

ESCROW AGREEMENT  
BARNSTABLE CONSERVATION & MANAGEMENT PERMIT

This ESCROW AGREEMENT (this "Agreement") is entered into as of this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_ by and between the Massachusetts Division of Fisheries and Wildlife, by and through the Natural Heritage and Endangered Species Program, having a principal place of business at 1 Rabbit Hill Road, Westborough, MA, 01581 ("NHESP"); the Town of Barnstable, MA ("Town") (proponent) having a principal place of business at \_\_\_\_\_; and \_\_\_\_\_, having a principal place of business at \_\_\_\_\_ ("Escrow Agent"). NHESP, Town of Barnstable, and Escrow Agent are referred to herein collectively as the "Parties".

1. Recitals

a. The Conservation and Management Permit No. 016-\_\_\_\_.DFW ("Permit") issued by NHESP to the Town contains financial assurance provisions in paragraph \_\_\_\_ of the Special Conditions section requiring that the Town ensure that funds are available in the sum of up to three annual payments of \$5,800.00, the final amount of funding to be determined as set forth in the Permit (the "Funds"), to carry out educational outreach, increased law enforcement, and selective predator management activities, for the benefit of Piping Plover, populations in Massachusetts. These payments will also satisfy a requirement of Certificate of Inclusion No. 16-\_\_, issued by the Division to the Town pursuant to United States Fish and Wildlife Service Incidental Take Permit \_\_\_\_\_. During 2016, the Permit requires the Town to deposit \$5,800 into an escrow account prior to carrying out the covered activity authorized by the permit, should this activity occur during 2016. Regardless of whether a payment is made in 2016, the Town shall deposit (an additional) \$5,800 into the escrow account by February 15, 2017. If the covered activity is implemented during 2017, the Town shall make an additional payment of \$5,800 into the escrow account by February 15, 2018. Therefore, as set forth in the Permit, the Town shall deposit a minimum of \$5,800 and up to \$17,400 into the escrow account over the course of the three year Permit Term.

b. The Parties agree the Funds shall be paid by the Town to the Escrow Agent and held in an interest bearing escrow account ("Escrow Account") (further defined in 2 below) and expended pursuant to the terms and conditions described below to mitigate for impacts associated with the covered activity (the "Project"), located in Barnstable, Massachusetts.

The Parties enter into this Agreement for the purpose of defining the terms and conditions under which the Funds shall be held and disbursed.

NOW THEREFORE, after consideration of the above recitals, the Town, NHESP and the Escrow Agent hereby covenant and agree as follows:

2. Escrow Account

a. The Town of Barnstable shall deliver the Funds to the Escrow Agent in the amounts, schedule and manner set forth in paragraphs \_\_\_\_ of the Permit and as summarized in Paragraph 1.a. of this agreement.

b. All funds delivered by the Town to the Escrow Agent shall be deposited by

the Escrow Agent in an interest bearing account or held in obligations by the US Government at one or more banks (“Depository Bank”), said accounts to be at all times insured by the Federal Deposit Insurance Corporation and which shall pay interest on the Funds at a reasonable rate. The Depository Bank shall be entitled to charge the Town directly for services related to maintenance of the Escrow Account at a rate not exceeding the Bank’s standard charges to other customers for similar services. Alternatively, the Town may supplement the Funds identified in paragraphs 1 and 2 with a contribution of an additional amount sufficient to cover anticipated fees.

c. The Escrow Account shall be opened by the Escrow Agent and funds may be withdrawn only by the Escrow Agent and no other person. Disbursements shall be made from the Escrow Account only in accordance with the terms of this Agreement.

d. The Escrow Agent shall maintain a record of all deposits, income, disbursements, and other transactions of the Escrow Account. Upon request, the Escrow Agent shall provide to any of the Parties a written accounting of all transactions. The Parties shall have the right to inspect all books and records of the Escrow Agent relating to the Escrow Account at reasonable times upon request. Escrow Agent’s computation of the Funds shall be deemed to be correct in the absence of manifest error.

e. The Escrow Agent shall keep possession of the book(s) and bank statements of the Escrow Account until such time as it is terminated in accordance with the terms of this Agreement, or until a successor Escrow Agent is appointed as provided herein.

