

**AMENDED AND RESTATED SUBAGREEMENT #2  
AGREEMENT BETWEEN DES MOINES AREA MPO, POLK COUNTY, IOWA AND  
CENTRAL IOWA WATER TRAILS, LLC REGARDING CONSTRUCTION AND  
FUNDING OF THE BUILD GRANT PROJECT**

This AMENDED AND RESTATED AGREEMENT (hereinafter “Agreement” and, sometimes referred to as Sub-Agreement #2) is made as of the \_\_\_\_\_ of \_\_\_\_\_, 2022 (the “Effective Date”), by and between Central Iowa Water Trails, LLC, an Iowa limited liability company (hereinafter “CIWT”), Polk County, Iowa, a governmental subdivision of the State of Iowa (hereinafter “Polk County”), and the Des Moines Area Metropolitan Planning Organization, a unit of local government pursuant to Iowa Code Chapter 28E (hereinafter “MPO”).

WHEREAS, CIWT, Polk County, and the MPO desire to develop, construct, and operate a world class system of water trails and dams with the goals of improving the quality of life for Iowans, attracting visitors and revitalizing local river fronts, all located in central Iowa; and

WHEREAS, the MPO was awarded a Better Utilizing Investments to Leverage Development Transportation Discretionary Grants Program (as further set forth in a Grant Agreement Under the Fiscal Year 2019 Build Transportation Grants Program, dated November 18, 2021, as amended and replaced with a First Amended and Restated Grant Agreement Under the Fiscal Year 2019 Build Transportation Grants Program, dated June 13, 2022, hereinafter, as so and hereafter amended or amended and restated, “BUILD Grant”) grant in an amount not to exceed \$25,000,000 for the first phase of a multi-phased project that will mitigate a dangerous low-head dam at Scott Avenue to help facilitate a recreational water trail, and enhance access points at Prospect Park, Birdland Marina and Harriet Street along the Des Moines River within the City of Des Moines (hereinafter, collectively, the “Project”); and

WHEREAS, the first phase of the Project is further described in Section 3.1 of the BUILD Grant and generally consists of three (3) components—Component 1: Scott Avenue Dam (in-water improvements), Component 2: Scott Avenue Dam (upland improvements), and Component 3: Harriet Street Access (“Phase 1”); and

WHEREAS, the BUILD Grant funds were granted to MPO for use in further development of the Project; and

WHEREAS, the current construction cost of Phase 1 is estimated to be \$48,000,000 and CIWT has agreed to secure all necessary funds to construct the Project in excess of the \$25,000,000 BUILD grant funds and the \$550,000 Surface Transportation Block Grant (STBG) funds; awarded to MPO in furtherance of the Project under (collectively, the “Allocated Funds”); and

WHEREAS, the MPO will serve as the contracting authority and remain in responsible charge for the construction contract for the Project; and

WHEREAS, Polk County will oversee construction administration and observation of the construction contract provisions on behalf of the MPO for the Project; and

WHEREAS, CIWT will oversee the operation and maintenance of the constructed facilities for the required time period following the construction of the Project (see Subagreement #3, referring to that certain Agreement Regarding USDOT Build Grant to the Des Moines Area Metropolitan Planning Organization Between the City of Des Moines, the Des Moines Area Metropolitan Planning Organization, Central Iowa Water Trails, LLC, and Polk County Conservation, dated September 13, 2021, as amended by a First Amendment, dated \_\_\_\_\_, 2022, and as hereafter amended or amended and restated); and,

WHEREAS, CIWT will deposit those funds in excess of the Allocated Funds necessary to complete the awarded construction contract (*all necessary funds, after the Allocated Funds, to complete construction of the Project – as provided in Subagreement #4, referring to that certain Subagreement #4, Sub-Agreement Between Des Moines Area MPO and Central Iowa Water Trails, LLC Regarding Funding of the Water Trails Project, dated September 16, 2021, as amended and restated in an Amended and Restated Subagreement #4, Sub-Agreement Between Des Moines Area MPO and Central Iowa Water Trails, LLC Regarding Funding of the Water Trails Project, of even date herewith, and as hereafter amended or amended and restated*) into an account held by the MPO to be expended exclusively in accordance with and in fulfillment of this Agreement, the BUILD Grant, and the STBG; and

