



COASTAL WATERBIRD MANAGEMENT AGREEMENT

Town of Harwich, MA

COASTAL WATERBIRD MANAGEMENT AGREEMENT dated as of May 18, 2010 (the "Agreement") by and between Massachusetts Audubon Society, Inc., a Massachusetts non-profit corporation exempt from Federal taxes under Section 501(c)(3) of the Internal Revenue Code with an address of Mass Audubon, 208 South Great Road, Lincoln, MA 01773 ("Mass Audubon"), and The Town of Harwich, Harwich, MA 02539 (the "Client").

WHEREAS, Mass Audubon, through its coastal waterbird protection program and activities, has expertise in coastal nesting bird monitoring and management; and

WHEREAS, Client desires the services of Mass Audubon to assist in monitoring and management of coastal nesting birds in conjunction with proposed beach nourishment at permitted locations including coastal areas along the south (Nantucket Sound) side of Harwich; and

WHEREAS, Mass Audubon through its Coastal Waterbird Program desires to perform such services for the Client; and

NOW, THEREFORE, in consideration of the premises and the mutual promises contained herein and for other valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Mass Audubon and the Client hereby agree as follows:

(1) Services:

- (a) The Client hereby engages Mass Audubon, through its Coastal Waterbird Program (hereinafter "Mass Audubon"), to perform the services described in Exhibit A attached hereto (the "Services"). Mass Audubon hereby agrees to devote its best efforts to the performance of the Services. All Services shall be performed by Mass Audubon at times that are mutually agreeable to Mass Audubon and the Client.
- (b) Either Mass Audubon or the Client may terminate the engagement of Mass Audubon under this Agreement at any time by giving written notice at any time to the other party stating its election to terminate this Agreement thirty (30) days after the date of receipt by the other party of such written notice. In the event of such termination, Mass Audubon shall be entitled to be paid through such thirty (30) day period and any compensation paid to Mass Audubon for services to be performed by

Mass Audubon beyond such thirty (30) day period shall be returned by Mass Audubon to the Client. The terminating party shall also provide notice to Mass Wildlife, US Fish and Wildlife Service, MA Natural Heritage and Endangered Species Program, and the US Army Corps of Engineers.

- (c) Unless terminated by one of the parties as provided above, this contract shall be in effect as of the date it is executed and shall run through September 1, 2013.

- (2) Compensation: For the performance of the Services, the Client agrees to pay to Mass Audubon the compensation set forth in Exhibit B attached hereto in accordance with the payment schedule and procedures set forth therein.

(3) Indemnification:

- (a) Mass Audubon hereby agrees to indemnify and hold harmless the Client from and against any and all claims, liabilities, and obligations (including, without limitation, reasonable attorneys' fees) arising out of or resulting from any material breach by Mass Audubon of this Agreement.
- (b) The Client hereby agrees to indemnify and hold harmless Mass Audubon and its officers, directors, agents, volunteers and employees (including, but not limited to, the personnel of Mass Audubon) from and against any and all claims, liabilities, and obligations (including, but not limited to, reasonable attorneys' fees) arising out of or resulting from the performance by Mass Audubon of the Services. Mass Audubon assumes no liability or obligation for any omissions from any work performed for the Client.
- (c) Mass Audubon shall be an independent contractor, with the sole responsibility of directing the work of its employees to be performed under this contract. Mass Audubon shall *hold harmless* the Client for any actions undertaken by Mass Audubon while on the Client's premises.
- (d) Mass Audubon agrees to carry all necessary insurance including, but not limited to, comprehensive general liability and Worker's Compensation and shall provide certificates of same to the Client. Mass Audubon will provide the Client with a certificate of Workmen's Compensation Insurance for employees used to perform the work requirements of the Contract. Mass Audubon shall also provide a certificate of comprehensive general liability coverage with limits of at least one million (\$1,000,000) dollars coverage per occurrence and \$2,000,000 in the aggregate, wherein Client shall be named as an additional insured.

- (4) Notice: Any and all notices under this Agreement shall be in writing and, if to Mass Audubon, shall be duly given if sent to Mass Audubon by registered or certified mail, postage prepaid, return receipt requested, addressed to Attention: Katharine Parsons, Coastal Waterbird Program Director, Massachusetts Audubon Society, PO Box 275, Cummaquid, MA 02637, and if to

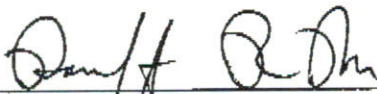
the Client addressed to the Client at the address set forth above. The primary contact person of the Client will be Tom Leach, and all notices under this Agreement shall be addressed to the Client to the attention of such person, with a copy to John Chatham, Town of Harwich Conservation Agent.