### 3. Disbursements

From time to time, NHESP may, on or before the date which is five (5) years from the date of this Agreement, request in writing the Escrow Agent to deliver all or portions of the Funds, plus any interest thereon, for educational outreach, increased law enforcement and or selective predator management, to provide a net-benefit to the Piping Plover in Massachusetts. Upon receipt of such written request, the Escrow Agent shall deliver the requested portion of the Funds to NHESP or any party designated in writing by NHESP. Delivery of the Funds in accordance with the terms of this Agreement shall be made by cashier’s check, or by federal funds wire transfer, at the option of the payee.

a. The Escrow Agent may make disbursements to the Depository Bank for services rendered in maintaining said account, consistent with paragraph 2b.

b. If, at the end of five (5) years from the date of this Agreement, any portion of the Funds is still held in escrow under this Agreement, then NHESP shall, within six (6) months after such five (5) year date, develop a plan for the use of any remaining Funds by NHESP or any party designated in writing by NHESP for further management for the benefit of the Piping Plover in Massachusetts.

c. The Escrow Agent shall release any remaining Funds to NHESP or any party designated in writing by NHESP in accordance with such plan.

### 4. Termination of Agreement

This Escrow Agreement shall terminate, and the Escrow Agent shall be relieved of all liability, after all funds in the Escrow Account have been properly disbursed in accordance with the terms and conditions of this Agreement. When the Escrow Account is terminated, the Escrow Agent shall provide a final accounting of all transactions hereunder to the Parties.

5. Duties and Liabilities of Escrow Agent

a. The sole duty of the Escrow Agent under this Agreement is to receive funds from the Town and to hold the funds for disbursement according to Section 3 above. The Escrow Agent shall be under no duty to pass upon the adequacy of any documents, to determine whether any of the Parties are complying with the terms and provisions of this Escrow Agreement, or to determine the identity or authority of any person purporting to be a signatory authorized by the Town or NHESP.

b. The Escrow Agent may conclusively rely upon, and shall be protected in acting on, a statement, certificate, notice, requisition, order, approval, or other document believed by the Escrow Agent to be genuine and to have been given, signed and presented by a duly authorized agent of the Town or NHESP. The Escrow Agent shall have no duty or liability to verify any statement, certificate, notice, request, requisition, consent, order, approval or other document, and its sole responsibility shall be to act only as expressly set forth in this Agreement. The Escrow Agent shall not incur liability for following the instructions contemplated by this Agreement or expressly provided for in this Agreement or other written instructions given to the Escrow Agent by the Parties. The Escrow Agent shall be under no obligation to institute or defend any action, suit or proceeding in connection with this Escrow Agreement, unless first indemnified to its satisfaction. The Escrow Agent may consult with counsel of its choice including shareholders, directors, and employees of the Escrow Agent, with respect to any question arising under or in connection with this Agreement, and shall not be liable for any action taken, suffered or omitted in good faith. The Escrow Agent shall be liable solely for its own willful misconduct.

c. The Escrow Agent may refrain from taking any action, other than keeping all property held by it in escrow if the Escrow Agent: (i) is uncertain about its duties or rights under this Escrow Agreement; (ii) receives instructions that, in its opinion, are in conflict with any of the terms and provisions of this Agreement, until it has resolved the conflict to its satisfaction, received a final judgment by a court of competent jurisdiction (if it deems such action necessary or advisable), or it has received instructions executed by both the Town and NHESP.

d. Escrow Agent is acting, and may continue to act, as counsel to the Town in connection with the subject transaction, whether or not the Funds are being held by Escrow Agent or have been delivered to a substitute impartial party or a court of competent jurisdiction.

e. Each of the Parties admits, acknowledges and represents to each of the other Parties that it has had the opportunity to consult with and be represented by independent counsel of such party's choice in connection with the negotiation and execution of this Agreement. Each of the Parties further admits, acknowledges and represents to the other Parties that it has not relied on any representation or statement made by the other Parties or

by any of their attorneys or representatives with regard to the subject matter, basis or effect of this Agreement.

