

AGREEMENT TO FUND NUTRIENT, FECAL COLIFORM AND TOXICS TOTAL MAXIMUM DAILY LOAD (TMDL)  
 STUDIES IN THE NEWPORT BAY WATERSHED  
 THIRD AMENDMENT AND FULL RESTATEMENT OF AGREEMENT

THIS THIRD AMENDMENT, for purposes of identification numbered D99-128, is made and entered into this \_\_\_\_ day of \_\_\_\_\_, 2010 , by and between the County of Orange ("COUNTY"), the Orange County Flood Control District ("DISTRICT"), the City of Costa Mesa ("COSTA MESA"), the City of Irvine ("IRVINE"), the City of Laguna Hills ("LAGUNA HILLS"), the City of Laguna Woods ("LAGUNA WOODS"), the City of Lake Forest ("LAKE FOREST"), the City of Newport Beach ("NEWPORT BEACH"), the City of Orange ("ORANGE"), the City of Santa Ana ("SANTA ANA"), the City of Tustin ("TUSTIN"), the Irvine Ranch Water District ("IRWD") and The Irvine Company ("TIC"), and Lennar Homes of California, Inc. ("LENNAR"). The fourteen entities are hereinafter sometimes jointly referred to as the "PARTIES" and individually as "PARTY". The cities are hereinafter sometimes jointly referred to as the "CITIES". Thirteen entities (all entities except for LENNAR) are sometimes jointly referred to as the "ORIGINAL PARTIES."

WITNESSETH

WHEREAS, the California Regional Water Quality Control Board, Santa Ana Region ("REGIONAL BOARD") has adopted Resolution No. 98-9, as amended by Resolution No. 98-100 amending the Water Quality Control Plan for the Santa Ana River Basin to incorporate a Nutrient TMDL for the Newport Bay/San Diego Creek Watershed on April 17, 1998 and Resolution 99-10 amending the Water Quality Control Plan for the Santa Ana River Basin to incorporate a TMDL for Fecal Coliform in Newport Bay on April 9, 1999 pursuant to the provisions of section 303(d) of the Clean Water Act; and,

WHEREAS, the United States Environmental Protection Agency (USEPA) has established TMDLs for toxic pollutants, San Diego Creek and Newport Bay, California on June 14, 2002, and the REGIONAL BOARD is developing implementation plans for each of the toxic pollutants; and,

WHEREAS, the adopted TMDLs contain requirements for studies, monitoring and the development of programs to attain TMDL reduction targets over a multi-year period; and,

WHEREAS, the ORIGINAL PARTIES entered into Agreement No. D99-128 on September 18, 2003, referred to hereinafter as "AGREEMENT", to provide funding for the Nutrient, Fecal Coliform and Toxics Total Maximum Daily Load (TMDL) studies in the Newport Bay Watershed; and,

WHEREAS, the PARTIES approved Amendment No. 1 to AGREEMENT on July 5, 2006, which amended Sections 3 (Funding), 4 (Program Budgets and Costs), 5 (Payments), 10 (No Third Party Beneficiaries), and 16 (Notices), and Exhibits A and C in their entirety and added the California Department of Transportation, LENNAR, Tustin Legacy Community Partners, and Orange County Great Park Corporation as AGREEMENT participants; and,

WHEREAS, the PARTIES approved Amendment No. 2 to AGREEMENT on March 29, 2008 to extend the term of the AGREEMENT for two (2) years to be consistent with the end of the current phase of the Nitrogen and Selenium Management Program and to recognize prior payments for services made directly by the California Department of Transportation and IRWD, for work plan development and Bay algae studies respectively; and,

WHEREAS, pursuant to Section 6 of the AGREEMENT, the AGREEMENT may be amended in writing only with the unanimous written approval of the PARTIES; and,

WHEREAS, Tustin Legacy Community Partners has terminated its development agreement for the Tustin Marine Corps Air Station and withdrawn from the AGREEMENT effective June 30, 2010; and,

