge (Bab). This portion of land is adjacent to the Penasquitos Regional Park and contains vernal pool #42 (Recon survey). The land will become part of the Penasquitos Regional Park.

Furthermore, Penasquitos Properties will redesign a Park View Estates project north of Penasquitos Canyon to provide a 100 foot zone between some Hd vernal pools and planned development. Lots 2420-2426 will be eliminated from the final plans to preserve pools north of the development. In exchange, the boundary of the Hd series over which the Corps would exercise permit authority would be adjusted to exclude the area to the south containing pool areas H11 & 12, identified in the California Fish and Game survey. (The Park View Estates project will not require an individual 404 Permit.)

## Commitments Required by the City

The City of San Diego's commitment to this program requires assurances that the Army Corps of Engineers and the U.S. Fish and Wildlife Service will allow for a road and water utility easement across the "H series" property and allow for a road easement for Calle Cristobal that bisects the Lopez Ridge preservation area if the City provides for offsetting acreage of vernal pools and associated mitigation adjacent to those pools that are impacted. The facilities will be designed under City supervision, Corps of Engineers permit authority, and U.S. Fish and Wildlife Service Section 7 consultation to avoid impact on vernal pools as much as possible, but it is recognized that some impact could occur. An example of the kind of road easement required for Calle Cristobal is provided (see map in Attachments).

Furthermore, The City of San Diego asks for a commitment from the U.S. Fish and Wildlife and the Army Corps of Engineers to work cooperatively with CALTRANS and the Navy to develop a satisfactory alignment and design for the much needed I-15 re-alignment and widening and the construction of Route 52.

The Army Corps of Engineers will recognize its nationwide 404 status for all vernal pool areas within the City which have not been identified above as requiring an individual 404 Permit.

## CONCLUSION

A coordinated effort involving many levels of government and the private sector has resulted in this program to assure preservation of a representative group of vernal pools and their biological contents. The program also provides for The City of San Diego to meet the health, safety, and welfare needs of this City by allowing orderly development to occur providing much needed housing and transportation facilities.

## REFERENCES

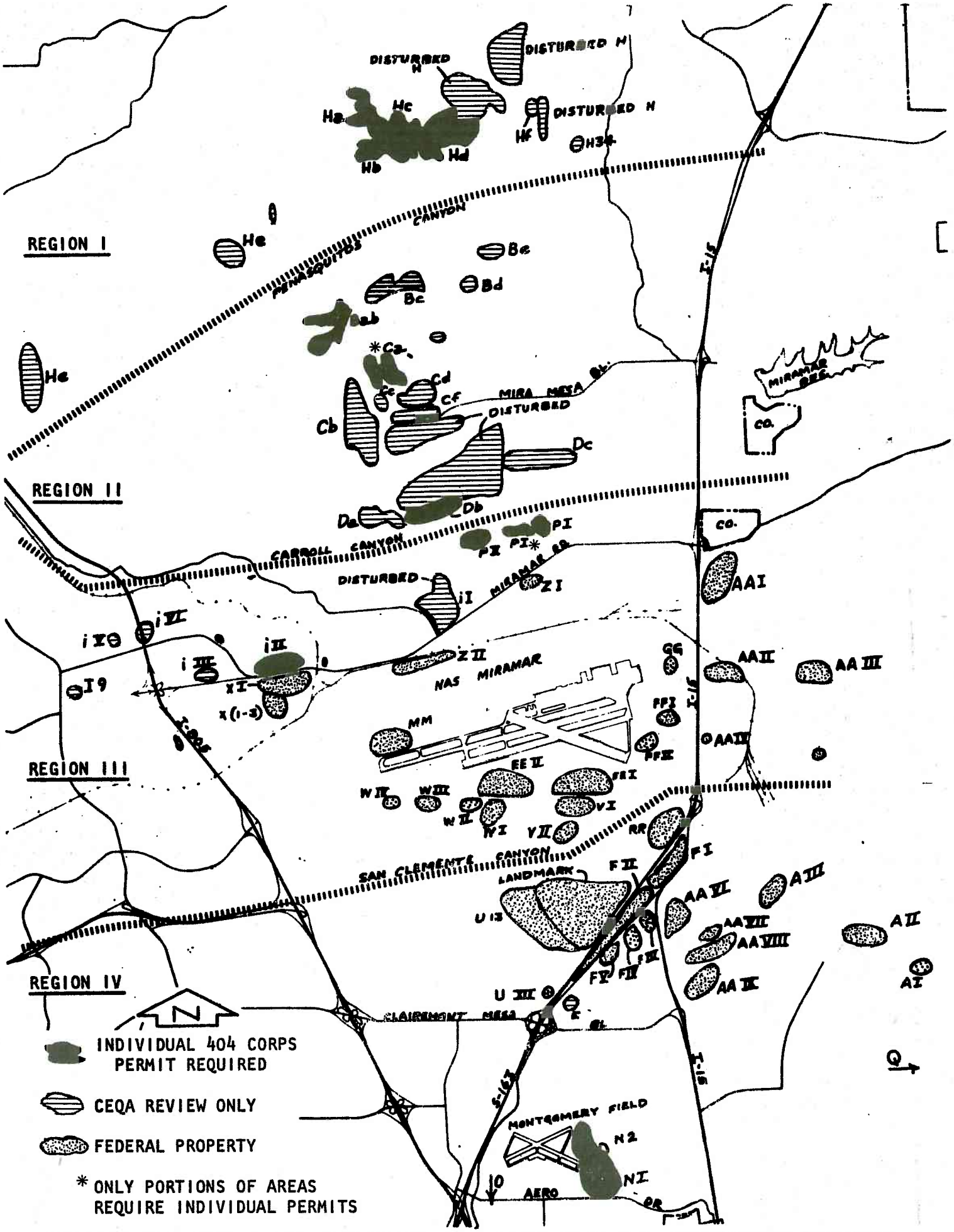
Balko, M.L. 1979. The Biological Evaluation of Vernal Pools in the San Diego Region. City of San Diego, Environmental Quality Division. 55 pp.

Beauchamp, R.M. and T. Cass. 1979. San Diego Vernal Pool Study. California Dept. of Fish and Game, Nongame Wildlife Investigations, Endangered Plant Program 145, Job I-1.0.

Oberbauer, T. 1976. Preservation of Vernal Pools on Otay Mesa. County of San Diego, Integrated Planning Office.