6. Escrow Agent's Fee

- a. The Escrow Agent shall be entitled to compensation from the Town for its basic services under this Escrow Agreement. The Escrow Agent may bill the Town directly for such services in accordance with the fee schedule attached to this Escrow Agreement as Exhibit B. Payments for services provided by Escrow Agent shall not be made from Escrow Funds.

7. Investment Risk

a. In no event shall the Escrow Agent have any liability as a result of any loss occasioned by the financial difficulty or failure of any institution, including Depository Bank, or which holds United States Treasury Bills, or other securities, or for failure of any banking institution, including Depository Bank, to follow the instructions of the Escrow Agent. Without limiting the generality of the foregoing, in no event shall the Escrow Agent incur any liability as the result of any claim or allegation that the Escrow Agent should have invested the escrow funds in United States Treasury Bills rather than hold same on deposit at the Depository Bank, or vice versa.

8. Notices

a. All notices permitted or required by this Agreement shall be in writing and shall be deemed duly provided when deposited in the United States mail, postage prepaid, certified or registered mail, return receipt requested, to the other Parties at the addresses set forth in the first paragraph of this Agreement. The Party providing notice may choose alternate methods, including hand delivery, Federal Express, or other recognized overnight courier. Notices provided by hand delivery; Federal Express or other recognized overnight courier shall be deemed duly provided when received at the addresses set forth in the first paragraph of this Agreement.

b. All notices, certification, authorizations, requests or other communications required, or permitted to be made under this Escrow Agreement shall be delivered as follows:

To the NHESP:

Assistant Director  
Natural Heritage and Endangered Species Program  
ATTN: Regulatory Review, CMP No. 014-244.DFW  
Division of Fisheries and Wildlife  
1 Rabbit Hill Road, North Drive  
Westborough, MA 01581

To the Town of Barnstable:

To the Escrow Agent:

or to such other place or to the attention of such other individual as a Party from time to time may designate by written notice to all other Parties.

9. Resignation, Removal, or Successor Escrow Agent

a. If, for any reason, the Escrow Agent is unable or unwilling to continue to act as Escrow Agent, he/she shall give written notice to the other Parties of his/her inability or unwillingness to continue as Escrow Agent. The parties shall agree upon a successor agent, formally appoint the successor agent, and provide written notification to the Escrow Agent of the subsequent appointment within ten (10) business days. The Escrow Agent shall then, within three (3) business days after receiving notice of subsequent appointment, deliver to the successor escrow agent all cash and other property held by the Escrow Agent under this Escrow Agreement. Upon such delivery, all obligations of the Escrow Agent under this Escrow Agreement shall automatically cease and terminate. If no successor escrow agent is designated within the prescribed ten (10) day period, or if notice of subsequent appointment is not received within such period, then the Escrow Agent may, at its option at any time thereafter, deposit the funds and any documents then being held by it in escrow into any court having appropriate jurisdiction, and upon making such deposit, shall thereupon be relieved of and discharged and released from any and all liability hereunder, including without limitation any liability arising from the Funds, or any portion thereof so deposited.

b. The Escrow Agent may be removed at any time by a written instrument or concurrent instruments signed by the NHESP and the Town and delivered to the Escrow Agent.

c. If at any time hereafter, the Escrow Agent shall resign, be removed, be dissolved, or otherwise become incapable of acting, or the position of the Escrow Agent shall become vacant for any of the foregoing reasons or for any other reason, the Parties hereto shall promptly appoint a successor Escrow Agent. Upon appointment, such successor Escrow Agent shall execute and deliver to his/her predecessor and to the Parties hereto an instrument in writing accepting such appointment hereunder. Thereupon, without further act, such successor Escrow Agent shall be fully vested with all the rights, immunities, and powers, and shall be subject to all the duties and obligations of his/her predecessor, and the predecessor Escrow Agent shall promptly deliver all books, records, and, other property and monies held by him/her hereunder to such successor Escrow Agent.