WHEREAS, due to State budget constraints the California Department of Transportation has withdrawn from the AGREEMENT effective June 30, 2010 and will address its discharges independently; and

WHEREAS, the Orange County Great Park Corporation has combined as a PARTY with IRVINE effective June 30, 2010; and,

WHEREAS, the PARTIES desire to extend the AGREEMENT through June 30, 2012 to provide for the performance of studies, monitoring and the development of programs and long-term funding to attain TMDL reduction targets over a multi-year period; and,

WHEREAS, in the event that long-term watershed funding is secured prior to AGREEMENT expiration, the PARTIES intend to further amend the AGREEMENT to incorporate this funding through revised cost share allocations; and,

WHEREAS, the PARTIES have revised the cost share allocations as shown in Exhibit A, which shall remain fixed for the duration of the AGREEMENT term; and,

WHEREAS, the PARTIES now desire to amend and restate the AGREEMENT in its entirety.

NOW THEREFORE: The PARTIES hereto unanimously agree to amend and restate the AGREEMENT in its entirety as follows:

Section 1. PURPOSE. This AGREEMENT is entered into for the purpose of funding and performing studies, research, monitoring and the development and implementation of programs related to the adopted TMDLs for nutrients, fecal coliform and toxics in the San Diego Creek and Newport Bay watersheds.

Section 2. TERM. The term of this AGREEMENT shall continue until June 30, 2012, unless sooner terminated as provided in Section 8.

Section 3. FUNDING COST SHARE ALLOCATIONS. Exhibit A, which is attached to this AGREEMENT and by this reference is made a part hereof, presents the cost share allocations for the PARTIES for the duration of the AGREEMENT.

Section 4. PROGRAM SCOPE OF WORK, BUDGET AND COSTS. The COUNTY shall work in concert with all PARTIES to develop a scope of work and a budget for the following fiscal year. The scope of work and budget for the upcoming fiscal year shall be submitted to each of the PARTIES by December 15 of each year. The budget shall contain an explanation of any recommended program changes, an estimate of all planned

expenditures and an estimate of the payment required from each PARTY for the following fiscal year.

The PARTIES shall be permitted to review and approve the program scope of work and budget for the forthcoming year, review work products, and provide direction for performance of the scope of work. Criterion for approval of the program scope of work and budget shall be affirmative responses from all PARTIES. The COUNTY and DISTRICT will constitute one approving PARTY. Any PARTY not providing a response by July 15 of each year shall be considered an affirmative response.

The COUNTY shall be entitled to charge to the program all costs for direct labor, materials, equipment and outside contract services for costs associated with carrying out the approved scope of work. Recoverable costs will also include an overhead charge.

Section 5. PAYMENTS. The COUNTY shall invoice each PARTY for its annual deposit at the beginning (July 1) of each fiscal year. Each PARTY shall pay the deposit within 45 calendar days of the date of the invoice. Each PARTY'S deposit shall be based on its prorated share of the approved annual budget, reduced by the sum of (a) its prorated share of any surplus identified in the prior fiscal year end accounting, and (b) its prorated share of any funding provided for programs in the approved budget from entities not party to this AMENDMENT.

Interest earned on the PARTIES' deposits will not be paid to the PARTIES, but will be credited against the PARTIES' share of the program costs.

The COUNTY shall notify each of the PARTIES if it appears that costs may exceed the budget approved by the PARTIES in any fiscal year. The COUNTY shall prepare a fiscal year end accounting within 60 calendar days of the end of the fiscal year. If the fiscal year end accounting results in costs (net of interest earnings) exceeding the sum of the deposits, and the COUNTY has notified and obtained approval from the PARTIES of potential cost overruns, the COUNTY shall seek approval of the excess cost from the PARTIES in the form of a revised budget and, upon approval, shall invoice

each PARTY for its prorated share of the excess cost up to the amount of the revised approved budget. Each PARTY shall pay the billing within 45 calendar days of the date of the invoice. If the fiscal year end accounting results in the sum of the deposits exceeding costs (net of interest earnings), the excess deposits will carry forward to reduce the billings for the following year. The fiscal year end accounting results and associated invoices for each PARTY will take into consideration any outside funding provided for programs in the approved budget from entities not party to this AGREEMENT.