WHEREAS, it is the desire of the MPO to plan, develop, and construct, the Project, in conjunction with Polk County, the City of Des Moines, and CIWT, and to receive, expend, and pay the BUILD Grant funds through the MPO in accordance with the BUILD Grant Agreement, and the STBG funds and also in accordance with the sub-agreement between the MPO and the IDOT (Subagreement #1); and

WHEREAS, the City of Des Moines, the Iowa Department of Transportation (hereinafter “IDOT”), and the FHWA are expressly within the contemplation of the parties to this Agreement and mutually intended to be third-party beneficiaries of this Agreement; and

NOW THEREFORE, in consideration of the forgoing and mutual covenants contained herein, the receipt and sufficiency of which are hereby mutually acknowledged, the parties agree as follows:

1. Agreement. Agreement means this Agreement, Exhibits A-C to the Agreement
2. Services. The MPO, CIWT, and Polk County agree to furnish on the sites identified in Exhibit A (“Sites”) all the services for which it is responsible, based on the amended BUILD Grant Agreement finalized on June 13, 2022, during construction of the Project and as described in Exhibit B (“Services”). Each of the MPO, CIWT and Polk County agrees to furnish the Services for which it is responsible under this Agreement in a timely and expeditious manner consistent with the standard of care in the applicable industry with respect to similar services in this area (i.e. the Project area) at the time of performance, and in any event exercising its commercially reasonable efforts, skill, and expertise in the

provision of the Services. Exhibit B is delineation of services to be provided by the MPO, CIWT, and Polk County that will be necessary for the Project to be timely constructed. Any changes to the scope or timing of the Services must be approved by the MPO, with consultation from the FHWA, IDOT, CIWT, and Polk County. The deadline for construction completion of Phase 1 of the Project will be December 30, 2025, unless that deadline is extended with the written concurrence of the MPO, IDOT, and FHWA or by operation of a force majeure or similar clause under the BUILD Grant. Construction of the remainder of the Project must commence on or before September 30, 2027, as further specified in the BUILD Grant, and shall otherwise be completed in the manner required by the BUILD Grant.

3. Reimbursements. The MPO shall make timely application (in no case after any deadline imposed for the Allocated Funds) for reimbursements of the Allocated Funds and disburse the same according to the payment process set forth in Exhibit C. All funds that the IDOT approves for reimbursement will be distributed to the Project Account held by the MPO for expenses related to completing construction of the Project and further disbursed in accordance with Subagreement #4.
  
4. Documents, Data, Records and Information. Polk County will make available to the MPO, CIWT, and to the City of Des Moines upon request all documents, data, records, and information pertinent to construction and operation of the Project, and acknowledges that the MPO, as a governmental body, is subject to Iowa Open Meetings and Public Records laws and regulations. Polk County will provide the MPO, and CIWT, and their respective consultants and representatives, as well as third-party beneficiaries to this Agreement, access during normal business hours to any records, contracts, projections, schedules, or other information relating to the Project, and keep the MPO apprised as to the day-to-day construction operations of the Project. The MPO must retain all documents, data, records, and information pertinent to construction and operation of the Project for a period of three (3) years after the entire Project is completed. Polk County will maintain and make available to the MPO all construction administration documentation generated during the Project. Upon completion of the entire Project, Polk County will transmit to the MPO a full and final set of construction documents.
  
5. Notices. All notices or other communications made pursuant hereto shall be in writing to the entities noted below at their appropriate email address. Either party and any third-party beneficiary may change its address for the purposes of this paragraph by giving five (5) days prior written notice of such change to the others.