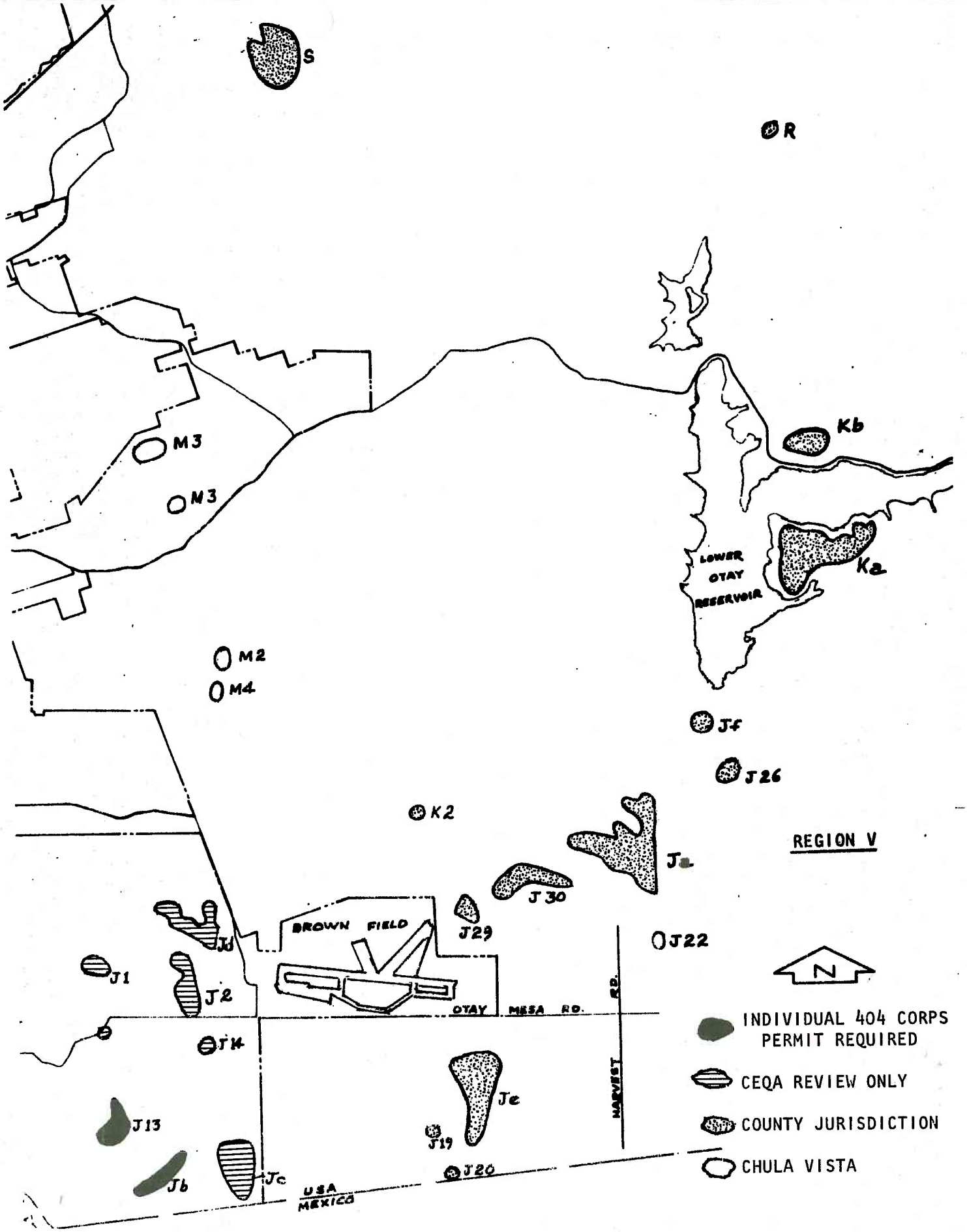
Villasenor, R. and R.B. Riggan. 1979. Report on Vernal Pools of the Kearny Mesa Region, San Diego County. Regional Environmental Consultants (Recon), Job Number 6891.

Zedler, P., T. Ebert, M.L. Balko, and R.M. Beauchamp. 1979. A Survey of Vernal Pools of Kearny Mesa, San Diego County, Spring 1979. California Department of Transportation, Grant 06309. 152 pp.



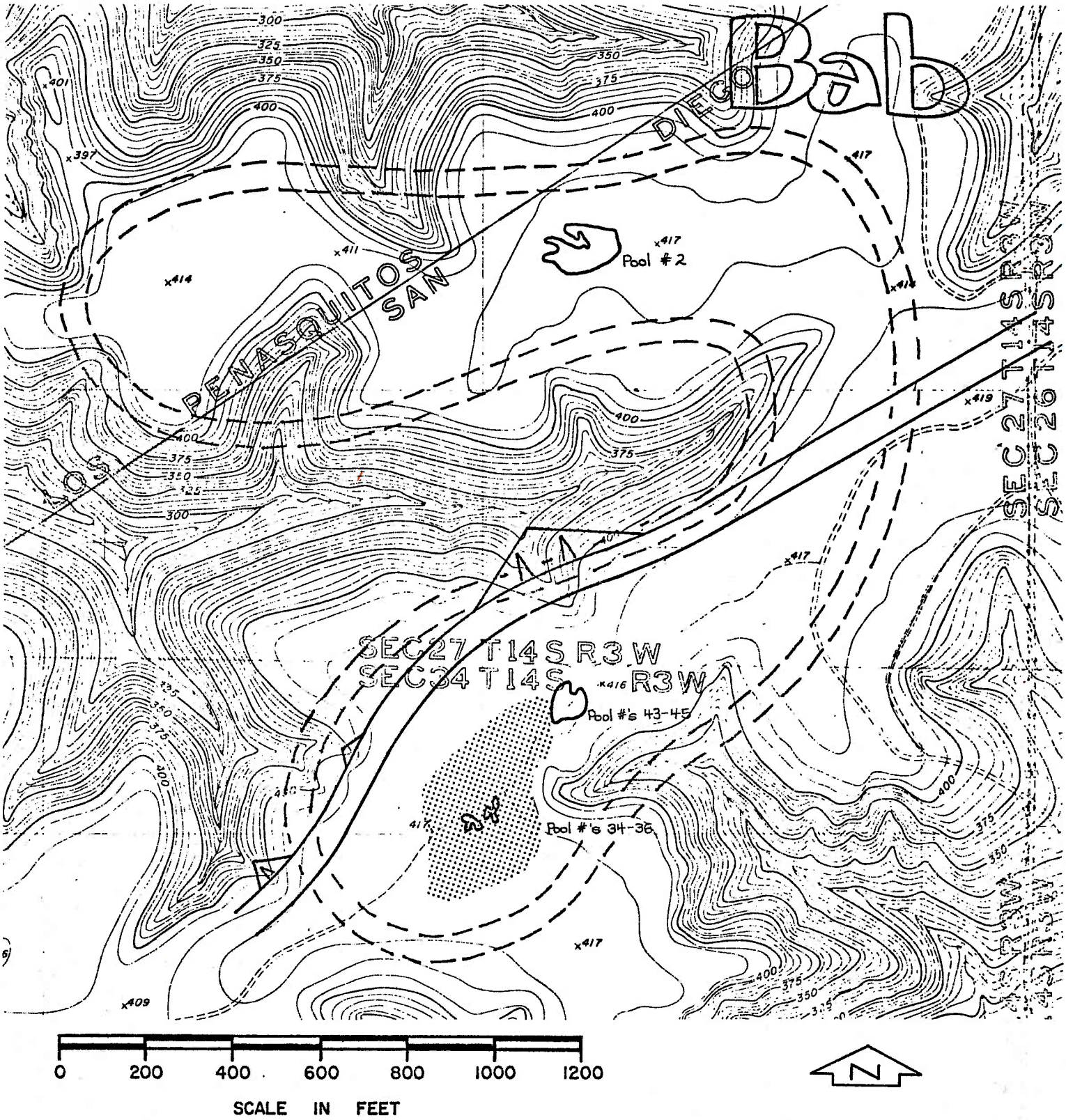

PRESERVATION PROGRAM-LOCATION OF VERNAL POOL AREAS UNDER CITY JURISDICTION REQUIRING AN INDIVIDUAL CORPS 404 PERMIT IN ADDITION TO REVIEW UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