Upon termination of the program, a final accounting shall be performed by the COUNTY. If costs remaining after the deduction of interest costs exceed the sum of the deposits, the COUNTY shall invoice each PARTY for its prorated share of the deficit. Each PARTY shall pay the invoice within 45 calendar days of the date of the invoice. If the sum of the deposits, including interest, exceeds the costs, the COUNTY shall reimburse to each PARTY its prorated share of the excess, within 45 calendar days of the final accounting.

Section 6. AMENDMENT. This AGREEMENT may be amended in writing only with the unanimous written approval of the parties.

Section 7. LIABILITY. It is mutually understood and agreed that, merely by the virtue of entering into this AGREEMENT, each PARTY neither relinquishes any rights nor assumes any liabilities for its own actions or the actions of other PARTIES. It is the intent of the PARTIES that the rights and liabilities of each Party shall remain the same, while this AGREEMENT is in force, as it was before this AGREEMENT was made, except as otherwise specifically provided in this agreement.

Section 8. TERMINATION. Any PARTY wishing to terminate its participation in this AGREEMENT shall so notify all other PARTIES in writing by March 1 of any year. Such termination shall be effective the following June 30. The terminating PARTY shall be responsible for financial obligations hereunder to the extent incurred in accordance with this agreement by the PARTY prior to the effective date of

termination. The balance of the PARTIES may continue in the performance of the terms and conditions of this AGREEMENT on the basis of a revised allocation of cost based on the funding formula in Exhibit A.

Section 9. AVAILABILITY OF FUNDS. The obligation of each PARTY is subject to the availability of funds appropriated for this purpose, and nothing herein shall be construed as obligating the PARTIES to expend or as involving the PARTIES in any contract or other obligation for the future payment of money in excess of appropriations authorized by law.

Section 10. NO THIRD PARTY BENEFICIARIES. Nothing expressed or mentioned in this AGREEMENT is intended or shall be construed to give any person, other than the PARTIES hereto and any entity in which a PARTY has a legal interest (such as, but not limited to, a limited liability membership interest or a partnership interest), and any permitted successors or assigns of a PARTY, any legal or equitable right, remedy or claim under or in respect of this AGREEMENT or any provisions herein contained. This AGREEMENT and any conditions and provisions hereof is intended to be and is for the sole and exclusive benefit of the PARTIES and the entities in which they have a legal interest and their successors or assigns and for the benefit of no other person, agency or entity.

Section 11. REFERENCE TO CALENDAR DAYS. Any reference to the word "day" or "days" herein shall mean calendar day or calendar days, respectively, unless otherwise expressly provided.

Section 12. ATTORNEYS FEES. In any action or proceeding brought to enforce or interpret any provision of this AGREEMENT, or where any provision hereof is asserted as a defense, each PARTY shall bear its own attorneys' fees and costs.

Section 13. ENTIRE AGREEMENT. This AGREEMENT is intended by the PARTIES as a final expression of their agreement and intended to be a complete and exclusive statement of the agreement and understanding of the PARTIES hereto in respect of the

subject matter contained herein. There are no restrictions, promises, warranties or undertakings, other than those set forth or referred to herein. This AGREEMENT supersedes all prior agreements and understandings between the PARTIES with respect to such matter.

Section 14. SEVERABILITY. If any part of this AGREEMENT is held, determined or adjudicated to be illegal, void, or unenforceable by a court of competent jurisdiction, the remainder of this AGREEMENT shall be given effect to the fullest extent reasonably possible.

Section 15. SUCCESSORS AND ASSIGNS. The terms and provisions of this AGREEMENT shall be binding upon and inure to the benefit of the PARTIES hereto and their successors and assigns.