**MPO:**

Todd Ashby  
c/o Executive Director  
420 Watson Powell Jr Way  
Des Moines, IA 50309  
tashby@dmampo.org

**CIWT:**

Maggie McClelland,  
Central Iowa Water Trails  
Project Manager  
P.O. Box 8071  
Des Moines, IA 50301  
maggie@greatoutdoorsfoundation.org

**POLK COUNTY:**

Robert Rice  
Director  
Polk County Public Works  
5885 NE 14th Street  
Des Moines, Iowa, 50313  
Robert.Rice@polkcountyiowa.gov

**Third-party Beneficiaries:**

**CITY OF DES MOINES:**

Scott Sanders  
City Manager  
400 Robert D. Ray Drive  
Des Moines, Iowa 50309-1891  
CityManager@dmgov.org

**IDOT:**

Debra Arp  
Systems Planning Bureau  
800 Lincoln Way  
Ames, Iowa 50010  
Debra.Arp@iowadot.us

**FHWA:**

Paul LaFleur  
FHWA – Iowa Division  
105 6<sup>th</sup> Street  
Ames, IA 50010  
paul.lafleur@dot.gov

6. Events of Default and Remedies.

- a. Any breach by CIWT of any material term or condition of this Agreement (including, without limitation, those set forth on the Exhibits attached hereto and being a part hereof), but only if such breach is incapable of cure or, if such breach

is capable of cure and continues more than 45-days after CIWT's receipt of written notice of such breach from either or both non-breaching party(ies), shall constitute a default by CIWT under this Agreement.

- b. The term of this Agreement shall commence on the date hereof and shall terminate on the date of completion of the Services (see Exhibit B) unless earlier terminated pursuant to this Section 6. Prior to incurring the first eligible costs of the Allocated Funds, the MPO may terminate this Agreement at any time and for any reason with ten (10) calendar days' prior written notice to Polk County, City of Des Moines, and CIWT.
- c. CIWT may terminate this Agreement upon giving prior written notice to the MPO only if the MPO: (a) materially breaches this Agreement (including, without limitation, those set forth on the Exhibits attached hereto and being a part hereof), and such breach is incapable of cure, or with respect to a material breach capable of cure, the MPO does not cure such breach within forty-five (45) days after receipt of written notice of such breach, or (b) (i) becomes insolvent or admits its inability to pay its debts generally as they become due; (ii) becomes subject, voluntarily or involuntarily, to any proceeding under any domestic or foreign bankruptcy or insolvency law, which is not fully stayed within twenty business days or is not dismissed or vacated within 60 days after filing; (iii) is dissolved or liquidated or takes any corporate action for such purpose; (iv) makes a general assignment for the benefit of creditors; or (v) has a receiver, trustee, custodian or similar agent appointed by order of any court of competent jurisdiction to take charge of or sell any material portion of its property or business. No such termination by CIWT will relieve it or any other party from its indemnification obligations as provided in paragraph 10 hereof, to the extent the event giving rise to indemnity thereunder arises on or before the effective date of the termination of this Agreement. If CIWT terminates this Agreement under this Section 6(c), the MPO shall reasonably cooperate with CIWT and Polk County to ensure the transition and completion of the Project.
- d. In the event of any breach by CIWT, the MPO will be entitled to exercise all rights and remedies available at law or in equity and, in the event of any litigation arising under this Agreement, the prevailing party will be entitled to recovery of costs and reasonable attorney fees.
- e. In the event of termination of this Agreement, CIWT shall sign and deliver to the MPO true and complete copies of CIWT's work product. As used herein, the "effective date of termination" shall be that date which is ten (10) calendar days after the non-terminating parties receipt of the notice of termination. The remedial and indemnification provisions for any breach shall survive the termination of this Agreement. Additionally, after the termination of this Agreement under Section 6, the MPO shall seek reimbursement from the Allocated Funds for Project costs incurred through the date of termination and, on receipt of any such Allocated Funds, shall pay CIWT such amounts; provided, that, in the case of termination on

account of CIWT's breach of this Agreement, the amount otherwise payable to CIWT shall be offset by the amount of the MPO's actual damages on account of such breach. CIWT has the right to terminate any line of credit or similar funding source as of the effective date of termination of this Agreement.