10. Interest

a. All interest income accrued on funds in the Escrow Account shall become part of the Escrow Account and shall remain in the Escrow Account. The Escrow Agent may disburse funds to the Town to pay federal and state taxes on accrued interest. Said disbursement may be made by the Escrow Agent only after receiving a written confirmation from the Town, with a copy sent to the NHESP, of all itemized federal and state tax liabilities

incurred by interest accrued on the Escrow Account.

11. Miscellaneous

a. This Escrow Agreement shall be binding upon, and shall inure to the benefit of the respective Parties hereto and their successors and assigns.

b. This Agreement shall be governed by and be construed in accordance with the laws of the Commonwealth of Massachusetts.

c. This Agreement shall be interpreted as an instrument under seal.

d. This Agreement may be executed in any number of counterparts, each of which shall constitute an original, and all counterparts shall constitute one Agreement.

e. This Escrow Agreement may not be amended, altered, or modified except by written instrument duly executed by all of the Parties hereto.

f. If the term, condition or provision of this Agreement, or the application thereof to any circumstances or party hereto, ever shall be held to be invalid or unenforceable, then in each such event the remainder of this Agreement or the application of such term, condition, or provision to any other circumstance or party hereto (other than those as to which it shall be invalid or unenforceable) shall not be thereby affected, and each term, condition and provision hereof shall remain valid and enforceable to the fullest extent permitted by law.

g. Each individual and entity executing this Agreement hereby represents and warrants that he, she or it has the capacity set forth on the signature pages hereof with full power and authority to bind the party on whose behalf he, she or it is executing this Agreement to the terms hereof.

12. Effective Date

a. This Agreement shall take effect on the latest date of execution by the NHESP, the Town, or Escrow Agent.

[SIGNATURE PAGES FOLLOW]

IN WITNESS WHEREOF, the parties have caused this Escrow Agreement to be duly executed as of the day and year first written above.

FOR THE MASSACHUSETTS DIVISION  
OF FISHERIES AND WILDLIFE:

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

COMMONWEALTH OF MASSACHUSETTS

\_\_\_\_\_, ss \_\_\_\_\_, 2015

On this \_\_ day of \_\_, 2015, before me, the undersigned notary public, personally appeared \_\_\_\_\_, and proved to me through satisfactory evidence of identification, which were \_\_\_\_\_, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that he/she signed it voluntarily for its stated purpose.

\_\_\_\_\_  
Notary Public  
My commission expires:

FOR TOWN OF BARNSTABLE:

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

STATE OF \_\_\_\_\_

\_\_\_\_\_, ss

\_\_\_\_\_, 2015

On this \_\_ day of \_\_, 2015, before me, the undersigned notary public, personally appeared \_\_\_\_\_, and proved to me through satisfactory evidence of identification, which were \_\_\_\_\_, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that he/she signed it voluntarily for its stated purpose.

\_\_\_\_\_  
Notary Public  
My commission expires:

FOR THE ESCROW AGENT:

*Company Name*

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

Name:

Title:

COMMONWEALTH OF MASSACHUSETTS

\_\_\_\_\_ ss.

\_\_\_\_\_, 2015

On this \_\_ day of \_\_, 2015, before me, the undersigned notary public, personally appeared \_\_\_\_\_, and proved to me through satisfactory evidence of identification, which were \_\_\_\_\_, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that he/she signed it voluntarily for its stated purpose.

\_\_\_\_\_  
Notary Public  
My commission expires: