

MEMORANDUM OF AGREEMENT

This Memorandum of Agreement (the “Agreement”) is dated as of September ____, 2022, by and between the Town of Wilton (the “Town”), a Connecticut municipal corporation with an address of 238 Danbury Road, Wilton, CT 06897 (the “Town”), and Save the Sound, Inc. (“Save the Sound”), a Connecticut non-stock corporation, with an address of 900 Chapel Street, Suite 2202, New Haven, CT 06510.

RECITALS

Whereas, the Town is the owner of the Strong Pond Dam (a/k/a Dana Dam) at Merwin Meadows Park, 52 Lovers Lane, Wilton, Connecticut (the “Dam”); and

Whereas, the Dam, a structure located on the Norwalk River, has been shown to block the migration of fish between Long Island Sound and fresh water; and

Whereas, the Dam contributes to an impairment of the Norwalk River as identified by the Connecticut Department of Energy and Environmental Protection (“DEEP”); and

Whereas, the Dam is a jurisdictional dam regulated by the Connecticut Department of Energy and Environmental Protection Office of Dam Safety (CT DEEP Dam Safety), with State ID #16105;

Whereas, under the jurisdiction of CT DEEP Dam Safety the Dam has a Hazard Classification of Class BB – Moderate Hazard, defined by state regulation: “A dam would be considered to have a moderate downstream hazard potential if were it to fail, it would cause damage to normally unoccupied storage structures, damage to low volume roadways, and/or moderate economic loss.”

Whereas, Class BB – Moderate Hazard dams require inspection by a qualified engineer every 7 years.

Whereas, CT DEEP Dam Safety granted the Town a stay on the inspection required in 2018, if the Town is actively pursuing removal of the Dam.

Whereas, removal of the Dam (the “Project”) has been identified as the preferred alternative to improve fish passage, water quality, and public safety, and is a priority of the Town, Save the Sound, DEEP, Trout Unlimited, the Norwalk River Watershed Association, and others; and

Whereas, Save the Sound and the Town have a shared interest in the river restoration and natural resource benefits provided by the Project; and

Whereas, in furtherance of the Project, Save the Sound has secured funding from public and private sources in the aggregate amount of \$2,500,000 (the “Total Grants Amount”);

Whereas, at Save the Sound’s request, Stantec Consulting Services Inc. (the “Engineer”) has been retained as the Engineer of Record;

Whereas, the Engineer recommended implementation of Phase I of the Project: returning the existing low-level outlet at the west end of the Dam to an operable condition would facilitate water handling necessary for the proposed removal of the Dam; and

Whereas, Phase I was completed in February 2022 and the low-level outlet is operable to facilitate water handling necessary for the proposed removal of the Dam;

Whereas, Save the Sound wishes to act as the project administrator for the completion of the Project with funding including the Total Grants Amount; and

Whereas, Save the Sound, with consultation from the Engineer, has determined that the Total Grants Amount is sufficient to cover the cost of completing the Project.

NOW, THEREFORE, Save the Sound and the Town agree as follows.

A. SAVE THE SOUND’S OBLIGATIONS. Save the Sound will:

1. Be responsible for engaging engineers, construction contractors and other consultants as needed to design and construct the Project;
2. Obtain all permits and approvals required for the Project including local, state and federal permits (as required);
3. Maintain, at Save the Sound’s expense, the insurance policies described in Schedule A (except that Save the Sound’s insurance program does not provide for a broad form contractual endorsement, per project aggregate and automobile liability; and Save the Sound will also provide professional liability coverage of \$1 million per claim, \$2 million aggregate in addition to the coverage provided under Section 4 of Schedule A) for the duration of the Project and deliver to each of the Directors a copy of a certificate of insurance prior to commencement of work on the Project;
4. Ensure that all permit requirements are met during construction of the Project;
5. Contract with the Engineer to provide design services and construction plans, to provide documents necessary for a construction contractor to complete the Project, and to provide construction observation (the “Engineering Contract”);
6. Ensure that the Engineering Contract meets requirements of Section C(1) of this Agreement;

7. Deliver a copy of the Engineering Contract, together with proof of insurance, to each of the Town's Director of Environmental Affairs and Assistant Director of Public Works/Town Engineer (collectively, the "Directors");
8. Review all engineering design and construction plans associated with the Project;
9. Submit to the Town for review and approval by the Directors plans and specifications developed by Save the Sound and the Engineer related to the Project and for the operations and maintenance procedures, provided that, upon approval of the Directors, the plans and specifications shall be referred to as the "Approved Plans";
10. Develop construction documents and select a construction contractor for the completion of the Project (the "Selected Contractor");
11. Notify the Directors of the Selected Contractor and afford the Directors at least one (1) week to object to the Selected Contractor prior to entering into a contract with the Selected Contractor, provided that Save the Sound shall not enter into a contract with any Selected Contractor to which either of the Directors reasonably objects;
12. Upon the expiration of the one (1) week period described in Section A(11) or, if sooner, receipt of notice signed by the Directors indicating that they have no objection to the Selected Contractor, enter into a written contract with the Selected Contractor (thereafter the "Contractor") for the completion of the Project in accordance with the Approved Plans (the "Construction Contract");
13. Ensure that the Construction Contract meets the requirements of Section C(2) of this Agreement;
14. Deliver a copy of the Construction Contract, together with copies of proof of insurance and payment of performance bond(s) to each of the Directors prior to the commencement of construction on the Project;
15. Develop permanent site signage explaining Project activities, and submit to the Directors for review and approval prior to purchase and installation;
16. Coordinate the activities of the Engineer and the Contractor and interface with local, State, and Federal agencies involved with the Project;
17. Collaborate with the Engineer in overseeing the construction work to the end that construction work is completed on schedule, on budget and that the cost of the Project does not exceed the Total Grants Amount;
18. In the event that Save the Sound determines that the cost of completing the Project will exceed the Total Grants Amount, cause the Contractor to suspend work on the Project until such time as Save the Sound has

raised the funds necessary to complete the Project from such private and public sources as Save the Sound deems appropriate;

19. Timely pay the Engineer and the Contractor for their services performed and work completed in accordance with the Engineering Contract and the Construction Contract, respectively;
20. Upon request by the Town, assign to the Town any or all of Save the Sound's rights under the Engineering Contract and/or the Construction Contract;
21. Upon completion of the Project, notify the Directors and request that the Directors inspect and review the completed Project work and deliver to Save the Sound either a written acceptance or exceptions within thirty (30) days;
22. Arrange for the Contractor to correct any deviations from the Approved Plans identified as exceptions by the Directors;
23. Hold back the retainage and performance bond required under the Construction Contract until receipt from the Directors of written acceptance of Project work;
24. Be responsible for compliance with any and all conditions of the Grants and all state and federal laws and regulations applicable to procurement and payment of wages to construction contractors (collectively, the "Applicable Conditions and Laws");
25. Indemnify, defend and hold harmless the Town and its elected and appointed officials, employees and agents (collectively, with the Town, the "Town Indemnitees") from any and all investigations, claims, causes of action, damages, costs, expenses, judgments, fines, penalties and awards, including, without limitation, reasonable attorneys' fees, arising out of: (a) the Project work, to the extent caused by negligent act or omission of an officer, employee, representative or volunteer of Save the Sound, including, without limitation, death, personal injuries and property damage; and (b) the Engineering Contract and the Construction Contract, including, without limitation, a cost overrun; and
26. Indemnify, defend and hold harmless the Town Indemnitees from any and all investigations, claims, causes of action, damages, costs, expenses, judgments, fines, penalties and awards, including, without limitation, reasonable attorneys' fees to the extent caused by failure of Save the Sound to comply with the Applicable Conditions and Laws.

B. THE TOWN'S OBLIGATIONS. The Town will:

1. Provide Save the Sound, the Engineer and the Contractor reasonable access to the property surrounding and adjacent to the Project site for the duration of the Project for all related planning and construction activities, staging, and storage of materials as defined in the Approved Plans and approved by state and federal regulatory agencies;

2. Cause the Directors to review all design, construction plans and regulatory permit materials for the Project submitted to the Directors by Save the Sound and respond to Save the Sound with any comments within thirty (30) days of receipt;
3. Cause the Directors to review the completed Project work and deliver to Save the Sound, within thirty (30) days, either a written acceptance of the Project work or exceptions to the Project work; and
4. Indemnify, defend and hold harmless Save the Sound and its officers, directors, employees and agents from any and all investigations, claims, causes of action, damages, costs, expenses, judgments, fines, penalties and awards, including, without limitation, reasonable attorneys' fees arising out of any actual or alleged negligent act or omission of a Town employee in connection with the Project or failure of the Town to comply with the Town's obligations under this Agreement.

