

**American River Flood Control District**  
**City of Sacramento - Two Rivers Trail Permit (Maintenance Agreement)**  
**Staff Report**

**Discussion:**

The City of Sacramento obtained the District's endorsement on their Central Valley Flood Protection Board encroachment permit application for the Two Rivers Trail in River Park conditioned on the stipulation that the terms of a District encroachment permit, or Maintenance Agreement, would be worked out. The Board reviewed a Draft Encroachment Permit at their December 2020 meeting and directed staff to finish the final negotiations with the City. District staff and legal counsel worked with the City to address all items of concern and both parties have agreed to the final draft at the staff level.

The final draft is included in the Board's packet for this item. The most noteworthy component of the permit is the City's commitment to provide a one time payment of \$80,000 to compensate for long term maintenance costs of the District's levee that result from the installation of the trail and its associated bicycle and pedestrian traffic.

**Recommendation:**

The General Manager recommends that the Board of Trustees approve the Encroachment Permit (Maintenance Agreement).

**PERMIT**

The American River Flood Control District (District) hereby issues to the City of Sacramento (Permittee) an encroachment permit for the purpose of constructing, operating, maintaining, repairing, rehabilitating, and replacing an approximate 1,500 foot section of the Two Rivers Trail in the River Park neighborhood of Sacramento on the crown of the District's South Bank American River levee ("Recreational Trail"), subject to the terms and conditions attached hereto as Exhibit A.

**ACCEPTED AND AGREED TO:**

By: City of Sacramento

Signature: \_\_\_\_\_

Date: February \_\_, 2021

**PERMIT ISSUED:**

By: American River Flood Control District

Date: February \_\_, 2021

Signature: \_\_\_\_\_  
Timothy R. Kerr, General Manager, ARFCD

## EXHIBIT A

### *TERMS AND CONDITIONS*

1. The District's Recreational Trails Policy, as of the date of this Permit and as it may be amended from time to time by the District's Board of Trustees, shall govern Permittee's activities pursuant to this Permit. The District reserves the right, at any time and in its sole discretion, to terminate this Permit if the Permittee substantially fails to comply with the terms of this Permit.
2. This Permit is issued to Permittee for the exclusive purpose of constructing, operating, maintaining, repairing, rehabilitating, and replacing the Recreational Trail that will be used by members of the public and extend for approximately 1,500 feet on the crown of the District's South Bank American River levee in the River Park neighborhood, as shown on the attached map and diagram. [Add attachments]
3. Permittee shall pay the District a one-time permit fee of \$80,000. The fee shall be used at the discretion of the District, which may include the cost of flagging under paragraph 4(c), as well as other anticipated increases in ordinary maintenance and operations costs that the District expects to incur in connection with this Permit.
4. The Recreational Trail and all related improvements, includes the decomposed granite shoulders of the trail but does not include any area waterward of the waterside hinge point. The Recreational Trail shall, at a minimum, satisfy the planning, location, design, construction, access, signage, and other applicable standards established by the California Central Valley Flood Protection Board. However, the District reserves the right to impose such additional requirements as it believes are reasonably necessary to adequately protect: (i) the District's levees and other facilities, (ii) public and private property that is protected from flooding by the District's levees and other facilities, and (iii) the health and safety of individuals who use the levee (including, without limitation, members of the public and employees of the District). Specifically:
  - a. The Recreational Trail shall be placed as close to the waterside crown hinge point as possible to preserve access to the landside toe.
  - b. Permittee shall provide signage at both ends of the paved crown section to indicate the Recreational Trail is subject to frequent closure for levee maintenance.
  - c. Upon 24-hour written notice by the District, Permittee shall either close the Recreational Trail or provide a detour for trail users.
  - d. Permittee shall promptly repair any damage to the Recreation Trail caused by the District during performance of routine levee operations and maintenance activities.
  - e. Permittee shall hold harmless and indemnify the District for any and all losses and damages associated with the Recreational Trail, as described more fully in paragraph 7 below.

f. Permittee shall perform routine maintenance on the Recreational Trail to address safety items such as:

- crumbling pavement edges
- shoulder compaction of material adjacent to pavement
- repair of cracks or potholes in the pavement
- clearing of sediment and leaves, etc.

Such maintenance shall be performed in a timely and workmanlike manner and shall be performed to the reasonable satisfaction of the District.

5. Permittee shall operate and maintain the Recreational Trail itself or submit to the District evidence of an agreement with a qualified public agency pursuant to which that public agency agrees to operate and maintain the Recreational Trail.

a. No later than [REDACTED], 2021, Permittee shall submit to the District for review and acceptance and shall agree to implement a plan of operation and maintenance for the Recreational Trail which addresses all aspects of operating and maintaining the Recreational Trail, including but not limited to, public safety; litter and graffiti control, signage, access control, security, compliance enforcement; repair, rehabilitation, replacement and removal of Recreational Trails facilities; and a plan and budget for financing and accomplishing the operations and maintenance plan.

b. Permittee recognizes and acknowledges that the District may make reasonable modifications to such plan for operation and maintenance and Permittee agrees that it shall accept all such modifications prior to opening the Recreational Trail to public use. The failure to accept such modifications shall result in termination of this Permit.

6. Permittee shall bear all costs associated with the planning, design, construction, operation, maintenance, repair, rehabilitation and removal of the Recreational Trail, including, but not limited to, any repairs required as a result of actions by the District or others to respond to a flood emergency.

a. Should Permittee not fulfill its obligations with respect to operation and maintenance of the Recreational Trail, the District shall notify the Permittee in writing of such failure. Permittee shall have thirty (30) days from the receipt of such notice either to cure such failure or to submit an acceptable plan to the District to cure such failure. If, within thirty (30) days after receipt of District's notice, Permittee does not either cure such failure or submit a plan acceptable to the District to cure such failure, the District, at the sole expense of Permittee, may perform Permittee's obligations with respect to operation and maintenance of the Recreational Trail or close the trail until Permittee takes corrective action satisfactory to the District.

b. Notwithstanding the foregoing, in the event of an emergency caused by Permittee's failure to fulfill its obligations with regard to operating and maintaining the Recreational Trail, which the District reasonably believes jeopardizes the safety or security of: (i) the District's levees and other facilities, (ii) public and private property that is protected from

flooding by the District's levees and other facilities, and (iii) the health and safety of individuals who use the levee (including, without limitation, members of the public and employees of the District), the District, after providing notice to the Permittee and at the Permittee's sole expense, may perform those obligations immediately.

c. In any of these circumstances, the District reserves the right to begin proceedings with the California Central Valley Flood Protection Board to revoke the Recreation Trail permit.

7. To the fullest extent permitted by law, Permittee shall indemnify, hold harmless and defend the District, paying counsel selected by the District for such defense, for all fees and costs associated with defense of District, its Board members, officers, employees, agents, and authorized volunteers, and each of them from and against:

a. Any and all claims, demands, causes of action, damages, costs, expenses, losses, or liabilities, in law or in equity, of every kind and nature whatsoever for, but not limited to, injury to or death of any person, and damages to or destruction of property of any person arising out of or in any manner directly or indirectly connected with this Permit, however caused, regardless of any negligence of District or its Board members, officers, employees, agents, or authorized volunteers, except for the sole negligence or willful misconduct of District or its Board members, officers, employees, agents, or authorized volunteers;

b. Any and all actions, proceedings, damages, costs, expenses, penalties or liabilities, in law or equity, of every kind or nature whatsoever, arising out of, resulting from, or on account of the violation of any governmental law or regulation, compliance with which is the responsibility of Permittee.

c. Any and all losses, expenses, damages (including damages to the work itself), attorney's fees, expert's fees, and other costs, including all costs of defense, which any of them may incur with respect to the failure, neglect, or refusal of Permittee to faithfully perform all of its obligations under this Permit. Such costs, expenses, and damages shall include all costs, including attorney's fees and expert's fees, incurred by the indemnified parties in any lawsuit to which they are a party.

Permittee agrees to carry insurance for this purpose as specified in paragraph 9 below. Permittee's obligation to indemnify shall not be restricted to insurance proceeds, if any, received by the District or its Board members, officers, employees, agents, or authorized volunteers.

