

AGREEMENT TO FUND NUTRIENT, FECAL COLIFORM AND TOXICS TOTAL MAXIMUM DAILY LOAD ("TMDL") PROGRAMS IN THE NEWPORT BAY WATERSHED

THIS AGREEMENT, for purposes of identification numbered D11-066, referred to hereinafter as "AGREEMENT", is made and entered into this 26th day of JUNE, 2012, 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." The CITIES, COUNTY and DISTRICT are hereinafter sometimes jointly referred to as the "MUNICIPAL PARTIES." 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, for 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, these TMDLs are included in the National Pollutant Discharge Elimination System ("NPDES") Municipal Permit Order No. R8-2009-0030 that require a cooperative watershed program; and,

WHEREAS, the ORIGINAL PARTIES entered into Agreement No. D99-128 on September 18, 2003 and subsequent amendments on July 5, 2006, March 29, 2008 and July 8, 2010 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 intend this AGREEMENT as a successor to Agreement No. D99-128 to provide for the performance of studies, research, monitoring, development and/or revision of programs related to the adopted TMDLs for nutrients, fecal coliform and toxics and current and future Clean Water Act §303(d) listings, as well as planning, permitting, design, construction, and maintenance of TMDL pilot projects ("PILOT PROJECTS"); and

WHEREAS, the PARTIES have reached agreement on a funding formula which is shown in Exhibit A; and

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

WHEREAS, it is recognized that regulatory compliance gained through the activities herein apply to all PARTIES equally, and

WHEREAS, it is recognized that additional compliance efforts may be necessary and the PARTIES may choose to fund projects under separate agreements; and

NOW, THEREFORE, in consideration of the foregoing, the PARTIES agree as follows:

Section 1. PURPOSE. This AGREEMENT is entered into for the purpose of funding and performing program activities related to the adopted TMDLs for nutrients, fecal coliform, and toxics and current and future Clean Water Act §303(d) listings in the Newport Bay Watershed.

Section 2. TERM. The term of this AGREEMENT shall commence upon approval and execution of this AGREEMENT by all PARTIES or July 1, 2012, whichever is later, and shall continue until June 30, 2015. The AGREEMENT may be renewed for an additional three (3) year term running July 1, 2015 to June 30, 2018 with approval of the PARTIES.

Section 3. PROGRAM WORK PLAN. The COUNTY shall work in concert with all PARTIES to develop a work plan for the following fiscal year. The work plan for the upcoming fiscal year shall be submitted to each of the PARTIES by December 15 of each year. The work plan may designate a PARTY as a lead other than the COUNTY for a work plan task(s).

Section 4. BUDGET AND COSTS. The COUNTY shall work in concert with all the PARTIES to develop a budget for the following fiscal year. Budgeted amounts for PILOT PROJECT(S) shall not exceed \$200,000 for all pilot projects in any one fiscal year. The 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 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. WORK PLAN TASK LEAD REIMBURSEMENT. If a PARTY is designated as a task lead, upon written authorization from COUNTY, the PARTY shall invoice the COUNTY for authorized expenses up to the approved budget amount for the work plan task.

Section 6. APPROVALS AND ADJUSTMENTS. The PARTIES shall be permitted to review and approve the budget and program work plan for the forthcoming year, review work products, and provide direction for performance of the work plan. The PARTIES shall be notified of the intent to issue

contracts to perform the program work plan, shall be permitted to participate in the preparation and review of the scope of work for such contracts, and to serve on the committee evaluating consultant qualifications/proposals subject to the requirements of the County of Orange Contract Policy Manual. Criterion for approval of the work plan and budget shall be affirmative responses from PARTIES representing ninety percent (90%) of the Cost Share Percentage in Exhibit A and 12 of the 13 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 as rendering an affirmative response.

Criterion for approval of adjustments to scopes of work shall be the same as for the approval of the work plan and budget.

Section 7. FUNDING COST SHARE ALLOCATIONS. Exhibit A, which is attached to this AGREEMENT and by this reference is made a part hereof, presents the funding formula and the fiscal year 2012-13 cost share percentages for the PARTIES. Land area calculations will be reviewed and revised as needed. A request for information documenting changes in land area will be made to the PARTIES each year by November 1.

Section 8. PAYMENTS. The COUNTY shall invoice each PARTY for its annual deposit at the beginning 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 AGREEMENT.

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 9. ADDITIONAL PARTIES. It is recognized that there may be other parties who wish to participate in and provide funding for the activities described in this AGREEMENT. Nothing in this AGREEMENT is intended to preclude additional participants being added by written amendment as parties to this AGREEMENT pursuant to Section 10. Cost allocations for the additional parties and PARTIES will be revised based on the funding formula in Exhibit A.

Section 10. AMENDMENT. This AGREEMENT may be amended in writing only with the unanimous written approval of the parties.

Section 11. 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 12. 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 13. 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 14. 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 15. 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 16. 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 17. 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 18. 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 19. 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 20. NOTICES. All notices required or desired to be given under this AGREEMENT shall be in writing and (a) delivered personally, or (b) sent by certified mail, return receipt requested or (c) sent by electronic mail 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 electronic mail 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 Community Development
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. Suite 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. 4th 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 Drive
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

Vice President of Community Development
Lennar
25 Enterprise, Ste 300
Aliso Viejo, CA 92656
Facsimile: (949) 349-0394


Section 21. EXECUTION OF AGREEMENT. This AGREEMENT may be executed in counterpart and the signed counterparts shall constitute a single instrument.

Section 22. 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: 6-26-12


By: 
Chairman of the Board of Supervisors

ORANGE COUNTY FLOOD CONTROL DISTRICT
a body corporate and politic

By: 
Chairman of the Board of Supervisors

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

Date: 6-26-12

By: 
Susan Novak
Clerk of the Board of Supervisors of
Orange County, California



APPROVED AS TO FORM
COUNTY COUNSEL

By: 
Deputy

Date: 5/22/2012

CITY OF COSTA MESA


Date: 7-20-12

By: 
Mayor

APPROVED AS TO FORM:

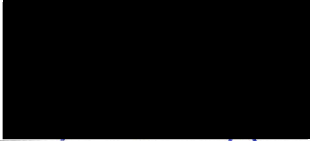

ATTEST:

Brenda Green
City Clerk


City Attorney of Costa Mesa

CITY OF IRVINE

Date: 7-3-12

By: 
Mayor 

APPROVED AS TO FORM:


ATTEST:


City Clerk


City Attorney of Irvine

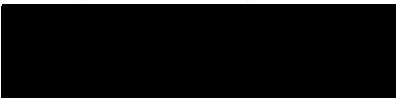
CITY OF LAGUNA HILLS


Date: June 12, 2012

By: 
Melody Carruth
Mayor

APPROVED AS TO FORM:


ATTEST:


Peggy J. Johns
City Clerk


Gregory E. Simonian
City Attorney of Laguna Hills


CITY OF LAGUNA WOODS

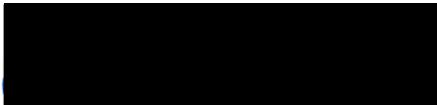
Date: 6-18-12

By: 
Cynthia S. Connors, Mayor

APPROVED AS TO FORM:


ATTEST:


Yolie Trippy, Deputy City Clerk


David B. Cosgrove, City Attorney of Laguna Woods

CITY OF LAKE FOREST

Date: 6-19-2012

By: 
Mayor

APPROVED AS TO FORM:



ATTEST:


City Clerk


City Attorney of Lake Forest


CITY OF NEWPORT BEACH


Date: 7/26/12

By: 
Mayor 

APPROVED AS TO FORM:

ATTEST:


City Clerk



City Attorney of Newport Beach

*KSA
5/30*



CITY OF ORANGE

Date: 7-3-12

By: 
Mayor

APPROVED AS TO FORM:

ATTEST:



City Clerk *chief for*


City Attorney of Orange


CITY OF SANTA ANA

CITY OF SANTA ANA


Date: JUL 18 2012

By: 
Paul M. Walters
City Manager


ATTEST:


Maria D. Huizar
Clerk of the Council

RECOMMENDED FOR APPROVAL:


Raul Godinez, II
Executive Director - PWA

APPROVED AS TO FORM:


Laura Sheedy
Assistant City Attorney

CITY OF TUSTIN

Date: 7-17-12

By:



Mayor

APPROVED AS TO FORM:

ATTEST:



City Clerk



City Attorney of Tustin

for

IRVINE RANCH WATER DISTRICT

Date: 26 Jun 2012

By:



Name: Paul Cook

Title: General Manager

APPROVED AS TO FORM:

Date: 6-20-12


By:




Legal Counsel - IRWD

THE IRVINE COMPANY

Date: 6/15/12

By: 
Name: Kristine Floyd
Title: Vice President and
Associate General Counsel

Date: 6/15/12

By: 
Name: Paul P. Hernandez
Title: Vice President
Government Relations

Lennar Homes of California, Inc.
A California corporation

Date: 6-6-12

By:



Name: John Baayoun
Title: Vice President

A blue handwritten signature, possibly "John Baayoun", written over the printed name and title.

EXHIBIT A
FUNDING FORMULA AND FISCAL 2012-13 COST SHARE PERCENTAGES

JURISDICTION	TOTAL SQUARE MILES ¹	SQ. MILES WITHIN WATERSHED ¹	NET LAND AREA ²	PERCENTAGE OF CITY LAND AREA IN WATERSHED ³	TOTAL POPULATION ⁴	ESTIMATED POPULATION IN WATERSHED ⁵	WEIGHTED LAND AREA & POPULATION SHARE ⁶	WEIGHTED NET LAND AREA SHARE ⁷	FISCAL YEAR 2012-13 COST SHARE PERCENTAGES ⁸
Costa Mesa	15.83	7.65	7.54	48.33	110,146	53,229	2.22	2.06	4.28
County of Orange	175.23	16.68	14.25	9.52	121,488	11,564	3.16	3.89	7.05
Irvine	65.98	65.80	50.82	99.73	219,156	218,558	12.58	13.89	26.44
Laguna Hills	6.64	1.18	1.16	17.77	30,410	5,404	0.27	0.32	0.33
Laguna Woods	3.31	1.88	1.88	56.80	16,224	9,215	0.45	0.51	0.96
Lake Forest	16.78	11.58	9.18	69.01	77,490	53,476	2.68	2.51	5.19
Newport Beach	24.74	17.63	14.58	71.26	85,376	60,840	3.56	3.98	7.55
Orange	25.78	1.88	1.73	7.29	136,995	9,990	0.47	0.47	0.94
Santa Ana	27.35	16.40	16.17	59.96	325,228	195,018	6.35	4.42	10.77
Tustin	11.14	11.14	10.49	100.00	75,781	75,781	3.19	2.87	6.06
OCFC District	---	---	---	---	---	---	---	---	10.00
IRWD	---	---	---	---	---	---	---	---	10.00
Irvine Co.	---	---	---	---	---	---	---	---	10.00
Lennar	---	---	---	---	---	---	---	---	0.15
	355.49	151.82	127.80	---	1,198,294	693,076	34.925	34.925	100.00

¹ Source: OC Public Works, OC Survey Section May 2011

² NET LAND AREA = Square miles within Watershed-Extractions for NPDES, Federal, State, County, IRWD, Irvine Company and Lennar

³ PERCENTAGE OF CITY LAND AREA IN WATERSHED = Square miles within Watershed/Total Square Miles * 100

⁴ Source: State of California, Department of Finance, E-1 Population Estimates for Cities, Counties and the State with Annual Percentage Change (May 2011 as updated)

⁵ ESTIMATED POPULATION IN WATERSHED = Total Population * Percentage of City Land Area in Watershed/100

⁶ WEIGHTED LAND AREA & POPULATION SHARE = ((Square Miles within Watershed/Total Square Miles of Watershed)*0.5) + ((Estimated Population in Watershed/Total Estimated Population in Watershed)*0.5) x 34.925

⁷ WEIGHTED NET LAND AREA SHARE = Net Land Area/Total Net Land Area * 34.925

⁸ COST SHARE PERCENTAGE = Weighted Land Area & Population Share + Weighted Net Land Area Share