AGREEMENT

This agreement, hereinafter referred to as "AGREEMENT" and for purposes of identification hereby numbered **D08-019** and dated the _____ day of _____, 20_____, is

BY and BETWEEN — ORANGE COUNTY FLOOD CONTROL DISTRICT, a body corporate and politic, hereinafter referred to as "FLOOD DISTRICT,"

AND

CITY OF COSTA MESA, a municipal corporation hereinafter referred to as "CITY,"

Which are sometimes individually referred to as "PARTY," or collectively referred to as "PARTIES."

RECITALS

WHEREAS, the Water Resources Development Act of 1986, P.L. 99-662, provided authority for the United States Army Corps of Engineers ("CORPS") to construct certain flood control improvements on the Santa Ana River and Santiago Creek, California referred to as the Santa Ana River Mainstem Project ("SARMP") ;

WHEREAS, the FLOOD DISTRICT is a Local Sponsor of the SARMP in partnership with the Riverside County Flood Control & Water Conservation District, and San Bernardino County Flood Control District through the Local Cooperation Agreement dated December 13, 1989 ("LCA");

WHEREAS, in 2003 the CORPS implemented a dredging project in the lower reaches of the Santa Ana River between Pacific Coast Highway and Adams Avenue ("REACHES 1 and 2") to remove accumulated sediments and associated vegetation ("DREDGING PROJECT") in order to complete SARMP construction activities in REACHES 1 and 2;

WHEREAS, vegetation removal activities of the DREDGING PROJECT required the CORPS to mitigate for the loss of 17 acres of habitat within REACHES 1 and 2 through the restoration, creation, and/or enhancement of 17-acres of riparian habitat or to participate in a mitigation banking option, in accordance with the conditions contained in California Department of Fish and Game ("DFG") 1601 permits for REACHES 1 and 2 dated January 2003 and February 2004 and the U.S. Fish and Wildlife Service ("FWS") Biological Opinion dated December 2003 ("MITIGATION REQUIREMENTS");

WHEREAS, the CITY desires to develop a portion of the Fairview Park Wetlands and Riparian Habitat Project located on CITY property in the vicinity of REACHES 1 and 2 which includes 20.0269 acres of riparian

habitat, riparian habitat channels, water quality improvement ponds and trail access ("PROJECT"), as shown in Exhibit A;

WHEREAS, the implementation of 17 acres of specific riparian habitat within PROJECT area is DFG's and FWS's preferred approach for fulfilling the Mitigation Requirements due to the proximity of Fairview Park to the DREDGING PROJECT in REACHES 1 and 2;

WHEREAS, the CITY and FLOOD DISTRICT have entered into a separate Conservation Easement Agreement dated April 24, 2008, encumbering the 20.0269 acres of PROJECT area;

WHEREAS, PROJECT is located within the overflow floodplain of Fairview Channel and therefore subject to periodic flooding and the FLOOD DISTRICT'S flood control improvements adjacent to PROJECT are not intended to and are not designed to provide flood protection for PROJECT;

WHEREAS, the CORPS will fund and construct specific PROJECT items including clearing and grubbing, grading, irrigation, planting, plant establishment, construction fencing and electrical as shown on Exhibit B, hereinafter referred to as "MITIGATION" to fulfill the MITIGATION REQUIREMENTS;

WHEREAS, the CITY desires to contribute grant funds towards construction of specific PROJECT items, to be constructed by the CORPS, including construction of riparian habitat channels, excavation of Pond E, rock slope protection, and construction of a waterline and concrete weirs as shown on Exhibit B, hereinafter referred to as "BETTERMENT;"

WHEREAS, the CORPS can only receive funds from a Local Sponsor of the SARMP, who is the FLOOD DISTRICT, for related CITY expenditures;

WHEREAS, CORPS contractor will construct entire PROJECT which includes MITIGATION and BETTERMENT items and perform one year of establishment activities for habitat created as part of PROJECTS is established and deemed complete per Conservation Easement;

WHEREAS, CITY and FLOOD DISTRICT shall enter into a separate Operations and Maintenance Agreement to take effect following CORPS PROJECT construction and one-year establishment period; and

WHEREAS after the CORPS has completed its construction of PROJECT, including one year of establishment activities, the CITY will maintain the site in perpetuity as described in the Conservation Easement.