(5) Miscellaneous:

- (a) This Agreement or any of the rights and obligations under this Agreement may not be assigned in whole or in part by any party hereto.
- (b) The provisions of Exhibit A and Exhibit B shall be incorporated in this Agreement by reference as if set forth in their entirety in this Agreement.
- (c) Insofar as it pertains to said maintenance dredging and beach nourishment this Agreement shall be binding upon, and shall inure to the benefit of, the respective heirs, legal representatives, successors, and assigns of the parties hereto. This Agreement constitutes the entire agreement of the parties hereto as to the subject matter hereof and supersedes all previous oral or written agreements between the parties hereto as to the subject matter hereof. This Agreement may be changed or amended only in writing signed by both parties hereto.
- (d) This Agreement shall be governed by, and construed in accordance with, the internal laws of The Commonwealth of Massachusetts without regard to its conflict of laws principles.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as an instrument under seal, all as of the day, month, and year first written above.

MASSACHUSETTS AUDUBON SOCIETY, INC.

By: 
 Bancroft R. Poor
 Assistant Treasurer/CFO

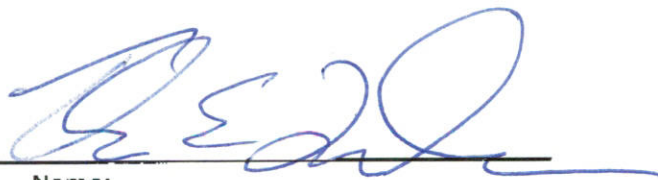
By: 
 Name: THOMAS LEACH, HARBOR MASTER
 Town of Harwich

EXHIBIT A

Description of Services

1. The Services to be performed by Mass Audubon for the Client shall be as follows:

Mass Audubon staff (one to two people, depending on extent of the project) will be available after disposal of sand as beach nourishment to monitor the presence of and minimize disturbance to state and federally listed coastal nesting birds (defined here as Piping Plovers, Least and Common Terns). The tasks involved in this work include, the following, according to state and federal guidelines:

- a) Pre- and/or during nourishment monitoring for the presence of nesting birds IF operations are taking place on or after April 1.
- b) Post-nourishment monitoring to determine the presence of nesting birds on all sites nourished at the start of this agreement, and for three summer field seasons beginning May 20, 2011.
- c) Post-nourishment monitoring and management, including symbolic fencing and signage to protect nests and scrapes, as needed, on all sites based on presence of potential nesting habitat and/or presence of birds, as determined by MA NHESP.
- d) Annual reporting to permitting agencies by September 30th of each year of the contract.

2. Client shall be responsible for all permitting and on-site maintenance work having to do with the maintenance dredging and disposal of sand.

3. Client shall give notice to Mass Audubon at least two weeks prior to the date of commencement of the project each year. Notice may be given by email or telephone to Dr. Katharine Parsons, Director, Coastal Waterbird Program, kparsons@massaudubon.org, 508-362-7475 x9351.

4. If necessary, and with appropriate notice (at least 48 hrs), Mass Audubon will undertake pre-construction operational monitoring within 48 hours prior to the scheduled start of operations and will continue monitoring during operations as needed based on the presence of coastal nesting birds at the site.

5. Client agrees to grant or secure for the personnel of Mass Audubon sufficient permission to enter private properties to permit Mass Audubon to perform properly the Services described herein for the Client. The Client shall immediately inform Mass Audubon if proper permission to enter the property or perform the proposed work cannot be obtained.

6. Mass Audubon is not obligated to perform any work beyond that described in this contract. If unforeseen circumstances results in the need to complete additional work, the parties will execute an amendment to this contract.

EXHIBIT B

Description of Compensation and Payment Schedule

The base annual fee for the Tasks in Exhibit A (above) is a minimum of \$5,000. This assumes time on the site for a qualified monitor billed at the rate of \$28/hour, plus travel to and from the site billed at \$0.45/mile.

If threatened coastal birds require additional monitoring, the cost for monitoring and reporting will be billed at \$25/hour, plus travel to and from the site at the rate of \$0.45/mile. The Client will be notified of the presence of coastal nesting birds prior to undertaking the work. All invoices will include an accounting of hours spent and mileage incurred. The additional cost will not exceed \$8,000/year.

The total due under this contract (base annual fee plus additional cost), shall not exceed \$13,000 in any one year period.

All payments will be due within 30 days of receipt of invoice.