FIGURE 1




PRESERVATION PROGRAM-LOCATION OF VERNAL POOL AREAS UNDER CITY JURISDICTION REQUIRING AN INDIVIDUAL CORPS 404 PERMIT IN ADDITION TO REVIEW UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

FIGURE 2




Map does not include the location of pool number's 42, 29, 37, 28, 33 and 38. Some of the pools could not be relocated and others are not close to the tentatively drawn road alignment.

RECON

DUPLICATE ORIGINAL COPY

**AGREEMENT**

This Agreement is made this 26th day of March, 1991 by and between Bob Baker Enterprises, Inc., a California corporation ("BAKER") and the City of San Diego, a municipal corporation ("CITY"), who agree as follows:

**RECITALS**

This Agreement is made with respect to the following facts:

A. BAKER is the owner of certain real property located on Miramar Road, consisting of approximately 14.85 acres, in the City of San Diego ("The Project Property").

B. BAKER is currently processing with the City of San Diego Vesting Tentative Map 88-0612 (VTM), Planned Industrial Development 88-0612 (PID), and the associated Resource Protection Ordinance (RPO Permit) to subdivide the Project Property for the development of auto dealerships (the "New Approvals"). The New Approvals revise the previously approved Tentative Map 83-0892 and PID 83-0892 (the "Previous Approvals").

C. The Project Property includes identified vernal pools. In conjunction with the Previous Approvals, the U.S. Army Corps of Engineers (the "Corps") allowed discharge of fill into all but approximately 1.25 acres of the vernal pools and vernal pool drainage area under a Nationwide Permit under Section 404 of the Federal Clean Water Act (the "Nationwide Permit").

D. As a result of the New Approvals, and the existing situation in regards to vernal pools in the City of San Diego, the Corps required BAKER to reinitiate "a Section 7 consultation." As a condition of the reconfirmation of the Nationwide Permit, and issuance of the New Approvals, the Corps and CITY respectively each require BAKER to mitigate for the loss of vernal pool habitat on the site by purchasing existing vernal pool habitat ("Off-Site Mitigation"). Approximately 14.4 acres of property are necessary to satisfy the Off-Site Mitigation requirements of the Nationwide Permit and the New Approvals.

E. BAKER has located an approximately 19.1-acre site owned by H.G. Fenton Material Company ("FENTON"). The property is located in the City of San Diego, as more particularly described in Exhibit "A" attached hereto and incorporated herein containing a legal description of the 19.1-acre parcel together with an Environmental and Energy Services Co. (ERC) photo depicting the total 19.1 acres, consisting of the 14.4-acre portion to be acquired for the Off-Site Mitigation of the Project Property and a 4.7-acre excess parcel of vernal pool land. The total site satisfies the Off-Site Mitigation requirements for the Nationwide Permit and the New Approvals, and also provides approximately 4.7 acres of vernal pools for the City Vernal Pool Preservation Program, if CITY wishes to use the land for such purposes.

F. FENTON and BAKER have entered into a Purchase Agreement and Escrow No. 90-22970-9, dated January 11, 1990, at Mission Valley Escrow ("the Escrow Agreement") for the purchase and sale of the Off-Site Mitigation property to satisfy the condition of BAKER's Nationwide Permit, the New Approvals and mitigation requirements of the City of San Diego.

DOCUMENT NO. RR-277584

FILED MAR 26 1991

OFFICE OF THE CITY CLERK
SAN DIEGO, CALIFORNIA

G. The Off-Site Mitigation property does not currently constitute a legal lot on any final parcel or subdivision map. Any transfer of the property to BAKER without the processing of a final parcel or subdivision map would result in possible violation of the Subdivision Map Act. There is insufficient time to process such a map to permit the timely transfer of the Off-Site Mitigation property.

H. Transfers of land to and from any public entity are exempt from the provisions of the Subdivision Map Act, and, therefore, it is BAKER and CITY's mutual desire and intent that BAKER, by and through the Escrow Agreement with FENTON, convey the Off-Site Mitigation property to CITY upon the terms and conditions of this Agreement.

1. <u>THE MITIGATION PROPERTY</u>

1.1 Upon City approval of said VTM 88-0612, PID 88-0612, the RPO Permit and within 30 days of the City Council adopting a resolution approving the Final Subdivision Map for the Project Property and prior to any grading of the Project Property, as a condition of said approvals, BAKER shall deposit with the City a standard form City Grant Deed, executed by FENTON, conveying to the CITY said approximately 19.1 acres as described in Exhibit "A." The conveyance shall be at no cost or expense to the CITY and the property shall be free and clear of any and all liens and/or encumbrances with the exception of only those items previously approved of, in writing, by the City prior to the close of Escrow 90-22970-9. Said escrow shall also be contingent upon City's written approval of the escrow instructions and language in the Grant Deed conveying the Off-Site Mitigation property to the City. Stewart Cerveny, Property Agent for the City of San Diego, shall be authorized to sign said approvals on behalf of the City. At the close of escrow, BAKER shall cause to be issued a CLTA policy of title insurance with Mechanics Lien Endorsements in favor of the CITY insuring title to the property in the name of the CITY subject to only those exceptions to title as mentioned above. Acceptance of the Grant Deed by the CITY shall be deemed to constitute fulfillment of BAKER's requirement to provide the 14.4 acres of "Off-Site Mitigation" vernal pool habitat lands as a condition of the approval of said VTM 88-0612, PID 88-0612, the Nationwide Permit, and the RPO Permit, and the Final Subdivision Map.

1.2 CITY agrees that upon the acceptance of the Grant Deed to the Off-Site Mitigation property by the CITY, BAKER shall be released by CITY from any and all obligation or liability in any way related to the Off-Site Mitigation property except for the funding of the Management, Maintenance and Preservation Fund as provided for in Paragraph 2 below.