8. By signature hereon, Permittee certifies that Permittee is aware of the provisions of Section 3700 of the California Government Code which require every employer to be insured against liability for workers' compensation or to undertake self-insurance in accordance with the provisions of that code, and Permittee will comply with such provisions in connection with any work performed on the subject Recreational Trail. Any persons providing services with or on behalf of Permittee shall be covered by workers' compensation (or qualified self-insurance).

9. Permittee shall cover or insure under the applicable laws relating to workers' compensation insurance, all of their officers, employees, agents, and authorized volunteers working on or about the subject Recreational Trail, in accordance with the "Workers' Compensation and Insurance Act," Division IV of the Labor Code of the State of California and any Acts amendatory thereof. Permittee shall provide employer's liability insurance in the amount of at least \$2,000,000 per accident for bodily injury and disease.
10. Permittee shall provide and maintain the following commercial general liability and automobile liability insurance:

Coverage: Coverage for commercial general liability and automobile liability insurance shall be at least as broad as the following:

- (1) Insurance Services Office Commercial General Liability Coverage (Occurrence Form CG 0001)
- (2) Insurance Services Office Automobile Liability Coverage (Form CA 0001), covering Symbol 1 (any auto)
- (3) Excess coverage reasonably acceptable to the District Limits: Permittee shall maintain limits not less than the following:
- (4) General Liability – Two million dollars (\$2,000,000) per occurrence for bodily injury, personal injury, and property damage. If Commercial General Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply to the Recreational Trail(s) hereunder (with the ISO CG 2503, or ISO CG 2504, or insurer's equivalent endorsement provided to the District) or the general aggregate limit shall be twice the required occurrence limit.
- (5) Automobile Liability - Two million dollars (\$2,000,000) for bodily injury and property damage each accident limit.
- (6) Excess Liability. Ten million (\$10,000,000) per occurrence.

These policies shall contain or be endorsed to contain the following provisions:

- A. The District, its Board members, officers, employees, agents, and authorized volunteers are to be given insured status (via ISO endorsement CG 2011, CG 2024 [if land only], or insurer's equivalent for general liability coverage) as respects: liability arising out of Permittee's use of District properties by Permittee and the public; or automobiles owned, leased, hired, or borrowed by the Permittee. The coverage shall contain no special limitations on the scope of protection afforded to the District, its Board members, officers, employees, agents, or authorized volunteers.

- B. For any claims related to this permit/easement, Permittee's insurance shall be primary insurance as respects the District, its Board members, officers, employees, agents, or authorized volunteers. Any insurance, self-insurance, or other coverage maintained by the District, its Board members, officers, employees, agents, or authorized volunteers shall not contribute to it.
- C. Any failure to comply with reporting or other provisions of the policies including breaches of warranties shall not affect coverage provided to the District, its Board members, officers, employees, agents, or authorized volunteers.
- D. Permittee's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.
- E. Each insurance policy required by this provision shall state or be endorsed to state that coverage shall not be canceled by either party, except after thirty (30) days (10 days for nonpayment of premium) prior written notice by US Mail has been given to District.

Such liability insurance shall indemnify the Permittee and Permittee's contractors against loss from liability imposed by law upon, or assumed under contract by, the Permittee or Permittee's contractors for damages on account of such bodily injury (including death), property damage, and personal injury.

The general liability policy shall cover bodily injury and property damage liability, owned and non-owned equipment, and blanket contractual liability.

The automobile liability policy shall cover all owned, non-owned, and hired automobiles.

Acceptance of the insurance by District shall not relieve or decrease any liability of Permittee.

All of the insurance shall be provided on policy forms and through companies satisfactory to the District or by means of a self-insurance program acceptable to the District

Any deductible or self-insured retention must be declared to and accepted by the District. At the option of the District, the Permittee shall either reduce or eliminate such deductibles or self-insured retention to levels acceptable to the District.

Insurance is to be placed with insurers having a current A.M. Best rating of not less than A-:VII or equivalent or, in the case of self-insurance programs, as otherwise acceptable to the District.

Prior to approval of the permit by the District/execution of the easement, Permittee shall file with the District a certificate of insurance (Accord Form 25-S or equivalent) signed by the insurer's representative. Such evidence of insurance shall include original copies of the

additional insured endorsement signed by the insurer's representative and evidence of waiver of rights of subrogation against the District (if Property Insurance is applicable). Such evidence shall also include confirmation that coverage includes or has been modified to include Required Provisions A through E above.

Permittee shall, upon demand of the District, deliver to the District such policy or policies of insurance (or copies thereof) and the receipts for payment of premiums thereon.

Permittee shall provide and maintain property insurance covering all risks of direct physical loss, damage, or destruction to:

The Recreational Trail in the amount of \$2,000,000 District shall be a named additional insured on any such policy(ies).

Permittee shall provide and maintain property insurance covering all risks of direct physical loss, damage, or destruction to any personal property used in connection with the Recreational Trail.

Permittee and insurer shall waive all rights of subrogation against the District, its Board members, officers, employees, agents, or authorized volunteers. Permittee shall provide the District with a certificate(s) of insurance evidencing property coverage.

11. In the alternative to the provisions of paragraph 10 above, Permittee may submit a statement of self-insurance that is reasonably acceptable to the District and the generally provides coverage similar to that required in paragraph 10 above.
12. The District's use of its properties for flood control purposes, including, but not limited to, the maintenance, repair, construction, and reconstruction of levees, will have priority over the use of those properties as a recreational trail. The District will endeavor to avoid interfering with the use of its properties, or any portion thereof, as a recreational trail in conducting its operations whenever feasible; however, the District shall not be under any obligation to avoid such interference. The District reserves the right to close the Recreational Trail and to prohibit recreational uses of its properties, or any portion thereof, during flood emergencies, during flood fights, and during routine maintenance, repair, construction, or reconstruction of levees. Whenever possible, the District will endeavor to give advance notice of such closings; however, it shall be under no obligation to do so. Recreational Trail closures may be of short duration during maintenance activities but may also be for extended periods for major or capital improvement projects. This right to close the trail for extended periods may be used for purposes of construction, reconstruction or repairs of levees by others including the California Central Valley Flood Protection Board and U.S. Army Corps of Engineers. The Permittee shall be responsible for developing and implementing a detour plan during construction or maintenance activities. Neither the District nor other agencies such as the State of California or the United States are obligated to provide a detour during the construction or maintenance activities.
13. The District reserves the right to grant to third parties the right to use all or any portion of its properties, so long as any such right granted to a third party does not unreasonably



- interfere with the exercise of the rights conveyed/issued to the Permittee. It shall be presumed, as a presumption affecting the burden of proof that any rights granted to any third party by the District within all or any portion of the District's properties will not unreasonably interfere with the exercise of the rights conveyed/issued to Permittee.
14. Permittee may not convey the right to use all or any portion of the District's properties for recreational purposes, or for any other purpose, to any third party without the prior written consent of District, which consent shall not be unreasonably withheld or delayed. Any such conveyance shall be subject to the terms and conditions of the original permit, subject to any and all terms and conditions additionally imposed by District, and subject to the District's encroachment control procedures (i.e. a permit will be required to be issued by District to the third party).
  15. Permittee may surrender this Permit at any time by at least 120 days' prior written notice of such surrender.
  16. As a condition of the District's issuance of this Permit and its continued existence, Permittee agrees that: (i) if construction of the Recreational Trail is not commenced within 12 months of the date upon which this Permit is issued and is not completed within 60 months of that date, or (ii) if the Permittee fails to maintain the Recreational Trail or carry out any duties or responsibilities required as a condition of the easement/permit for a period of 12 consecutive months after it has been completed, or (iii) if the Permittee ceases making the Recreational Trail available to the public for the recreational purposes, Permittee shall be conclusively presumed to have surrendered the easement/permit.
  17. Should the District ever determine that the use of all or any portion of its properties as a recreational trail is inconsistent with the use of such lands for flood control purposes, the District may terminate this Permit upon thirty (30) days written notice to the Permittee.
  18. As a condition of any voluntary or involuntary surrender or termination of this Permit, Permittee must remove the Recreational Trail and all associated facilities from District properties, at the sole cost and expense of Permittee, within 180 days of receipt/delivery of notice of surrender/termination; except for those parts/facilities, if any, that the District has requested to be left in place. The District shall notify the Permittee what portions, if any, of the Recreational Trail must be left in place within 90 days of receipt/delivery of notices of surrender/termination of this Permit. If the Permittee has not removed the Recreational Trail and restored the District's properties to the condition that existed before construction of the Recreational Trail within the required time period, or made arrangements satisfactory to the District for such removal and restoration, the Permittee agrees that the District may carry out the removal and restoration and the Permittee shall be liable for all costs thereof.
  19. Should the District ever determine that a particular use of the Permit unduly stresses the flood control facilities or increases the District's costs of maintaining its levees or other facilities, the District reserves the right to prohibit such particular use of the Permit.

20. Permittee shall operate and maintain the Recreation Trail so as to avoid injury or damage to any person or property. Permittee shall be responsible for all security for the Recreation Trail.
21. In operating and maintaining the Recreation Trail, Permittee shall, at all times, exercise all necessary precautions for the safety and environmental protection of public safety and the District's property, and be in compliance with all federal, state, and local statutory and regulatory requirements including, but not limited to, State of California, Division of Industrial Relations (Cal/OSHA) regulations, Cal/EPA, and the US Department of Transportation, including the Omnibus Transportation Employee Testing Act (as applicable).
  - a. Permittee shall not use or allow anyone else to use the Recreation Trail or the District's property to generate, manufacture, refine, transport, treat, store, handle, recycle, release, or dispose of any hazardous material, other than as reasonably necessary for the operation of the Permittee's activities as contemplated under the permit/easement. The term "hazardous material" means any hazardous substance, material, or waste, including but not limited to those listed in 49 CFR 172.101 (US Department of Transportation), the Cal/EPA Chemical Lists, or lists of petroleum products and their derivatives. However, this shall not apply to the use of petroleum products and related substances incidental to operation of motorized equipment and vehicles whose operation are necessary to the construction, operation, and maintenance of the Recreation Trail or the District's flood control facilities.
  - b. Permittee shall immediately notify the District in writing upon becoming aware of any release of hazardous material, violation of any environmental law, or actions brought by third parties against the Permittee alleging environmental damage.
22. Permittee shall give all notices required by law and shall comply with all laws, ordinances, rules, and regulations pertaining to the activities authorized by this Permit. The Permittee shall be liable for all violations of the law in connection with this Permit.
23. No waiver of any violation or breach of the covenants or conditions of the easement/permit shall be considered to be a waiver or breach of any other violation or breach of the covenants and conditions of this Permit.
24. This Permit shall be binding on and inure to the benefit of the successors of the District and of the Permittee. Consistent with other terms and conditions of this approval, Permittee may not assign its interest in, or obligations under, this Permit without the written consent of the District, which consent shall not be unreasonably withheld or delayed.
25. If, after the date of execution of this Permit, any of its provisions are held to be illegal, invalid, or unenforceable under present or future law, such provisions shall be fully severable. However, in lieu thereof, there shall be added a provision as similar in terms to such illegal, invalid, or unenforceable provision as may be possible and be legal, valid, and enforceable.

26. All notices, requests, or other communications (“notices”) required under this easement/permit shall be in writing and shall be deemed to have been duly given and received on (i) the date of service if served personally or served by electronic mail on the party to whom notice is to be given at the address(es) provided below, or (ii) on the first day after mailing, if mailed by Federal Express, U.S. Express Mail, or other similar overnight courier service, postage prepaid, and addressed as provided below, or (iii) on the third day after mailing if mailed to the party to whom notice is to be given by first class mail, registered or certified, postage prepaid, addressed as follows:

To District:                      General Manager  
  American River Flood Control District  
  185 Commerce Circle  
  Sacramento, CA. 95815  
  Telephone:     (916) 929 - 4006  
  Facsimile:     (916) 929 - 4160

To Permittee:                    City Manager  
  City of Sacramento  
  915 I Street  
  Sacramento, CA 95814

Any party may change such address for notification purposes by sending written notice thereof to the other parties consistent with the terms of this paragraph.