NOW, THEREFORE THE PARTIES MUTUALLY AGREE AS FOLLOWS:

1. RECITALS

The recitals set forth above are incorporated herein by this reference.

2. PURPOSE

The purpose of this AGREEMENT between PARTIES is to establish the terms and conditions for FLOOD DISTRICT's transfer of CITY funds to the CORPS for the implementation of PROJECT as well as establishing other obligations arising from the Conservation Easement and related to the construction of PROJECT,

3. PROJECT COORDINATION

a. FLOOD DISTRICT's Director of Orange County Public Works ("OCPW"), or an authorized designee, hereinafter referred to as "FLOOD DISTRICT REPRESENTATIVE," shall be FLOOD DISTRICT's representative in all matters pertaining to this AGREEMENT.

b. CITY's Public Services Director, or an authorized designee, hereinafter referred to as "CITY REPRESENTATIVE," shall be CITY's representative in all matters pertaining to this AGREEMENT.

4. PERIOD OF PERFORMANCE

The term of this AGREEMENT shall commence upon its execution by FLOOD DISTRICT's Board of Supervisors and CITY COUNCIL. Thereafter, the AGREEMENT shall remain in effect until PROJECT construction and one year establishment period and final accounting is deemed to be satisfactorily complete by CITY and FLOOD DISTRICT, or unless terminated by either PARTY provided that written notice of termination is given to the other PARTY pursuant to Paragraph **7** precedent to satisfactory completion. FWS and DFG shall concur that MITIGATION REQUIREMENTS, as defined by the Habitat Mitigation and Monitoring Plan of the Conservation Easement Agreement, are satisfied.

5. CITY'S RESPONSIBILITIES

a. Upon FLOOD DISTRICT's request, CITY shall submit four-hundred and sixty thousand dollars ($460,000) ("FUNDS"), which represents the estimated cost to construct BETTERMENT items

in PROJECT, to FLOOD DISTRICT within thirty (30) calendar days after receiving notification from the FLOOD DISTRICT. FLOOD DISTRICT shall manage FUNDS as prescribed in Paragraph **6**.a. CITY's contribution of FUNDS is a portion of the total PROJECT cost, which is estimated to be $1.46 million according to the CORPS. Final project cost will be determined at the close of the CORPS' construction contract.

b. CITY shall bear all its own administrative costs associated with this AGREEMENT.

c. CITY may at its discretion, at no cost to FLOOD DISTRICT and CORPS, furnish a resident engineer during construction of the PROJECT. CITY's resident engineer's access to the PROJECT site shall be subject to meeting all CORPS regulations as dictated by CORPS' resident engineer. CITY shall be entitled to consult and cooperate with CORPS' resident engineer, ensure conformance of the construction of BETTERMENT with the approved plans and specifications and provide review and approval for any change orders for BETTERMENT. However, after consultation and cooperation with CITY, the decision of CORPS' resident engineer regarding all matters involving the construction of PROJECT shall be final.

d. Subject to Paragraph **5**.a. above, CITY shall be responsible for payment of all approved change orders for BETTERMENT. All change orders for BETTERMENT shall be subject to review, consultation and concurrence by CITY prior to their execution and implementation by the CORPS contractor. However, CITY's decision regarding change orders shall be subordinate to CORPS' resident engineer's decision, which shall be final. Subject to this paragraph and the paragraph above, CITY shall pay the costs for all approved change orders within thirty (30) days after receipt of a written request for payment from FLOOD DISTRICT. Documentation for change order requests pertaining to the BETTERMENT shall be provided to CITY by the CORPS.

