

**Wildlands and Woodlands Conservation Project
Western Massachusetts Aggregation**

MEMORANDUM OF AGREEMENT

This Memorandum of Agreement (the “MOA”) is entered into as of the Effective Date specified in Section 7, by and among The New England Forestry Foundation, a Massachusetts charitable corporation with its principal office and mailing address at 32 Foster Street, P.O. Box 1346, Littleton, MA 01460, in its capacity of Conservation Intermediary (“CI”) and The New England Forestry Foundation, Mount Grace Land Conservation Trust, East Quabbin Land Trust, The Kestrel Trust, Franklin Land Trust, Monterey Preservation Land Trust, and the Berkshire Natural Resources Council, all nonprofit corporations with their principal offices and mailing addresses listed in Exhibit A (each, a “LT”).

WITNESSETH:

WHEREAS, Each LT is an independent land trust working to protect natural resources within the Commonwealth of Massachusetts;

WHEREAS, in addition to being a LT, CI is a conservation organization with broad experience conducting fundraising for land conservation projects from individuals, corporations and foundations;

WHEREAS, CI and the LT’s are in support of the land conservation goal of protecting 1.5 million acres of forest described in the report issued by the Harvard Forest titled, “Wildlands and Woodlands, A Vision for the Forests of Massachusetts” (the “W&W Initiative”);

WHEREAS, in furtherance of the W&W Initiative, CI and the LT’s wish to cooperate with and assist one another in organizing, financing and managing a pilot land protection effort in western Massachusetts, to pursue the acquisition of Conservation Restrictions (“CRs”) on 72 tracts of land (each, a “Project”) encompassing approximately 10,344 acres and requiring total acquisition and related expenses of approximately \$13,000,000, exclusive of in-kind gifts (hereinafter, the “Aggregation”);

WHEREAS, the owner of each Project has granted or is expected to grant to a sponsoring LT an option to purchase a CR with respect to the Project;

WHEREAS, each Project, its acquisition cost and its sponsoring LT is listed on Exhibit B hereto and;

WHEREAS, CI is willing to collect and disburse funds for and manage and coordinate the Aggregation subject to the terms and conditions of this Memorandum of Understanding (“MOA”);

NOW THEREFORE, in consideration of the foregoing and the mutual covenants contained herein, the parties agree as follows:

1. **Cooperative Fundraising Effort.** During the term of this MOA, the parties shall engage in a cooperative fundraising effort to raise the funds necessary to acquire the CRs for all of the Projects and fund all related Aggregation expenses in accordance with the following principles:
 - a. The parties will follow fundraising, public relations and marketing strategies and procedures to be developed and modified from to time by CI, in consultation with the LT's.
 - b. CI will be the applicant of record for funds from foundations, federal and state agencies, corporations and individuals (each, a "Donor"), except where CI and one or more land trusts may agree otherwise. Each LT shall write letters of support as requested by CI to assist in funding applications and solicitations.
 - c. Until the Aggregation is terminated, the parties will use their best efforts to assure that the Aggregation is a priority in all fundraising activities of each LT, with the following exceptions:
 - (1) Where a prior relationship between a LT and a potential Donor exists, the LT shall have complete discretion in determining whether to solicit funds for the Aggregation from such Donor.
 - (2) Where a LT develops a new relationship with a potential Donor in connection with fundraising for a new or existing project not related to the Aggregation, the LT shall have complete discretion in determining whether to solicit funds for the Aggregation from such Donor.
 - (3) Fundraising activities by LT's in connection with their normal activities, including fundraising for operating costs, will not be subject to the provisions of this section.
 - d. Except where CI and one or more land trusts may agree otherwise, each LT shall direct any funds tendered for the funding of any Project to the CI. For the avoidance of doubt, the parties agree that, until the Aggregation is terminated, no LT shall participate in the closing of any Project except in accordance with this MOA.
2. **Independent Organizations.** The parties shall remain independent non-profit organizations and the relationship among them under this MOA shall be as cooperating entities and not as partners. Each organization shall remain responsible for its own expenses not associated with the Aggregation.