2. **MANAGEMENT, MAINTENANCE, AND PRESERVATION FUND**

Concurrent with BAKER'S deposit of the Grant Deed as provided for in Section 1.1 above, BAKER shall deposit $100,000 with the City and the City shall establish a special fund with said sum for the purpose of providing perpetual management, maintenance and preservation of the 19.1 acres as a vernal pool preserve. The City shall deposit said $100,000 in an interest-bearing account in accordance with the City's general policies and procedures for depositing City funds. The interest earned shall accrue to the special fund and shall be used solely and exclusively for costs incurred for the management, maintenance and preservation of the vernal pool preserve. Any interest not expended for such costs shall remain in the fund. On or about March 31, 2001, the total amount available in the fund shall be reviewed. In the event said total amount exceeds $100,000 plus a factor equal to any increase in the Consumer Price Index all items-San Diego during the period January 1, 1991, through December 31, 2000, any such excess shall be reimbursed to BAKER. In the event the City purchases the 4.7-acre portion of the property pursuant to this agreement, BAKER shall be reimbursed only 75.4 percent of any such excess funds.

3. **EXCESS 4.7-ACRE MITIGATION CREDIT**

By acceptance of the Grant Deed by the CITY, the CITY shall also thereinafter recognize that BAKER, its successors or assigns, shall have a credit for 4.7 acres of vernal pool habitat lands to use towards satisfying any requirements, imposed now or in the future, of the United States of America, or any of its agencies, including but not limited to the United States Fish and Wildlife Service (FWS), the United States Army Corps of Engineers (Corps), the City of San Diego, or any other local jurisdiction in the County of San Diego, in mitigation of any environmental impacts of any projects of BAKER or its successor or assigns in the City or County of San Diego (the "Mitigation Credits"). BAKER may transfer the Mitigation Credits for the 4.7-acre portion without a transfer of the underlying fee to the Off-Site Mitigation property, in whole or in part, to any other person or entities, including the City of San Diego in one or more transfers, for valuable consideration, which shall belong exclusively to BAKER, and said transferee may thereafter use the transferred Mitigation Credits for mitigation in connection with any project of the transferees in the City or County of San Diego, according to the mitigation policy of FWS, or any other federal, state or local agency subject to approval by such agencies.

In the event BAKER elects to transfer any Mitigation Credits associated with the 4.7-acre portion, in whole or in part, BAKER agrees that it shall notify CITY in writing of such transfer ("Notice of Transfer"), and CITY agrees that it shall cooperate with BAKER and CITY's approval or consent is not required for any such transfer, and no consideration shall be due CITY. Any such transfer shall be subject to CITY's exclusive option to purchase as provided in Paragraph 4 below.

4. **CITY'S EXCLUSIVE OPTION TO PURCHASE MITIGATION CREDITS TO EXCESS 4.7-ACRE PARCEL**

CITY shall have the exclusive option to purchase from BAKER the Mitigation Credits to the excess 4.7-acre portion as shown on Exhibit "A" for a period of 90 days from the date of the City Manager's or his authorized representative's acceptance of the Grant Deed from FENTON to the Off-Site Mitigation property as shown in the acceptance block on the Grant Deed. The purchase price of the Mitigation Credits to the 4.7-acre portion shall be $184,555. In addition to the purchase price, the City shall reimburse to BAKER $24,600 of the funds furnished by BAKER to establish the Management, Maintenance and Preservation Fund described in Paragraph 2 above.

Within the 90-day option period and upon receipt of a CITY warrant-check in the amount of $209,155 representing the purchase price of the 4.7-acre portion of $184,555 plus reimbursement to BAKER of the $24,600 portion of the Management, Maintenance and Preservation Fund, BAKER shall execute an agreement prepared by the City Attorney releasing any and all claim to Mitigation Credits for the Off-Site Mitigation property and acknowledging receipt of that portion of the of the Management, Maintenance and Preservation Fund reimbursed to Baker.

5. **DEED RESTRICTIONS**

CITY acknowledges that the Grant Deed will contain a restriction that provides if CITY fails to manage, maintain and preserve the entire 19.1-acre Off-Site Mitigation property in perpetuity as a Vernal Pool Preserve, then the Off-Site Mitigation property, at the option of the United States Fish & Wildlife Service (FWS), shall transfer to the FWS in order to preserve the Off-Site Mitigation property as a Vernal Pool Preserve. Notwithstanding a reversion of the Off-Site Mitigation property to FWS, CITY shall remain obligated, at its sole cost and expense, to manage and maintain the Off-Site Mitigation property as a Vernal Pool Preserve.

6. **CONTINUING OBLIGATIONS**

This Agreement shall be recorded concurrently with the recordation of the Grant Deed for the Off-Site Mitigation property.

All terms and conditions of this Agreement which expressly or impliedly require continuing obligations of any party shall survive the delivery of the Grant Deed to the Off-Site Mitigation property.

7. **NOTICES.**

All notices or other communications required or permitted herein shall be in writing, and shall be personally delivered or sent by registered or certified mail, postage prepaid, return receipt requested and shall be deemed received upon the earlier of (1) date of delivery to the address of the person to receive such notice at the following addresses as evidenced

by the execution of the return receipt, or (2) four (4) business days after the date of posting by the United States Post Office:

| | |
|---|---|
| TO BAKER: | Bob Baker Enterprises<br>530 Camino de la Siesta, Suite 307<br>San Diego, California 92108 |
| WITH A COPY TO: | Worley, Schwartz, Garfield & Rice<br>Attn. Donald R. Worley and<br>Patricia Kent<br>401 B Street, Suite 1150<br>San Diego, California 92101 |
| TO CITY: | City Manager<br>City of San Diego<br>202 C Street<br>San Diego, California 92101 |

Notice of change of address shall be given by written notice in the manner detailed in this paragraph.

8. **ENTIRE AGREEMENT**

This Agreement contains the entire Agreement between the parties hereto, and no addition or modification of any term or provision shall be effective unless set forth in writing, signed by all parties.

9. **COUNTERPARTS**

This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which, together, shall constitute one and the same Agreement.

10. **APPLICABLE LAW**

This Agreement shall be construed in accordance with the laws of the United States, and to the extent not inconsistent with the law of the United States, the law of the State of California.

11. **WAIVERS**

No waiver by any party of any provision hereof shall be deemed a waiver of any other provision hereof or of any subsequent breach of any party by the same or any other provision.

12. **TIME OF THE ESSENCE**

Time is of the essence of this Agreement and all terms and conditions thereof.

13. **ATTORNEY'S FEES**

In the event any party must bring an action to interpret or enforce the terms of the Agreement, then the prevailing party shall be entitled to recover, in addition to all other costs and remedies, its reasonable attorney's fees.

IN WITNESS WHEREOF, the parties hereto have affixed their signatures as of the date first hereinabove written.

BOB BAKER ENTERPRISES, INC.,
a California corporation

By _____

THE CITY OF SAN DIEGO

By James L. Spotts, Property Director
FOR City Manager

I HEREBY APPROVE the form and legality of the foregoing Agreement this 10 day of April, 1990.