C. CONTRACT REQUIREMENTS.

1. The Engineering Contract shall:
 - a. Provide that the Engineer's scope of services will include reviewing the progress of construction work and the Contractor's invoices and certifying to Save the Sound and the Town that all work is completed in accordance with the Grants and the Approved Plans;
 - b. Provide that the Town is a third-party beneficiary of the Engineering Contract to the extent necessary to enforce Save the Sound's rights and the Engineer's obligations under the Engineering Contract;
 - c. Provide that Save the Sound shall have the right to assign to the Town all of Save the Sound's rights under the Engineering Contract upon written notice to the Engineer;
 - d. Require the Engineer to hold a valid Connecticut license or licenses to perform the engineering services associated with the Project;
 - e. Require the Engineer to meet the insurance requirements described in Schedule B;
 - f. Require the Engineer to indemnify, defend and hold harmless Save the Sound and the Town Indemnitees from liability arising out of any negligent acts and omissions of the Engineer subject to a monetary limitation of not less than \$5,000,000;
 - g. Require the Engineer to advise Save the Sound and the Directors as to all change order requests submitted by the Contractor and to forward to each of the Directors a copy of each of the Engineer's progress reports and certifications.
2. The Construction Contract shall:

- a. Provide that the Town is a third party beneficiary of the Construction Contract to the extent necessary to enforce Save the Sound's rights and the Contractor's obligations under the Construction Contract;
- b. Provide that Save the Sound shall have the right to assign to the Town all of Save the Sound's rights under the Construction Contract upon written notice to the Contractor;
- c. Require the Contractor to hold a valid Connecticut license or licenses, as required by applicable Connecticut statutes and regulations, for the work on the Project;
- d. Require the Contractor to meet the insurance requirements described in Schedule A;
- e. Provide for retainage of five percent (5%) of all progress payments;
- f. Require the Contractor to post a payment and performance bond on the current AIA form or forms or other forms reasonably acceptable to the Town, issued by a surety company licensed as a surety in the State of Connecticut, provided that the amount indicated in the bond shall be 100% of the contract sum indicated in the Construction Contract and Save the Sound and the Town shall each be listed as obligees;
- g. Require the Contractor to fully warrant and guarantee to Save the Sound and the Town that all the Project work is free of material defects and is constructed in accordance with the Approved Plans for a period of one year following the date of acceptance of the completed project by the Town; and
- h. Require Contractor to indemnify, defend and hold harmless the Town Indemnitees from and against any and all claims, damages, losses, lawsuits, judgments, liens, actions and expenses, including but not limited to reasonable attorney's fees, to the extent caused by the negligent acts or omissions of the Contractor relative to any and all work performed by the Contractor.

D. MISCELLANEOUS PROVISIONS.

1. All notices of any nature referred to in this Agreement shall be in writing and sent by registered or certified mail, postage prepaid, or recognized overnight delivery service (such as FEDEX) to the respective addresses set forth below or to such other addresses as the respective parties hereto may designate in writing:

If to Wilton:	Town of Wilton Attn: Director of Environmental Affairs 238 Danbury Road Wilton, CT 06897
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If to Save the Sound: Save the Sound, Inc.
Attn: Executive Director
900 Chapel Street, Suite 2202
New Haven, CT 06510

2. This Agreement, together with all exhibits and/or schedules hereto, integrates all of the terms and conditions mentioned herein or incidental hereto, and supersedes all negotiations or previous agreements between the parties with respect to all or any part of the subject matter hereof. Save the Sound acknowledges that, in connection with Save the Sound's decision to sign this Agreement, Save the Sound has not relied on any representations, promises or agreements of any kind except for those set forth in this Agreement.

3. The provisions of this Agreement are severable, and, if any one or more provisions may be determined to be judicially unenforceable, in whole or in part, the remaining provisions, and any partially unenforceable provision, to the extent enforceable, in any jurisdiction, shall nevertheless be binding and enforceable if and to the extent that the economic and legal substance of the transactions contemplated is not materially adversely affected in any matter as to any party and shall be construed and enforced so as to effectuate the intent of the entire Agreement, including the wholly or partially unenforceable provision, to the maximum extent legally permissible.

4. Any amendments to this Agreement shall be effective only when duly executed by duly authorized representatives of the Town and Save the Sound.

5. This Agreement shall be governed by and construed in accordance with the laws of the State of Connecticut. The parties consent to the jurisdiction and exclusive venue of the State and/or Federal courts in Connecticut in any litigation concerning this Agreement or its enforcement.

6. Neither party may assign or transfer its rights or obligations under this Agreement without first obtaining the prior written consent of the other party, which consent may be granted or withheld in the sole and absolute discretion of the applicable party.

7. If any provision of this Agreement is held invalid, the balance of the provisions of this Agreement shall not be affected thereby if the balance of the provisions of this Agreement would then continue to conform to the requirements of applicable laws.

8. The Recitals are considered an integral part of this Agreement.

9. This Agreement shall be binding upon the successors and permitted assigns of the parties.

10. The parties agree that they waive a trial by jury as to any and all claims, causes of action or disputes arising from this Agreement.

11. Any waiver of the terms and conditions of this Agreement by either of the parties shall not be construed to be a waiver of any other term or condition of this Agreement.

12. This Agreement may be executed in one or more counterparts, each of which will be deemed to be an original of this Agreement and all of which, when taken together, will be deemed to constitute one and the same agreement. The exchange of copies of this Agreement and of signature pages by Portable Document Format (i.e., PDF), or by other electronic means shall constitute effective execution and delivery of this Agreement as to the parties and may be used in lieu of the original Agreement for all purposes.

{This space intentionally left blank. The next page is the signature page.}

WHEREFORE, the parties have entered into this Agreement as of the date and year first written on Page 1.

TOWN OF WILTON

By: Lynne Vanderslice
Its: First Selectwoman

SAVE THE SOUND, INC.

By: Curt Johnson
Its: President

{Signature page to Memorandum of Agreement}

SCHEDULE A
INSURANCE REQUIREMENTS (SAVE THE SOUND AND CONTRACTOR)

Save the Sound and Contractor shall each, at its own expense and cost, obtain and keep in force during the entire duration of the Project the following insurance coverages covering Save the Sound / Contractor (as applicable) and all of its agents, employees, consultants and other providers of all or part of the services described in the Agreement / Construction Contract (as applicable) and shall name the Town as additional insured on a primary and non-contributory basis to its Commercial General Liability and Automobile insurance policies. All insurance shall be purchased from a company or companies with an A.M./Best rating of A-(VII) or better. Minimum limits and requirements are as follows.

1. **Workers' Compensation**: Workers' compensation insurance required by law with employer's liability limits for at least the amounts of liability for bodily injury by accident of \$500,000 each accident and bodily injury by disease of \$500,000 including a waiver of subrogation.

2. Commercial General Liability

Commercial general liability insurance including products and completed operations and including XCU coverage if applicable. Limits shall be at least: bodily injury & property damage coverage with an occurrence limit of \$1,000,000; personal & advertising injury limit of \$1,000,000 per occurrence; General aggregate limit of \$2,000,000 (other than products and completed operations); Products and completed operations aggregate limit of \$2,000,000. Coverage will continue three years after the completion of the work.

- The policy shall name the Town as an additional insured and include ISO Form CG 2010 (04/13) and CG 2037 (04/13) or equivalent.
- The coverage will be provided on an occurrence basis and shall be primary and shall no contribute in any way to any insurance or self-insured retention carried by the Town.
- The policy shall contain a waiver of subrogation in favor of the Town.
- The coverage shall contain a broad form contractual liability endorsement or wording within the policy form to comply with the hold harmless and indemnity provision(s) of all agreements between the Town and the respondent.
- A per project aggregate limit of liability endorsement shall apply for any construction contract.
- Deductible and self-insured retentions shall be declared and are subject to the approval of the Town.

3. Commercial Automobile

Commercial automobile insurance for any owned, non-owned or hired autos, in the amount of \$1,000,000 each accident covering bodily injury and property damage on a combined single limit basis. The policy shall name the Town as an additional insured and provide a waiver of subrogation.

4. Umbrella or Excess Liability

Umbrella or excess liability policy in excess (without restriction or limitation) of those limits and coverages described in items (1) through (3) above. The policy shall contain limits of liability in the amount of \$1,000,000 each occurrence and \$2,000,000 in the aggregate. The Town reserves the right to require higher limits of umbrella or excess liability coverage depending on the scope of the agreement.

Each Policy of Insurance shall include a waiver of subrogation in favor of the Town and the Engineer and shall provide no less than thirty (30) days' notice to the Town in the event of a cancellation or change in conditions or amounts of coverage. The Commercial General Liability, Automobile and Excess/Umbrella Liability shall name the Town as an additional insured.

The above insurance requirements shall also apply to all subcontractors and the Save the Sound / Contractor (as applicable) shall not allow any subcontractor to commence work until the subcontractor's insurance has been so obtained and approved.

SCHEDULE B INSURANCE REQUIREMENTS (ENGINEER)

The Engineer shall, at its own expense and cost, obtain and keep in force during the entire duration of the Engineering the following insurance coverages covering the Engineer and all of its agents, employees, consultants and other providers of all or part of the services described in the Engineering Contract and shall name the Town as additional insured on a primary and non-contributory basis to the Engineer's Commercial General Liability and Automobile insurance policies. All insurance shall be purchased from a company or companies with an A.M./Best rating of A-(VII) or better. Minimum limits and requirements are as follows.

1. Workers' Compensation: Workers' compensation insurance required by law with employer's liability limits for at least the amounts of liability for bodily injury by accident of \$500,000 each accident and bodily injury by disease of \$500,000 including a waiver of subrogation.

2. Commercial General Liability

Commercial general liability insurance including products and completed operations and including XCU coverage if applicable. Limits shall be at least: bodily injury & property damage coverage with an occurrence limit of \$1,000,000; personal & advertising injury limit of \$1,000,000 per occurrence; General aggregate limit of \$2,000,000 (other than products and completed operations); Products and completed operations aggregate limit of \$2,000,000. Coverage will continue three years after the completion of the work.

- The policy shall name the Town as an additional insured and include ISO Form CG 2010 (04/13) and CG 2037 (04/13) or equivalent.
- The coverage will be provided on an occurrence basis and shall be primary and shall not contribute in any way to any insurance or self-insured retention carried by the Town.
- The policy shall contain a waiver of subrogation in favor of the Town.
- The coverage shall contain a broad form contractual liability endorsement or wording within the policy form to comply with the hold harmless and indemnity provision(s) of all agreements between the Town and the respondent.
- A per project aggregate limit of liability endorsement shall apply for any construction contract.
- Deductible and self-insured retentions shall be declared and are subject to the approval of the Town.

3. Commercial Automobile

Commercial automobile insurance for any owned, non-owned or hired autos, in the amount of \$1,000,000 each accident covering bodily injury

and property damage on a combined single limit basis. The policy shall name the Town as an additional insured and provide a waiver of subrogation.

4. Umbrella or Excess Liability

Umbrella or excess liability policy in excess (without restriction or limitation) of those limits and coverages described in items (1) through (3) above. The policy shall contain limits of liability in the amount of \$5,000,000 each occurrence and \$5,000,000 in the aggregate. The Town reserves the right to require higher limits of umbrella or excess liability coverage depending on the scope of the agreement.

5. Errors and Omissions / Professional Liability

Errors & omissions insurance for liability resulting from the negligent performance of professional duties or operations. The policy shall contain limits of liability in the amount of \$5,000,000 each claim and \$5,000,000 in the aggregate per project. The policy shall name the Town as an additional insured. The Engineer must agree to maintain continuous professional liability coverage for the entire duration of this Project and for seven (7) years beyond substantial completion of the Project. If the Engineer does not maintain continuous coverage, the Engineer shall provide for an Extended Reporting Period in which to report claims for seven (7) years following the conclusion of the Project.

Each Policy of Insurance shall include a waiver of subrogation in favor of the Town and shall provide no less than thirty (30) days' notice to the Town in the event of a cancellation or change in conditions or amounts of coverage. The Commercial General Liability, Automobile and Excess/Umbrella Liability shall name the Town as an additional insured.

The above insurance requirements shall also apply to all subcontractors and the Engineer shall not allow any subcontractor to commence work until the subcontractor's insurance has been so obtained and approved.