3. **LT Representatives and Director.** Each land trust shall designate a member of its Board of Directors or staff to serve as its liaison (each, an “LT Representative”) and the principal contact for day-to-day decisions regarding the Aggregation. Each LT Representative shall have the authority to act on behalf of the LT designating such person with regard to the Aggregation, and CI and each LT shall be entitled to rely on any instruction, notice or consent received from an LT Representative. CI shall designate a member of its staff to serve as the Aggregation Director and the principal contact for day-to-day decisions regarding the Aggregation.
4. **Budget.** A budget shall guide all management and financial decisions regarding the Aggregation. The initial budget for the Aggregation is attached hereto and incorporated herein as Exhibit C (the “Budget”) and by approval of this Agreement is deemed approved by each party. CI may recommend from time to time amendments to the Budget, which shall be submitted to each LT Representative for their organization’s approval. No amendment shall take effect until approved by five LT’s.
5. **Determination of Project Funding Priorities.** The parties acknowledge that there is no assurance that they will be able to raise the funds necessary to finance the acquisition costs of CR’s for all of the Projects, or that all of the Project CR’s can be successfully obtained on the terms currently expected. The parties also acknowledge that, regardless of the order of priorities they may agree upon, Donors may wish to provide funds earmarked for specific Projects. To address these possibilities the parties have agreed upon an imperfect method for determining the order in which Projects will be funded. The parties acknowledge that such method may result in funding priorities that one or more LT’s may find unsatisfactory but have nevertheless agreed upon the following selection method in order to establish certainty regarding the order in which Projects will be funded. The Project which at any time is at the top of the CI’s priority list is referred to as the “First Project in Line”.
 - a. **Project Sponsorship and Substitutions.** Each Project shall be deemed to be sponsored by the LT identified on Exhibit B as the sponsor of such Project. An LT may, for any reason, remove a Project from the Aggregation by notifying CI. An LT, with the consent of CI, may substitute a new Project for a removed Project provided that the cost to the Aggregation of the new project is equal to or less than the original Project. While substitution may be permitted, it is not encouraged and is viewed as an exceptional circumstance. Without limiting the foregoing, the CI will not consent to a substitution if, in its reasonable judgment, such substitution could jeopardize the successful completion of the Aggregation.
 - b. **LT Project List.** Each LT shall provide CI with a list of the Projects sponsored by such LT showing the order in which the LT desires such Projects to be funded (each, an “LT Project List”). A substituted Project will have the same position on the relevant LT Project list as the Project it replaces. Except as specifically provided herein or agreed upon by the unanimous approval of the LT’s, no other changes in an LT Project List will be permitted

c. **LT Selection Precedence.** The following order of LT precedence, established by a random selection process, is agreed upon by the parties. Except as provided in Section 6.d(2), CI shall fund one Project from each LT Project List in such order of precedence, until all Projects are funded. The parties acknowledge that the costs of Projects will vary substantially.

- (1) New England Forestry Foundation
- (2) Mount Grace Land Conservation Trust
- (3) Berkshire Natural Resources Council
- (4) The Kestrel Trust
- (5) Monterey Preservation Land Trust
- (6) Franklin Land Trust
- (7) East Quabbin Land Trust

d. **Deferred Project.** If CI has funds available to complete the closing of the First Project in Line, but the relevant Closing Conditions, as defined in Section 6.c, cannot be satisfied, CI may give written notice to the sponsoring LT of CI's intention to defer the Project. In such event, if such Closing Conditions shall not be satisfied within 10 days following such notice, the Project next in priority on the sponsoring LT's Project List, if any, shall automatically become the First Project in Line and the relevant Project List shall be automatically amended to move the deferred Project to last place, provided that the deferred Project shall be the first priority of the sponsoring LT at their request as soon as all Closing Conditions are satisfied.

6. **Aggregation Account and Disbursements.** CI will manage the funds raised for the Initiative as follows:

a. **Bank Account.** CI shall establish and maintain a segregated interest bearing bank account for Aggregation funds (the "Aggregation Account") and shall deposit in such Account all contributions and other amounts received by CI in connection with the Aggregation.

b. **Aggregation Expenses.** CI may pay third parties or reimburse itself for all Aggregation Expenses, defined to include all reasonable costs incurred in connection with the creation and organization of the Aggregation as set forth in the Budget, plus any unanticipated additional costs incurred by CI in the performance of its duties hereunder, including without limitation, legal, accounting and similar expenses, which in the reasonable judgment of CI could not be avoided. Aggregation Expenses shall take priority over all other disbursements. Notwithstanding the foregoing, Restricted Gifts, as defined in Section 6.d, may be used only in accordance with applicable restrictions.

c. **Project Funding.** CI shall, subject to availability, disburse the funds to implement Projects in the order established pursuant to Section 5. For each Project, funds shall be disbursed only upon completion of all due diligence, documentation and other

conditions deemed reasonable by CI and the sponsoring LT, including without limitation, the conditions listed on Exhibit D (“Closing Conditions”). For each Project, CI shall have the authority to disburse the acquisition cost set forth on Exhibit B plus due diligence, legal, documentation and other direct costs not to exceed the budgeted amount per Project set forth on Exhibit B. If the Project cannot be closed without expenditures by CI in excess of such amount, the Closing Conditions shall be deemed unsatisfied. Any five LT’s may waive a Project Closing Condition or approve disbursement of funds from the Aggregation Account to fund closing costs in excess of the budgeted amount for any Project. For each Project, CI shall provide the sponsoring LT with at least 60 days’ prior written notice of the anticipated closing date and the specific Closing Conditions required by CI. Although not a requirement, as funds become available, CI shall make every attempt to notify all LTs of the amount of funding expected and the potential group of projects that could be funded. This notification is intended to assist LTs in preparing their projects for closing.