JOHN W. WITT, City Attorney

By _____
Harold O. Valderhaug
Deputy City Attorney

SAC:st(8)
3-28-91



R-277584

EXHIBIT "A"

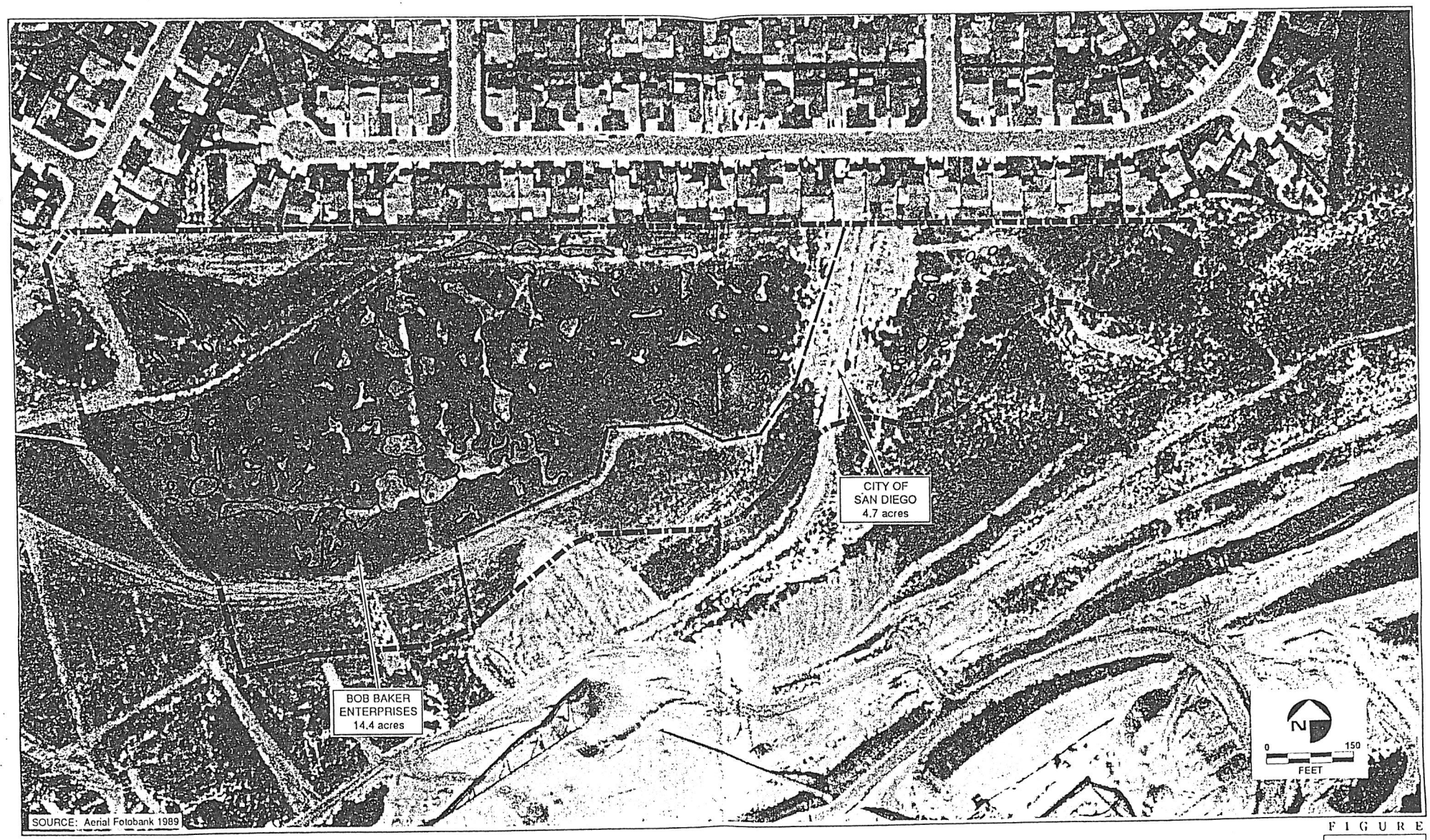
J-11289

19.1 Acre Vernal Pool Habitat

Being a portion of the South Half of Section 2, Township 15 South, Range 3 West, San Bernardino Meridian in the City of San Diego, County of San Diego, State of California according to the Official Plat thereof; said portion more particularly described as follows:

Beginning at the intersection of the centerline of Parkdale Avenue as dedicated to public use on Mira Mesa West Unit No. 6, Map No. 9283 on file in the office of the recorder of said County with the Northerly line of said South Half; thence along said Northerly line South 87°58'45" East 1908.82 feet; thence leaving said Northerly line South 34°06'48" West 147.88 feet; thence South 79°59'53" West 60.92 feet; thence North 73°53'27" West 77.85 feet; thence South 58°30'25" West 90.95 feet; thence South 35°39'10" West 141.88 feet; thence South 75°29'54" West 88.65 feet; thence North 82°22'34" West 72.81 feet; thence North 89°12'57" West 55.54 feet; thence South 65°42'54" West 83.52 feet; thence South 38°10'18" West 115.50 feet; thence South 62°05'50" West 71.46 feet; thence South 80°26'44" West 71.51 feet; thence North 89°49'40" West 159.71 feet; thence south 64°24'52" West 91.30 feet; thence South 52°22'49" West 153.91 feet; thence South 70°29'36" West 109.55 feet; thence South 88°51'23" West 195.40 feet; thence South 83°58'55" West 132.20 feet; thence North 12°58'57" West 141.37 feet; thence North 35°40'36" West 103.05 feet; thence North 43°13'24" West 193.85 feet; thence North 09°42'36" West 297.02 feet; thence North 31°21'20" East 65.00 feet to the Point of Beginning.

Containing 19.10 Acres.




FIGURE

1

ERC
Environmental
and Energy
Services Co.

EXHIBIT A

19.1-Acre H.G. Fenton Property Including "D-Series" Vernal Pools

(R-91-1514 REV.1)

RESOLUTION NUMBER R-277584

ADOPTED ON MAR 26 1991

BE IT RESOLVED, by the Council of The City of San Diego, that the City Manager is hereby authorized and empowered to execute, for and on behalf of The City of San Diego, an agreement with BOB BAKER ENTERPRISES, INC., a California corporation, whereby Bob Baker Enterprises, Inc. will purchase and establish a management fund for 19.1 acres of off-site vernal pool habitat, consisting of 14.4 acres to satisfy off-site mitigation requirements of VTM, PID and RPO Permit No. 88-0612 plus a 4.7-acre excess portion the City will have an option to purchase for vernal pool preservation, under the terms and conditions set forth in that agreement on file in the office of the City Clerk as Document No. RR-277584.

BE IT FURTHER RESOLVED, that the City Manager is authorized to accept a deed to the 19.1-acre parcel as more particularly set forth in the above referenced agreement.

BE IT FURTHER RESOLVED, that there be no right to repurchase granted to the Grantor of the 19.1-acre parcel.

BE IT FURTHER RESOLVED, that the City Attorney is hereby directed to bring an ordinance to the City Council, in two weeks time, dedicating the 14.4-acre portion of the property to park and recreation use.

BE IT FURTHER RESOLVED, that the matter of whether or not to buy the 4.7-acre portion of the site is deferred for later review and consideration by the Council.

APPROVED: JOHN W. WITT, City Attorney

By _____
Harold O. Valderhaug
Deputy City Attorney

HOV:ps
03/12/91
04/02/91 REV.1
Or.Dept:Prop.
Aud.Cert:
Job:521035
R-91-1514
Form=r-t

Passed and adopted by the Council of The City of San Diego on March 26, 1991 by the following vote:

YEAS: Wolfsheimer, Roberts, Pratt, Bernhardt, Henderson, McCarty, Mayor O'Connor.

NAYS: None.

NOT PRESENT: Hartley, Filner.

AUTHENTICATED BY:

**MAUREEN O'CONNOR**
Mayor of The City of San Diego, California

**CHARLES G. ABDELNOUR**
City Clerk of The City of San Diego, California

(SEAL)

By: RHONDA R. BARNES, Deputy

I HEREBY CERTIFY that the above and foregoing is a full, true and correct copy of RESOLUTION NO. R- 277584, passed and adopted by the Council of The City of San Diego, California on March 26, 1991.

**CHARLES G. ABDELNOUR**
City Clerk of The City of San Diego, California

(SEAL)

By: Rhonda R. Barnes, Deputy

CC-1628 (10-90)

Jerry D. Hemme [SBN 99010]
GOODE, HEMME & PETERSON, APC
6256 Greenwich Dr., Suite 500
San Diego, California 92122
Telephone: (858) 587-3555
Facsimile: (858) 587-3545

Attorneys for defendant
SOUTHVIEW, LLC

# UNITED STATES DISTRICT COURT
# SOUTHERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY; et al.<br><br>Plaintiffs,<br>v.<br><br>JIM BARTEL; et al.<br><br>Defendants. | Case No. 98-CV-02234-B (JMA)<br><br>**STIPULATED SETTLEMENT AGREEMENT RE: SOUTHVIEW PROJECT** |

Plaintiffs Southwest Center for Biological Diversity et al. and Proposed Intervenor-Defendant Southview, LLC jointly state as follows:

A. WHEREAS, on or about October 13, 2006, the Court issued an Order and Injunction ("Injunction"), as amended on December 15, 2006 (Docket Nos. 263 and 280), Southwest Center for Biological Diversity v. Bartel, 470 F.Supp.2d 1118 (S.D. Cal. 2006) ("Bartel"), finding the City of San Diego's Habitat Conservation Plan and Fish and Wildlife Service issuance of an incidental take permit covering seven vernal pool species and Biological Opinion violated the Endangered Species Act ("ESA"). For relief, the Court enjoined the following:

(1) any and all pending applications for development of land containing vernal pool habitat,

(2) those projects where the City [of San Diego] has granted permission, but the development has not yet physically begun to destroy vernal habitat, and

(3) any further development where the permittee is presently engaged in the destruction of vernal pool habitat.

B. WHEREAS, on December 12, 2007, FWS revised the designation of critical habitat for the San Diego fairy shrimp in accordance with an unrelated court order. The revised designation, in part, accounts for Bartel and its holding that the City's HCP failed to ensure the survival and recovery of the seven vernal pool species, including San Diego fairy shrimp.

C. WHEREAS, Southview is the owner of a 42.6 acre parcel in south San Diego on Otay Mesa (the "Southview Property"). San Diego fairy shrimp are found in vernal pool habitat on the Southview Property and FWS has designated critical habitat for San Diego fairy shrimp on the Southview Property.

D. WHEREAS, Southview has had pending before the City of San Diego, a land development project identified as City of San Diego Project #2204 (the "Southview Project"). The City of San Diego notified Southview that its Southview Project is subject to the Bartel injunction and its application for development would not be processed.

E. WHEREAS, the Southview Project covers approximately half of the property on its western portion. Southview seeks approval for the development of this portion, which consists of 21.58 acres (the "Western Parcel"). Upon City approval of the Southview Project, the Western Parcel's 21.58 acres will become a legal parcel separate and apart from the remaining 21 acre eastern portion (the "Eastern Parcel"). Although there is no current pending application for development of the Eastern Parcel before the City of San Diego, development of the Eastern Parcel is reasonably foreseeable and Southview has a general design and configuration for developing the Eastern Parcel.

F. WHEREAS, Southview's environmental experts have surveyed and analyzed both the Western and Eastern Parcels. Surveys conducted between 2001 and 2008

found that none of the seven vernal pool species listed under the Endangered Species Act currently occupy the Western Parcel. There is also no San Diego fairy shrimp Critical Habitat on the Western Parcel. The Eastern Parcel contains vernal pools and vernal pool habitat currently occupied by San Diego fairy shrimp. A portion of the Eastern Parcel (approximately 4 acres) is also designated as Critical Habitat for San Diego fairy shrimp.

G. WHEREAS, on or about March 2, 2009, Southview filed a Motion to Intervene and a Motion to be Excluded from the Court's Injunction on the basis that its project neither represented an application for the development of land containing vernal pool habitat nor will Southview engage in the destruction of occupied vernal pool habitat on the Western Parcel.

H. WHEREAS, Federal Defendants have filed a response to Southview's motions [Docket No. 391] raising no formal objection and taking no position on the motions. Federal Defendants noted that the Southview Project involved only the Western Parcel, that the survey data provided to FWS pursuant to Section 10(a)(1)(A) of the ESA did not indicate the presence of any listed vernal pool species on the Western Parcel, that FWS is not aware of any data to contradict that survey data, and that FWS does not anticipate future review of the Southview Project under the ESA.

I. WHEREAS, the City takes no position on the Southview motions provided that, if this settlement is approved by the Court, such approval does not in any way reduce or otherwise affect the City's authority to review the Southview Project to ensure that the proposed development complies with all State and City laws and regulations.

J. WHEREAS, Plaintiffs and Southview agree that it is desirable for both Southview and for conservation of vernal pool species for the parties to work cooperatively to resolve vernal pool conservation issues raised by the proposed development on both the Western and Eastern Parcels. Through this Settlement Agreement, Plaintiffs and Southview formalize their efforts to work toward a more comprehensive plan for the conservation of vernal pool habitat and vernal pool species at the Southview Property and within the City of San Diego. Plaintiffs and Southview further agree that if the terms of this Agreement are

implemented, development on the Western Parcel of the Southview Development Site will have no adverse impact on vernal pool habitat, the vernal pool species, or designated critical habitat for San Diego fairy shrimp. Further, commitments by Southview under this agreement will enhance conservation of fairy shrimp and fairy shrimp habitat on the Eastern Parcel, and thereby produce an outcome superior to merely maintaining the status quo. As a result, Plaintiffs and Southview agree that the Southview Project on the Western Parcel should not be subject to the injunction.

NOW, THEREFORE, IT IS STIPULATED BY AND BETWEEN THE PLAINTIFFS AND PROPOSED-INTERVENOR-DEFENDANT AS FOLLOWS:

**1. Plaintiff's Stipulation to Southview's Motions.**

A. Plaintiffs do not oppose Southview's Motion to Intervene in this action and stipulate to Southview's intervention in this matter for the purpose of seeking an exemption from the Bartel injunction.

B. In exchange for the conservation actions described below and provided the Court retains jurisdiction to enforce the terms of this Stipulated Settlement Agreement as requested, Plaintiffs do not oppose Southview's Motion to be Excluded from the Court's Injunction, and will join in a motion to the court to grant the motion.

C. Plaintiffs agree not to challenge or oppose Southview's development of the Western Parcel, or the issuance to Southview of any permit for development of the Western Parcel in any federal or state court, or before any federal or state agency, or the City on any grounds or basis. However, should Southview breach any duty or obligation under this agreement, Plaintiffs reserve the right to challenge or oppose such development and permitting by any legal means. Further, barring any breach of this agreement by Southview, Plaintiffs agree not to encourage any person or entity to bring a challenge to the development of the Western Parcel or any permit Southview seeks for development of the Western Parcel. Breach of this provision by Plaintiffs shall excuse Southview from any payment still due as set forth in sections 4 and 5 below.

**2. The Southview Project -- The Western Parcel**

Southview will insure that its development of the Western Parcel will include at least a 100-foot buffer from the delineated watershed boundary of the vernal pools and vernal pool habitat located on the Eastern Parcel to avoid and direct or indirect impacts. Southview shall undertake management actions on the Western Parcel to conserve those pools on the Eastern Parcel in perpetuity, including constructing and maintaining a secure fence and no-trespass signs, and eliminating non-native weeds. Southview's obligations under this paragraph 2 shall terminate upon the termination of Southview's ownership interest in the Western Parcel provided that Southview's successor-in-interest assumes these obligations in writing.

**3. Eastern Parcel**

A. Avoidance: In the development of the Eastern Parcel, Southview shall avoid all direct and indirect impacts (as defined by ESA regulations) to (1) the listed vernal pool species, (2) areas occupied by listed vernal pool species, (3) occupied or unoccupied vernal pools and vernal pool habitat, and (4) habitat designated as critical habitat for the San Diego fairy shrimp and depicted in Exh. A. To ensure avoidance of impacts, Southview shall insure any development of the Eastern Parcel includes at least 100-foot buffers from:

(1) the delineated watershed of areas occupied by listed vernal pool species,

(2) the delineated watershed of the vernal pools, and

(3) designated San Diego fairy shrimp critical habitat.

To the extent practicable, Southview shall endeavor to design development on the Eastern Parcel to avoid fragmenting vernal pool habitat and to provide for connectivity (1) between vernal pool habitat within the Eastern Parcel and (2) between vernal pool habitat on the Eastern Parcel and other habitat and natural areas adjacent to the Eastern Parcel.

B. Fencing: Within 30 days after the court's order approving of this Stipulated Settlement Agreement, Southview agrees to construct a secure fence around the perimeter of the Eastern Parcel and maintain the fence in "good repair" in perpetuity, such that there is no off-highway vehicle trespass. Southview's obligations under this sub-paragraph 3B shall terminate upon the termination of Southview's ownership interest in the Eastern Parcel

provided that Southview's successor-in-interest assumes these obligations in writing. The fence shall remain until completion of any future development of the Eastern Parcel, at which time Southview shall erect a permanent secure fence around vernal pool habitat areas that are protected under the Settlement Agreement or pursuant to the terms of approval of the City and other governmental entity.

C. Multi-Habitat Preservation Area Boundary Adjustment: Southview agrees to expand the Multi-Habitat Preservation Area [MHPA] to include the north end of the canyon on the Eastern Parcel through a proposed MHPA amendment. Southview may seek City approval to reduce the MHPA boundary on the southern portion of the Eastern Parcel in order to better conform to sensitive habitat on the site, provided all direct and indirect impacts (as defined under ESA regulations) to (1) the listed vernal pool species, (2) areas occupied by listed vernal pool species, (3) occupied or unoccupied vernal pools and vernal pool habitat, and (4) habitat designated as critical habitat for the San Diego fairy shrimp are avoided.

D. Management Plan: Southview shall manage all vernal pool habitat on the Eastern Parcel (identified in Exh. B) in accordance with the Management Plan (Exh. C), including maintaining the perimeter fence, eliminating weeds, and constructing and maintaining no-trespass signs to protect the conserved areas. Southview shall monitor these activities at least once every two months to insure the management activities are achieving their goal of preserving vernal pools on the Eastern Parcel. Southview shall fund these management activities in perpetuity. Southview's obligations under this sub-paragraph 3D shall terminate upon the termination of Southview's ownership interest in the Eastern Parcel provided that Southview's successor-in-interest assumes these obligations in writing.

E. Restoration Plan: Southview shall restore and preserve vernal pool habitat on the Eastern Parcel. Southview shall prepare and implement a Restoration Plan as part of any approvals needed for the Eastern Parcel from either the U.S. Fish and Wildlife Service or the City of San Diego.

F. Southview shall not complete or submit to the City of San Diego or the U.S. Fish and Wildlife Service any applications for map approvals, discretionary permits, or ESA authorizations for the Eastern Parcel, nor seek to have the Eastern Parcel excluded from the Injunction, until: (i) the City completes a Habitat Conservation Plan for the vernal pool species, or (ii) November 1, 2011, whichever comes first. Plaintiffs reserve the right to oppose any effort by Southview to be excluded from the Injunction.

G. Southview shall provide written notice by electronic mail to Plaintiffs, through their attorneys of record, of the availability of any Initial Study, Environmental Assessment, Draft Environmental Impact Report, or Negative Declaration prepared in connection with proposed development on the Eastern Parcel immediately upon the availability of such notice, and furnish copies of such documents upon request.

**4. <u>Southview's Contribution to the City's HCP.</u>**

A. Southview will contribute $25,000 to the City of San Diego to help pay for the development of a new vernal pool species Habitat Conservation Plan. This payment shall be made 30 days after the approval of the tentative map for the Western Parcel.

B. In the event that these funds are not needed for the development of a new vernal pool species Habitat Conservation Plan, the City of San Diego may use the money for implementation of the vernal pool species Habitat Conservation Plan. In the event that the City of San Diego determines that these funds are not needed for the implementation of the vernal pool species Habitat Conservation Plan, this amount will be added to the contribution described in section 5.C below.

**5. <u>Southview's Contribution to Vernal Pool Species Conservation.</u>**

In order to further the conservation of vernal pool species and vernal pool habitat, Southview shall make the following contributions to a non-profit conservation entity or entities designated by plaintiffs:

A. $100,000 within fifteen (15) days of approval of this Stipulated Settlement Agreement by the court and entry of the order which releases the Western Parcel from the Injunction.

B. $200,000 within fifteen (15) days of approval of the tentative map for the Western Parcel, or six months from entry of the order which releases the Western Parcel from the Injunction, whichever is sooner.

C. $200,000 within fifteen (15) days after the approval and recordation of the final map for the Western Parcel by the City of San Diego. This payment is conditioned upon the City's approval becoming final.

