

PROJECT AGREEMENT

for the

FARGO-MOORHEAD METROPOLITAN AREA FLOOD RISK MANAGEMENT PROJECT - DIVERSION
CHANNEL AND ASSOCIATED INFRASTRUCTURE

Dated August 19, 2021

between

METRO FLOOD DIVERSION AUTHORITY,
as Authority

and

RED RIVER VALLEY ALLIANCE, LLC
as Developer

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EXHIBIT

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This Project Agreement (this "**Agreement**") is entered into as of August 19, 2021:

BETWEEN:

- (1) The **METRO FLOOD DIVERSION AUTHORITY** (the "**Authority**"), a permanent North Dakota political subdivision and joint powers entity formed through the Joint Powers Agreement, dated June 1, 2016, by and among the City of Moorhead, the City of Fargo, Clay County, Cass County and the Cass County Joint Water Resource District; and
 - (2) **RED RIVER VALLEY ALLIANCE, LLC** (the "**Developer**"), a limited liability company formed under the laws of the state of Delaware,
- (each a "**Party**" and, together, the "**Parties**").

RECITALS

- (A) The construction of the locally preferred plan for the Fargo-Moorhead Metropolitan Area Flood Risk Management Project (the "**Comprehensive Project**") in the Fargo, North Dakota and Moorhead, Minnesota Metropolitan Area, as described in the Report of the Chief of Engineers, dated December 19, 2011 (the "**Chief of Engineers Report**"), was authorized by Section 7002(2) of the Water Resources Reform and Development Act of 2014, Public Law 113-121 ("**WRRDA**").
- (B) On July 11, 2016, the Department of the Army, represented by the United States Army Corps of Engineers ("**USACE**"), and the City of Fargo, the City of Moorhead and the Authority (collectively, the "**Non-Federal Sponsors**") (i) entered into a Project Partnership Agreement (the "**PPA**") for implementation of the Comprehensive Project, as amended by Amendment Number 1 to Project Partnership Agreement, dated March 19, 2019 and (ii) signed a public-private partnership memorandum of understanding (the "**P3 MOU**") which clarifies certain rights and responsibilities of USACE and the Non-Federal Sponsors in relation to the Project (as defined below).
- (C) The Comprehensive Project consists of: the Diversion Channel and Associated Infrastructure work package, as more fully described in this Agreement (the "**Project**" or "**DCAI**" or "**SWDCAI**"); other work, which is being undertaken by the Non-Federal Sponsors; the Southern Embankment and Associated Infrastructure work package; and Mitigation and Associated Infrastructure, which is being undertaken by USACE either directly or as work-in-kind by the Authority, in accordance with the PPA.
- (D) Pursuant to the authority provided in the JPA, the Authority wishes to use a public-private partnership delivery process for the design, construction, financing, operation and maintenance of the Project.
- (E) On July 14, 2016, the Authority approved and publicly issued a Request for Qualifications (collectively with all subsequently issued addenda, the "**RFQ**") regarding a proposed future solicitation for the Project.
- (F) On December 16, 2016, the Authority issued to the Proposers a draft Request for Proposals (including a form of this Agreement) (collectively with all subsequently issued addenda, the "**RFP**").
- (G) The Authority received technical proposals on March 24, 2021, and corresponding financial proposals on April 26, 2021 in response to the RFP, including from Red River Valley Alliance (the "**Successful Proposer**") on behalf of the Developer. On May 17, 2021, the Authority received certain revised financial proposal submittals amending or superseding the original financial proposals, including from the Successful Proposer on behalf of the Developer.
- (H) On June 18, 2021, pursuant to the evaluation process outlined in the RFP, the Authority selected the Successful Proposer on behalf of the Developer as the "Successful Proposer" under the RFP (the "**Selection Date**"). The Authority's decision was based on its overall evaluation of the proposals received from the Proposers and the Authority's conclusion that the Successful Proposer's proposal sufficiently satisfied all criteria required by the RFP and offered the best value proposal.

- (I) On June 30, 2021, the Authority notified the Successful Proposer that it was exercising certain pre-agreed options and accordingly those have been incorporated into this Agreement.
- (J) On August 9, 2021, the Authority Members authorized the Authority, among other things, to advance the implementation and delivery of the Project as a public-private partnership project and to enter into this Agreement.
- (K) This Agreement is entered into under NDCC Chapter 48-02.1, and the Authority has determined that the requirements of NDCC Sections 40-22-37 and 48.01.2-13 will not apply to this Agreement.

THE PARTIES AGREE AS FOLLOWS:

PART A - PRELIMINARY

1. DEFINITIONS, INTERPRETATION AND PRECEDENCE

1.1 Definitions

Unless the context otherwise requires, capitalized terms and acronyms used in this Agreement have the meanings given in Exhibit 1 (Definitions) and Attachment 1-4 (*Acronyms and Abbreviations*) of the Technical Requirements.

1.2 Interpretation

(a) In this Agreement:

- (i) headings are for convenience only and do not affect interpretation;
- (ii) unless otherwise stated, a reference to any agreement, instrument or other document is to such agreement, instrument or other document as amended or supplemented from time to time;
- (iii) a reference to this Agreement or any other agreement includes all exhibits, schedules, forms, appendices, addenda, attachments or other documents attached to or otherwise expressly incorporated in this Agreement or any such other agreement (as applicable);
- (iv) subject to Section 1.2(a)(v), a reference to an Article, Section, subsection, clause, Exhibit, schedule, form or appendix is to the Article, Section, subsection, clause, Exhibit, schedule, form or appendix in or attached to this Agreement, unless expressly provided otherwise;
- (v) a reference in the main body of this Agreement, or in an Exhibit, to an Article, Section, subsection or clause is to the Article, Section, subsection or clause of the main body of this Agreement, or of that Exhibit (as applicable);
- (vi) a reference to a Person includes such Person's permitted successors and assigns;
- (vii) a reference to a singular word includes the plural and vice versa (as the context may require);
- (viii) the words "including", "includes" and "include" mean "including, without limitation", "includes, without limitation" and "include, without limitation", respectively;
- (ix) an obligation to do something "promptly" means an obligation to do so as soon as the circumstances permit, avoiding any delay;
- (x) in the computation of periods of time from a specified date to a later specified date, the word "from" means "from and including" and the words "to" and "until" mean "to and including"; and

- (xi) unless otherwise specified, all monetary amounts, references and obligations are expressed and payable in Dollars.
- (b) This Agreement is not to be interpreted or construed against the interests of a Party merely because that Party proposed this Agreement or some provision of it, or because that Party relies on a provision of this Agreement to protect itself.
- (c) The Parties acknowledge and agree that this Agreement has been prepared jointly by the Parties and has been the subject of arm's length and careful negotiation, that each Party has been given the opportunity to independently review this Agreement with legal counsel, and that each Party has the requisite experience and sophistication to understand, interpret and agree to the particular language of the provisions of this Agreement. Accordingly, in the event of an ambiguity in or Dispute regarding the interpretation of this Agreement, this Agreement will not be interpreted or construed against the Party preparing it simply as a consequence of their preparing it.
- (d) Portions of this Agreement are written in active voice or imperative mood. In sentences using the imperative mood, unless otherwise specifically stated, the subject "Developer" is implied, and it is understood that the Developer shall perform such work, comply with such requirements, furnish such material or take such action. The word "shall" is also implied and, when implied or stated, is to be considered mandatory and, unless otherwise specifically stated, pertains to requirements or actions of the Developer.

1.3 Order of Precedence

- (a) Except as otherwise expressly provided in this Section 1.3, if there is any conflict, ambiguity or inconsistency between the provisions of this Agreement (including all Exhibits), the order of precedence will be as follows, from highest to lowest:
 - (i) the provisions of the main body of this Agreement;
 - (ii) the provisions of the Exhibits to this Agreement, other than Exhibit 5 (Technical Requirements) and Exhibit 6 (Developer Proposal);
 - (iii) subject to Section 6(b) (Innovative Technical Concepts), the provisions of any ITC included in the Developer Proposal;
 - (iv) the provisions of the Technical Requirements;
 - (v) the provisions of the Developer Proposal,in each case, as amended or supplemented from time to time in accordance with this Agreement.
- (b) If there is any conflict, ambiguity or inconsistency between any of the provisions in this Agreement having the same order of precedence (including all Exhibits), the provision establishing a higher standard of safety, reliability, durability, performance or service will prevail.
- (c) If the Developer Proposal includes statements, provisions, concepts or designs that can reasonably be interpreted as offering to:
 - (i) provide higher (but not lower) quality items than otherwise required by the main body of this Agreement or the other Exhibits to this Agreement; or
 - (ii) perform services or meet standards in addition to or better than those otherwise required,the Developer's obligations under this Agreement include compliance with all such statements, provisions, concepts and designs as set out in the Developer Proposal.

- (d) Additional or supplemental details or requirements in a provision of this Agreement with lower priority will be given effect, except to the extent that they irreconcilably conflict with any provision of this Agreement with higher priority.

1.4 Discretions

Except as otherwise expressly provided in this Agreement, all determinations, consents or approvals of the Authority or the Developer under this Agreement must not be unreasonably withheld, conditioned or delayed.

2. TERMS AND CONDITIONS PRECEDENT TO COMMERCIAL CLOSE AND FINANCIAL CLOSE

2.1 Term

This Agreement (and all of the rights and obligations under this Agreement) will come into effect on the Commercial Closing Date and continue until the earlier of:

- (a) the Expiry Date; or
 - (b) the Early Termination Date,
- (the "**Term**").

2.2 Conditions Precedent to the Commercial Closing Date

The occurrence of the Commercial Closing Date is subject to the satisfaction (or waiver by the Party benefiting) of each of the following conditions:

(a) Closing Security

The Developer has delivered the Closing Security to the Authority and it has become fully effective in accordance with its terms.

(b) Commercial Closing Documents

Each of the following documents (x) has been executed by the relevant parties, (y) is in form and substance reasonably approved by the Authority and (z) has been delivered to the Authority along with certification by the Developer that such document is true, complete and accurate:

- (i) the D&C Contract; and
- (ii) the D&C Contractor Direct Agreement,

(the documents listed in clauses (i) and (ii), collectively, the "**Commercial Closing Documents**"). It will be unreasonable for the Authority to withhold approval of a Commercial Closing Document if the relevant document is materially consistent with the relevant form of the same document or term sheet (as applicable) included with the Developer Proposal.

(c) Developer Corporate Documents

The Developer has delivered to the Authority such documents and certificates as the Authority may reasonably request evidencing:

- (i) the organization, existence and good standing of the Developer; and

- (ii) the authorization of the entry by the Developer into this Agreement and each of the other Commercial Closing Documents.

(d) Qualification to do Business

The Developer has provided to the Authority evidence reasonably acceptable to the Authority that the following entities are qualified to do business in North Dakota and Minnesota:

- (i) the Developer; and
- (ii) the D&C Contractor or, if the D&C Contractor is an unincorporated consortium, partnership or other form of joint venture, each D&C Contractor Member.

(e) Licensing Requirements

The Developer has provided to the Authority evidence reasonably acceptable to the Authority that the Developer or the D&C Contractor:

- (i) has an Engineer of Record who is licensed in North Dakota, pursuant to NDCC Chapter 43-19.1; and
- (ii) is properly licensed, or has engaged one or more Contractors that is properly licensed, to carry out the design, surveying layout and construction of the Project in compliance with:
 - (A) NDCC Chapter 43-19.1 (Professional Engineers and Land Surveyors) governing the requirements for engineers and land surveyors; and
 - (B) NDCC Chapter 43-07 (Contractors) governing the requirements for contractors.

(f) Representations and Warranties of the Developer

The representations and warranties of the Developer in Section 3.1 (Developer Representations and Warranties) are true and correct in all material respects as of the date of this Agreement.

(g) Representations and Warranties of the Authority

The representations and warranties of the Authority in Section 3.2 (Authority Representations and Warranties) are true and correct in all material respects as of the date of this Agreement.

(h) Developer Opinions

The Developer has delivered to the Authority customary legal opinions addressed to the Authority, from external legal counsel, as to:

- (i) organization and existence of the Developer;
- (ii) due authorization and execution of the Commercial Closing Documents; and
- (iii) enforceability of, and no violation of law or the Developer's organizational documents with respect to, each of the Commercial Closing Documents,

which legal opinions must be dated as of the Commercial Closing Date and in form and substance reasonably acceptable to the Authority.

(i) **Authority Opinion**

The Authority has provided to the Developer a legal opinion dated as of the Commercial Closing Date in substantially the form attached as Exhibit 27 (Form of Authority Legal Opinion).

(j) **Certification Regarding Use of Contract Funds for Lobbying**

The Developer has delivered to the Authority a signed certification in the form attached as Exhibit 8 (Certification Regarding Use of Contract Funds for Lobbying) from each of the following:

- (i) the Developer;
- (ii) each Key Contractor;
- (iii) each D&C Contractor Member; and
- (iv) each Equity Member.

(k) **Certification Regarding Debarment and Suspension**

The Developer has delivered to the Authority a signed certificate certifying that it will not knowingly enter into a contract with anyone who is ineligible under the 40 CFR Part 32 to participate in the Project.

2.3 Conditions Precedent to the Financial Closing Date

The occurrence of the Financial Closing Date is subject to satisfaction (or waiver by the Party benefiting) of each of the following conditions:

(a) **Financial Closing Documents**

Each of the following documents (x) has been executed by the relevant parties, (y) is in form and substance reasonably approved by the Authority and (z) has been delivered to the Authority along with certification by the Developer (other than with respect to the Lenders Direct Agreement) that such document is true, complete and accurate:

- (i) the Lenders Direct Agreement;
- (ii) the Finance Documents;
- (iii) the Equity Member Funding Agreements; and
- (iv) the Performance Security,

(the documents listed in clauses (i) – (iv), collectively, the "**Financial Closing Documents**"). It will be unreasonable for the Authority to withhold approval of a Financial Closing Document if the relevant document is materially consistent with the relevant form of the same document or term sheet (as applicable) included with the Developer Proposal.

(b) **Corporate Documents**

The Developer has delivered to the Authority such documents and certificates as the Authority may reasonably request evidencing:

- (i) the good standing of the Developer; and

- (ii) the authorization of the entry by the Developer into each of the Financial Closing Documents.

(c) **Base Case Financial Model**

The Developer has delivered to the Authority:

- (i) an unrestricted electronic version of the Base Case Financial Model, in the form attached as Exhibit 28 (Base Case Financial Model), that incorporates amendments (if any) agreed by the Parties between the Financial Proposal Date and the Financial Closing Date (including any revision to the Base MAPs pursuant to Exhibit 13 (Update to the Base MAPs));
- (ii) the books and documents setting forth all assumptions, calculations and methodology used in the preparation of the Base Case Financial Model; and
- (iii) any other documentation necessary or reasonably requested by the Authority to operate the Base Case Financial Model.

(d) **Developer Opinion**

The Developer has delivered to the Authority customary legal opinions addressed to the Authority, from external legal counsel, as to:

- (i) organization and existence of the Developer;
- (ii) due authorization and execution of the Financial Closing Documents; and
- (iii) enforceability of, and no violation of law or the Developer's organizational documents with respect to, each of the Financial Closing Documents,

which legal opinions must be dated as of the Financial Closing Date and in form and substance reasonably acceptable to the Authority.

(e) **Authority Opinion**

The Authority has provided to the Developer and the Lenders a legal opinion dated as of the Financial Closing Date in substantially the form attached as Exhibit 27 (Form of Authority Legal Opinion).

(f) **Model Auditor Opinion**

If requested by the Authority, the Developer has delivered to the Authority a supplemental audit report and model auditor opinion addressed to, and in form and substance reasonably acceptable to, the Authority, to address any changes to the logic and formulae of the Base Case Financial Model.

(g) **CCJWRD Opinion**

The Authority has delivered to the Developer a customary legal opinion addressed to the Developer and Lenders, from external legal counsel in substantially the form attached as Exhibit 29 (Form of CCJWRD Legal Opinion), as to:

- (i) status and existence of the CCJWRD as a North Dakota political subdivision;
- (ii) due authorization of the resolution authorizing the issuance of the Temporary P3 Improvement Warrants and the execution of the Master Indenture of Trust;

- (iii) due execution and delivery of the Temporary P3 Improvement Warrants and the Master Indenture of Trust;
- (iv) enforceability of the terms and conditions of the Master Indenture of Trust as they relate to the Temporary P3 Improvement Warrants and CCJWRD;
- (v) no violation of North Dakota or United States of America law; and
- (vi) no actions, suits, proceedings, investigations or litigation affecting the ability of the CCJWRD to execute and deliver, or to perform its obligations under, the Master Indenture of Trust or the Temporary P3 Improvement Warrants,

which legal opinion must be dated as of the Financial Closing Date.

(h) Representations and Warranties of the Developer

The representations and warranties of the Developer in Section 3.1 (Developer Representations and Warranties) are true and correct in all material respects as of the Financial Closing Date, and the Developer has delivered to the Authority a certificate signed by an authorized representative of the Developer stating the same.

(i) Representations and Warranties of the Authority

The representations and warranties of the Authority in Section 3.2 (Authority Representations and Warranties) are true and correct in all material respects as of the Financial Closing Date, and the Authority has delivered to the Developer a certificate signed by an authorized representative of the Authority stating the same.

(j) Commercial Close

The Commercial Closing Date has occurred.

(k) Financial Close

The Developer has delivered to the Authority a certificate confirming that all conditions precedent set out in Section 2.3 (Conditions Precedent to the Financial Closing Date) except for the Authority Conditions Precedent have been satisfied or otherwise waived.

(l) Authority Financial Close Responsibilities

The Authority shall have cooperated with the Developer in providing disclosure information to the Developer about the Authority and shall have provided to Developer customary certifications and opinions, including appropriate opinions in connection with the Developer's incurrence of any debt or issuance of any bonds (including, but not limited to, PABs), and executed an agreement with respect to any continuing disclosure requirements that apply to the underwriter of any Project Debt in accordance with any Applicable Law.

(m) Master Indenture of Trust

The CCJWRD, the Authority, the City of Fargo, as fiscal agent, and the Bank of North Dakota, as trustee, have executed the Master Indenture of Trust as of the Financial Closing Date.

(n) Temporary P3 Improvement Warrants

The CCJWRD has issued each of the Temporary P3 Improvement Warrants in the forms attached as Part 2 (Temporary P3 Improvement Warrants) of Exhibit 7 (Master Indenture of Trust and P3 Improvement Warrants).

(o) **Authority and CCJWRD Corporate Documents**

The Authority has delivered to the Developer such documents and certificates as the Developer may reasonably request evidencing:

- (i) the authorization of the Authority to enter into the Master Indenture of Trust; and
- (ii) the authorization of the CCJWRD to enter into the Master Indenture of Trust and to issue the Temporary P3 Improvement Warrants.

(p) **WIFIA Loan Closing**

The EPA and the Authority have executed the loan documents required for the WIFIA Loan and the WIFIA Loan is in place and fully effective.

2.4 Achievement of or Failure to Achieve the Financial Closing Date

(a) **Financial Model Closing Protocol**

The Authority and the Developer will agree upon a Financial Model Closing Protocol at least thirty (30) days prior to the Financial Closing Date.

(b) **Achievement of the Financial Closing Date**

Upon the satisfaction or waiver of each of the conditions precedent to the Financial Closing Date set out in Section 2.3 (Conditions Precedent to the Financial Closing Date), unless otherwise agreed by the Parties:

- (i) the Authority and the Developer shall sign an amendment agreement to:
 - (A) replace the Base Case Financial Model in Exhibit 28 (Base Case Financial Model) with the amended Base Case Financial Model delivered under Section 2.3(c)(i) (Base Case Financial Model);
 - (B) update the Base MAPs, Base Case Equity IRR, and Key Ratios in accordance with Exhibit 13 (Update to the Base MAPs); and
 - (C) incorporate any other amendments (if any) agreed by the Parties between the Commercial Closing Date and the Financial Closing Date;
- (ii) the Authority and the Developer shall sign a certificate specifying the Financial Closing Date; and
- (iii) the Authority shall return the Closing Security to the Developer within three (3) Business Days of the Financial Closing Date.