- d. **Restricted Gifts.** The parties acknowledge that funds may be contributed subject to Donor conditions requiring the application of such funds to specific Projects. Such funds are referred to as “Restricted Gifts”. All other funds held in the Aggregation Account are referred to as “Unrestricted Funds.” CI will deposit all Restricted Gifts in the Aggregation Account, but shall treat such Gifts as separate funds on its books and shall disburse such Gifts as follows:
 - (1) When funding the First Project in Line, CI shall first apply to such Project any available Restricted Gifts and shall fund the balance of the Project costs using Unrestricted Funds.
 - (2) When the CI has on hand Restricted Gifts in an amount sufficient to close the Project for which they were donated which is not currently the First Project in Line, CI may, if all Closing Conditions are satisfied, proceed directly with such closing using such Restricted Gifts. Such closing will not affect the order in which remaining Projects will be funded.
- e. **Excess Funds.** Upon the termination of the Aggregation as provided in Section 7, CI shall notify the LT’s in writing of such termination. 30 business days following such notice, CI shall transfer to the LT’s any funds remaining in the Aggregation Account in proportion to the number of closed Projects sponsored by each LT, or shall transfer such funds to a pooled monitoring and enforcement program, or a subsequent aggregation program in accordance with written instructions from any four LT’s provided to CI prior to the expiration of such 30 days.
- f. **Reports.** CI shall, promptly following each calendar quarter, provide the LT’s with a report in reasonable detail of all Aggregation Account receipts and disbursements. CI shall, in consultation with the LT’s, determine the contents and formats of any additional reports.

7. **Term.** The Aggregation shall commence upon execution of this MOA by all parties (the “Effective Date”) and shall terminate six months after all the closings of the Projects or 24 months following the Effective Date, whichever is earlier. The provisions of Section 8 shall survive termination of the Initiative. The term of the Aggregation may be shortened or extended upon such terms as may be agreed by the CI and any five LT’s.
8. **Duties, Liabilities and Powers of CI.**
 - a. **Nature of Relationship with LT’s.** CI shall not have a fiduciary relationship in respect of any LT by reason of this Agreement; the nature of its duties shall be mechanical and administrative in nature only. Nothing in this Agreement shall be deemed to constitute CI a trustee within the meaning of the Trust Indenture Act of 1939, as amended or superseded, or otherwise.
 - b. **Obligation to Act; Limitation of Liability.** CI shall have no implied duties to the LT’s, or any obligation to the LT’s to take any action hereunder or incur any costs except any action specifically required hereunder to be taken by the CI. Without limiting the foregoing CI shall be fully justified in failing or refusing to take any action hereunder (A) if such action would, in the opinion of CI, be contrary to law or the terms of this Agreement, (B) if it shall not receive such advice or concurrence of the LT’s as it deems appropriate, or (C) if it shall not first be indemnified to its satisfaction by the LT’s against any and all liability and expense which may be incurred by it by reason of taking or continuing to take any such action. No LT shall have any right of action whatsoever against CI as a result of CI acting or refraining from acting in accordance with the instructions of a majority of the LTs except as specifically provided herein. Neither CI nor any of its directors, officers, agents or employees shall be liable to any LT for any action taken or omitted to be taken by it or them hereunder or in connection herewith except for its or their own gross negligence or willful misconduct. Neither CI nor any director, officer, employee or agent of CI shall be responsible for or have any duty to ascertain, inquire into or verify (i) any recital, report, information, warranty or representation made by any LT, any LT Representative or any Donor; (ii) the performance or observance of any of the covenants or agreements of any LT; (iii) the validity, effectiveness or genuineness of any written instrument, or (iv) the existence, genuineness or value of any Project.
 - c. **Reliance on Documents; Counsel.** CI shall be entitled to rely upon any notice, consent, certificate, resolution, affidavit, letter, email, telegram, facsimile transmission, teletype or telecopier message, cablegram, radiogram, statement, paper or other document or telephone message believed by it to be genuine and correct and to have been signed or sent by the proper person or persons. CI may consult with legal counsel (who may be counsel for one or more of the LTs), independent public accountants and any other experts selected by it. Neither CI nor its directors, officers, agents or employees shall be liable for any action taken or omitted to be taken by any of them in good faith reliance upon the advice of such persons.