D. The use of these funds for the conservation of vernal pool species and vernal pool habitat shall be at Plaintiffs' sole discretion.

**6. <u>Attorney's Fees.</u>**

A. Southview will pay plaintiffs' attorney's fees in the amount of $50,600.12 within fifteen (15) days of approval by the court and entry of the order which releases the Western Parcel from the Injunction.

**7. <u>Miscellaneous Provisions.</u>**

A. Entire Agreement. This Agreement sets forth and shall constitute the entire agreement between the parties with respect to the subject matter of this Agreement and shall supersede any and all prior agreements, understandings, promises, warranties and representations made by any party to any other party concerning the subject matter of this Agreement and its applicable terms.

B. Amendment. This Agreement may not be released, amended or modified in any manner except by an instrument in writing signed by each of the parties hereto.

C. Successors and Assigns. All the terms and provisions contained herein shall inure to the benefit of and shall be binding upon each of the parties and their respective heirs, executors, personal representatives, successors and assigns.

D. Further Assurances. The parties shall cooperate fully and execute all supplementary documents and take all additional actions that may be necessary or appropriate to give full force and effect to the terms and intent of this agreement.

E. Attorneys' Fees. In the event of a breach of this Agreement, the prevailing party, as defined under the Endangered Species Act, shall be entitled to its reasonable

attorneys' fees and costs incurred to enforce its terms.

F. Captions. Titles or captions contained in this Agreement are inserted only as a matter of convenience and for reference, and in no way define, limit, extend or describe the scope of this Agreement or the intent of any provision hereof.

G. Separate Counterparts. This Agreement may be executed in multiple counterpart facsimile signature pages, each of which shall be deemed an original, and all of which taken together shall constitute one Agreement.

H. Advice of Counsel. The parties have received independent legal advice from legal counsel with respect to the advisability of making the settlement provided for herein, or have voluntarily chosen not to seek the same, with respect to the advisability of executing this Agreement, and with respect to the releases, waivers, and all other matters contained herein. The parties acknowledge that they have executed this Agreement without fraud, duress, or undue influence.

I. Enforcement of Agreement. The Court shall retain jurisdiction for the sole purpose of enforcing the terms of this Stipulated Settlement Agreement. See Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375 (1994). This Stipulated Settlement Agreement is effective as of the date the District Court grants the proposed Order on the parties' Joint Motion to Approve Stipulated Settlement Agreement Re: Southview Development Project.

Dated: December ___, 2009

Center for Biological Diversity

By _____
Peter Galvin
Its: Conservation Director

Dated: December 31, 2009

Southview, LLC

By _____
Clem Abrams
Its: Managing Member

attorneys' fees and costs incurred to enforce its terms.

F. Captions. Titles or captions contained in this Agreement are inserted only as a matter of convenience and for reference, and in no way define, limit, extend or describe the scope of this Agreement or the intent of any provision hereof.

G. Separate Counterparts. This Agreement may be executed in multiple counterpart facsimile signature pages, each of which shall be deemed an original, and all of which taken together shall constitute one Agreement.

H. Advice of Counsel. The parties have received independent legal advice from legal counsel with respect to the advisability of making the settlement provided for herein, or have voluntarily chosen not to seek the same, with respect to the advisability of executing this Agreement, and with respect to the releases, waivers, and all other matters contained herein. The parties acknowledge that they have executed this Agreement without fraud, duress, or undue influence.

I. Enforcement of Agreement. The Court shall retain jurisdiction for the sole purpose of enforcing the terms of this Stipulated Settlement Agreement. See Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375 (1994). This Stipulated Settlement Agreement is effective as of the date the District Court grants the proposed Order on the parties' Joint Motion to Approve Stipulated Settlement Agreement Re: Southview Development Project.

Dated: December 28, 2009

Center for Biological Diversity

By _____
Peter Galvin
Its: Conservation Director

Dated: December____, 2009

Southview, LLC

By _____
Clem Abrams
Its: Managing Member

Approved as to Form:

Dated: January 7, 2010

By /S/ Jerry D. Hemme
Jerry D. Hemme
Attorneys for defendant
SOUTHVIEW, LLC

Dated: January 7, 2010

By /S/ Neil Levine
Neil Levine
Attorneys for Plaintiffs

Jerry D. Hemme [SBN 99010]
GOODE, HEMME & PETERSON, APC
6256 Greenwich Dr., Suite 500
San Diego, California 92122
Telephone: (858) 587-3555
Facsimile: (858) 587-3545

Attorneys for defendant
SOUTHVIEW, LLC

# UNITED STATES DISTRICT COURT
# SOUTHERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY; et al.<br><br>Plaintiffs,<br>v.<br><br>JIM BARTEL; et al.<br><br>Defendants. | Case No. 98-CV-02234-B (JMA)<br><br>**ADDENDUM TO STIPULATED SETTLEMENT AGREEMENT RE: SOUTHVIEW PROJECT** |

Plaintiffs Southwest Center for Biological Diversity et al. and Proposed Intervenor-Defendant Southview, LLC jointly state as follows:

A. WHEREAS, the Parties entered into a Stipulated Settlement Agreement filed with this Court on January 7, 2010 [Docket #421]

B. WHEREAS, the Parties desire to amend the Stipulated Settlement Agreement for the purpose of providing the City of San Diego assurance that if the City takes a neutral position on the Agreement, that position cannot be used to support an objection by the Parties to the extension of Airway Road, should the City move forward with the Airway Road extension.

NOW, THEREFORE, IT IS STIPULATED BY AND BETWEEN THE PLAINTIFFS AND PROPOSED-INTERVENOR-DEFENDANT THAT THE FOLLOWING SHALL BE AN AMENDMENT TO THE STIPULATED SETTLEMENT AGREEMENT:



Jan 12 10 04:58p PGalvin 707-986-7805 p.1

1. The Circulation Map of the City of San Diego's Otay Mesa Community Plan Update's Mobility Element presently designates Airway Road as a Four Lane Major Road that may extend through a portion of the area to be preserved under the terms of the Settlement Agreement. The Parties agree that nothing in this Agreement shall affect the parties' right to object to the extension of Airway Road, nor shall the City's Statement of Neutrality concerning this Agreement be used by any party to this Agreement as a basis for objecting to an effort by the City to move forward with the Airway Road extension if the City decides to do so. The parties, by entering into this Agreement, and the City, by not formally objecting to this Agreement, intend to preserve all rights they may have with respect to the proposed extension of Airway Road.

2. Except as amended or modified herein, all the terms of the Original Stipulated Settlement Agreement shall remain in full force and effect.

Dated: January , 2010

Center for Biological Diversity

By _____
Peter Galvin
Its: Conservation Director

Dated: January 13 2010

Southview, LLC

By _____
Clem Abrams
Its: Managing Member

Approved as to Form:

Dated: January , 2010

By /S/ Jerry D. Hemme
Jerry D. Hemme
Attorneys for defendant
SOUTHVIEW, LLC

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