e. Upon satisfactory completion of BETTERMENT by Corps contractor, CITY shall agree to maintain Pond E and trails within PROJECT area as shown in Exhibit A and CITY shall assume maintenance of entire PROJECT upon satisfactory completion of one year of establishment

activities by CORPS contractor and receipt of written concurrence from FLOOD DISTRICT per separate Operations and Maintenance Agreement.

f. CITY shall issue permits, including administrative charges, at no cost to FLOOD DISTRICT and CORPS for the construction and for one year establishment activities of PROJECT.

g. CITY shall comply with the payment and reimbursement procedures specified in Sections 6.a through 6.f for all those costs related to BETTERMENT. If CITY is paid a REFUND as defined below in Section 6.d., CITY will assign to FLOOD DISTRICT any rights CITY has to any remaining FUNDS held in the interest bearing escrow account provided for in Section 6.a. below. CITY will provide any documentation needed by FLOOD DISTRICT to permit FLOOD DISTRICT to be reimbursed from that escrow for amounts paid to the CITY.

6. FLOOD DISTRICT RESPONSIBILITIES

a. FLOOD DISTRICT shall deposit all FUNDS received from CITY, which shall be expended for non-administrative project costs, in an interest bearing escrow account ("ESCROW") for CITY's exclusive benefit consistent with this AGREEMENT and shall account to CITY for all interest accrued on such FUNDS. CITY's FUNDS shall receive interest at the same rate as all other FLOOD DISTRICT funds deposited in ESCROW.

b. FLOOD DISTRICT shall bear all its own administrative costs associated with this AGREEMENT.

c. After CORPS successfully negotiates a construction contract for BETTERMENT, if the negotiated total required, as determined by the CORPS ("CONTRACT COST"), plus CORPS' design and administrative costs and contingencies, exceed the FUNDS ($460,000) remitted to FLOOD DISTRICT by CITY, plus accrued interest referenced above, written justification supporting such excess amount shall be provided by FLOOD DISTRICT to CITY prior to the award of the BETTERMENT contract to the CORPS' contractor. After it receives, reviews, and approves of such written justification for the CONTRACT COST, CITY shall deposit such additional amount with FLOOD DISTRICT within sixty (60) calendar days of the receipt of a request for payment from FLOOD DISTRICT. If CITY does not approve of CONTRACT COST

described above, FLOOD DISTRICT and CITY shall meet and confer to develop a mutually agreeable revised scope for BETTERMENT to fit within the CITY's budgeted project funds. Should DISTRICT and CITY agree upon a revised scope for BETTERMENT, FLOOD DISTRICT shall forward the revised scope to CORPS and request a revised CONTRACT COST.

d. After completion of PROJECT, FLOOD DISTRICT shall provide to CITY a final written accounting of FUNDS. If that accounting indicates that FUNDS deposited in ESCROW, plus interest, were greater than those amounts paid to CORPS contractor for BETTERMENT, FLOOD DISTRICT will pay CITY that difference ("REFUND"). REFUND will be paid by the FLOOD DISTRICT from DISTRICT funds which are separate from ESCROW within thirty (30) calendar days of the date of the completion of final accounting by FLOOD DISTRICT.

e. FLOOD DISTRICT shall notify the California Department of Fish and Game for impacts to the Placentia Drain.

f. FLOOD DISTRICT shall assign, as and when needed, a qualified Construction Division Inspector ("INSPECTOR") from Orange County Orange Public Works to PROJECT, whose function shall be to verify that any PROJECT work is accomplished in a good quality workmanlike manner. Field corrections shall be documented in writing by INSPECTOR with a copy submitted to CITY. FLOOD DISTRICT's resident engineer's access to the PROJECT site shall be subject to meeting all CORPS regulations as dictated by CORPS' resident engineer. FLOOD DISTRICT shall be entitled to consult and cooperate with CORPS' resident engineer, ensure conformance of the construction of PROJECT with the approved plans and specifications and provide review and approval for any change orders.