(c) **Extension of Financial Closing Deadline**

- (i) The Financial Closing Deadline may only be extended as follows:
 - (A) at the sole discretion of the Authority, in the case of a delay to the satisfaction of any Developer Condition Precedent, for up to ninety (90) days;
 - (B) at the sole discretion of the Developer, in the case of a delay to the satisfaction of any Authority Condition Precedent, for up to ninety (90) days in aggregate; or

(C) upon the occurrence of a Compensation Event or Relief Event, for such time as is reasonable given the circumstances, but in any event no more than ninety (90) days.

(ii) If the Financial Closing Deadline is extended pursuant to Section 2.4(c)(i), the Developer shall extend the expiration of the Closing Security so that such security remains valid for at least ten (10) days after the Financial Closing Deadline (as extended).

(d) Failure to Achieve the Financial Closing Date

If the Financial Closing Date does not occur by the Financial Closing Deadline, either Party may terminate this Agreement in accordance with Article 46 (Termination for Failure to Achieve Financial Close).

3. REPRESENTATIONS AND WARRANTIES

3.1 Developer Representations and Warranties

The Developer represents and warrants to the Authority as follows:

(a) Existence and Good Standing

The Developer is a limited liability company duly organized, validly existing and in good standing under the laws of the State of Delaware.

(b) Good Standing and Qualification

The Developer is in good standing and qualified to do business in North Dakota and Minnesota.

(c) Power and Authority

The Developer has the power and authority to execute, deliver and perform its obligations under this Agreement and the other Principal Developer Documents.

(d) Authorization

(i) The execution, delivery and performance of this Agreement and the other Principal Developer Documents have been (or will be) duly authorized by all necessary corporate action of the Developer.

(ii) Each Person executing this Agreement and the other Principal Developer Documents on behalf of the Developer has been (or at the time of execution will be) duly authorized to execute and deliver each such document on behalf of the Developer.

(e) Execution

This Agreement and each other Principal Developer Document has been (or will be) duly executed and delivered by the Developer.

(f) Enforceability

This Agreement and each other Principal Developer Document constitutes (or at the time of execution and delivery will constitute) a legal, valid and binding obligation of the Developer, enforceable against it and, if applicable, each Equity Member (with respect to any Principal Developer Document to which such Equity Member is a party) in accordance with its terms, subject to applicable bankruptcy, insolvency and similar laws affecting the enforceability of the rights of creditors generally and the general principles of equity.

(g) No Contravention

The execution, delivery and performance by the Developer of this Agreement and the other Principal Developer Documents does not (and at the time of execution will not) conflict with or result in a default under or a violation of:

- (i) the Developer's organizational documents;
- (ii) any other material agreement or instrument to which the Developer is a party or which is binding on the Developer or any of its assets; or
- (iii) any Applicable Law in effect on the date on which this representation is made.

(h) No Litigation

There is no action, suit, proceeding, investigation or litigation pending against or served on the Developer or, to the Developer's knowledge, threatened that:

- (i) could reasonably be expected to have a material adverse effect on the ability of the Developer to perform its obligations under this Agreement or any other Principal Developer Document;
- (ii) challenges the existence of the Developer;
- (iii) challenges either the Developer's authority to execute, deliver or perform, or the validity or enforceability of, this Agreement or any other Principal Developer Document; or
- (iv) challenges the authority of the Developer's representative executing this Agreement or any other Principal Developer Document.

(i) No Consent

The execution, delivery and performance of this Agreement and each other Principal Developer Document by the Developer and consummation of the transactions contemplated hereunder and thereunder do not require any consent, approval, or authorization of, notice to, or declaration, filing or registration with any Person not obtained or accomplished as of the date this representation is made.

(j) No Developer Default

No Developer Default has occurred and is continuing.

(k) Base Case Financial Model

The Base Case Financial Model:

- (i) was prepared by or on behalf of the Developer in Good Faith;
- (ii) utilizes the same financial formulae that the Developer utilized in making its decision to enter into this Agreement and in making disclosures to potential equity investors and Lenders under the Finance Documents;
- (iii) fully discloses all cost, revenue and other financial assumptions and projections that the Developer used in making its decision to enter into this Agreement and in making disclosures to potential equity investors and Lenders under the Finance Documents; and

(iv) represents the projections that the Developer believes in Good Faith are realistic and reasonable for the Project, subject to the following qualifications:

(A) such projections (1) are based upon a number of estimates and assumptions and (2) are subject to significant business, economic and competitive uncertainties and contingencies; and

(B) no representation or warranty is made that any of the assumptions are correct, that such projections will be achieved or that the forward-looking statements expressed in such projections will correspond to actual results.

(l) Licenses, Skill and Expertise

The Developer, the D&C Contractor and the Lead Engineer have all required authority, license status, professional ability, skills and capacity (as applicable) to perform the Work.

(m) Constraints

Without limiting its rights and remedies expressly granted under this Agreement, based on the Disclosed Information and other available public records, the Developer has evaluated the constraints affecting design and construction of the Project, including the Project Site, as well as the conditions of the Governmental Approvals in effect, and has reasonable grounds for believing, and does believe, that the Project can be designed and built within such constraints.

(n) Project Site and Disclosed Information

(i) Without limiting its rights and remedies expressly granted under this Agreement, the Developer has, in accordance with Good Industry Practice:

(A) investigated and reviewed the Disclosed Information and other available public records; and

(B) familiarized itself with the Project Site and the surrounding locations based on the Disclosed Information and other available public records.

(ii) Based on investigation, review and examination of the Disclosed Information and other available public records, the Developer is familiar with and, subject to the provisions of this Agreement, accepts the physical requirements of the Work.

(o) Applicable Law

The Developer has familiarized itself with the requirements of all Applicable Laws and the conditions of any required Governmental Approvals. The Developer has no reason to believe that any Governmental Approval required to be obtained by the Developer will not be granted in due course and remain in effect so as to enable the Work to proceed in accordance with this Agreement and the other Project Documents.

(p) Ownership

Exhibit 2 (Developer Ownership) sets out the legal, beneficial and equitable ownership of the Developer, and no arrangements are in place that will result in, or are reasonably likely to result in, a Restricted Change in Ownership.

(q) Bankruptcy

No Insolvency Event has arisen with respect to the Developer or any Equity Member.

3.2 Authority Representations and Warranties

The Authority represents and warrants to the Developer that:

(a) Existence

The Authority is a permanent North Dakota political subdivision and joint powers entity formed through the Joint Powers Agreement, is validly existing in North Dakota and has the requisite authority to carry on its present activities and those proposed under the JPA and the Principal Authority Documents.

(b) Power and Authority

The Authority has the power and authority to:

- (i) execute this Agreement and the other Principal Authority Documents; and
- (ii) deliver and perform its obligations under this Agreement, the other Principal Authority Documents and the JPA.

(c) Authorization

- (i) The execution, delivery and performance of this Agreement, the other Principal Authority Documents and the JPA have been (or will be) duly authorized by all necessary action of the Authority and the CCJWRD.
- (ii) Each Person executing this Agreement and the other Principal Authority Documents on behalf of the Authority has been (or at the time of execution will be) duly authorized to execute and deliver each such document on behalf of the Authority.

(d) Execution

This Agreement and each other Principal Authority Document have been (or will be) duly executed and delivered by the Authority.

(e) Enforceability

This Agreement, each other Principal Authority Document and the JPA constitute (or at the time of execution and delivery will constitute) a legal, valid and binding obligation of the Authority, enforceable against it in accordance with its terms, subject to applicable bankruptcy, insolvency and similar laws affecting the enforceability of the rights of creditors generally and the general principles of equity.

(f) No Contravention

The execution, delivery and performance by the Authority of this Agreement and the other Principal Authority Documents do not (and at the time of execution will not) conflict with or result in a default under or a violation of:

- (i) the JPA;
- (ii) any other material agreement or instrument to which the Authority is a party or which is binding on the Authority or any of its assets; or
- (iii) any Applicable Law in effect on the date on which this representation is made.

(g) No Litigation

There is no action, suit, proceeding, investigation or litigation pending against or served on the Authority or, to the Authority's knowledge threatened, that:

- (i) could reasonably be expected to have a material adverse effect on the ability of the Authority to perform its obligations under this Agreement, the JPA or any other Principal Authority Document;
- (ii) challenges the existence of the Authority;
- (iii) challenges the Authority's authority to:
 - (A) execute this Agreement or any other Principal Authority Document; or
 - (B) deliver or perform, this Agreement, the JPA or any other Principal Authority Document;
- (iv) challenges the validity or enforceability of this Agreement, the JPA or any other Principal Authority Document; or
- (v) challenges the authority of the Authority official executing this Agreement or any other Principal Authority Document.

(h) No Consent

- (i) The execution, delivery and performance of this Agreement and each other Principal Authority Document by the Authority and consummation of the transactions contemplated hereunder and thereunder do not require any consent, approval, or authorization of, notice to, or declaration, filing or registration with any Person not obtained or accomplished as of the date this representation is made.
- (ii) The delivery and performance of the JPA and consummation of the transactions contemplated thereunder do not require any consent, approval, or authorization of, notice to, or declaration, filing or registration with any Person not obtained or accomplished as of the date this representation is made.

(i) Special Assessment District

- (i) The CCJWRD has completed all actions necessary to create the FM Flood Risk Management District No. 1.
- (ii) The CCJWRD has completed all actions required to levy special assessments for the Project.
- (iii) No landowner affected by the proposed special assessment arising out of the FM Flood Risk Management District No. 1 filed an appeal within the statutorily allowed time period to consent to such special assessment, and there is no action, suit, proceeding, investigation or litigation pending, or to the Authority's knowledge threatened, to challenge the validity or enforceability of the FM Flood Risk Management District No. 1.

(j) No Authority Default

No Authority Default has occurred and is continuing.

(k) **USACE**

The Authority provided the USACE with the draft Technical Requirements and has taken into account the comments of the USACE in accordance with the P3 MOU.

3.3 **Repetition of Representations and Warranties**

The representations and warranties of the Developer and the Authority contained in this Agreement are made as of the date of this Agreement and repeated on the Financial Closing Date.

4. **[NOT USED]**

5. **INITIAL PARTNERING WORKSHOP AND DESIGNATED REPRESENTATIVES**

5.1 **Initial Partnering Workshop**

The Developer shall convene and lead, and the Authority shall participate in, an Initial Partnering Workshop in accordance with Section 2.10.3 of the Technical Requirements.

5.2 **Designation of Representatives**

The Authority and the Developer shall each designate an individual or individuals who will be authorized to make decisions and bind the Parties on matters relating to this Agreement (the "**Authority Representative**" and "**Developer Representative**", respectively). Exhibit 3 (Initial Designation of Authorized Representatives) provides initial designations, which may be changed by a subsequent notice in writing delivered to the other Party in accordance with Section 57.9 (Notices and Communications).

6. **INNOVATIVE TECHNICAL CONCEPTS**

If implementation of an ITC forming part of the Project requires the approval or consent of any Governmental Entity (including USACE) or other third party:

- (a) the Developer will have full responsibility for, and bear the full risk of, obtaining any such approval or consent (including any necessary modifications to the Authority-Provided Approvals); and
- (b) if such approval or consent is not granted, or there is an unreasonable and unjustified delay in obtaining such approval or consent (subject to Article 31 (Authority Changes and Directive Letters)), the Developer shall:
 - (i) perform the Work as if such ITC had never formed part of the Project; and
 - (ii) not be entitled to any additional time, relief or compensation under this Agreement.

7. **REVIEW OF SUBMITTALS**

7.1 **General**

- (a) The terms and procedures set out in this Article 7 will govern all Submittals delivered or submitted to the Authority pursuant to this Agreement.
- (b) Submittals delivered or submitted to Third Parties will be governed by the terms and procedures set out in Article 11 (Utilities and Third Parties) and the relevant Third Party MOU.

7.2 Time Periods

- (a) Whenever the Authority is entitled to review, comment on, affirmatively approve, accept or reject a Submittal, the Authority shall review, comment on, affirmatively approve, accept or reject such Submittal:
 - (i) where a period is specified in this Agreement, within such period; or
 - (ii) where no period is specified in this Agreement, promptly (and in any event within twenty (20) Business Days),after the date the Authority receives an accurate and complete Submittal in conformance with this Agreement.
- (b) Subject to Section 7.2(c), the Authority's review period will be reduced to ten (10) Business Days for any re-submission of a Submittal and the Authority's review will be limited to a review of those matters that necessitated the re-submission.
- (c) If the reason for the re-submission was a rejection (in accordance with the terms of this Article 7) of a prior Submittal because it was incomplete, the time periods set forth in Section 7.2(a) will apply.
- (d) The Developer shall, in coordination with the Authority, schedule, prioritize and coordinate all Submittals to allow an efficient and orderly Submittal review process.
- (e) If the Developer exceeds any of the limits on Submittals set out in the Technical Requirements, the Parties shall (taking into account the number and nature of any other Submittals that the Authority may concurrently be in the process of reviewing) agree in Good Faith to a reasonable time period for review by the Authority of the Submittals that exceed such limit.

7.3 Discretionary Submittal

- (a) Each Discretionary Submittal is subject to the approval or acceptance of the Authority in its absolute discretion.
- (b) The Developer must not commence or permit the commencement of any Work that is the subject of, governed by or dependent upon a Discretionary Submittal until it has submitted the Discretionary Submittal to the Authority and the Authority has provided its approval or acceptance to the Discretionary Submittal.
- (c) If the Authority rejects a Discretionary Submittal, the Authority shall provide its rationale for such rejection.
- (d) If the Authority rejects a Discretionary Submittal, the Developer must re-submit the Submittal and Section 7.2(b) or Section 7.2(c) (as applicable) and Section 7.3 will re-apply.

7.4 R&C Submittal

- (a) Each R&C Submittal is subject to the review and comment of the Authority, in its reasonable discretion, in accordance with this Section 7.4.
- (b) The Authority may respond to an R&C Submittal by:
 - (i) responding with "no comment";
 - (ii) rejecting the R&C Submittal and providing Compliance Comments with reference to the grounds set forth in Section 7.4(d)(i); or
 - (iii) providing Compliance Comments with reference to the grounds set forth in Section 7.4(d)(i) or Preference Comments (or both).

- (c) If the Authority fails to respond to an R&C Submittal in accordance with Section 7.4(b) within the period required under this Agreement the Developer may provide written notice of such failure to the Authority. If the Authority fails to respond within five (5) Business Days of such notice, the Authority will be deemed to have responded with "no comment".
- (d) The Authority may:
 - (i) subject to Section 7.4(e), make "Compliance Comments" on or reject an R&C Submittal if:
 - (A) the Work that is the subject of the R&C Submittal fails to comply with any applicable covenant, condition, requirement, term or provision of this Agreement;
 - (B) the Work that is the subject of the R&C Submittal is not to a standard at least equal to Good Industry Practice; or
 - (C) the Developer has not provided all content or information required with respect to the R&C Submittal; and
 - (ii) make "Preference Comments" on an R&C Submittal that reflect concerns regarding interpretation or preference that are not based on the grounds set out in Section 7.4(d)(i).
- (e) For a Project Element or Buildable Unit requiring the provision of fish passage that is covered by an Approved Fish Passage Submittal, the following apply:
 - (i) the Parties acknowledge that the Authority approved the concepts and approaches to fish passage within the Approved Fish Passage Submittals, but did not review the Approved Fish Passage Submittals for compliance with any other requirements of the Technical Requirements with respect to that Project Element or Buildable Unit;
 - (ii) subject to clause (iii), the Authority may not reject, or make Compliance Comments on, an R&C Submittal for that Project Element or Buildable Unit on the grounds that the concept and approach to fish passage in that R&C Submittal fails to comply with the Technical Requirements, to the extent that the concept and approach to fish passage in that R&C Submittal is consistent with the concept and approach in an Approved Fish Passage Submittal for that Project Element or Buildable Unit; and
 - (iii) nothing in an Approved Fish Passage Submittal or in clause (ii), limits the Developer's obligation to comply with the specific fish passage requirements set forth in Part 2 (*Non-Aqueduct Fish Passages*) and Part 3 (*Aqueduct Fish Passages*) of Attachment 3-15 (*Fish Passage*) of the Technical Requirement, to address the conditions and comments to the Approved Fish Passage Submittal as required in Attachment 3-31 (*Approved Fish Passage Submittals*), or to comply with any other requirements of the Technical Requirements relating to that Project Element or Buildable Unit.
- (f) If the Authority makes a Compliance Comment on an R&C Submittal or rejects an R&C Submittal on any ground permitted under Section 7.4(d)(i) and the Developer does not dispute such Compliance Comment or rejection in accordance with Section 7.5 (*Submittals Disputes*), the Developer shall:
 - (i) amend the R&C Submittal in accordance with the Authority's comments; and
 - (ii) re-submit the revised R&C Submittal to the Authority and Section 7.2(b) or Section 7.2(c) (as applicable) and this Section 7.4 will re-apply.
- (g) If the Authority makes a Preference Comment on an R&C Submittal, the Developer shall use Reasonable Efforts to accommodate or otherwise resolve such Preference Comment.

- (h) The Developer shall not commence or permit the commencement of any Construction Work, O&M Work or Renewal Work that is the subject of, governed by or dependent upon an R&C Submittal until it has submitted or resubmitted the R&C Submittal to the Authority and either:
 - (i) the Authority has responded with "no comments" or is deemed to have responded with "no comment" under Section 7.4(c); or
 - (ii) the Authority has provided comments with no Compliance Comments; or
 - (iii) any disputed Compliance Comments provided by the Authority have been resolved in accordance with Section 7.5 (Submittals Disputes).

7.5 Submittals Disputes

- (a) If the Developer does not intend to accommodate or otherwise resolve any Compliance Comment or any Preference Comment, the Developer shall deliver to the Authority within twenty-one (21) days after receipt of the applicable comment, a written explanation as to why:
 - (i) in the case of a Compliance Comment, modifications are not required; or
 - (ii) in the case of a Preference Comment, the Developer is unable, after using Reasonable Efforts, to accommodate or resolve the Preference Comment in accordance with Section 7.4(g) (R&C Submittal),

which explanation, in each case, must include the facts, analyses and reasons that support the conclusion.
- (b) If the Developer fails to deliver an explanation to the Authority in accordance with Section 7.5(a), such failure will constitute the Developer's:
 - (i) agreement to make all changes necessary to accommodate and resolve the Compliance Comment or Preference Comment (as applicable); and
 - (ii) full acceptance of all responsibility for such changes at the Developer's risk.
- (c) If the Authority disagrees with the Developer's explanation delivered pursuant to Section 7.5(a), the Parties shall attempt in Good Faith to resolve the Dispute. If the Parties are unable to resolve the Dispute, the Dispute shall be resolved according to the Expedited Dispute Resolution Procedures.

7.6 Limitations on the Developer's Right to Rely

Nothing in this Article 7 (including any act or omission of the Authority pursuant to this Article 7) will:

- (a) relieve the Developer from the performance of its obligations under this Agreement;
- (b) constitute acceptance by the Authority that the Work satisfies the requirements of this Agreement; or
- (c) prevent the Authority from subsequently raising a Compliance Comment in accordance with this Article 7 if the same Compliance Comment was not made by the Authority on a previous Submittal.

PART B – PROJECT SITE AND OTHER GENERAL REQUIREMENTS

8. PROJECT SITE

8.1 Nature of the Developer's Interests

- (a) Subject to Section 8.3 (Access to the Project Site), this Agreement does not grant to the Developer any right, title, interest or estate (including by way of lease, easement, conveyance, lien or mortgage) in the Project, the Project Site or any assets incorporated into, or in any way connected with, the Project or the Project Site.
- (b) Except as provided in Section 8.2(b) (Limited Right to Revenue-Generating Activity), the Developer is not the legal or equitable owner of, and does not have any legal or equitable interest in, the Project Site for any purpose. The Developer's rights under this Agreement are derived solely from its status as a developer and independent contractor, as described in this Agreement.
- (c) The payments to be received by the Developer under this Agreement are not payments in the nature of rent, fees or purchase price of real property.
- (d) As between the Authority and the Developer, the Authority is responsible for paying any possessory taxes or taxes imposed or levied as a result of ownership of title to the Project Site.

8.2 Limited Right to Revenue-Generating Activity

- (a) Except as permitted pursuant to Section 8.2(b), the Developer has no authority or right to collect or impose any revenue, fee, toll, rent, charge or other amount for or from the use of the Project or the Project Site, without the prior written consent of the Authority.
- (b) From and after the dates on which the Developer is granted Access in accordance with Section 8.3(a) (Access to the Project Site), the Developer or its licensee may use any portion of the Project or the Project Site that has not been acquired via last resort eminent domain (as noted in Exhibit 4-2a (Project ROW Diversion Authority Parcels) of Exhibit 4 (Project Land)) for Permitted Revenue-Generating Activity and retain all revenue generated from such Permitted Revenue-Generating Activity subject to complying with the requirements of Exhibit 32 (Permitted Revenue-Generating Activity).
- (c) Subject to Section 8.2(d), the Developer shall release, defend, indemnify and hold harmless the Indemnified Parties against any and all liability for Losses arising from or related to Third Party Claims to the extent such Losses arise out of, or as a consequence of, any Permitted Revenue Generating Activity.
- (d) The Developer shall not be responsible or be obligated to release, defend, indemnify or hold harmless any Indemnified Party with respect to any liability or Losses under Section 8.2(c) to the extent that the same arise as a direct result of the fraud, negligence, recklessness, bad faith or willful misconduct of an Indemnified Party.
- (e) To the extent a Third Party Claim arises out of, or as a consequence of, any activity permitted pursuant to Section 8.2(b), Section 33.4 (Conduct of Third Party Claims Against the Authority) will apply.

8.3 Access to the Project Site

- (a) The Authority shall, at its own cost, obtain and provide the Developer with Access to:
 - (i) the Non-BNSF Project Site on the NTP1 Issuance Date or, with respect to:
 - (A) a parcel that has a forecasted possession or turnover date of June 7, 2021 indicated in the column entitled "Forecasted Possession or Turnover Date" in Exhibit 4-2a (Project ROW Diversion Authority Parcels) of Exhibit 4 (Project Land); and

- (B) a Temporary Construction Easement that has a TCE date start of June 15, 2021 indicated in the column entitled "TCE Start" in Exhibit 4-4a (Temporary Construction Easements) of Exhibit 4 (Project Land),

the later of (x) June 7, 2021 or June 15, 2021 (as applicable) or (y) the NTP1 Issuance Date (the "**Access Date**");

- (ii) the RRVW Land on April 1, 2023; and
- (iii) the BNSF Land on the date on which the Authority will have the right to enter onto the BNSF Land pursuant to the executed BNSF Temporary Occupancy Permits and BNSF C&M Agreements (the "**BNSF Access Date**"),

in each case, until the end of the Term (in the case of the Project ROW) or until the applicable TCE Expiry Date (in the case of the Temporary Construction Easements).

- (b) Subject to the terms of this Agreement, the Developer will have the right to enter onto the:

- (i) Non-BNSF Project Site from the Access Date;
- (ii) the RRVW Land from April 1, 2023; and
- (iii) the BNSF Land from the BNSF Access Date,

for the sole purpose of performing its obligations and exercising its rights under this Agreement.

8.4 Temporary Construction Easements

- (a) The Project Site contains a number of temporary construction easements (the "**Temporary Construction Easements**"), each of which is identified in Exhibit 4- 4a (Temporary Construction Easements) of Exhibit 4 (Project Land), for which the Developer will be granted Access for activities not part of the permanent Work associated with the Project.
- (b) The Developer's right to Access the land subject to each Temporary Construction Easement will terminate on the applicable TCE Expiry Date.
- (c) The Developer may request an extension of the original TCE Expiry Date for a Temporary Construction Easement by providing written notice (requesting such extension) to the Authority. The notice must:
 - (i) identify the relevant Temporary Construction Easement and the period of extension required for the TCE Expiry Date; and
 - (ii) subject to Section 8.4(g), include an undertaking by the Developer that it will reimburse the Authority for any reasonable costs and expenses the Authority incurs in providing the requested extension in accordance with Section 8.4(f).
- (d) If the Developer provides a notice in accordance with Section 8.4(c) at least eighteen (18) months prior to the original TCE Expiry Date, the Authority shall, to the fullest extent permitted by Applicable Law, extend the TCE Expiry Date for the applicable Temporary Construction Easement to the date requested by the Developer.
- (e) If the Developer provides a notice in accordance with Section 8.4(c) less than eighteen (18) months prior to the original TCE Expiry Date, the Authority shall, to the extent permitted by Applicable Law, use Reasonable Efforts to extend the TCE Expiry Date for the applicable Temporary Construction Easement to the date requested by the Developer.

- (f) Subject to Section 8.4(g), the Developer shall reimburse the Authority for any reasonable costs and expenses the Authority incurs in extending the TCE Expiry Date for a Temporary Construction Easement, within thirty (30) days of receiving an invoice from the Authority for such amounts.
- (g) If an extension of the TCE Expiry Date for a Temporary Construction Easement is granted pursuant to Article 27 (Compensation Events) or Article 28 (Relief Events), the Authority will be responsible for the costs and expenses it incurs in providing such extension.
- (h) The Developer shall:
 - (i) comply with all requirements imposed on the Authority and any user of each Temporary Construction Easement regarding use of the land subject to such Temporary Construction Easement;
 - (ii) restore the land subject to each Temporary Construction Easement to its condition as of the date on which Access to such land was provided to the Developer (subject to ordinary wear and tear), and ensure that it complies with any other applicable requirements of this Agreement; and
 - (iii) ensure such land is handed back to the Authority by the applicable TCE Expiry Date.
- (i) The Developer shall reimburse the Authority for all costs, liabilities and amounts that become due and payable by the Authority as a result of the Developer's failure to comply with Section 8.4(h) within thirty (30) days of receiving an invoice from the Authority with respect to such costs.

8.5 Access and Inspection Rights for the Authority and Other Persons

- (a) The Developer shall, in the performance of the Work on the Project Site, grant access to any third parties that may from time to time have access rights to the Project Site, including the Third Parties, Utility Owners and USACE.
- (b) The Developer acknowledges that the Authority (and any Person authorized by the Authority, including the Authority-Related Entities and the EPA) may, (x) at reasonable times and (y) if Construction Work is ongoing at the location to be entered, upon reasonable notice, enter the Project Site and any other location where the Work is being carried out for the purpose of:
 - (i) observing or inspecting the Work;
 - (ii) monitoring compliance by the Developer with its obligations under this Agreement (including the Technical Requirements) and all Applicable Laws and Governmental Approvals; or
 - (iii) exercising any right or performing any obligation that such party has under this Agreement, any Third Party MOU, any Utility MOU or the PPA.
- (c) When exercising the rights pursuant to Section 8.5(b), the Authority shall do so (and shall ensure that any Person authorized by the Authority, including the Authority-Related Entities and EPA, does so) in a manner that:
 - (i) does not unreasonably interfere with the Developer's performance of the Work or exercise of its rights under this Agreement; and
 - (ii) complies with the Developer's reasonable site access, environmental and work health and safety policies and procedures.
- (d) Without prejudice to the Developer's right to claim a Compensation Event under paragraph (h) of the definition of "Compensation Event" and without limiting Section 8.5(a), the Developer acknowledges that the

Authority, other Governmental Entities, Utility Owners or Third Parties (or contractors on behalf of any such party) may access the Project Site to construct additional infrastructure on or in the vicinity of the Project Site.

- (e) The Developer shall use Reasonable Efforts to:
 - (i) coordinate its Work so it does not interfere with the exercise by the Authority (and any Person authorized by the Authority, including the Authority-Related Entities and EPA) of its right of entry; and
 - (ii) provide the Authority (and any Person authorized by the Authority, including the Authority-Related Entities and EPA) with every reasonable facility and other assistance necessary for any inspection by such parties, including providing access to any relevant systems, registers, manuals, records (including financial records), plans and programs.

9. DISCLOSED INFORMATION

9.1 No Representation

The Developer acknowledges that, without limiting its rights and remedies expressly granted under this Agreement:

- (a) neither the Authority nor any other Authority-Related Entity makes any representations or warranties as to the relevance, completeness, accuracy or fitness for any purpose of any of the Disclosed Information;
- (b) the Disclosed Information is for reference purposes only and is not mandatory or binding on the Developer; and
- (c) the Developer is not entitled to rely on the Disclosed Information as accurately describing existing conditions, presenting design, engineering or maintenance solutions or directions, or defining means or methods for complying with the requirements of this Agreement, the Governmental Approvals or Applicable Law.

9.2 No Liability

Except as otherwise expressly provided in this Agreement, neither the Authority, any other Authority-Related Entity nor any of their respective agents, officers or employees will have any liability to the Developer with respect to any:

- (a) inaccuracy, omission, lack of fitness for any purpose or inadequacy of any kind whatsoever in the Disclosed Information;
- (b) failure to make available to the Developer any materials, documents, drawings, plans or other information relating to the Project; or
- (c) causes of action, claims or Losses whatsoever suffered by any Developer-Related Entity by reason of any use of information contained in, or any action or forbearance in reliance on, the Disclosed Information.

9.3 Indicative Design

Without limiting the generality of Section 9.1 (No Representation) and Section 9.2 (No Liability):

- (a) the Indicative Design was provided to the Developer as part of the Disclosed Information for informational purposes only;
- (b) the Developer cannot rely on the Indicative Design;

- (c) the Authority will not be responsible for the relevance, completeness, accuracy, adequacy or fitness for any purpose of the Indicative Design and Section 9.1 (No Representation) and Section 9.2 (No Liability) apply to the Indicative Design;
- (d) the Authority does not represent that the Indicative Design will meet the Technical Requirements;
- (e) the Developer is on notice that the Indicative Design has elements that do not comply with the Technical Requirements and the Developer's use of any part of the Indicative Design in its Design Work will not relieve the Developer of its obligation to comply with the Project Agreement;
- (f) nothing in this Agreement requires the Developer to use the Indicative Design or to adopt concepts shown in the Indicative Design and the Developer is under no obligation to do so;
- (g) the Developer will be required to create its own drawings and design; and
- (h) the Developer will be solely responsible for its Design Work and the adoption or use of any concepts derived from, or inspired by, the Indicative Design will be the Developer's sole risk and the Authority will have no liability to the Developer with respect to the Developer's use of any portion of the Indicative Design, including to the extent that any such portion of the Indicative Design does not comply with the Technical Requirements.

9.4 Due Diligence

The Developer will, subject to the terms of this Agreement, be deemed to have satisfied itself as to:

- (a) the assets to which it will receive rights (including, where applicable, any existing structures, Utilities or work on, over or under such Project Site);
- (b) the nature and extent of the risks assumed by it under this Agreement, including with respect to:
 - (i) geotechnical, climatic, hydrological, ecological, environmental and general conditions of each part of the Project Site;
 - (ii) the ground and subsoil;
 - (iii) the materials (whether natural or otherwise) to be excavated;
 - (iv) the form and nature of each part of the Project Site;
 - (v) the risk of injury or damage to property near to or affecting each part of the Project Site and to occupiers of such property;
 - (vi) the nature of the design, work, materials, facilities, machinery or equipment necessary to carry out its obligations under this Agreement;
 - (vii) the Access to and through each part of the Project Site and the adequacy of the Access with respect to the Project Site for the purposes of carrying out its obligations under this Agreement;
 - (viii) the precautions, times and methods of working necessary to prevent or, if it is not possible to prevent, to mitigate or reduce, any nuisance or interference, whether public or private, being caused to any third parties; and
 - (ix) the scope of the Disclosed Information.

9.5 No Reliance

The Developer acknowledges and confirms that it has not entered into this Agreement on the basis of, and has not relied upon, any statement or representation (whether negligent, innocent or otherwise) or warranty or other provision (whether oral, written, express or implied) made or agreed to by the Authority, any other Authority-Related Entity or any of their respective agents or employees, except those expressly repeated or referred to in this Agreement, and the only remedy or remedies available with respect to any misrepresentation or untrue statement made to it will be any remedy available under this Agreement.

9.6 No Claims or Relief from Obligations

Subject to any rights that the Developer has pursuant to this Agreement, the Developer will not in any way be relieved from any obligation under this Agreement, nor will it be entitled to claim against the Authority or any other Authority-Related Entity on grounds that any information, whether obtained from the Authority or otherwise (including information made available by the Authority), is incorrect or insufficient and the Developer shall make its own inquiries as to the accuracy and adequacy of that information.

9.7 Remedies and Liability

Nothing in this Article 9 (Disclosed Information) will:

- (a) prejudice the Developer's express rights and remedies under this Agreement; or
- (b) exclude any liability that the Authority or any of its agents or employees would otherwise have to the Developer for any statements made fraudulently or in bad faith, or which constitute willful misconduct.

10. GOVERNMENTAL APPROVALS

10.1 Compliance with Governmental Approvals

The Developer shall at all times perform its obligations under this Agreement in compliance with all Governmental Approvals.

10.2 Responsibility for Governmental Approvals

(a) Developer Responsibility

- (i) Except with respect to Authority-Provided Approvals, the Developer is solely responsible for obtaining all Governmental Approvals (including any application, revision, modification, amendment, supplement, renewal or extension) required in connection with its performance of this Agreement.
- (ii) Subject to Section 10.2(b)(ii) and Section 10.2(b)(iii), the Developer is responsible for obtaining amendments or modifications to any Authority-Provided Approvals necessary to reflect the Developer's Final Design or means and methods if the Final Design or construction means and methods deviate from the basis upon which an Authority-Provided Approval was initially granted by the relevant Governmental Entity. If any necessary amendments or modifications are not permitted by the Governmental Entity, the Developer shall, at its own risk of delay and cost, revise its Final Design or means and methods as necessary to satisfy the requirements and conditions of the relevant Governmental Entity.
- (iii) The Developer shall be responsible for obtaining all approvals required from the North Dakota State Engineer in connection with the Developer's performance of this Agreement, including the phased permitting process described in the DCAI Construction Permit.

(b) Authority Responsibility

- (i) The Authority has obtained all Authority-Provided Approvals as of the date of this Agreement.
- (ii) Subject to the Developer complying with Section 2.5.2.1.2 (*Environmental Change Report*) and 3.11.5.2.1 (*Non-Forested Wetlands Documentation of Change*) of the Technical Provisions, the Authority is responsible for obtaining Necessary Section 404 Permit Modifications.
- (iii) The Developer shall provide the Authority with at least twelve (12) months' prior written notice of any required extension of the Section 404 Permit or reauthorization of the DCAI Construction Permit. Such notice must specify the period of extension or reauthorization (as applicable) that is required. Subject to receiving such notice, the Authority is responsible for obtaining an extension of the Section 404 Permit or the reauthorization of the DCAI Construction Permit (as applicable).

10.3 Cooperation with Respect to Governmental Approvals

- (a) If requested by the Developer, the Authority shall cooperate with the Developer in relation to any application by the Developer for a Governmental Approval and shall, at the reasonable request of the Developer, and where necessary to obtain, renew, replace, extend the validity of, or arrange necessary amendments to, any Governmental Approval:
 - (i) execute such documents as can only be executed by the Authority;
 - (ii) make such applications as required by Applicable Law, either in its own name or jointly with the Developer, as can only be made by the Authority or in joint names of the Developer and the Authority, as applicable; and
 - (iii) attend meetings with appropriately qualified staff and cooperate with relevant Governmental Entities as reasonably requested by the Developer,in each case, within a reasonable period of time of being requested to do so by the Developer.
- (b) If the Authority provides any assistance to the Developer pursuant to Section 10.3(a), the Developer shall reimburse the Authority for its reasonable third party costs (which would not otherwise be incurred by the Authority in connection with the Project) associated with the provision of such assistance within thirty (30) days of receiving an invoice from the Authority with respect to such costs.

10.4 Copies of Governmental Approvals

- (a) The Developer shall promptly (and in any event within five (5) Business Days after submitting an application or obtaining a Governmental Approval) deliver to the Authority true and complete copies of:
 - (i) any application for a Governmental Approval submitted by the Developer (including any application to amend an existing Governmental Approval); and
 - (ii) any new or amended Governmental Approval obtained by the Developer.
- (b) The Developer shall copy the Authority on any transmission of information by the Developer to USACE in connection with any of the following Governmental Approvals:
 - (i) the NEPA Compliance Documentation;
 - (ii) the Section 401 Certification; and
 - (iii) the Section 404 Permit.

11. UTILITIES AND THIRD PARTIES

11.1 Developer's General Responsibilities

- (a) The Developer shall:
 - (i) perform in accordance with Applicable Law, Governmental Approvals and this Agreement all obligations set forth in the tables in Attachment 3-25 (*Utility and AHJ Roles and Responsibilities*) to the Technical Requirements that are not allocated to another party;
 - (ii) use Reasonable Efforts to provide any assistance that the Authority reasonably requires to perform its obligations under any Utility MOU or Third Party MOU, and for which the Developer is not primarily responsible pursuant to Attachment 3-25 (*Utility and AHJ Roles and Responsibilities*) to the Technical Requirements; and
 - (iii) perform its obligations under this Agreement in a manner that does not cause the Authority to breach (directly or indirectly) the provisions of any Utility MOU or Third Party MOU.
- (b) Subject to the terms of this Agreement, the Developer is responsible for:
 - (i) coordinating and causing all Utility Adjustments necessary in order to comply with its obligations under this Agreement; and
 - (ii) ensuring that all Utility Adjustment Work and Third Party Work performed by the Developer comply with this Agreement, Applicable law and any applicable Utility MOU or Third Party MOU.

11.2 Utility MOUs and Third Party MOUs

The Authority will, promptly following execution, to the extent not already provided in Appendix A to Attachment 3-25 (*Utility and AHJ Roles and Responsibilities*) to the Technical Requirements, provide the Developer with a copy of:

- (a) each Utility MOU and Third Party MOU; and
- (b) any amendment to a Utility MOU or Third Party MOU.

11.3 Notices and Communications

- (a) The Developer shall:
 - (i) copy the Authority on any notice, correspondence or other information that the Developer provides to a Utility Owner or Third Party to the extent it relates to the Comprehensive Project; and
 - (ii) promptly (and in any event within five (5) Business Days) provide the Authority with a copy of any notice, correspondence or other information that the Developer receives from a Utility Owner or Third Party to the extent it relates to the Comprehensive Project.
- (b) The Authority shall:
 - (i) copy the Developer on any notice, correspondence or other information that the Authority provides to a Utility Owner or Third Party to the extent it relates to the Work; and
 - (ii) promptly (and in any event within five (5) Business Days) provide the Developer with a copy of any notice, correspondence or other information that the Authority receives from a Utility Owner or Third Party to the extent it relates to the Work.

- (c) If a Third Party MOU requires that the Authority provide a document, notice or information to the applicable Third Party (including any Submittals), the Developer shall provide the document, notice or information to the Authority no later than fifty percent (50%) of the time afforded to the Authority to provide such document, notice or information under the Third Party MOU.

11.4 Submittals

- (a) For any Design Work that is being completed by a Utility Owner in connection with a Utility MOU:
 - (i) upon receipt of any related Submittal from the Utility Owner, the Authority shall provide the Submittal to the Developer; and
 - (ii) both the Authority and the Developer shall review the Submittal within the time period specified in the Utility MOU (or if no time period is specified in the Utility MOU, promptly, and in any event within twenty (20) Business Days after the date the Authority and Developer receive such Submittal), and the Developer, with the Authority's approval, shall respond directly to the Utility Owner.
- (b) For any Design Work that is the Developer's responsibility in connection with a Utility MOU, including as set out in Attachment 3-25 (*Utility and AHJ Roles & Responsibilities*) to the Technical Requirements:
 - (i) the Developer shall provide any related Submittal to both the Utility Owner and the Authority; and
 - (ii) the Authority shall review the Submittal within the time period specified in the Utility MOU (or if no time period is specified in the Utility MOU, promptly, and in any event within twenty (20) Business Days after the date the Authority receives such Submittal), and respond directly to the Developer, however, such Submittal will also be subject to the Utility Owner's review.
- (c) The provisions of Section 11.3 (*Notices and Communication*) will apply with respect to Submittals provided to and received from Utility Owners under this Section 11.4.
- (d) With respect to the Third Party Work, the Developer shall not provide any Submittals directly to a Third Party or receive any Submittals directly from a Third Party. All such Submittals will be managed through the Authority.

11.5 Betterments

- (a) The Developer shall notify the Authority if it receives a request from a Utility Owner to undertake a Betterment.
- (b) The Developer shall not undertake any Betterment without the prior written consent of the Authority. If the Authority requires the Developer to undertake a Betterment, the Authority will issue an Authority Change Request.

11.6 Costs Associated with Utility Adjustment Work and Third Party Work

- (a) As between the Developer and the Authority, the Developer is responsible for all costs of all Utility Adjustment Work and Third Party Work and all liabilities and amounts that become due and payable by the Authority under a Utility MOU or Third Party MOU that relate to or arise from the Developer's or any Developer-Related Entity's actions or inactions in carrying out such Utility Adjustment Work and Third Party Work (as applicable). The Developer will fulfill this responsibility by either:
 - (i) to the extent that under this Agreement the Developer is responsible for performing all or any part of Utility Adjustment Work or Third Party Work (including where, in accordance with Attachment 3-25 (*Utility and AHJ Roles and Responsibilities*) to the Technical Requirements, the Developer elects to perform the relevant Utility Adjustment Work or Third Party Work), by performing the Utility Adjustment Work or Third Party Work itself at its own cost and reimbursing the Authority for any

liabilities or amounts that become due and payable by the Authority under a Utility MOU or Third Party MOU that relate to or arise from the Developer's or any Developer-Related Entity's actions or inactions in carrying out such Utility Adjustment Work or Third Party Work (as applicable); or

- (ii) to the extent that under this Agreement, a Utility MOU or a Third Party MOU, the applicable Utility Owner or Third Party is responsible for performing all or any part of the Utility Adjustment Work or Third Party Work (including where, in accordance with Attachment 3-25 (*Utility and AHJ Roles and Responsibilities*) to the Technical Requirements, the Developer elects to not perform the relevant Utility Adjustment Work or Third Party Work), by reimbursing the Authority for any amounts the Authority pays the Utility Owner or Third Party in accordance with the Utility MOU or Third Party MOU for that Utility Adjustment Work or Third Party Work (as applicable). Notwithstanding the preceding sentence, the Developer will not be required to reimburse the Authority for amounts it pays:
 - (A) NuStar for Utility Adjustment Work performed under the NuStar Memorandum of Understanding;
 - (B) SBA for Utility Adjustment Work performed under the SBA Memorandum of Understanding;
 - (C) Magellan for Utility Adjustment Work performed under the Magellan Memorandum of Understanding; or
 - (D) the applicable Third Party for design review performed under the Third Party MOUs under the headings "Transportation", "Cities and Townships", and "Water Resource Districts" in Part 2 (Third Party MOUs) of Exhibit 22 (Utility and Third Party MOUs).
- (b) Where the Developer is required to reimburse the Authority under Section 11.6(a), the Developer shall reimburse the Authority with respect to any such amounts within thirty (30) days of receiving an invoice from the Authority for those amounts.
- (c) The Developer will not be responsible under Section 11.6(a) for any amounts that become due and payable by the Authority to a Utility Owner under a Utility MOU or to a Third Party under a Third Party MOU to the extent that they represent amounts that either relate to or arise from the occurrence of:
 - (i) a Compensation Event; or
 - (ii) a breach by the Authority of an obligation under the applicable Utility MOU or Third Party MOU which was not caused by a breach by the Developer of its obligations under this Agreement.
- (d) The Developer acknowledges that any estimates of costs to be incurred by Utility Owners or Third Parties in connection with any Utility Adjustment Work or Third Party Work were provided to the Developer for information purposes only and no such estimate will be construed as a cap or limitation on the Developer's reimbursement obligation under Section 11.6(a)(ii).
- (e) The Developer shall provide written notice to the Authority promptly of any Utility Adjustment Work costs for which the Utility Owner is responsible under Applicable Law or the relevant Utility MOU.
- (f) For all Utility Adjustment Work performed by the Developer, the Developer shall maintain and provide to the Authority a complete set of cost records in accordance with the recordkeeping and audit requirements of this Agreement and Applicable Law.

11.7 Failure by Utility Owner or Third Party to Cooperate

- (a) The Developer shall use Reasonable Efforts to obtain the cooperation of each Utility Owner, as necessary for Utility Adjustment Work, and each Third Party, as necessary for Third Party Work, to be performed in connection with the Work.
- (b) The Developer shall provide written notice to the Authority (for Utility Adjustment Work, a "**Utility Delay Notice**", and for Third Party Work, a "**Third Party Delay Notice**") promptly if the Developer reasonably believes that:
 - (i) a Utility Owner has not or will not undertake or permit Utility Adjustment Work, or a Third Party has not or will not undertake or permit Third Party Work, in a manner consistent with the timely completion of the Work or in accordance with Applicable Law, any Governmental Approval, this Agreement or its applicable Utility MOU or Third Party MOU;
 - (ii) a Utility Owner or Third Party is not cooperating in a timely manner to provide agreed-upon work or approvals in accordance with its Utility MOU or Third Party MOU, as applicable; or
 - (iii) any other dispute will arise between the Developer and a Utility Owner or Third Party, as applicable, with respect to the Project, despite the Developer's Reasonable Efforts to obtain such Utility Owner's or Third Party's cooperation, as applicable, or otherwise resolve such dispute (including a dispute relating to a Betterment).
- (c) A Utility Delay Notice or Third Party Delay Notice may include a request that the Authority assist in resolving the dispute or in otherwise obtaining the Utility Owner's or Third Party's timely cooperation, as applicable ("**Request for Assistance**").
- (d) After delivering a Utility Delay Notice or Third Party Delay Notice (with or without a Request for Assistance), the Developer shall provide the Authority with such information as the Authority requests regarding the Utility Owner's or Third Party's failure, as applicable, to cooperate or to comply with the Utility MOU or Third Party MOU, as applicable, and the effect of any resulting delay on the Project Schedule.
- (e) After delivering to the Authority a Utility Delay Notice or Third Party Delay Notice (with or without a Request for Assistance), the Developer shall continue to use Reasonable Efforts to pursue the Utility Owner's or Third Party's cooperation and compliance, as applicable, with the Utility MOU or Third Party MOU, as applicable.
- (f) If the Developer issues a Request for Assistance, the Authority shall, subject to receiving satisfactory evidence that all of the Conditions to Assistance have been satisfied, take such reasonable steps as the Developer may request to obtain the cooperation of the Utility Owner or Third Party, as applicable, or resolve the dispute. This Section 11.7(f) does not oblige the Authority to prosecute eminent domain or other legal proceedings, or to exercise any other remedy available to it under Applicable Law or existing contract unless the Authority elects to do so in its sole discretion.
- (g) The "**Conditions to Assistance**" are that the Developer has provided evidence reasonably satisfactory to the Authority that each of the following conditions have been satisfied:
 - (i) the relevant Utility Adjustment or Third Party Work is necessary;
 - (ii) the time for completion of all aspects of the relevant Utility Adjustment Work or Third Party Work in the Project Schedule is in accordance with the relevant Utility MOU or Third Party MOU;
 - (iii) the Developer submitted any necessary applications, designs or other submittals to the Utility Owner or Third Party in accordance with the requirements of the Utility Owner and the Utility MOU or the

Third Party and the Third Party MOU, as applicable, and such documentation was complete and accurate;

- (iv) the Developer has performed and is performing its applicable obligations under Section 11.1(a)(i) and has complied and is complying with its obligations to cooperate and coordinate with the Utility Owner or the Third Party, as applicable, in accordance with this Agreement;
 - (v) the Developer has made and is making Reasonable Efforts to obtain the Utility Owner's or Third Party's cooperation, as applicable; and
 - (vi) the Utility Owner or Third Party, as applicable, is not cooperating or otherwise complying with its Utility MOU or Third Party MOU, as applicable.
- (h) Within ten (10) Business Days of the Authority receiving a Request for Assistance, the Authority will notify the Developer in writing if it objects to a Request for Assistance on the basis that one or more of the Conditions to Assistance has not been satisfied, in which case the following will apply:
- (i) if the Authority objects on the basis that one or more of the conditions in clauses (i), (ii), (iii) or (iv) of Section 11.7(g) have not been satisfied, the Developer shall take such action as is appropriate to satisfy the applicable Conditions to Assistance;
 - (ii) if the Authority objects on the basis that the condition in clauses (v) or (vi) of Section 11.7(g) has not been satisfied, the Developer shall use Reasonable Efforts during the next ten (10) days to obtain the Utility Owner's or Third Party's cooperation and compliance, as applicable;
 - (iii) the Developer may resubmit its Request for Assistance once all relevant Conditions to Assistance have been satisfied;
 - (iv) no resubmittal of a Request for Assistance under Section 11.7(h)(iii) will be accepted unless all of the Authority objections have been addressed; and
 - (v) the process in this Section 11.7(h) will continue until the earlier of the date that:
 - (A) the Developer succeeds in obtaining the Utility Owner's or Third Party's cooperation, as applicable, or in otherwise resolving the dispute; or
 - (B) the Authority determines, based on evidence the Developer presents, that the Conditions to Assistance have been satisfied.
- (i) The Developer may dispute the Authority's determination that one or more of the Conditions to Assistance has not been satisfied in accordance with the Expedited Dispute Resolution Procedures.
- (j) Subject to the Developer continuing to satisfy the Conditions to Assistance in clauses (i) to (v) of Section 11.7(g), a failure by a Utility Owner or Third Party, as applicable, to comply with its obligations under its Utility MOU or Third Party MOU, as applicable, or to cooperate with the Developer in relation to a Utility Adjustment (including an unreasonable request for a Betterment to be completed that would materially delay the Project Schedule) or Third Party Work, as applicable, where such failure continues for a period of forty-five (45) days or more after:
- (i) the Developer has issued a Request for Assistance; and
 - (ii) the Conditions to Assistance have been satisfied,

will constitute a Compensation Event and the Developer may submit to the procedures set forth in Section 27.2 (Notice and Information for Compensation Events) following such forty-five (45) day period.

- (k) A Utility Owner or Third Party exercising or enforcing rights granted to it under a Utility MOU or Third Party MOU, as applicable, will not be construed as such entity failing to cooperate with the Developer in connection with such Utility MOU or Third Party MOU, as applicable.

11.8 Utility Permit Applications

- (a) For reasons unrelated to a Utility Adjustment, it is anticipated that from time to time during the Work, Utility Owners may apply for Utility permits to:
 - (i) install new Utilities that would cross or longitudinally occupy those areas of the Project Site that are subject to the Authority's permitting jurisdiction; or
 - (ii) modify, upgrade, relocate or expand existing Utilities within such areas.
- (b) For such Utility permit applications pending as of, or submitted after, the Financial Closing Date, the Developer shall:
 - (i) as reasonably requested, assist the Authority in its consideration of each Utility permit application in accordance with this Agreement;
 - (ii) make available upon request the most recent Project design information or As-Built Drawings, as applicable, to the applicants;
 - (iii) assist each applicant, as reasonably requested, with information regarding the location of other proposed and existing Utilities; and
 - (iv) use Reasonable Efforts to coordinate work schedules with such applicants, as appropriate, to avoid the applicants' activities interfering with the Project Schedule.

11.9 Utility Revenue

To the extent that any revenue is generated with respect to the use or occupation by a Utility of space in any part of the Project Site, that revenue will be for the account of the Authority and the Developer will have no interest in that revenue.

11.10 Disputes

- (a) The Developer shall use Reasonable Efforts to cooperate and coordinate with the Authority, including through provision of any assistance reasonably requested by the Authority, if a dispute arises between the Authority and (i) a Utility Owner in relation to the Utility Adjustment Work or (ii) a Third Party in relation to the Third Party Work.
- (b) The Developer shall use Reasonable Efforts to cooperate and coordinate with the Authority, a Third Party or a Utility Owner (as applicable), including through provision of any assistance reasonably requested by the Authority or such Third Party or Utility Owner (as applicable), if a third party claim is filed against any such party in relation to the Third Party Work or the Utility Adjustment Work (as applicable).

11.11 BNSF Preliminary Activities Memorandum of Understanding

The Parties acknowledge and agree that:

- (a) a draft BNSF Preliminary Activities Memorandum of Understanding was provided to the Proposers prior to the Setting Date for the purposes of setting a baseline (subject to clause (b) of this Section 11.11) against which the Proposers could prepare and price their Proposals but that the BNSF Preliminary Activities Memorandum of Understanding will not be executed;

- (b) the BNSF Timelines and Process Responsibilities Table sets forth certain baseline processes, responsibilities, and estimated timings for those processes, as between the Developer, BNSF and the Authority;
- (c) when interpreting the BNSF Preliminary Activities Memorandum of Understanding, it will be deemed to incorporate the BNSF Timelines and Process Responsibilities Table and, to the extent there is any inconsistency between the processes, responsibilities, and estimated timings in the BNSF Timelines and Process Responsibilities Table and any corresponding processes, responsibilities, and timings in the BNSF Preliminary Activities Memorandum of Understanding, the BNSF Timelines and Process Responsibilities Table will prevail;
- (d) notwithstanding that the BNSF Preliminary Activities Memorandum of Understanding will not be executed, for the purposes of this Agreement and unless otherwise indicated, a reference to a Third Party MOU in this Agreement will be taken to include a reference to the BNSF Preliminary Activities Memorandum of Understanding as if it were executed, with BNSF as the corresponding Third Party; and
- (e) subject to clause (c) of this Section 11.11, a reference to a Third Party failing to comply with its obligations under a Third Party MOU will be deemed to include a failure by BNSF to comply with the obligations that it would have been subject to under the BNSF Preliminary Activities Memorandum of Understanding, had that document been executed.

12. HAZARDOUS MATERIALS

12.1 General Obligations

- (a) Except as otherwise expressly provided in this Agreement, the Developer is responsible for the management, treatment, handling, storage, monitoring, remediation, removal, transport and disposal of any Hazardous Materials in, under or on the Project Site that are encountered during the Term, in each case to the extent required by any Applicable Law, Governmental Approval or this Agreement.
- (b) Before any Remedial Action (other than with respect to a Developer Hazardous Materials Release) is taken for which the Developer has responsibility that would inhibit the Authority's ability to ascertain the nature and extent of the relevant Hazardous Environmental Condition, the Developer shall, subject to Section 12.1(c) and Section 12.1(d), provide the Authority with a reasonable opportunity to inspect areas and locations that require Remedial Action within a reasonable time period.
- (c) If there is a sudden Hazardous Materials Release, the Developer may take the minimum action necessary to stabilize and contain the relevant Hazardous Materials Release without providing the Authority with prior notice pursuant to Section 12.1(b) or the opportunity to inspect the relevant areas and locations. In these circumstances, the Developer shall promptly (and in any event within two (2) Business Days) notify the Authority of the sudden Hazardous Materials Release and its location.
- (d) Nothing in this Article 12 prevents the Developer from complying with Applicable Law, Governmental Approvals or the requirements of any Governmental Entity (including USACE, in its capacity as regulator in relation to U.S. waters, but not in its capacity as developer of those parts of the Comprehensive Project which are not included in the Project).
- (e) The Developer is (without accepting or assuming responsibility under any Applicable Law) responsible for obtaining and maintaining all Governmental Approvals relating to any Remedial Action and is solely responsible for compliance with all Governmental Approvals and Applicable Laws concerning or relating to Hazardous Materials.
- (f) In carrying out any Remedial Action that is the subject of a Compensation Event, the Developer shall, subject to Section 12.1(h), take such steps and actions as the Authority may reasonably require in order to protect and preserve the Authority's potential claims of contribution and indemnity, statutory or otherwise, against potentially responsible parties.

- (g) The Developer shall provide prompt written notice to the Authority if the Developer discovers any Hazardous Materials regulated under CERCLA on the Project Site.
- (h) The Developer is not required to undertake any steps or actions required by the Authority pursuant to Section 12.1(f) that are inconsistent with Applicable Laws or the requirements of this Agreement or any relevant Governmental Entities (including USACE) or Governmental Approvals.
- (i) Except as otherwise expressly provided in this Agreement, the Developer will bear all costs and expenses of complying with this Article 12 during the Term.

12.2 Generator Status

- (a) As between the Authority and the Developer, the Developer will be deemed the sole generator and arranger under 40 CFR, Part 262 with respect to any Developer Hazardous Materials Release. The Developer agrees to be identified as the sole generator and arranger of such Hazardous Materials on waste manifests and any other documentation submitted to transporters, disposal facilities and any Governmental Entity.
- (b) As between the Authority and the Developer, the Authority will be deemed the sole generator and arranger under 40 CFR, Part 262 with respect to any Hazardous Materials for which the Developer is not identified as the sole generator and arranger in accordance with Section 12.2(a). The Authority agrees to be identified as the sole generator and arranger of such Hazardous Materials on waste manifests and any other documentation submitted to transporters, disposal facilities and any Governmental Entity.

12.3 Third Party Claims

- (a) To the extent permitted by Applicable Law, the Developer shall release, defend, indemnify and hold harmless the Indemnified Parties from any claims, causes of action and Losses initiated, prosecuted, incurred or suffered by any Indemnified Party as a result of, or arising out of, any Hazardous Materials for which the Developer is deemed to be the sole generator or arranger pursuant to Section 12.2 (Generator Status).
- (b) To the extent that the Authority is deemed to be the sole generator or arranger of Hazardous Materials pursuant to Section 12.2 (Generator Status), the Authority shall reimburse the Developer for Losses (in an amount net of any insurance proceeds received pursuant to the Insurance Policies or any amounts which the Developer is deemed to have self-insured in accordance with Article 35 (Insurance and Reinstatement)) arising from, or with respect to, any Third Party Claims initiated against the Developer or any Developer-Related Entity in connection with such Hazardous Materials.
- (c) The Developer shall promptly (and in any event within five (5) Business Days of the Developer becoming aware) notify the Authority of circumstances, potential claims and matters that are reasonably likely to give rise to any Third Party Claim referred to in Section 12.3(b) and of any such Third Party Claim being commenced.
- (d) If the Developer provides notice to the Authority under Section 12.3(c) with respect to the commencement of any Third Party Claim referred to in Section 12.3(b), the following will apply:
 - (i) the Parties shall promptly consult in Good Faith to agree whether (for the purposes of this Agreement) the Authority or the Developer (or both) is the generator or arranger of the relevant Hazardous Materials under Section 12.2 (Generator Status). If the Parties do not reach agreement within fourteen (14) days of the notice under Section 12.3(c), either Party may submit the Dispute for resolution under the Expedited Dispute Resolution Procedures. The determination under the Expedited Dispute Resolution Procedures will be binding solely for the purpose of determining whether the Authority or the Developer is required to assume defense of the Third Party Claim;
 - (ii) if it is agreed or determined that the Authority is the generator or arranger of all of the relevant Hazardous Materials under Section 12.2 (Generator Status), the Authority shall assume defense of

the Third Party Claim. The Developer shall cooperate with the Authority as necessary or as reasonably requested by the Authority to defend such claim;

- (iii) if it is agreed or determined that the Developer is the generator or arranger of all or part of the relevant Hazardous Materials under Section 12.2 (Generator Status), the Developer shall assume defense of the Third Party Claim. In this case, the Authority may give written notice to the Developer to transfer the defense of any such Third Party Claim to the Authority at any time, in which case the Developer shall promptly transfer the defense of such claim and cooperate with the Authority as necessary or reasonably requested by the Authority to defend such claim;
 - (iv) unless and until the Authority assumes defense of any such Third Party Claim, the Developer shall keep the Authority reasonably informed at all times regarding such claim;
 - (v) the Developer shall not enter into any agreement or settlement with respect to any such Third Party Claim without the prior written approval of the Authority; and
 - (vi) the Developer shall take all reasonable steps to minimize and mitigate any Loss for which the Developer is entitled to reimbursement under Section 12.3(b).
- (e) If the Developer is entitled to reimbursement under Section 12.3(b), the Developer may submit invoices for reimbursement on a monthly basis. The Authority shall pay any amounts due under Section 12.3(b) within forty five (45) days of receiving an invoice from the Developer.

13. SAFETY COMPLIANCE

13.1 General

The Developer shall perform all work necessary to implement Safety Compliance throughout the Term.

13.2 Safety Compliance Orders

- (a) The Authority shall use Good Faith efforts to inform the Developer at the earliest practicable time of any circumstance or information relating to the Project which in the Authority's reasonable judgment is likely to result in a Safety Compliance Order.
- (b) Except in the case of an Emergency, the Authority shall consult with the Developer prior to issuing a Safety Compliance Order concerning a risk to public or worker safety, alternative compliance measures, and cost impacts.
- (c) Subject to conducting prior consultations in accordance with Section 13.2(b), the Authority may issue Safety Compliance Orders to the Developer at any time from and after the Commercial Closing Date.
- (d) If the Authority issues a Safety Compliance Order, the Developer shall proceed to carry out the Safety Compliance Order as expeditiously as reasonably possible.
- (e) Subject to Section 13.2(f), the Developer shall be responsible for all of its costs and expenses incurred in relation to the issuance of a Safety Compliance Order pursuant to Section 13.2(d).
- (f) The Developer will not be responsible for costs and expenses incurred in relation to the issuance of a Safety Compliance Order pursuant to Section 13.2(d) to the extent that the issuance of such Safety Compliance Order constitutes a Compensation Event and the Developer is entitled to relief under Article 27 (Compensation Events).

PART C – DESIGN AND CONSTRUCTION

14. DESIGN AND CONSTRUCTION

14.1 General Obligations

The Developer shall perform the D&C Work in accordance with:

- (a) Good Industry Practice;
- (b) all Applicable Laws;
- (c) the requirements of all Governmental Approvals;
- (d) the Technical Requirements and all other requirements of this Agreement; and
- (e) with respect to the Construction Work, the Released for Construction Documents.

14.2 Nonconforming and Defective Work

- (a) The Developer shall rectify all Nonconforming Work and Defects, including, to the extent necessary, through removal or replacement, whether discovered by the Developer or by the Authority.
- (b) The performance of any Required Actions in accordance with Section 48.3 (Required Action by the Authority) will not in any respect diminish or derogate from the Developer's obligations under this Section 14.2.
- (c) Subject to Section 55.2 (Consequential Losses), nothing contained in this Agreement in any way limits the right of the Authority to assert claims for damages resulting from Defects in the Work for the period of limitations prescribed by Applicable Law, and the obligations of the Developer under this Section 14.2 are in addition to any other rights or remedies the Authority may have under this Agreement or under Applicable Law.

14.3 Excavated Material

- (a) Except with respect to the Reserved Material and as otherwise expressly provided in this Agreement, the Developer will have all rights and title to soil, rock, gravel, sand, minerals, timber and any other resources obtained in the excavation or exercise of the Work that are not incorporated into the permanent Project ("**Excavated Material**"), and the right to use such items or dispose of them (including through sale to a third party) is expressly vested in and reserved by the Developer.
- (b) The Developer shall use or dispose of any Excavated Material in a manner that does not violate any Applicable Law or Governmental Approval.
- (c) If the Developer elects to sell and transfer any of the Excavated Material to a third party, the Developer shall:
 - (i) provide written notice to the Authority of such sale; and
 - (ii) ensure that the end use of such Excavated Material does not violate any Applicable Law or Governmental Approval.

14.4 Suspension of Construction Work

- (a) The Authority may at any time suspend, in whole or in part, the Construction Work by written order to the Developer. Any such written order must be supported by the Authority's reasons for the required suspension of the Construction Work.

- (b) Any suspension of the Construction Work by the Authority pursuant to this Section 14.4 will constitute a Compensation Event except where the suspension order is made in response to:
 - (i) any failure by the Developer to comply with any Applicable Law or Governmental Approval, in each case:
 - (A) that constitutes a failure to handle, preserve and protect archaeological, paleontological or historic resources, or failure to handle Hazardous Materials in accordance with Applicable Laws and Governmental Approvals; or
 - (B) where such failure would have a material adverse effect on the Project; or
 - (ii) the existence of conditions unsafe for workers, other Project personnel or the general public, including failures to comply with Safety Standards or perform Safety Compliance (but only if such conditions do not arise as a direct result of a Compensation Event or Relief Event).
- (c) Any suspension order made in response to matters referred to in Sections 14.4(b)(i) or 14.4(b)(ii) will cease to apply as soon as the relevant matter has been rectified or remedied to the reasonable satisfaction of the Authority.

14.5 Right to Uncover

- (a) The Developer shall ensure that the Authority is provided with reasonable advance notice of, and the opportunity to witness, all inspection and test activity with respect to the D&C Work in accordance with this Agreement. If the Developer does not provide such notice and opportunity, the Developer shall, at the request of the Authority, uncover any relevant part of the D&C Work which has been covered up or otherwise put out of view to permit the Authority to inspect the relevant D&C Work. The Developer shall bear all costs of any uncovering or removal, regardless of whether or not any Defect or Nonconforming Work is discovered in the relevant D&C Work.
- (b) In addition to its rights under Section 14.5(a), the Authority may, at any time during the Term, give notice requiring the Developer to uncover and inspect (or allow the Authority to inspect) any part or parts of the D&C Work, or to test any part or parts of the D&C Work, if the Authority believes that such part or parts of the D&C Work contains Defects or Nonconforming Work, or that the Developer has failed to comply with the requirements of this Agreement relevant to such part or parts of the D&C Work. The notice must include reasonably detailed reasons for the required uncovering, inspection or tests.
- (c) The Developer shall comply with any notice delivered under Section 14.5(b).
- (d) If any inspection or test carried out pursuant to Sections 14.5(b) and 14.5(c) show that the relevant part or parts of the D&C Work contains Defects or Nonconforming Work, or that the Developer has failed to comply with the requirements of this Agreement relevant to such part or parts of the D&C Work:
 - (i) the Developer shall diligently rectify all such Defects, Nonconforming Work or non-compliance at no cost to the Authority; and
 - (ii) the Developer will not be entitled to any compensation, relief or extensions of time with respect to the exercise by the Authority of its right under Section 14.5(b).
- (e) If any inspection or test carried out pursuant to Sections 14.5(b) and 14.5(c) show that the relevant part or parts of the D&C Work does not contain Defects or Nonconforming Work, and that the Developer has complied with the requirements of this Agreement relevant to such part or parts of the D&C Work, the exercise by the Authority of its right under Section 14.5(b) will constitute a Compensation Event.

15. NOTICES TO PROCEED

15.1 Preliminary Work and Conditions Precedent to NTP1

- (a) The Developer shall not commence or permit commencement of the Preliminary Work until the Authority has issued a notice ("**NTP1**") to the Developer authorizing commencement of the Preliminary Work.
- (b) Upon satisfaction of the conditions precedent set out in Part 1 (Conditions Precedent to NTP1) of Exhibit 11 (Conditions Precedent to Notices to Proceed), the Developer shall deliver a notice to the Authority certifying that such conditions precedent have been satisfied and requesting the issue of NTP1.
- (c) Within seven (7) Business Days after receipt of the notice provided by the Developer under Section 15.1(b), the Authority shall either:
 - (i) if all applicable conditions precedent have been satisfied, issue NTP1; or
 - (ii) if any applicable conditions precedent have not been satisfied, notify the Developer in writing of which conditions precedent have not been satisfied.
- (d) If any applicable conditions precedent to NTP1 have not been satisfied, the Developer may resubmit a notice pursuant to Section 15.1(b) once the relevant condition has been satisfied and Section 15.1(c) will apply. If the Authority determines that it does not require the full seven (7) Business Days to determine whether all of the conditions have been satisfied under Section 15.1(c), the Authority may notify the Developer that a shorter period will apply.
- (e) If the Developer does not agree with the Authority's determination as to whether the conditions precedent to NTP1 have been satisfied, the Developer may submit such Dispute for resolution in accordance with the Expedited Dispute Resolution Procedures.

15.2 Remaining Work and Conditions Precedent to NTP2

- (a) The Developer shall not commence or permit commencement of the Remaining Work, until the Authority has issued a notice ("**NTP2**") to the Developer authorizing commencement of the Remaining Work.
- (b) Upon satisfaction of the conditions precedent set out in Part 2 (Conditions Precedent to NTP2) of Exhibit 11 (Conditions Precedent to Notices to Proceed), the Developer shall deliver a notice to the Authority certifying that such conditions precedent have been satisfied and requesting the issue of NTP2.
- (c) Within seven (7) Business Days after receipt of the notice provided by the Developer under Section 15.1(b), the Authority shall either:
 - (i) if all applicable conditions precedent have been satisfied, issue NTP2; or
 - (ii) if any applicable conditions precedent have not been satisfied, notify the Developer in writing of which conditions precedent have not been satisfied.
- (d) If any applicable conditions precedent to NTP2 have not been satisfied, the Developer may resubmit a notice pursuant to Section 15.2(b) once the relevant condition has been satisfied and Section 15.2(c) will apply. If the Authority determines that it does not require the full seven (7) Business Days to determine whether all of the conditions have been satisfied under Section 15.2(c), the Authority may notify the Developer that a shorter period will apply.
- (e) If the Developer does not agree with the Authority's determination as to whether the conditions precedent to NTP2 have been satisfied, the Developer may submit such Dispute for resolution in accordance with the Expedited Dispute Resolution Procedures.

15.3 **Additional Conditions to Commencement of Construction of Certain Project Elements**

Despite Section 15.2 (Remaining Work and Conditions Precedent to NTP2), the Developer may not undertake any Construction Work with respect to the Railroad Crossings until the applicable Railroad Protective Liability policy and any other required railroad insurances under Exhibit 9 (Required Insurance) have been obtained and is in full force and effect in accordance with Article 35 (Insurance and Reinstatement), and the Developer has delivered to the Authority written verification of such insurance coverage as required by Article 35 (Insurance and Reinstatement).

16. **COMPLETION**

16.1 **Interim Completion of Project Elements**

- (a) The Developer shall provide written notice to the Authority of the anticipated date for Interim Completion of each Interim Completion Element no later than sixty (60) days prior to the anticipated date for Interim Completion of the applicable Interim Completion Element.
- (b) No later than fifteen (15) Business Days prior to the anticipated date for Interim Completion of the applicable Interim Completion Element, the Developer shall provide written notice to the Authority of the anticipated date for such Interim Completion so as to allow the Authority to commence its review of those Interim Completion Conditions capable of being reviewed at the time of such notice. The notice must include a list of all Interim Completion Conditions for the relevant Interim Completion Element.
- (c) No later than ten (10) Business Days prior to satisfying all Interim Completion Conditions with respect to an Interim Completion Element, the Developer shall meet and confer with the Authority to confirm that the list of requirements provided for in Section 16.1(b) is in accordance with this Agreement.
- (d) The Developer shall provide written notice to the Authority once it has satisfied all of the Interim Completion Conditions relating to an Interim Completion Element (excluding condition 1 of Part 1 on Exhibit 12 (Construction Completion Conditions)) (a "**Notice of Interim Completion**").
- (e) Within fifteen (15) Business Days of receiving a Notice of Interim Completion:
 - (i) the Authority shall inspect the relevant Interim Completion Element, review the Final Design Documents, Construction Documents and other Submittals and conduct such other investigation as may be necessary to evaluate whether Interim Completion has been achieved with respect to the relevant Interim Completion Element; and
 - (ii) the Authority shall either:
 - (A) if all the applicable Interim Completion Conditions have been satisfied, issue a written certificate which certifies that the Developer has achieved Interim Completion with respect to the relevant Interim Completion Element (a "**Certificate of Interim Completion**"); or
 - (B) if any applicable Interim Completion Condition has not been satisfied, notify the Developer in writing of the reasons why Interim Completion for the relevant Interim Completion Element has not been achieved.
- (f) If any applicable Interim Completion Condition has not been satisfied, the Developer may resubmit a notice pursuant to Section 16.1(d) once the relevant Interim Completion Condition has been satisfied and Section 16.1(e) will apply. If the Authority determines that it does not require the full fifteen (15) Business Days to reconduct the relevant inspections and investigations under Section 16.1(e), the Authority may notify the Developer that a shorter period will apply.

- (g) If the Developer does not agree with the Authority's determination as to whether the Interim Completion Conditions have been satisfied or as to the date of Interim Completion for any Interim Completion Element, the Developer may submit such Dispute for resolution in accordance with the Expedited Dispute Resolution Procedures.
- (h) No later than ninety (90) days following the date on which the Developer receives a Certificate of Interim Completion with respect to an Interim Completion Element, the Developer shall deliver to the Authority a complete set of the As-Built Drawings for the relevant Interim Completion Element, in the form required under this Agreement.
- (i) In connection with the Authority's issuance of the Certificate of Interim Completion, the Authority may in its reasonable discretion add items to the Punch List. Any Dispute regarding whether an item added by the Authority is appropriately included on the Punch List will be resolved according to the Expedited Dispute Resolution Procedures.
- (j) The Developer shall complete all Punch List items for an Interim Completion Element within ninety (90) days of the date on which the Developer receives a Certificate of Interim Completion for such Interim Completion Element.

16.2 Intentionally Omitted

16.3 Project Substantial Completion

- (a) The Developer shall provide written notice to the Authority of the anticipated date for Project Substantial Completion:
 - (i) at least three hundred sixty-five (365) days prior to the anticipated date for Project Substantial Completion; and
 - (ii) at least one hundred twenty (120) days prior to the anticipated date for Project Substantial Completion.
- (b) The Developer shall provide a further written notice to the Authority of the anticipated date for Project Substantial Completion at least fifteen (15) Business Days prior to the anticipated date for Project Substantial Completion, so as to allow the Authority to commence its review of those Project Substantial Completion Conditions capable of being reviewed at the time of such notice. The notice must include a list of all Project Substantial Completion Conditions.
- (c) No later than ten (10) Business Days prior to satisfying all Project Substantial Completion Conditions, the Developer shall meet and confer with the Authority to confirm that the list of requirements provided for in Section 16.3(b) is in accordance with this Agreement.
- (d) The Developer shall provide written notice to the Authority once it has satisfied all of the Project Substantial Completion Conditions (excluding condition 1 of Part 3, on Exhibit 12 (Construction Completion Conditions)) (a "**Notice of Project Substantial Completion**").
- (e) Within fifteen (15) Business Days of receiving a Notice of Project Substantial Completion:
 - (i) the Authority shall inspect the Project, review the Final Design Documents, Construction Documents and other Submittals and conduct such other investigation as may be necessary to evaluate whether Project Substantial Completion has been achieved; and
 - (ii) the Authority shall:

- (A) if all the applicable Project Substantial Completion Conditions have been satisfied, issue a written certificate which certifies that the Developer has achieved Project Substantial Completion and the Project Substantial Completion Date (the "**Certificate of Project Substantial Completion**"); or
 - (B) if any applicable Project Substantial Completion Condition has not been satisfied, notify the Developer in writing of the reasons why Project Substantial Completion has not been achieved.
- (f) If any Project Substantial Completion Condition has not been satisfied, the Developer may resubmit a notice pursuant to Section 16.3(d) once the relevant Project Substantial Completion Condition has been satisfied and Section 16.3(e) will apply. If the Authority determines that it does not require the full fifteen (15) Business Days to reconduct the relevant inspections and investigations under Section 16.3(e), the Authority may notify the Developer that a shorter period will apply.
- (g) If the Developer does not agree with the Authority's determination as to whether the Project Substantial Completion Conditions have been satisfied or as to the Project Substantial Completion Date, the Developer may submit such Dispute for resolution in accordance with the Expedited Dispute Resolution Procedures.
- (h) In connection with the Authority's issuance of the Certificate of Project Substantial Completion, the Authority may in its reasonable discretion add or remove items to or from the Punch List. Any Dispute regarding whether an item added by the Authority is appropriately included on the Punch List will be resolved according to the Expedited Dispute Resolution Procedures.
- (i) The issuance of a Certificate of Project Substantial Completion shall be conclusive evidence that Project Substantial Completion has occurred, and of the Project Substantial Completion Date, for the sole purpose of ascertaining that the Developer may claim the Substantial Completion Milestone Payment in accordance with Section 23.2 (Substantial Completion Milestone Payment) and Availability Payments in accordance with Article 24 (Availability Payments).

16.4 Project Final Completion

- (a) The Developer shall achieve Project Final Completion by the Scheduled Project Final Completion Date.
- (b) The Developer shall provide written notice to the Authority of the anticipated date for Project Final Completion no later than fifteen (15) Business Days prior to the anticipated date for Project Final Completion, so as to allow the Authority to commence its review of those Project Final Completion Conditions capable of being reviewed at the time of such notice. The notice must include a list of all Project Final Completion Conditions.
- (c) No later than ten (10) Business Days prior to satisfying all Project Final Completion Conditions, the Developer shall meet and confer with the Authority to confirm that the list of requirements provided for in Section 16.4(b) is in accordance with this Agreement.
- (d) The Developer shall provide written notice to the Authority once it has satisfied all of the Project Final Completion Conditions (excluding condition 1 of Part 4, on Exhibit 12 (Construction Completion Conditions))(a "**Notice of Project Final Completion**").
- (e) Within fifteen (15) Business Days of receiving a Notice of Project Final Completion:
 - (i) the Authority shall inspect the items on the Punch List, review the As-Built Drawings and carry out such other investigation as may be necessary to evaluate whether Project Final Completion has been achieved; and
 - (ii) the Authority shall:

- (A) if all the applicable Project Final Completion Conditions have been satisfied, issue a written certificate which certifies that the Developer has achieved Project Final Completion (the "**Certificate of Project Final Completion**"); or
 - (B) if any applicable Project Final Completion Condition has not been satisfied, notify the Developer in writing of the reasons why Project Final Completion has not been achieved.
- (f) If any Project Final Completion Condition has not been satisfied, the Developer may resubmit a notice pursuant to Section 16.4(d) once the relevant Project Final Completion Condition has been satisfied and Section 16.4(e) will apply. If the Authority determines that it does not require the full fifteen (15) Business Days to reconduct the relevant inspections and investigations under Section 16.4(e), the Authority may notify the Developer that a shorter period will apply.
- (g) If the Developer does not agree with the Authority's determination as to whether the Project Final Completion Conditions have been satisfied or as to the date of Project Final Completion, the Developer may submit such Dispute for resolution in accordance with the Expedited Dispute Resolution Procedures.

PART D – OPERATION AND MAINTENANCE

17. OPERATION AND MAINTENANCE

17.1 Duration of the O&M Work

The Developer shall carry out the O&M Work from the relevant dates set out in the Technical Requirements.

17.2 General Obligations

- (a) The Developer shall carry out the O&M Work within the Maintenance Limits in accordance with:
 - (i) Good Industry Practice;
 - (ii) all Applicable Laws;
 - (iii) the requirements of all Governmental Approvals; and
 - (iv) the Technical Requirements and all other requirements of this Agreement.
- (b) The Developer shall at all times undertake sufficient O&M Work to ensure ongoing compliance with the O&M Performance Requirements.

17.3 Utility Accommodation

It is anticipated that from time to time during the Operating Period, Utility Owners will apply for additional Utility permits to:

- (a) install new Utilities that would cross or longitudinally occupy areas of the Project ROW that are subject to the CCJWRD's and the Authority's permitting jurisdiction; or
- (b) modify, repair, upgrade, relocate or expand existing Utilities within such areas.

For such Utility permit applications submitted after the Project Substantial Completion Date, the Developer shall:

- (i) as reasonably requested, assist the Authority in its consideration of each Utility permit application in accordance with this Agreement;

- (ii) within five (5) Business Days of a request from the Authority, provide copies of the most recent Project design information and As-Built Drawings, as applicable, to the Authority for forwarding to the applicants;
- (iii) as reasonably requested, assist each applicant with information regarding the location of other proposed and existing Utilities; and
- (iv) use Reasonable Efforts to coordinate work schedules with such applicants, as appropriate, to avoid the applicants' activities interfering with the operation of the Project.

17.4 Law Enforcement Services

- (a) The Developer acknowledges that any Governmental Entity empowered to enforce all Applicable Laws is free to enter the Project at any and all times to carry out its law enforcement duties. No provision of this Agreement is intended to surrender, waive or limit any law enforcement powers of any Governmental Entity, and all such police powers are expressly reserved.
- (b) Subject to Section 17.4(c), none of the Authority, the Authority Members or the Developer will have any liability or obligation to each other resulting from, arising out of or relating to:
 - (i) the failure of a public law enforcement agency to provide services; or
 - (ii) a public law enforcement agency's negligence or misconduct in providing services.
- (c) Failure by a public law enforcement agency to provide services will not excuse the Developer from performance of any of its obligations under this Agreement.

17.5 O&M Management Plan and Manual

- (a) Despite any other provision of this Agreement to the contrary, the Authority shall be required to approve the O&M Management Plan prepared by the Developer in accordance with Section 2.7.1 (*The O&M Management Plan*) of the Technical Requirements. The Authority may only withhold its approval of such O&M Management Plan if:
 - (i) it does not comply with the requirements of Section 2 (*Project Administrative and Management Requirements*) of the Technical Requirements;
 - (ii) it is inconsistent with any approved Quality Management Plan;
 - (iii) with respect to any one (1) year or five (5) year Renewal Work Schedule, it does not set out a proposed program of Renewal Work that is reasonably likely to ensure that the condition of the Project Elements will meet or exceed the O&M Performance Requirements over the period to which the proposed Renewal Work Schedule relates; or
 - (iv) during the Handback Period only, the proposed Renewal Work Schedule is not consistent with the Transition Plan.
- (b) Within ten (10) Business Days of the Authority's request, the Developer and any relevant O&M Contractor shall promptly meet and confer with the Authority to review and discuss any periodic Renewal Work Schedule submitted to the Authority pursuant to the Technical Requirements.
- (c) The O&M Manual shall be prepared by the Developer in accordance with Section 2.7.2 (*O&M Manual*) of the Technical Requirements and shall be submitted to the Authority as an R&C Submittal, in accordance with the Technical Requirements.

17.6 **Suspension of O&M Work**

- (a) The Authority may at any time suspend, in whole or in part, the O&M Work by written order to the Developer. Any such written order must be supported by the Authority's reasons for the required suspension of the O&M Work.
- (b) Any suspension of the O&M Work by the Authority pursuant to this Section 17.6 will constitute a Compensation Event except where the suspension order is made in response to:
 - (i) any failure by the Developer to comply with any Applicable Law or Governmental Approval, in each case:
 - (A) that constitutes a failure to handle, preserve and protect archaeological, paleontological or historic resources, or failure to handle Hazardous Materials in accordance with Applicable Laws and Governmental Approvals; or
 - (B) where such failure would have a material adverse effect on the Project; or
 - (ii) the existence of conditions unsafe for workers, other Project personnel or the general public, including failures to comply with Safety Standards or perform Safety Compliance arising from the failure to perform the O&M Work in accordance with this Agreement or Applicable Law (but only if such condition does not arise as a direct result of a Compensation Event or Relief Event).
- (c) Any suspension order made in response to matters referred to in Sections 17.6(b)(i) or 17.6(b)(ii) will cease to apply as soon as the relevant matter has been rectified or remedied to the reasonable satisfaction of the Authority.

18. **OPERATION OF DIVERSION INLET STRUCTURE**

The Authority will retain all right to, and responsibility for, operation of the Diversion Inlet Structure throughout the Term. The Developer will not have any liability or obligation for the operation or maintenance of the Diversion Inlet Structure.

19. **HANDBACK**

19.1 **Handback Obligations**

- (a) On the Termination Date, the Developer shall hand back the Project to the Authority, at no charge to the Authority, in accordance with the Handback Requirements.
- (b) If there is an Early Termination, the Developer shall be required to comply with the requirements of this Section 19.1 only to the extent that any Renewal Work under the Handback Requirements was scheduled to have been performed prior to the Early Termination Date.

19.2 **Handback Reserve Account**

- (a) **Establishment and Security**
 - (i) No later than the first (1st) Business Day of the Handback Period, the Developer shall establish a reserve account (the "**Handback Reserve Account**") to be held and controlled by a third party (the "**HR Account Bank**") to be agreed between the Parties.
 - (ii) Within three (3) Business Days of establishing the Handback Reserve Account, the Developer shall provide to the Authority the details of the Handback Reserve Account, including the name, address and contact information for the depository institution and the account number.

- (iii) The Developer shall grant to the Authority a first priority security interest in the Handback Reserve Account, which shall be perfected through an account control agreement (to be agreed and entered into by the Parties no later than the first (1st) Business Day of the Handback Period).
- (iv) The Developer shall not grant a security interest to any third party in relation to the Handback Reserve Account.
- (v) Any withdrawal from the Handback Reserve Account:
 - (A) will be controlled by the operation of the account control agreement entered into pursuant to Section 19.2(a)(iii); and
 - (B) will require the prior written approval (or deemed approval) of the Authority, in accordance with Section 19.2(c) (Withdrawal from the Handback Reserve Account).

(b) Funding

- (i) No later than sixty (60) days prior to the commencement of the Handback Year, the Developer shall deliver to the Authority a report setting out its calculations of the Handback Reserve Amount in accordance with Exhibit 18 (Calculation of Handback Amounts).
- (ii) Within thirty (30) days of the Developer delivering a report to the Authority pursuant to Section 19.2(b)(i), the Parties shall seek to agree upon the Handback Reserve Amount and, in the absence of agreement, the Handback Reserve Amount will be finally determined pursuant to the Dispute Resolution Procedures.
- (iii) If, on the date that is five (5) Business Days following each date of agreement or determination of the Handback Reserve Amount, the aggregate of:
 - (A) the balance of the Handback Reserve Account; and
 - (B) the undrawn value of any Handback Letter of Credit,

is not at least equal to the Handback Reserve Amount, the Authority may withhold amounts from subsequent Monthly Disbursements, and pay such amounts into the Handback Reserve Account, until such time as the aggregate of:

- (aa) the balance of the Handback Reserve Account; and
- (bb) the undrawn value of any Handback Letter of Credit,

is equal to the Handback Reserve Amount then required.

- (iv) If, on any date of agreement or determination of the Handback Reserve Amount, the aggregate of:
 - (A) the balance of the Handback Reserve Account; and
 - (B) the undrawn value of any Handback Letter of Credit,exceeds the Handback Reserve Amount, then the Authority will (at the request of the Developer):
 - (aa) approve a release of funds by the HR Account Bank to the Developer in accordance with the account control agreement entered into pursuant to Section 19.2(a)(iii) (Establishment and Security); or

- (bb) surrender any Handback Letter of Credit in exchange for a replacement Handback Letter of Credit,

so that the balance of the Handback Reserve Account plus the undrawn value of all Handback Letters of Credit held by the Authority equals the Handback Reserve Amount.

(c) Withdrawal from the Handback Reserve Account

- (i) Subject to Section 19.2(c)(ii), the Developer will be entitled to withdraw funds from the Handback Reserve Account, in such amounts and at such times as needed, only to pay for Renewal Work that was taken into account in the calculation of the Handback Reserve Amount.
- (ii) Prior to withdrawing funds from the Handback Reserve Account, the Developer shall give written notice to the Authority of the amount to be withdrawn and the purpose for which funds will be used, together with such other supporting information as the Authority may reasonably require.
- (iii) Within ten (10) Business Days of receiving a notice under Section 19.2(c)(ii), the Authority shall either approve or withhold its approval to the Developer's proposed withdrawal. The Authority may only withhold its approval to any proposed withdrawal from the Handback Reserve Account if:
 - (A) the Developer is unable to demonstrate, to the reasonable satisfaction of the Authority, that the proposed withdrawal amount will be used to meet costs incurred by the Developer or a Developer-Related Entity in undertaking any Renewal Work that was taken into account in the calculation of the Handback Reserve Amount; or
 - (B) the aggregate of:
 - (aa) the balance of the Handback Reserve Account;
 - (bb) the undrawn value of any Handback Letter of Credit; and
 - (cc) the aggregate amount of all withdrawals made from the Handback Reserve Account since the Handback Reserve Amount was most recently agreed,is less than the Handback Reserve Amount.
- (iv) If the Authority fails to respond within the ten (10) Business Day period referred to in Section 19.2(c)(iii), the Authority will be deemed to have given its approval to the relevant withdrawal request.

(d) Handback Letters of Credit

- (i) In lieu of the establishment or ongoing funding of all or part of the Handback Reserve Account, the Developer may deliver to the Authority one or more letters of credit (each in a form and from an Eligible Issuer and on the basis that the Authority will be the sole beneficiary) with an aggregate value, when combined with the balance of the Handback Reserve Account, equal to the ongoing Handback Reserve Amount.
- (ii) If the Developer delivers one or more letters of credit to the Authority in accordance with Section 19.2(d)(i) and the Handback Reserve Account has already been established, then the Authority shall approve the release of amounts then standing to the credit of the Handback Reserve Account to the Developer so that the balance of the Handback Reserve Account plus the undrawn value of all Handback Letters of Credit held by the Authority equals the Handback Reserve Amount.

(e) Termination Date

Within ten (10) Business Days after the Termination Date, the Authority shall:

- (i) do one or both of the following:
 - (A) require the HR Account Bank to pay to the Authority amounts standing to the credit of the Handback Reserve Account; or
 - (B) draw upon any Handback Letter of Credit,

in an aggregate amount equal to that required to undertake any Renewal Work that must be undertaken to ensure that the Project meets the Handback Requirements as of the Termination Date; and
- (ii) following the payment or draws referred to in Section 19.2(e)(i):
 - (A) approve the release of any remaining balance of the Handback Reserve Account to the Developer; and
 - (B) return any Handback Letter of Credit with an undrawn value remaining to the Developer.

PART E – SUBCONTRACTING AND KEY PERSONNEL

20. CONTRACTORS AND KEY PERSONNEL

20.1 Subcontracting

- (a) Nothing in this Agreement will create any contractual relationship between the Authority and any Contractor.
- (b) No Contract entered into by any Developer-Related Entity will impose any obligation or liability upon the Authority or any other Authority-Related Entity to any Contractor or any of its employees.
- (c) The retention of Contractors by the Developer will not relieve the Developer of its obligations under this Agreement and the Developer will at all times be fully responsible under this Agreement for the acts and omissions of all Contractors performing Work in relation to the Project, as if they were the acts and omissions of the Developer.

20.2 Key Personnel

(a) Key Personnel

The Developer shall maintain a Developer Executive Leadership and Management Team and Core Staff throughout the Term in accordance with this Section 20.2 and Exhibit 10 (Key Personnel).

(b) Developer Executive Leadership and Management Team

With respect to the Developer Executive Leadership and Management Team:

- (i) the Developer shall retain, or shall ensure that the relevant Key Contractor will retain, employ and utilize the individuals specifically named and listed as Key Personnel in Table 10.1 (Developer Executive Leadership and Management Team) of Exhibit 10 (Key Personnel) (or replacements approved in accordance with this Section 20.2) to fill the corresponding positions for the time periods set out in Table 10.1 (Developer Executive Leadership and Management Team) of Exhibit 10 (Key Personnel);

- (ii) each of the Key Personnel shall fulfill the "Primary Functions/Duties" and satisfy the "Minimum Qualifications/Experience" of such Key Personnel position, in each case, specified in Table 10.1 (Developer Executive Leadership and Management Team) of Exhibit 10 (Key Personnel);
- (iii) each of the Key Personnel shall be full-time, permanent staff retained or employed by and solely for the Developer or the relevant Key Contractor (as applicable) to work on the Project, and shall act independently of other organizations who may have an interest in the Developer; and
- (iv) each of the Key Personnel shall be based in the Project Office.

(c) Core Staff

With respect to the Core Staff:

- (i) the Developer shall retain, or shall ensure that the relevant Key Contractor will retain, employ and utilize individuals to fill the Key Personnel positions specified in Table 10.2 (Core Staff) of Exhibit 10 (Key Personnel) for the time periods set out in Table 10.2 (Core Staff) of Exhibit 10 (Key Personnel);
- (ii) each of the Key Personnel shall fulfill the "Primary Functions/Duties" and satisfy the "Minimum Qualifications/Experience" of such Key Personnel position specified in Table 10.2 (Core Staff) of Exhibit 10 (Key Personnel); and
- (iii) the Developer shall obtain the prior written consent of the Authority for the appointment of any Key Personnel.

(d) Appointment and Replacement of Key Personnel

- (i) The Developer shall not change or substitute any Key Personnel except:
 - (A) due to retirement, death, disability, incapacity or voluntary or involuntary termination of employment; or
 - (B) with the prior written consent of the Authority.
- (ii) The Developer shall notify the Authority in writing of any proposed replacement for any Key Personnel position, and shall ensure that any replacement satisfies the "Minimum Qualifications/Experience" for that position set out in Exhibit 10 (Key Personnel).
- (iii) The Authority will have the right to:
 - (A) review the qualifications, capability and experience of each individual to be appointed to a Key Personnel position (including personnel employed by any Key Contractor to fill any such position); and
 - (B) approve or reject the appointment of such individual in such position prior to the commencement of any Work by such individual (such approval not to be unreasonably withheld, delayed or conditioned). It will be reasonable for the Authority to reject a proposed individual if that individual does not have qualifications, capability and experience that satisfy the "Minimum Qualifications/Experience" set out in Exhibit 10 (Key Personnel).
- (iv) The Developer shall prepare a role profile, and submit such proposal in writing to the Authority, for any new Developer Executive Leadership and Management Team or Core Staff role it proposes. If the Authority objects to a proposed additional or substitute Key Personnel role, the Developer shall repeat the above process until the Authority has consented in writing to the proposed additional or substitute Key Personnel role.

(e) **General Obligations**

- (i) The Developer shall ensure that each individual filling a Key Personnel position will dedicate the amount of time necessary for the proper prosecution and performance of the Work.
- (ii) A Key Personnel member may undertake more than one Developer Executive Leadership and Management Team or Core Staff role with the prior written consent of the Authority, however, no individual shall be nominated to fulfill the equivalent of more than one full-time role.
- (iii) The Developer shall prepare and maintain an organizational chart showing the Key Personnel that comprise the Developer Executive Leadership and Management Team and the Core Staff throughout the Term. For each of the Key Personnel, the chart shall indicate:
 - (A) their name;
 - (B) the percentage of their time dedicated to each Key Personnel role;
 - (C) their principal employer organization; and
 - (D) their reporting line(s).
- (iv) The Developer shall provide the Authority with office and cell phone numbers, as well as email addresses, for all Key Personnel. The Developer shall also provide to the Authority five personnel who the Authority can contact 24 hours per day, seven (7) days per week, as necessary, with at least three (3) such personnel being Key Personnel, including:
 - (A) prior to the Project Substantial Completion Date, two from the D&C Contractor and one from the Developer; and
 - (B) on or after the Project Substantial Completion Date:
 - (aa) if an O&M Contractor is performing the O&M Work, two from the O&M Contractor and one from the Developer; or
 - (bb) if the Developer is self-performing the O&M Work, three from the Developer,

in each case, who will be able to, in turn, promptly contact all other Key Personnel.

21. **APPLICABLE LAW**

21.1 **General**

The Developer shall at all times in carrying out the Work comply, and require its Contractors to comply, with all Applicable Laws, including the federal requirements and implementing regulations listed below and set out in Exhibit 31 (Federal Requirements):

- (a) Section 601 of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000d), and Department of Defense Directive 5500.11;
- (b) the Age Discrimination Act of 1975 (42 U.S.C. 6102);
- (c) the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), and Army Regulation 600-7; and
- (d) 40 U.S.C. 3141-3148 and 40 U.S.C. 3701-3708 (labor standards originally enacted as the Davis-Bacon Act, the Contract Work Hours and Safety Standards Act, and the Copeland Anti-Kickback Act).

21.2 Assistance with Reporting Requirements

The Developer shall provide all assistance reasonably requested by the Authority in connection with any reporting requirements the Authority must comply with under any Applicable Law, including the federal requirements and implementing regulations set out in Section 21.1 (General).

21.3 Conflicting Provisions

If there is any conflict between any Applicable Law and the other requirements of this Agreement, Applicable Law will prevail and take precedence over any such conflicting provisions.

21.4 Certification Regarding Use of Contract Funds for Lobbying

The Developer shall:

- (a) ensure that all Contracts (including lower tier subcontracts) that exceed \$100,000 include the language of the certification in Exhibit 8 (Certification Regarding Use of Contract Funds for Lobbying); and
- (b) require that all Contractors (including lower tier subcontractors) that are party to such Contracts certify and disclose accordingly.

PART F – NONCOMPLIANCE AND PAYMENTS

22. NONCOMPLIANCE EVENTS

22.1 Noncompliance Events Tables

The tables provided in Exhibit 16 (Noncompliance Events) identify:

- (a) Developer failures to comply with obligations of this Agreement that constitute Noncompliance Events;
- (b) whether each Noncompliance Event is a Category A Noncompliance Event, a Category B Noncompliance Event or a Category C Noncompliance Event;
- (c) the applicable Cure Period (if any) for each Noncompliance Event;
- (d) the number of Noncompliance Points that may be assessed for each Noncompliance Event in accordance with Section 22.4 (Assessment of Noncompliance Points); and
- (e) where applicable, whether the Noncompliance Event is a "Flood Control" or "Non-Flood Control"-related Noncompliance Event.

22.2 Notification of Noncompliance Events by the Developer

- (a) The Developer shall notify the Authority in writing of the occurrence of any Noncompliance Event as soon as reasonably practicable, and in any event within 48 hours after the applicable Noncompliance Start Date and Time.
- (b) Each notice provided by the Developer to the Authority in accordance with Section 22.2(a) must:
 - (i) identify the relevant Noncompliance Event;
 - (ii) identify the relevant Noncompliance Start Date and Time;
 - (iii) identify the applicable Cure Period (if any);

- (iv) identify whether it is a Category A Noncompliance Event, a Category B Noncompliance Event or a Category C Noncompliance Event;
 - (v) where applicable, identify whether it is a "Flood Control" or "Non-Flood Control"-related Noncompliance Event;
 - (vi) identify the number of Noncompliance Points that are specified for that Noncompliance Event in Exhibit 16 (Noncompliance Events); and
 - (vii) provide reasonable detail of the circumstances of the Noncompliance Event.
- (c) The Developer shall notify the Authority in writing of the rectification of any Noncompliance Event. The notice provided by the Developer to the Authority must:
 - (i) identify the relevant Noncompliance Rectification Date;
 - (ii) provide reasonable detail of the manner in which the Noncompliance Event was cured; and
 - (iii) specify measures taken by the Developer to prevent the reoccurrence of the Noncompliance Event.

22.3 Notification of Noncompliance Events by the Authority

- (a) If the Authority believes a Noncompliance Event has occurred for which the Authority has not received notification from the Developer in accordance with Section 22.2(a) (Notification of Noncompliance Events by the Developer), the Authority may deliver to the Developer a written notice setting forth the Authority's determination of the occurrence of a Noncompliance Event.
- (b) Each notice provided by the Authority to the Developer in accordance with Section 22.3(a) must:
 - (i) identify the relevant Noncompliance Event;
 - (ii) identify the relevant Noncompliance Start Date and Time;
 - (iii) identify the applicable Cure Period (if any);
 - (iv) identify whether it is a Category A Noncompliance Event, a Category B Noncompliance Event or a Category C Noncompliance Event;
 - (v) where applicable, identify whether it is a "Flood Control" or "Non-Flood Control"-related Noncompliance Event; and
 - (vi) identify the number of Noncompliance Points that are specified for that Noncompliance Event in Exhibit 16 (Noncompliance Events).

22.4 Assessment of Noncompliance Points

Subject to Section 22.5 (Concurrent Noncompliance Events), Noncompliance Points may be assessed in accordance with the principles set forth in this Section 22.4.

(a) Cure Periods

Cure Periods for Category A Noncompliance Events and Category B Noncompliance Events will apply as follows:

- (i) the first Cure Period will commence at the Noncompliance Start Date and Time; and

- (ii) each subsequent Cure Period will commence on the date the immediately preceding Cure Period expires, if the relevant Noncompliance Rectification Date has not occurred on or before that date.

(b) **Category A Noncompliance Events**

For a Category A Noncompliance Event, the number of Noncompliance Points specified for that Category A Noncompliance Event in Exhibit 16 (Noncompliance Events) will be assessed:

- (i) on the date that the first Cure Period expires; and
- (ii) on the date that each subsequent Cure Period expires,

in each case, if the relevant Noncompliance Rectification Date has not occurred on or before that date.

(c) **Category B Noncompliance Events**

For a Category B Noncompliance Event, the number of Noncompliance Points specified for that Category B Noncompliance Event in Exhibit 16 (Noncompliance Events) will be assessed at the Noncompliance Start Date and Time and will be further assessed:

- (i) on the date that the first Cure Period expires; and
- (ii) on the date that each subsequent Cure Period expires,

in each case, if the relevant Noncompliance Rectification Date has not occurred on or before that date.

(d) **Category C Noncompliance Events**

For a Category C Noncompliance Event, the number of Noncompliance Points specified for that Category C Noncompliance Event in Exhibit 16 (Noncompliance Events) will be assessed at the Noncompliance Start Date and Time.

(e) **Failure to Report**

Nothing in this Agreement will prevent the assessment of Noncompliance Points for both the occurrence of a Noncompliance Event and the failure to notify the Authority of the same Noncompliance Event in accordance with this Agreement.

22.5 Concurrent Noncompliance Events

If, but for this Section 22.5, more than one Noncompliance Event delineated in separate line items in the tables contained in Exhibit 16 (Noncompliance Events) would apply with respect to the same breach or failure to perform obligations under this Agreement ("**Concurrent Noncompliance Events**") then, for that Reporting Period:

- (a) Noncompliance Points will only be assessed for the Concurrent Noncompliance Event for which the highest number of Noncompliance Points would be assessed during that Reporting Period; and
- (b) Noncompliance Points for each other Concurrent Noncompliance Event will not be assessed during that Reporting Period.

22.6 Records of Noncompliance Events

The Developer shall keep and, upon request, provide the Authority with current records of:

- (a) all Noncompliance Events;

- (b) the number of Noncompliance Points assessed for all such Noncompliance Events and the date of each assessment; and
- (c) each Noncompliance Start Date and Time and Noncompliance Rectification Date.

22.7 Increased Monitoring

- (a) Subject to Section 28.5(b)(iii)(C) but without prejudice to any other rights the Authority may have under this Agreement, if a Noncompliance Increased Monitoring Trigger occurs, the Authority may, upon written notice to the Developer, increase the level of its monitoring, inspection, testing and auditing of the Work and the Developer's compliance with this Agreement to such level as the Authority determines in its absolute discretion.
- (b) The Authority may continue to exercise its rights under Section 22.7(a) until such time as the Developer has demonstrated to the reasonable satisfaction of the Authority that:
 - (i) the Developer is diligently pursuing the cure of all uncured Noncompliance Events; and
 - (ii) the Developer intends to diligently perform and is capable of performing its obligations under this Agreement.
- (c) The Developer shall reimburse the Authority for any increased or additional costs incurred by the Authority in exercising its rights under Section 22.7(a) within thirty (30) days of receiving an invoice from the Authority with respect to such costs.

22.8 Termination

Without prejudice to any other rights the Authority may have under this Agreement, if the Noncompliance Developer Default Trigger occurs, the Authority may terminate this Agreement in accordance with Article 42 (Termination for Developer Default).

22.9 Deductions Arising from Noncompliance Events

The Parties agree that:

- (a) because of the unique nature of the Project, it is difficult or impossible to determine with precision the amount of damages that would or might be incurred by the Authority as a result of any Noncompliance Event;
- (b) the assessment of Noncompliance Points for Noncompliance Events will result in Deductions in accordance with Exhibit 14 (Milestone Payments) or Exhibit 15 (Payment Mechanism);
- (c) such Deductions are in the nature of liquidated damages (and not a penalty) and are fair and reasonable to compensate the Authority for Losses it will incur as a result of Noncompliance Events, including:
 - (i) additional costs of administering this Agreement;
 - (ii) additional costs of providing temporary flood control measures;
 - (iii) loss of use, enjoyment and benefit of the Project and associated transportation facilities by the general public; and
 - (iv) injury to the credibility and reputation of the Authority and other Authority-Related Entities among policymakers and the general public.

22.10 Notification of Request for Extension to Response Time for Nonconformances

- (a) To the extent that the Developer encounters unavoidable circumstances that materially interfere with its ability to comply with a Response Time for Nonconformance as provided in Attachment 4-1 (*Performance and Measurement Table*) of the Technical Requirements, the Developer shall follow the procedures in this Section 22.10 to request an extension to the Response Time for Nonconformance.
- (b) The Developer shall submit a written notice to the Authority of a request for an extension to a Response Time for Nonconformance promptly (and in any event within one (1) day) after becoming aware of the inability to comply with the specified Response Time for Nonconformance.
- (c) Any request for an extension to a Response Time for Nonconformance must:
 - (i) state that it is a request for an extension to a Response Time for Nonconformances;
 - (ii) identify the relevant Nonconformance by reference to Attachment 4-1 (*Performance and Measurement Table*);
 - (iii) contain full details of the relevant Nonconformance that demonstrates an entitlement to an extension;
 - (iv) contain full details of the claimed extension of response time for the relevant Response Time for Nonconformance; and
 - (v) detail any steps that the Developer has taken or will take to mitigate any effects of the extension and the future reoccurrence of the need for such an extension.
- (d) The Authority may determine, in its sole discretion, the extent to which it will grant such a request.

23. MILESTONE PAYMENTS

23.1 Intentionally Omitted

23.2 Substantial Completion Milestone Payment

- (a) At any time following the occurrence of the Project Substantial Completion Date, the Developer may deliver to the Authority an invoice for payment of the Substantial Completion Milestone Payment, together with all of the following:
 - (i) a detailed calculation of the Substantial Completion Milestone Payment in accordance with Section 1 of Exhibit 14 (*Milestone Payments*);
 - (ii) a copy of the Certificate of Project Substantial Completion;
 - (iii) a written certification by the Developer to the Authority that no amounts due and payable to any Contractor or Supplier remain unpaid with respect to the Work performed prior to the Project Substantial Completion Date (except amounts subject to a Good Faith dispute, for which the Developer or the relevant Contractor (as applicable) has established adequate reserves, to the reasonable satisfaction of the Authority);
 - (iv) a written certification by the Developer to the Authority that the Project is free and clear of any liens or claims arising out of or in connection with the Work performed prior to the Project Substantial Completion Date by the Developer or any Contractor;

- (v) copies of lien waivers, in form and substance reasonably satisfactory to the Authority, from each Contractor with a Contract of five hundred thousand dollars (\$500,000) or more in value, individually or in aggregate, as necessary to support the Developer's certification required by Section 23.2(a)(iv) or, if the Developer is unable to obtain all such waivers, a letter of credit or bond, in form and substance reasonably satisfactory to the Authority, to protect the Authority and the Project from any liens and claims arising out of or in connection with the performance of the Work performed prior to the Project Substantial Completion Date by the Developer or any Contractor; and
 - (vi) the final Monthly Performance Report covering the time period from the day after the penultimate Monthly Performance Report through and including the Project Substantial Completion Date.
- (b) Subject to Section 23.4(a) (Limitations on Milestone Payments) and Section 25 (Disputed Amounts), the Authority shall pay the Substantial Completion Milestone Payment, less any amount due to the Authority under Section 27.8(c)(ii) (Finance Costs during the Authority Delay Period), to the Developer within thirty (30) days of receipt by the Authority of the invoice and materials required to be submitted by the Developer in accordance with Section 23.2(a) in form and substance reasonably satisfactory to the Authority.

23.3 Additional Milestone Payments

- (a) Subject to Section 23.3(c) and Section 23.4 (Limitations on Milestone Payments), on the last day of each month prior to the Project Substantial Completion Date (each a "**AMP Calculation Date**"), the Developer may deliver to the Authority an invoice for payment of an Additional Milestone Payment, together with all of the following:
- (i) a detailed calculation of the Additional Milestone Payment in accordance with Section 2 of Exhibit 14 (Milestone Payments);
 - (ii) a copy of the applicable Certificates of Interim Completion;
 - (iii) a written certification by the Developer to the Authority that no amounts due and payable to any Contractor or Supplier remain unpaid with respect to the Work performed prior to the applicable AMP Calculation Date (except amounts subject to a Good Faith dispute, for which the Developer or the relevant Contractor (as applicable) has established adequate reserves, to the reasonable satisfaction of the Authority);
 - (iv) a written certification by the Developer to the Authority that the Project is free and clear of any liens or claims arising out of or in connection with the Work performed prior to the AMP Calculation Date by the Developer or any Contractor; and
 - (v) copies of lien waivers, in form and substance reasonably satisfactory to the Authority, from each Contractor with a Contract of five hundred thousand dollars (\$500,000) or more in value, individually or in aggregate, as necessary to support the Developer's certification required by Section 23.3(a)(iv) or, if the Developer is unable to obtain all such waivers, a letter of credit or bond, in form and substance reasonably satisfactory to the Authority, to protect the Authority and the Project from any liens and claims arising out of or in connection with the performance of the Work performed prior to the applicable AMP Calculation Date by the Developer or any Contractor;
- (b) Subject to Section 23.3(d), (Section 23.4 (Limitations on Milestone Payments)) and Section 25 (Disputed Amounts), the Authority shall pay the relevant Additional Milestone Payment to the Developer within thirty (30) days of receipt by the Authority of the invoice and materials required to be submitted by the Developer in accordance with Section 23.3(a) in form and substance reasonably satisfactory to the Authority.
- (c) The Developer shall deliver to the Authority an invoice for payment of the final Additional Milestone Payment, together with the materials required under Section 23.3(a), at the same time that it delivers the materials

required to be submitted to the Authority for the Substantial Completion Milestone Payment in accordance with Section 23.2(a).

- (d) The Authority shall pay the final Additional Milestone Payment to the Developer at the same time that the Authority pays the Substantial Completion Milestone Payment to the Developer pursuant to Section 23.2(b) (Substantial Completion Milestone Payment).

23.4 Limitations on Milestone Payments

- (a) Despite any other provision of this Agreement to the contrary, the Developer may not claim, and the Authority will not be required to pay all or a portion of an Additional Milestone Payment to the extent that such Additional Milestone Payment or portion of such Additional Milestone Payment, when added to all Additional Milestone Payments that have been previously paid by the Authority, would exceed the Maximum Cumulative Additional Milestone Payments for the relevant AMP Calculation Date.
- (b) If all or a portion of a Milestone Payment that would otherwise be payable to the Developer under this Article 23 is not paid solely as a result of this Section 23.4(a), the Developer may claim, and the Authority will be required to pay, such amount at the same time as the next Milestone Payment, subject to this Section 23.4(a).

23.5 Monthly Performance Reports Prior to Project Substantial Completion

- (a) Until the Project Substantial Completion Date has occurred, the Developer shall submit a Monthly Performance Report to the Authority no later than the tenth (10th) day of each month following the Financial Closing Date.
- (b) The Monthly Performance Report must contain the information required by Exhibit 17 (Monthly Performance Reports, Part 1 – Form of Monthly Performance Report to be Delivered Prior to Project Substantial Completion).
- (c) Within ten (10) Business Days of receipt, the Authority shall notify the Developer if a Monthly Performance Report is incomplete or incorrect in any material respect, in which case the Developer shall, subject to the Developer's right to dispute the Authority's assessment, submit a correct and complete Monthly Performance Report.
- (d) If, more than ten (10) Business Days after receiving a Monthly Performance Report, but prior to the Project Substantial Completion Date, the Authority determines that:
 - (i) a Monthly Performance Report submitted by the Developer is inaccurate; and
 - (ii) had such Monthly Performance Report been accurate, it would result in a deduction from a Milestone Payment different from that reported in the Monthly Performance Report,the Developer shall, subject to the Developer's right to dispute the Authority's assessment, make an adjustment to correct the inaccuracy on the next applicable Monthly Performance Report to be submitted to the Authority.
- (e) The Authority will not be obligated to pay interest on any late payments arising due to resubmitted Monthly Performance Reports pursuant to Section 23.5(c).

24. AVAILABILITY PAYMENTS

24.1 Availability Payments

From the Project Substantial Completion Date until the end of the Term, Availability Payments will be calculated and earned by the Developer according to the methodology in Exhibit 15 (Payment Mechanism).

24.2 **Invoicing and Monthly Performance Reports Following Project Substantial Completion**

- (a) No later than the tenth (10th) day of each month following the Project Substantial Completion Date, the Developer shall submit:
 - (i) an invoice setting out the amount and calculation of the Availability Payment due for the current month; and
 - (ii) a Monthly Performance Report for the Work performed in the prior month.
- (b) The Monthly Performance Report shall contain the information required by Exhibit 17 (Monthly Performance Reports, Part 2 – Form of Monthly Performance Report to be Delivered Following Project Substantial Completion).
- (c) Within ten (10) Business Days of receipt, the Authority shall notify the Developer if such invoice or Monthly Performance Report is incomplete or incorrect in any material respect, in which case the Developer shall, subject to the Developer's right to dispute the Authority's assessment, submit a correct and complete invoice or Monthly Performance Report (as applicable).
- (d) On the later of:
 - (i) thirty (30) days following receipt of a correct and complete invoice and Monthly Performance Report; or
 - (ii) the tenth (10th) day of the month following receipt of a correct and complete invoice and Monthly Performance Report,

the Authority shall pay to the Developer the Monthly Disbursement due.
- (e) No interest will accrue on late payments arising from any invoices to the extent they are incomplete or incorrect.
- (f) If, more than ten (10) Business Days after receiving an invoice and Monthly Performance Report, the Authority determines that:
 - (i) the Monthly Performance Report submitted by the Developer is inaccurate; and
 - (ii) had the Monthly Performance Report been accurate, it would have resulted in a Deduction different from that reported in the Monthly Performance Report,

the Developer shall, subject to the Developer's right to dispute the Authority's assessment, make an adjustment to correct the inaccuracy on the next applicable Monthly Performance Report to be submitted to the Authority and reflect the correct Deduction in the next applicable invoice. The Authority shall not be obligated to pay interest on any late payments arising due to resubmitted Monthly Performance Reports pursuant to this Section 24.2(f).
- (g) For the final Monthly Disbursement to be made under this Agreement prior to the end of the Term, the Authority may delay payment of such Monthly Disbursement for an additional thirty (30) days in order to verify the Monthly Performance Report with respect to such final Monthly Disbursement.

25. **DISPUTED AMOUNTS**

- (a) The Authority may dispute, in Good Faith, any amount specified in an invoice or Monthly Performance Report submitted pursuant to Article 23 (Milestone Payments) or Article 24 (Availability Payments).

- (b) The Authority will pay the amount of any such invoice that is not in dispute and may withhold the balance of such invoice that is in dispute, pending resolution of the Dispute.
- (c) The Developer may dispute, in Good Faith, any determination by the Authority that an invoice is incomplete or incorrect in a material respect.
- (d) Any amount determined to be due pursuant to the Dispute Resolution Procedures will be paid within thirty (30) days following resolution of the Dispute, together with interest accrued thereon at a rate equal to the Prime Rate from the date on which amount was initially due through and including the date on which the payment is made.

PART G – DELAYS AND SUPERVENING EVENTS

26. DELAYS

26.1 Notice

- (a) If at any time the Developer becomes aware that there will be or is likely to be a delay in the Work such that:
 - (i) Project Substantial Completion will not occur by the Scheduled Project Substantial Completion Date or, following the Scheduled Project Substantial Completion Date, there will be further delay in the achievement of Project Substantial Completion; or
 - (ii) Project Final Completion will not occur by the Scheduled Project Final Completion Date or, following the Scheduled Project Final Completion Date, there will be further delay in the achievement of Project Final Completion,

the Developer shall promptly (and in any event within ten (10) Business Days) after becoming aware of the likely delay give notice to the Authority to that effect specifying the reason for the delay or likely delay.

- (b) Subject to Section 26.1(e), within thirty (30) days of submitting a notice to the Authority pursuant to Section 26.1(a), the Developer shall submit to the Authority an estimate of the likely effect on the most recent Project Status Schedule Update of such delay, including its impact on the commencement of the Construction Work or the achievement of Project Substantial Completion or Project Final Completion (as applicable).
- (c) Subject to Section 26.1(e), within thirty (30) days of submitting a notice to the Authority pursuant to Section 26.1(a)(i), the Developer shall submit to the Authority a plan which sets out specific actions and an associated schedule to be followed by the Developer in order to meet the Project Substantial Completion Long Stop Date (a "**Project Substantial Completion Implementation Plan**"). Such actions may include:
 - (i) changes in organizational and management structure;
 - (ii) revising and restating management plans and procedures;
 - (iii) improvements to quality control practices;
 - (iv) increased monitoring and inspections;
 - (v) changes in Key Personnel and other important personnel; and
 - (vi) replacement of Contractors.

- (d) Within thirty (30) days of receiving a Project Substantial Completion Implementation Plan, the Authority shall notify the Developer whether such Project Substantial Completion Implementation Plan is acceptable (in the Authority's reasonable discretion). If the Authority notifies the Developer that its Project Substantial

Completion Implementation Plan is acceptable, the Developer shall implement such Project Substantial Completion Implementation Plan in accordance with its terms.

- (e) The Developer will not be required to submit a notice under Section 26.1(b) or (c) if it has submitted a claim under Article 27 (Compensation Events) or Article 28 (Relief Events) with respect to the relevant delay.

26.2 Supply of Information

Following delivery of notice by the Developer pursuant to Section 26.1 (Notice), the Developer shall promptly (and in any event within seven (7) Business Days of delivery of such notice) supply to the Authority any further information relating to the delay which:

- (a) is received by the Developer; or
- (b) is reasonably requested by the Authority.