Section 16. NOTICES. All notices required or desired to be given under this AGREEMENT as amended shall be in writing and (a) delivered personally, or (b) sent by certified mail, return receipt requested or (c) sent by telefacsimile communication followed by a mailed copy, to the addresses specified below, provided each PARTY may change the address for notices by giving the other PARTIES at least ten (10) days written notice of the new address. Notices shall be deemed received when actually received in the office of the addressee or when delivery is refused, as shown on the receipt of the U.S. Postal service, or other person making the delivery, except that notices sent by telefacsimile communication shall be deemed received on the first business day following transmission.

Director of Public Services  
City of Costa Mesa  
P.O. Box 1200  
Costa Mesa, CA 92628-1200  
Facsimile: (714) 754-5028

Director of Public Works  
City of Irvine  
P.O. Box 19578

Irvine, CA 92623-9578  
Facsimile: (949) 724-6440

Director of Public Services  
City of Laguna Hills  
24035 El Toro Road  
Laguna Hills, CA 92653  
Facsimile: (949) 707-2633

Director of Community Development  
City of Laguna Woods  
24264 El Toro Road  
Laguna Woods CA 92637  
Facsimile: (949) 639-0591

Director of Public Works  
City of Lake Forest  
25550 Commercentre Dr. Ste 100  
Lake Forest, CA 92630  
Facsimile: (949) 461-3511

Director of Public Works  
City of Newport Beach  
3300 Newport Blvd.  
Newport Beach, CA 92658  
Facsimile: (949) 718-1840

Director of Public Works  
City of Orange  
300 E. Chapman Ave  
Orange, CA 92866  
Facsimile: (714) 744-5573

Director of Public Works  
City of Santa Ana  
101 W. 4<sup>th</sup> St.  
Santa Ana, CA 92701  
Facsimile: (714) 647-5635

Director of Public Works  
City of Tustin  
300 Centennial Way  
Tustin, CA 92780  
Facsimile: (714) 734-8991

Director, OC Public Works  
County of Orange  
300 N. Flower Street  
Santa Ana, CA 92702-4048  
Facsimile: (714) 834-2395

Director, Water Quality  
Irvine Ranch Water District  
3512 Michelson Dr  
Irvine, CA 92712  
Facsimile: (949) 453-1228



Vice President of Environmental Affairs  
The Irvine Company  
550 Newport Center  
Newport Beach, CA 92658-8904  
Facsimile: (949) 720-2448

Five Point Communities (Lennar)  
Jim Werkmeister  
Manager, Environmental Affairs  
25 Enterprise, Ste 400  
Aliso Viejo, CA 92656  
Facsimile: (949)

Section 17. STATUS OF ORIGINAL AGREEMENT. Upon approval of this AGREEMENT by all PARTIES, the original agreement of September 18, 2003, as amended on July 5, 2006 and March 29, 2008 will be superseded by this AGREEMENT.

Section 18. EXECUTION OF AGREEMENT. This AGREEMENT may be executed in counterpart and the signed counterparts shall constitute a single instrument.

Section 19. GOVERNING LAW AND VENUE. This AGREEMENT has been negotiated and executed in the State of California and shall be governed by and construed under the laws of the State of California. In the event of any legal action to enforce or interpret this AGREEMENT, the sole and exclusive venue shall be a court of competent jurisdiction located in Orange County, California, and the PARTIES hereto agree to and do hereby submit to the jurisdiction of such court, notwithstanding Code of Civil Procedure section 394. Furthermore, the PARTIES have specifically agreed, as part of the consideration given and received for entering into this AGREEMENT, to waive any and all rights to request that an action be transferred for trial to another county under Code of Civil Procedure Section 394 or any other provision of law.