7. Venue and Jurisdiction. Any and all claims, disputes, or controversies related to this Agreement, or breach thereof; shall be litigated in the federal courts of the United States or the courts of the State of Iowa in each case located in the City of Des Moines, which shall be the sole and exclusive forum for such litigation.
  
8. Indemnification. Each party hereto shall, to the fullest extent permitted by applicable law, defend, indemnify, and hold harmless the other parties to this agreement their respective members, managers, officers, employees, agents, successors, and permitted assigns from and against all third party losses, damages, liabilities, deficiencies, actions, judgments, interest, awards, penalties, fines, costs or expenses of whatever kind, including reasonable attorneys' fees and the cost of enforcing any right to indemnification hereunder, and the cost of pursuing any insurance providers, to the extent arising out of or resulting from: (a) bodily injury, death of any person or damage to real or tangible, personal property to the extent resulting from the willful, fraudulent or negligent acts or omissions of the indemnifying party or its personnel during the term of this Agreement; and (b) the indemnifying party's breach of any of its representations, warranties or obligations set forth in this Agreement, INCLUDING by way of example and not as a limitation, any breach that would cause the MPO to breach the MPO's obligations to the FHWA with respect to BUILD Grant funds, but EXCEPT, in each case, those third party losses incurred by the MPO resulting from willful misconduct or negligence on its or their part. The interpretation of this Agreement shall be governed by the terms of the BUILD Grant Agreement and the MPO-IDOT sub-agreement (Subagreement #1) and direct conflicts between those terms and the terms of this Agreement shall be resolved in favor of the terms of the BUILD Grant Agreement and MPO-IDOT sub-agreement. As to the priority between the BUILD Grant Agreement and MPO-IDOT sub-agreement, the BUILD Grant Agreement controls. Notwithstanding anything in this Agreement to the contrary, it shall not be deemed a direct conflict between the Build Grant Agreement and/or the MPO-IDOT sub-agreement, in the first part, and this Agreement, in the second part, if this Agreement has another party hereto, perform an obligation of the MPO under the Build Grant Agreement and/or the MPO-IDOT sub-agreement with respect to the Project.
  
9. Insurance.
  - a. CIWT will obtain and maintain throughout the term of this Agreement public liability insurance in such company or companies, and in such coverage amounts as may be agreeable to the MPO and such policy(ies) shall name the MPO as an additional insured with the right to notice prior to any coverage change or cancellation. Upon request of any MPO successor or assign, such successor or assign will likewise be

added as an additional named insured with the right to notice prior to any coverage change or cancellation.

- b. If, for any period of time, CIWT is in breach of the foregoing insurance requirements, the MPO is authorized, but not required, to effectuate such insurance immediately and without prior notice to CIWT and the cost thereof will be recoverable from CIWT.

10. General Conditions.

- a. Each of the MPO, CIWT, and Polk County shall perform the Services for which it is responsible, as designated on Exhibit B, exercising its commercially reasonable efforts, skill, and expertise in the provision of such Services, and in a professional and competent manner in accordance with the standard of care applicable in the applicable industry with respect to similar services, in this area at this time. The parties hereto anticipate that decisions shall be made in a consensual manner; provided, however, that in the event of any disagreement between the parties, the MPO will make the final decision as the responsible charge.
- b. Each of the Exhibits referred to herein and attached hereto is an integral part of this Agreement and is incorporated herein by reference.
- c. This Agreement shall be construed and interpreted under and shall be governed and enforced according to the domestic laws of the State of Iowa (without reference to the doctrine of conflicts of law).
- d. This Agreement constitutes an agreement for the performance of Services by the MPO, CIWT, and Polk County. Nothing contained in this Agreement shall be deemed to create a relationship of employer-employee, master-servant, partnership, joint venture or any other relationship between the MPO, CIWT, and Polk County. No party hereto shall have authority to bind any other party hereto unless specifically approved by such other party in writing. Work performed by employees of a party to this Agreement unless otherwise stated in this Agreement, shall be at performing party's expense. In such case, such performing party will be responsible for worker compensation insurance, unemployment taxes, and other expenses associated with the Project including without limitation the cost of necessary permits and licenses.
- e. This Agreement including Exhibits A-C contains the entire agreement between the parties with respect to the subject matter hereof and supersedes all other agreements or understandings between the parties with respect thereto.
- f. This Agreement may not be amended or supplemented, nor may any obligations hereunder be waived, except by a written instrument signed by the parties hereto after consultation with the FHWA and the IDOT. As of the Effective Date, this Agreement supersedes and replaces that certain Subagreement #2 Agreement Between Des Moines