7. NOTICES

a. Notices or other communications which may be required or provided under the terms of this AGREEMENT shall be given as follows:

FLOOD DISTRICT: Director
Orange County Public Works
P. O. Box 4048
Santa Ana, CA 92702-4048

Facsimile No. (714) 834-2395

CITY: Public Services Director
City of Costa Mesa
P.O. Box 1200
Costa Mesa, CA 92628-1200
Facsimile No. (714) 754-5028

b. All notices shall be in writing and deemed effective when delivered in person or on the second business day after deposit in the United States mail, first class, postage prepaid and addressed as above. Notwithstanding the above, the PARTIES may also provide notices by facsimile transmission, and any such notice so given shall be deemed to have been given upon receipt during normal business hours or in the event of receipt after business hours, the following business day. Any notices, correspondence, reports and/or statements authorized or required by this AGREEMENT, addressed in any other fashion shall be deemed not given.

c. Either PARTY hereto may change its address to which notices are to be sent by giving written notice of such change to the other PARTY.

8. INDEMNIFICATION

a. Indemnification by CITY

CITY hereby agrees to indemnify, defend (with counsel approved in writing by FLOOD DISTRICT), and hold harmless FLOOD DISTRICT, County of Orange ("COUNTY") and the elected or appointed officers, employees, agents and authorized representatives of FLOOD DISTRICT and/or COUNTY ("FLOOD DISTRICT/COUNTY INDEMNITEES") from any and all losses, injuries, liability, damages, claims, costs and expenses (including attorneys' fees and court costs), incurred by or made against FLOOD DISTRICT, COUNTY, or any FLOOD DISTRICT/COUNTY INDEMNITEES arising out of or resulting from (i) any breach of this AGREEMENT by CITY, (ii) the willful misconduct or negligent acts of CITY and/or CITY INDEMNITEES (as defined below) in connection with the performance of this AGREEMENT, (iii) injury to or death of any person or persons (including but not limited to workmen, members of the public, CITY employees, or contractors of CITY or subcontractors), or damage to

adjoining or other property, resulting from the operation and/or maintenance of PROJECT; provided, however, that the indemnification provided by this subparagraph shall not operate to relieve FLOOD DISTRICT or COUNTY from any loss, injury, liability, damages, claims, costs or expenses to the extent determined by a court of competent jurisdiction to have been proximately caused by the willful misconduct or negligent acts of FLOOD DISTRICT, COUNTY, or the FLOOD DISTRICT/COUNTY INDEMNITEES, or the contractors, agents, employees, representatives, invitees, licensees or guests of any of them. Approval by FLOOD DISTRICT of CITY's construction plans for PROJECT improvements shall not relieve CITY of any obligation described in this paragraph. As used in this subparagraph and subparagraph (b), below, the term "CITY INDEMNITEES" shall include any of the elected or appointed officers, employees, agents or official representatives of the CITY.

b. Risk Acceptance and Indemnification by CITY

CITY acknowledges that the principal purpose of PROJECT is for habitat mitigation purposes for the CORPS DREDGING PROJECT as well as recreational purposes. CITY, on behalf of itself and its indemnitees, licensees and guests, waives and releases FLOOD DISTRICT and COUNTY from all claims for damage to or destruction of PROJECT and interruption of any CITY operations and use of PROJECT, by actions of FLOOD DISTRICT for habitat mitigation purposes, including but not limited to flooding, overflow conditions or an activities or uses of the property by FLOOD DISTRICT for flood control purposes. CITY further acknowledges that that PROJECT is subject to periodic flooding and the FLOOD DISTRICT'S flood control improvements adjacent to PROJECT are not intended to and are not designed to provide flood protection for PROJECT, and that FLOOD DISTRICT is not liable to CITY or any other parties for loss of revenue, cancellation of any CITY sponsored event, access to PROJECT or for any other claims or causes of action resulting from the cancellation of this AGREEMENT or inability to use PROJECT for any cause or reason. CITY agrees, in accordance with Paragraph 8.a. above, to indemnify, defend with counsel approved by FLOOD DISTRICT in writing, and hold