- d. Reimbursement and Indemnification.** The LT's agree to reimburse and indemnify CI ratably in proportion to the costs of their respective sponsored Projects, as set forth on Exhibit B, for and against (i) any out-of-pocket amounts for which CI is entitled to reimbursement in its role as CI, for which Aggregation Account funds are not available upon termination of the Aggregation, (ii) any other out-of-pocket expenses incurred by CI on behalf of the LTs in connection with the administration and enforcement of this Agreement and (iii) any liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, expenses or disbursements of any kind and nature whatsoever which may be imposed on, incurred by or asserted against CI in such capacity, provided that no LT shall be liable for any of the foregoing to the extent they arise from the gross negligence or willful misconduct of CI. For the avoidance of doubt, the indemnification and reimbursement obligations of the LT's under this Section 8.d shall not apply to CI's staff expenses or other ordinary operating costs.
- e. Successor CI.** CI may resign at any time by giving written notice thereof to the LTs, and CI may be removed at any time with or without cause by written notice received by CI from any four LTs. Upon any such resignation or removal, any four LTs shall have the right to appoint, on behalf of the LTs, a successor CI. CI shall transfer remaining Aggregation account funds to the successor CI and shall use its best efforts with granting organizations in transferring its responsibilities to the successor CI.
9. **Miscellaneous.** This MOA shall be construed and enforced in accordance with the laws of the Commonwealth of Massachusetts. This MOA embodies the entire agreement and understanding among the parties and supersedes all prior agreements and understandings relating to the subject matter hereof. This MOA shall be binding upon and inure to the benefit of the parties and their successors and assigns. All of the Exhibits to this MOA are made a part of this MOA as though set forth in full herein. The headings in this MOA are for convenience of reference only, and shall not limit or otherwise affect the meaning hereof. This MOA may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. This agreement may be amended and provisions hereof may be waived only by a written instrument executed by CI and six LT's (including CI in its capacity of LT).

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IN WITNESS WHEREOF, each party has executed this MOA on the respective date indicated below.

New England Forestry Foundation,
CI and LT

Mount Grace Land Conservation Trust, LT

By:
Its:
Date: _____, 2010

By:
Its:
Date: _____, 2010

East Quabbin Land Trust, LT

The Kestrel Trust, LT

By:
Its:
Date: _____, 2010

By:
Its:
Date: _____, 2010

Monterey Preservation Land Trust, LT

Franklin Land Trust, LT

By:
Its:
Date: _____, 2010

By:
Its:
Date: _____, 2010

Berkshire Natural Resources Council, LT

By:
Its:
Date: _____, 2010

EXHIBIT A

WESTERN MASS. AGGREGATION INITIATIVE PARTICIPATING LAND TRUST CONTACT INFORMATION

New England Forestry Foundation, Inc.

P.O. Box 1346, 32 Foster Street, Littleton, MA 01460
(978) 952-6856 F: (978) 952-6356; www.newenglandforestry.org
Lynn W. Lyford, Executive Director
llyford@newenglandforestry.org, (978) 952-6856 xt.104

Penny Flynn, Development Manager
pflynn@newenglandforestry.org, (978) 952-6856 xt.101

Whitney Beals, Director of Land Protection
wbeals@newenglandforestry.org, (978) 952-6856 xt. 109

Mount Grace Land Conservation Trust

1461 Old Keene Road, Athol, MA 01331
(978) 248-2043 F: (978) 248-2053; www.mountgrace.org
Leigh Youngblood, Executive Director
youngblood@mountgrace.org, (978)248-2055 xt. 20

David Graham Wolf, Conservation Director
wolf@mountgrace.org, (978) 248-2055 xt. 11

Pam Kimball, Development Director
kimball@mountgrace.org, (978) 248-2055 xt.13

East Quabbin Land Trust

P.O. Box 5, 120 Ridge Road, Hardwick, MA 01037
(413) 477-8229; www.eqlt.org
Cynthia Henshaw, Executive Director
chenshaw@eqlt.org

Kestrel Trust

P.O. Box 1016, Amherst, MA 01004
(413) 695-3468; kestreltrust.org
Kristin DeBoer, Executive Director
kristen@kestreltrust.org

Franklin Land Trust

P.O. Box 450, 36 State Street, Shelburne Falls, MA 01370
(413) 625-9151; F: (413) 625-9153; www.franklinlandtrust.org
Richard K. Hubbard, Executive Director
rkhubbard@verizon.net; (413) 625-9151, xt. 101

Brandon Vickery, Land Protection Specialist
bvickery@verizon.net; (413) 625-9151 xt.4

Monterey Preservation Land Trust

P.O. Box 504, Monterey, MA 01245
Jonathan Sylbert, President
jsylbert@mac.com

Berkshire Natural Resources Council

20 Bank Row, Pittsfield, MA 01201
(413) 499-0596; www.bnrc.net
Narain Schroeder, Director of Land Conservation
NSchroeder@BNRC.net

EXHIBIT B

This is the list of projects

EXHIBIT C

This is the project budget