IN WITNESS WHEREOF, the PARTIES hereto have executed this AGREEMENT the day and year first above written:

**COUNTY OF ORANGE,**  
a political subdivision of the State of  
California

Date: \_\_\_\_\_

By: \_\_\_\_\_  
Chairman of the Board of Supervisors

**ORANGE COUNTY FLOOD CONTROL DISTRICT**  
a body corporate and politic

By: \_\_\_\_\_  
Chairman of the Board of Supervisors

APPROVED AS TO FORM:  
COUNTY COUNSEL

By: \_\_\_\_\_  
Geoffrey K. Hunt, Deputy

Date: \_\_\_\_\_

SIGNED AND CERTIFIED THAT A COPY OF  
THIS AGREEMENT HAS BEEN DELIVERED TO  
THE CHAIRMAN OF THE BOARD

By: \_\_\_\_\_  
DARLENE J. BLOOM  
Clerk of the Board of Supervisors of  
Orange County, California

Date: \_\_\_\_\_

**CITY OF COSTA MESA**

Date: \_\_\_\_\_

By: \_\_\_\_\_  
Mayor

APPROVED AS TO FORM:

ATTEST:

\_\_\_\_\_  
City Clerk

\_\_\_\_\_  
City Attorney of Costa Mesa

**CITY OF IRVINE**

Date: \_\_\_\_\_

By: \_\_\_\_\_  
Mayor

APPROVED AS TO FORM:

ATTEST:

\_\_\_\_\_  
City Clerk

\_\_\_\_\_  
City Attorney of Irvine

**CITY OF LAGUNA HILLS**

Date: \_\_\_\_\_

By: \_\_\_\_\_  
Mayor

APPROVED AS TO FORM:

ATTEST:

\_\_\_\_\_  
City Clerk

\_\_\_\_\_  
City Attorney of Laguna Hills

CITY OF LAGUNA WOODS

Date: \_\_\_\_\_

By: \_\_\_\_\_  
Mayor

APPROVED AS TO FORM:

ATTEST:

\_\_\_\_\_  
City Clerk

\_\_\_\_\_  
City Attorney of Laguna Woods

**CITY OF LAKE FOREST**

Date: \_\_\_\_\_

By: \_\_\_\_\_  
Mayor

APPROVED AS TO FORM:

ATTEST:

\_\_\_\_\_  
City Clerk

\_\_\_\_\_  
City Attorney of Lake Forest

**CITY OF NEWPORT BEACH**

Date: \_\_\_\_\_

By: \_\_\_\_\_  
Mayor

APPROVED AS TO FORM:

ATTEST:

\_\_\_\_\_  
City Clerk

\_\_\_\_\_  
City Attorney of Newport Beach



**CITY OF ORANGE**

Date: \_\_\_\_\_

By: \_\_\_\_\_  
Mayor

APPROVED AS TO FORM:

ATTEST:

\_\_\_\_\_  
City Clerk

\_\_\_\_\_  
City Attorney of Orange

CITY OF SANTA ANA

Date: \_\_\_\_\_

By: \_\_\_\_\_  
Mayor

APPROVED AS TO FORM:

ATTEST:

\_\_\_\_\_  
City Clerk

\_\_\_\_\_  
City Attorney of Santa Ana

**CITY OF TUSTIN**

Date: \_\_\_\_\_

By: \_\_\_\_\_  
Mayor

APPROVED AS TO FORM:

ATTEST:

\_\_\_\_\_  
City Clerk

\_\_\_\_\_  
City Attorney of Tustin

**THE IRVINE RANCH WATER DISTRICT**

Date: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**THE IRVINE COMPANY**

Date: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**Lennar Homes of California,**  
a Developer Member of Heritage Fields Limited  
Liability Company

Date: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

EXHIBIT A

<b>PARTY</b>	<b>Cost Share Percentage</b>
Costa Mesa	4.26%
Irvine	24.24%
Laguna Hills	0.54%
Laguna Woods	0.90%
Lake Forest	5.07%
Newport Beach	6.47%
Orange	0.89%
Santa Ana	13.52%
Tustin	5.92%
County of Orange	3.82%
OCFCD	7.29%
IRWD	12.15%
TIC	12.15%
Lennar	2.76%
<b>TOTAL</b>	<b>100.00%</b>