FLOOD DISTRICT and the County of Orange harmless from any and all such claims. Nothing herein shall be deemed to require CITY to replace any portion of the PROJECT which is damaged or destroyed by causes beyond CITY's control.

c. Indemnification by FLOOD DISTRICT

FLOOD DISTRICT hereby agrees to indemnify, defend (with counsel approved in writing by CITY) and hold harmless CITY and CITY INDEMNITEES or their elected or appointed officials, employees, agents and authorized representatives from any and all losses, injuries, liability, damages, claims, costs and expenses (including attorneys' fees and court costs), incurred by or made against CITY or any CITY INDEMNITEE arising out of or resulting from (i) any breach of this AGREEMENT by the FLOOD DISTRICT, (ii) the willful misconduct or negligent acts of the FLOOD DISTRICT or its elected or appointed officials, officers, employees, agents, contractors and authorized representatives in connection with the performance of this AGREEMENT, and (iii) FLOOD DISTRICT's other obligations under the terms of this Agreement and applicable agreements with the CORPS provided, however, that the indemnification provided by this subparagraph shall not operate to relieve CITY from any loss, injury, liability, damages, claims or expenses to the extent determined by a court of competent jurisdiction to have been proximately caused by the willful misconduct or negligent acts of CITY, CITY INDEMNITEES or the guests or licensees of any of them. CITY acknowledges that FLOOD DISTRICT's indemnity obligations do not include any loss, injury, liability, damages, claims or expenses arising out of any risks assumed by CITY pursuant to Paragraph 8.b of this AGREEMENT.

9. HAZARDOUS OR TOXIC MATERIALS

CITY shall not store or allow toxic or hazardous materials in areas that may affect PROJECT. If CITY breaches the obligations stated herein, or if contamination by toxic or hazardous materials otherwise occurs for which CITY is legally liable to DISTRICT for damage resulting there, then CITY shall indemnify, defend with counsel approved in writing by FLOOD DISTRICT, and hold FLOOD DISTRICT and COUNTY harmless from any and all claims, attorneys fees, consultant fees and

expert witness fees that arise during or after the term of this AGREEMENT as a result of such contamination. This indemnification includes without limitation costs and penalties paid, if any, incurred by FLOOD DISTRICT or COUNTY in connection with any investigation of site conditions or any cleanup, remedial, removal, or restoration work required by any federal, state or local governmental entity because of toxic or hazardous materials being present in the soil or ground water and the presence of such materials in the soil or ground water is determined to be proximately caused by the acts of CITY, its indemnitees, licensees or guests. CITY shall promptly take all actions at its sole cost and expense as are necessary to clean, remove and restore the Conservation Easement Area to its condition prior to the introduction of such toxic or hazardous materials by CITY provided CITY shall first have obtained FLOOD DISTRICT's approval and the approval of any necessary governmental entities.

10. INDEPENDENT CONTRACTOR STATUS

This AGREEMENT is by and between FLOOD DISTRICT and CITY and is not intended and shall not be construed so as to create the relationship of agent, servant, employee, partnership, joint venture or association, as between FLOOD DISTRICT and CITY.

11. SUCCESSORS

This AGREEMENT shall be binding on the successors of the PARTIES hereto and shall not be succeeded by any PARTY without the prior written consent of the other PARTY. The consent of such other PARTY shall not be withheld unreasonably but, prior to approving any such succession involving the performance of any obligations pursuant to this AGREEMENT, the other PARTY shall be satisfied by competent evidence that the successor is technically qualified and financially able to perform those services to be succeeded. Failure to obtain the other PARTY's required prior written approval of any proposed succession will render such succession void.

12. WAIVER OF RIGHTS

The failure of FLOOD DISTRICT or CITY to insist upon strict performance of any of the terms, covenants or conditions of this AGREEMENT shall not be deemed a waiver of any right or remedy

that FLOOD DISTRICT or CITY may have, and shall not be deemed a waiver of the right to require strict performance of all the terms, covenants and conditions of this AGREEMENT thereafter, nor shall such failure constitute a waiver of any remedy for the subsequent breach or default of any term, covenant or condition of this AGREEMENT.

13. APPLICABLE LAW

This AGREEMENT has been negotiated and executed in the State of California and shall be governed by and construed in accordance with 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.

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.

15. ATTORNEY FEES/COSTS

Should litigation be necessary to enforce any terms or provisions of this AGREEMENT, then each PARTY shall bear its own litigation and collection expenses, witness fees, court costs and attorney's fees.

16. EXHIBITS

This AGREEMENT incorporates by this reference, the following exhibit, which is attached hereto and incorporated herein:

a. Exhibit A: Fairview Park Wetlands and Riparian Habitat Project - Site Plan

b. Exhibit B: Mitigation and Betterment Schedule of Work Items

17. WAIVER AND INTERPRETATION

Titles or captions contained herein are inserted as a matter of convenience and for reference, and in

no way define, limit, extend or describe the scope of this AGREEMENT or any provisions hereof. No provision in this AGREEMENT is to be interpreted for or against a PARTY because that PARTY or its legal representative drafted such provision.

18. AUTHORITY

The PARTIES to this AGREEMENT represent and warrant that this AGREEMENT has been duly authorized and executed and constitutes the legally binding obligation of their respective organizations or entities, enforceable in accordance with its terms.

19. AMENDMENT(S)

It is mutually understood and agreed by PARTIES that no addition to, alteration of, or variation of the terms of this AGREEMENT, nor any oral understanding or agreement not incorporated herein, shall be valid unless made in writing and signed and approved by both PARTIES.

20. ENTIRE AGREEMENT

This document sets forth the entire AGREEMENT between the FLOOD DISTRICT and CITY and may be modified only by a written amendment between the PARTIES hereto, in accordance with Paragraph **19** ("AMENDMENT(S)"), above.

20. COUNTERPART

The PARTIES may execute this AGREEMENT in counterpart.

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IN WITNESS WHEREOF, each PARTY hereto has executed this AGREEMENT by its duly authorized representatives as of the date set forth below.