Area MPO, Polk County, Iowa, and Central Iowa Water Trails, LLC Regarding Construction and Funding of the Build Grant Project, dated September 14, 2021.

- g. This Agreement and the covenants contained herein shall be, for the Term of this Agreement, binding upon and shall inure to the benefit of the parties hereto and their respective permitted assigns and successors-in-interest, as well as to each of the named third-party beneficiaries.
- h. No failure or delay by a party in the exercise of any right given to such party hereunder shall constitute a waiver thereof. No waiver of any breach of any agreement or provision contained herein shall be deemed a waiver of any preceding or succeeding breach thereof or of any other agreement or provision contained herein.
- i. Whenever the context hereof shall so require, the singular shall include the plural, the male gender shall include the female and the neuter, and vice versa.
- j. The invalidity, illegality or unenforceability of any provision of this Agreement shall not affect the validity or enforceability of any other provision hereof. In any such event, a court of competent jurisdiction is authorized to reform such provision(s) in a way that will most nearly achieve the original intent of the parties.
- k. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original but all of which shall together constitute one instrument. Facsimile or pdf signatures shall be recognized as originals.
- l. Time is of the essence of this Agreement. All references to a party shall include its successors and assigns; provided, that, no party hereto shall assign this Agreement without at least 10 business days' advance written notice to the other parties hereto. For sake of clarity, CIWT's assignment of this Agreement to Iowa Confluence Water Trails ("ICON") is permitted and shall be effective on the later of 10 business days' after CIWT's delivery of written notice to the other parties hereto or the assignment date provided in any such notice. If and only to the extent likewise recognized by the FHWA under the BUILD Grant, in no event shall CIWT be liable or responsible or be deemed to have breached this Agreement for any failure or delay in performing any term of this Agreement (except for any payment obligation) when and to the extent such failure or delay is caused by any circumstances beyond the CIWT's reasonable control (a "**Force Majeure Event**"), including, without limitation, acts of God, flood, fire, earthquake, explosion, war, terrorism, invasion, riot or civil unrest, embargo, blockade, strikes or labor stoppages or other industrial disturbances, passage of law, pandemic, government shutdown, or nonpayment of funds by the FHWA or another party providing any portion of the Allocated Funds..
- m. Each of the respective parties represents that such action has been taken as is necessary to be legally bound by the undertakings in this Agreement. Each of the respective parties affirmatively represents that fulfilling their obligations under this Agreement



will not constitute a breach of any other contract or agreement to which that party is also a party.

- n. The respective parties agree to execute such other and additional documents and do such other and additional things as may be necessary and prudent to effectuate the foregoing.

IN WITNESS WHEREOF, the parties have executed this Agreement effective as of the Effective Date.

**CENTRAL IOWA WATER TRAILS, LLC**

By:

\_\_\_\_\_

Name:

\_\_\_\_\_

Title:

\_\_\_\_\_

**DES MOINES AREA METROPOLITAN  
PLANNING ORGANIZATION**

By:

\_\_\_\_\_

Name:

\_\_\_\_\_

Title:

\_\_\_\_\_

**POLK COUNTY, IOWA**

By:

\_\_\_\_\_

Name:

\_\_\_\_\_

Title:

\_\_\_\_\_