CITY OF COSTA MESA,
a body corporate and politic in the State of California

Date: _____

By: _____
Mayor, City Council

Date: _____

APPROVED AS TO FORM
Office of the City Counsel
Costa Mesa, California

By: _____
~~Deputy~~ CITY ATTORNEY

Orange County Flood Control District

Date: _____

By_____
Chair of the Board of Supervisors
Orange County, CA

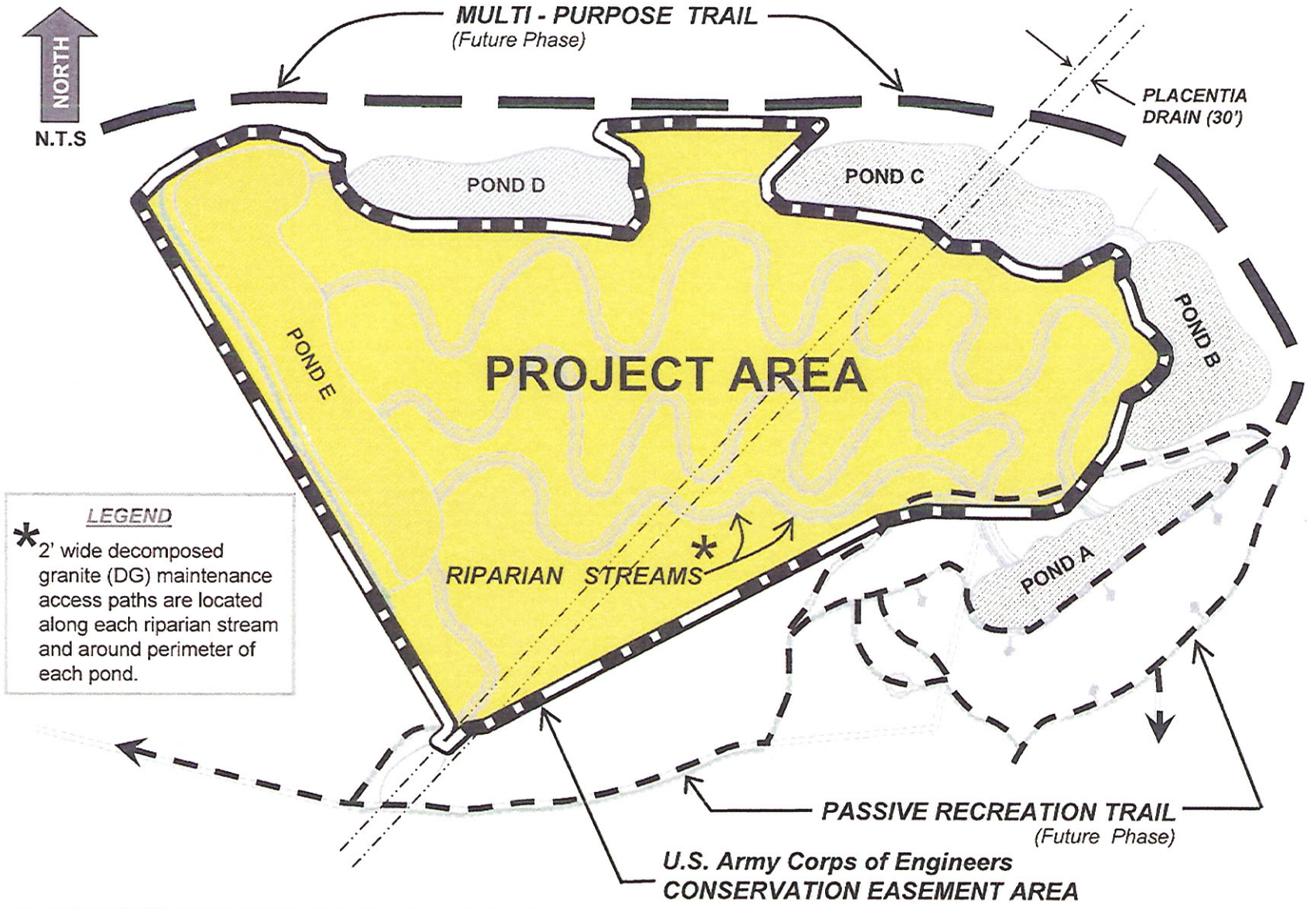
Signed and certified that a copy of this document has been delivered to the Chair of the Board per G.C. Sec 25103, Reso 79-1535
Attest:

_____
Darlene J. Bloom
Clerk of the Board of Supervisors
County of Orange, California

Date: 6/17/2008

APPROVED AS TO FORM
Office of the County Counsel
Orange County, California

By:_____
Deputy



Fairview Park Wetlands and Riparian Habitat Project – SITE PLAN

Fairview Park Cooperative Agreement
EXHIBIT A

Exhibit B

Fairview Park Wetlands and Riparian Habitat Project
Schedule of Work Items for CONSERVATION EASEMENT AREA

ITEM #	ITEM DESCRIPTION	ESTIMATED QUANTITY	UNIT
MITIGATION Items (to be paid by the Corps)			
1.0	As-Built Drawings	1.00	LS
2.0	Clear and Grub	17.00	AC
3.0	Grading	17.00	AC
4.0	Irrigation for Riparian Areas	1.00	LS
5.0	Planting for Riparian Areas	1.00	LS
6.0	Plant Establishment	1.00	LS
7.0	Temporary Construction Fence	4,500.00	LF
8.0	Electrical	2,000.00	LF
BETTERMENT Items (to be paid by the City of Costa Mesa through OCFCD)			
9.0	Access Trails	16,000.00	SF
10.0	Excavation Pond E	13,000.00	CY
11.0	Excavation Riparian Creeks	10,800.00	CY
12.0	Rock Slope Protection	250.00	TN
13.0	Six Inch HDPE Water Line	2,750.00	LF
14.0	Concrete Weirs	4.00	EA