27. COMPENSATION EVENTS

27.1 Entitlement to Claim

If a Compensation Event directly causes, or is reasonably likely to directly cause, the Developer to do any one or more of the following:

- (a) fail to achieve Project Substantial Completion by the Scheduled Project Substantial Completion Date or, following the Scheduled Project Substantial Completion Date, incur further delay in achieving Project Substantial Completion;
- (b) fail to achieve Project Final Completion by the Scheduled Project Final Completion Date or, following the Scheduled Project Final Completion Date, incur further delay in achieving Project Final Completion;
- (c) fail to comply with its obligations under this Agreement;
- (d) incur additional or increased costs; or
- (e) fail to complete all Work on a Temporary Construction Easement by the TCE Expiry Date,

subject to Section 27.9 (Material Flood Events), Section 27.10 (Railroad Crossings) and Section 27.11 (Pandemic Event Change in Law), the Developer may claim one or more of the following in accordance with this Article 27:

- (i) an extension to the Scheduled Project Substantial Completion Date or, following the Scheduled Project Substantial Completion Date, the Project Substantial Completion Long Stop Date;
- (ii) an extension to the Scheduled Project Final Completion Date;
- (iii) relief from compliance with its obligations under this Agreement;
- (iv) compensation for any Change in Costs that the Developer has incurred or will incur as a direct result of such Compensation Event;
- (v) compensation for any Finance Costs in accordance with Section 27.8 (Finance Costs during the Authority Delay Period); or
- (vi) an extension of the TCE Expiry Date for a Temporary Construction Easement.

27.2 Notice and Information for Compensation Events

- (a) The Developer shall comply with the procedures in this Section 27.2 to claim an extension of time, relief from its obligations or compensation (as applicable) with respect to a Compensation Event.
- (b) The Developer shall submit a notice that complies with Section 27.2(c) (an "**Initial Compensation Event Notice**") to the Authority promptly (and in any event within thirty (30) days) after the date that the Developer first became aware that the relevant Compensation Event had occurred and would have the effect that is the subject of the Developer's claim.
- (c) An Initial Compensation Event Notice must:
 - (i) state that it is an Initial Compensation Event Notice;
 - (ii) identify the relevant Compensation Event (including any details then available to the Developer having made due inquiry); and
 - (iii) state the Developer's intention to claim an extension of time, relief from obligations or compensation (as applicable) under this Article 27.
- (d) In addition to the Initial Compensation Event Notice, the Developer shall submit a notice that complies with Section 27.2(e) (a "**Detailed Compensation Event Notice**") to the Authority promptly (and in any event within forty-five (45) days) after the date that the Developer first became aware that the relevant Compensation Event had occurred and would have the effect that is the subject of the Developer's claim.
- (e) A Detailed Compensation Event Notice must include:
 - (i) a statement that it is a Detailed Compensation Event Notice;
 - (ii) full details of the relevant Compensation Event (as available to the Developer having made due inquiry);
 - (iii) full details of any extension of time, relief from obligations, or compensation for Change in Costs and Finance Costs claimed under this Article 27;
 - (iv) a Time Impact Analysis (based on the then current Project Baseline Schedule) demonstrating that the relevant Compensation Event will result in an identifiable and measurable disruption to the Construction Work that will have a Critical Path Impact and will extend the time required to achieve Project Substantial Completion or Project Final Completion, or to complete all Work on a Temporary Construction Easement by the TCE Expiry Date (as applicable);
 - (v) details of any steps that the Developer has taken or will take to mitigate the effect of the Compensation Event in accordance with Section 27.3 (Mitigation);
 - (vi) evidence reasonably satisfactory to the Authority demonstrating that the Developer has or will incur a Change in Costs (if any); and
 - (vii) evidence reasonably satisfactory to the Authority demonstrating that any Finance Costs claimed by the Developer will be incurred during the period for which Project Substantial Completion is delayed beyond the Scheduled Project Substantial Completion Date, without giving effect to any extension, as a direct result of the Compensation Event.
- (f) If at the time of issuing the Detailed Compensation Event Notice, the Compensation Event is continuing, the Developer shall:

- (i) submit an updated Detailed Compensation Event Notice every thirty (30) days until the Compensation Event has ended; and
- (ii) within thirty (30) Business Days of the Compensation Event ending, submit a final Detailed Compensation Event Notice.

27.3 Mitigation

The Developer shall use Reasonable Efforts to mitigate the delay and any other consequences of any Compensation Event that is the subject of a notice pursuant to Section 27.2 (Notice and Information for Compensation Events).

27.4 Failure to Provide Required Notice or Information

If any notice or information is not provided to the Authority in accordance with the requirements of Section 27.2 (Notice and Information for Compensation Events), for the relevant Compensation Event:

- (a) the Developer will not be entitled to any compensation; and
- (b) the Developer will not be entitled to any extension of time or relief from its obligations (as applicable) with respect to the period between the date on which the relevant information is required to have been provided pursuant to Section 27.2 (Notice and Information for Compensation Events) and the date on which the relevant information is provided.

27.5 Burden of Proof

The Developer bears the burden of proving both the occurrence of a Compensation Event and the resulting direct and adverse impacts on it.

27.6 Grant of Relief and Compensation for Compensation Events

- (a) The Developer will be entitled to an extension of time, relief from obligations or compensation (as applicable) in accordance with Section 27.6(b), only if the Developer has satisfied all of the following:
 - (i) complied with its obligations under Section 27.2 (Notice and Information for Compensation Events) and Section 27.3 (Mitigation);
 - (ii) demonstrated to the reasonable satisfaction of the Authority that a Compensation Event has occurred;
 - (iii) demonstrated to the reasonable satisfaction of the Authority that:
 - (A) the Compensation Event was the direct cause or is reasonably likely to be the direct cause of:
 - (aa) a delay in achieving (I) Project Substantial Completion by the Scheduled Project Substantial Completion Date or, following the Scheduled Project Substantial Completion Date, further delay in achieving Project Substantial Completion or (II) Project Final Completion by the Scheduled Project Final Completion Date or, following the Scheduled Project Final Completion Date, further delay in achieving Project Final Completion;
 - (bb) the Developer failing to comply with its obligations under this Agreement;
 - (cc) the Developer incurring a Change in Costs; or

- (dd) a delay in the Developer completing all Work on a Temporary Construction Easement by the TCE Expiry Date; and
 - (B) any extension of time, relief from obligations or compensation for Change in Costs and Finance Costs claimed could not reasonably be mitigated or recovered without substantial cost by the Developer acting in accordance with Good Industry Practice (including by re-sequencing, reallocating or redeploying its forces to other portions of the Construction Work).
- (b) subject to Section 27.9 (Material Flood Events), Section 27.10 (Railroad Crossings) and Section 27.11 (Pandemic Event Change in Law), if the Developer satisfies the conditions set out in Section 27.6(a), the Developer will be entitled to an extension of time, relief from obligations or compensation (as applicable), as follows:
 - (i) in the case of a delay demonstrated pursuant to Section 27.2 (Notice and Information for Compensation Events):
 - (A) the Scheduled Project Substantial Completion Date or, following the Scheduled Project Substantial Completion Date, the Project Substantial Completion Long Stop Date;
 - (B) the Scheduled Project Final Completion Date; or
 - (C) the TCE Expiry Date for the relevant Temporary Construction Easement,will be extended by such time as is reasonable for such a Compensation Event;
 - (ii) subject to Section 27.7 (Calculation of Change in Costs), in the case of:
 - (A) Capital Expenditure incurred by the Developer at any time; or
 - (B) if any other Change in Costs arising prior to Project Substantial Completion,demonstrated pursuant to Section 27.2 (Notice and Information for Compensation Events), the Authority shall, within sixty (60) days of its receipt of a written claim by the Developer that is not disputed (supported by all relevant information), pay the Developer for such Capital Expenditure or other Change in Costs (as adjusted to reflect the Capital Expenditure or other Change in Costs actually incurred by the Developer) that the Developer incurs as a direct result of the relevant Compensation Event;
 - (iii) in the case of any Change in Costs that are not the subject of Section 27.6(b)(ii), the Authority shall compensate the Developer in accordance with Article 39 (Relevant Events and the Financial Model) or in such other manner as the Parties may agree (acting reasonably);
 - (iv) in the case of any Finance Costs that the Developer will incur during the period for which the Scheduled Project Substantial Completion Date is extended, the Authority shall compensate the Developer in accordance with Section 27.8 (Finance Costs during the Authority Delay Period);
 - (v) if any Noncompliance Points would not have occurred but for the occurrence of the Compensation Event, such Noncompliance Points will be deemed to have not occurred for the purposes of this Agreement;
 - (vi) if any Developer Default or breach of this Agreement would not have occurred but for the occurrence of the Compensation Event, such Developer Default or breach will be deemed to have not occurred for the purposes of this Agreement;

- (vii) if any part or parts of the Availability Test is or are failed as of an Annual Availability Determination Date (as determined in accordance with Section 2 (*Project Administrative and Management Requirements*) of the Technical Requirements), and such test or tests would not have been failed but for the occurrence of the Compensation Event, such failure will be deemed to have not occurred for the purposes of this Agreement; and
 - (viii) the Authority shall give the Developer such relief from its ongoing obligations under this Agreement as is reasonable given the nature of the Compensation Event and the Developer's ongoing obligations.
- (c) Within thirty (30) days after receipt of a final Detailed Compensation Event Notice, the Authority shall notify the Developer of its determination as to the Developer's entitlement to any compensation, extension of time or other relief under this Section 27.6. If the Authority fails to respond within such thirty (30) day period, the Authority will be deemed to have rejected the Developer's entitlement to any compensation, extension of time or other relief under this Article 27.
- (d) Within ten (10) Business Days after:
 - (i) the Developer receives notice from the Authority of its determination under Section 27.6(c); or
 - (ii) the Authority is deemed to have rejected the Developer's entitlement to any compensation, extension of time or other relief under Section 27.6,the Developer shall:
 - (A) notify the Authority in writing of whether it accepts the determination or deemed rejection made by the Authority; or
 - (B) submit a Dispute by way of written protest in accordance with Section 54.3(a) (*Written Protest to the Authority*).
- (e) If the Developer does not submit a Dispute by way of a written protest pursuant to Section 27.6(d)(ii)(B) within the ten (10) Business Day period, the Developer will be deemed to have accepted the determination or deemed rejection.
- (f) If the Developer accepts or is deemed to have accepted the Authority's determination or deemed rejection under Section 27.6(d), the Developer will have irrevocably waived and released any claim with respect to the alleged Compensation Event.

27.7 Calculation of Change in Costs

For the purposes of Section 27.6 (*Grant of Relief and Compensation for Compensation Events*), any Change in Costs will be calculated in accordance with Exhibit 19 (*Principles for Calculation of Change in Costs*).

27.8 Finance Costs during the Authority Delay Period

- (a) For the purposes of this Section 27.8, the "**Authority Delay Period**" means the period for which the Developer is granted an extension of time for the Scheduled Project Substantial Completion Date under Section 27.6 (*Grant of Relief and Compensation for Compensation Events*).
- (b) Subject to Section 27.11 (*Pandemic Event Change in Law*), if any Finance Costs become due for payment or repayment by the Developer during an Authority Delay Period:
 - (i) no earlier than forty-five (45) days prior to the date such Finance Costs become due for payment or repayment, the Developer shall provide the Authority with an invoice for an amount equal to such

Finance Costs (including evidence demonstrating that such Finance Costs are payable and their due date for payment); and

- (ii) the Authority shall pay such Finance Costs to the Developer within thirty (30) Business Days of receiving an invoice for such amount in accordance with Section 27.8(b)(i).
- (c) Subject to Section 27.11 (Pandemic Event Change in Law), no later than twenty (20) days after the Project Substantial Completion Date, the Parties shall calculate (such calculation being referred to below as the "**Reconciliation**"), in accordance with Article 39 (Relevant Events and the Financial Model), the extent to which the Developer was left in a better or worse position as a result of the Authority Delay Period caused by the Compensation Event, taking into account the payments made to the Developer by the Authority pursuant to Section 27.8(b), and the following will apply:
 - (i) if the Reconciliation demonstrates that the Developer was left in a worse position despite the payments made to the Developer by the Authority pursuant to Section 27.8(b), the Authority shall, within sixty (60) days of completion of the Reconciliation, make a lump sum payment to the Developer or adjust the Availability Payments to the Developer, in either case, in an amount that would result in the Developer being left in a no better and no worse position; and
 - (ii) if the Reconciliation demonstrates that the Developer was left in a better position as a result of the payments made to the Developer by the Authority pursuant to Section 27.8(b), a deduction will be made from the Substantial Completion Milestone Payment in accordance with Section 23.2(b) (Substantial Completion Milestone Payment) in an amount that would result in the Developer being left in a no better and no worse position.

27.9 Material Flood Events

Nothing in this Article 27 (Compensation Events) will entitle the Developer to compensation in respect of any claim brought against it by a third party that relates to an Authority Retained Responsibility. All such claims are the subject of Section 34.4 (Third Party Claims Relating to Authority-Retained Responsibilities).

27.10 Railroad Crossings

To the extent that the Developer is entitled to claim Capital Expenditure under this Article 27 (Compensation Events) for a Compensation Event under paragraph (t) of the definition of "Compensation Event" with respect to a Railroad Crossing, the following principles will apply when determining the extent to which the Authority is required to reimburse such Capital Expenditure to the Developer:

- (a) for each Railroad Crossing, the first \$500,000 of increased Capital Expenditure in respect of that Railroad Crossing will be for the account of the Developer and the Authority will not be required to reimburse the Developer for such amount; and
- (b) to the extent that increased Capital Expenditure in respect of a Railroad Crossing exceeds \$500,000, the Authority will only be required to reimburse the Developer for 85% of such excess amount in respect of that Railroad Crossing.

27.11 Pandemic Event Change in Law

To the extent that the Developer makes a claim under this Article 27 (Compensation Events) for a Compensation Event under paragraph (c) of the definition of "Compensation Event" with respect to a Pandemic Event Change in Law:

- (a) the Developer will not be entitled to compensation for Change in Costs with respect to such Compensation Event;

- (b) its entitlement to compensation for "Finance Costs" under Section 27.8(b) (*Finance Costs during the Authority Delay Period*) with respect to that Compensation Event will be limited to the amounts described in paragraph (b) of the definition of "Finance Costs"; and
- (c) Section 27.8(c) (*Finance Costs during the Authority Delay Period*) will not apply.

27.12 Relied Upon Disclosed Geotechnical Information

With respect to any claim made under this Article 27 (*Compensation Events*) relating to Relied Upon Geotechnical Data, the Authority bears no liability and the Developer has no right to be compensated or granted relief for any of the following:

- (a) the inaccuracy of any data, interpretations, opinions or other information included in the Disclosed Geotechnical Information that is not Relied Upon Geotechnical Data; and
- (b) the completeness, scope, presentation or usability of any of the Disclosed Geotechnical Information for the Developer's purposes, including (without limitation) any means, methods, techniques, sequences or procedures of design or construction employed by the Developer.

27.13 Sole Remedy

Except for any rights it may have under Article 41 (*Termination for Authority Default*), the Developer's sole remedy in relation to any Compensation Event will be the operation of this Article 27.

28. RELIEF EVENTS

28.1 Entitlement to Claim

If a Relief Event directly causes, or is likely to directly cause, the Developer to do any one or more of the following:

- (a) fail to achieve Project Substantial Completion by the Scheduled Project Substantial Completion Date or, following the Scheduled Project Substantial Completion Date, incur further delay in achieving Project Substantial Completion;
- (b) fail to achieve Project Final Completion by the Scheduled Project Final Completion Date or, following the Scheduled Project Final Completion Date, incur further delay in achieving Project Final Completion;
- (c) fail to comply with any of its obligations under this Agreement; or
- (d) fail to complete all Work on a Temporary Construction Easement by the TCE Expiry Date,

the Developer may claim one or more of the following in accordance with this Article 28:

- (i) an extension to the Scheduled Project Substantial Completion Date or, following the Scheduled Project Substantial Completion Date, the Project Substantial Completion Long Stop Date;
- (ii) an extension of the Scheduled Project Final Completion Date;
- (iii) relief from any rights of the Authority under Article 42 (*Termination for Developer Default*); or
- (iv) an extension of the TCE Expiry Date for a Temporary Construction Easement.

28.2 Notice and Information

- (a) The Developer shall comply with the procedures in this Section 28.2 to claim an extension of time or relief from its obligations with respect to a Relief Event.
- (b) The Developer shall submit a notice that complies with Section 28.2(c) (an "**Initial Relief Event Notice**") to the Authority promptly (and in any event within thirty (30) days) after the date that the Developer first became aware that the relevant Relief Event had occurred and would have the effect that is the subject of the Developer's claim.
- (c) An Initial Relief Event Notice must:
 - (i) state that it is an Initial Relief Event Notice;
 - (ii) identify the relevant Relief Event (including any details then available to the Developer having made due inquiry); and
 - (iii) state the Developer's intention to claim an extension of time or relief from any rights of the Authority under Article 42 (Termination for Developer Default) (as applicable) under this Article 28.
- (d) In addition to the Initial Relief Event Notice, the Developer shall submit a notice that complies with Section 28.2(e) (a "**Detailed Relief Event Notice**") to the Authority promptly (and in any event within forty-five (45) days) after the date that the Developer first became aware that the relevant Relief Event had occurred and would have the effect that is the subject of the Developer's claim.
- (e) A Detailed Relief Event Notice must include:
 - (i) a statement that it is a Detailed Relief Event Notice;
 - (ii) full details of the relevant Relief Event (as available to the Developer having made due inquiry);
 - (iii) full details of the extension of time or relief from any rights of the Authority under Article 42 (Termination for Developer Default) claimed or reasonably likely to be claimed (as applicable) under this Article 28;
 - (iv) a Time Impact Analysis (based on the then current Project Baseline Schedule) demonstrating that the relevant Relief Event will result in an identifiable and measurable disruption to the Construction Work, which will have a Critical Path Impact and will extend the time required to achieve Project Substantial Completion or Project Final Completion, or to complete all Work on a Temporary Construction Easement by the TCE Expiry Date (as applicable); and
 - (v) details of any steps that the Developer has taken or will take to mitigate the effect of the Relief Event in accordance with Section 28.3 (Mitigation).
- (f) If at the time of issuing the Detailed Relief Event Notice, the Relief Event is continuing, the Developer shall:
 - (i) submit an updated Detailed Relief Event Notice every thirty (30) days until the Relief Event has ended; and
 - (ii) within ten (10) Business Days of the Relief Event ending, submit a final Detailed Relief Event Notice.

28.3 Mitigation

The Developer shall use Reasonable Efforts to mitigate the delay and any other consequences of any Relief Event that is the subject of a notice pursuant to Section 28.2 (Notice and Information).

28.4 Failure to Provide Required Notice or Information

If any notice or information is not provided to the Authority in accordance with the requirements of Section 28.2 (Notice and Information), for the relevant Relief Event, the Developer will not be entitled to any extension of time or relief from termination with respect to the period between the date on which the relevant information is required to have been provided pursuant to Section 28.2 (Notice and Information) and the date on which the relevant information is provided.

28.5 Grant of Relief

- (a) The Developer will be entitled to an extension of time or relief from obligations (as applicable) in accordance with Section 28.5(b) only if the Developer has satisfied all of the following:
 - (i) complied with its obligations under Section 28.2 (Notice and Information) and Section 28.3 (Mitigation);
 - (ii) demonstrated to the reasonable satisfaction of the Authority that a Relief Event has occurred;
 - (iii) demonstrated to the reasonable satisfaction of the Authority that:
 - (A) the Relief Event was the direct cause or is reasonably likely to be the direct cause of:
 - (aa) a delay in achieving (I) Project Substantial Completion by the Scheduled Project Substantial Completion Date or, following the Scheduled Project Substantial Completion Date, further delay in achieving Project Substantial Completion or (II) Project Final Completion by the Scheduled Project Final Completion Date or, following the Scheduled Project Final Completion Date, further delay in achieving Project Final Completion;
 - (bb) the Developer failing to comply with its obligations under this Agreement;
 - (cc) a delay in the Developer completing all Work on a Temporary Construction Easement by the TCE Expiry Date; and
 - (B) any extension of time or relief from obligations claimed could not reasonably be mitigated or recovered without substantial cost by the Developer acting in accordance with Good Industry Practice (including by re-sequencing, reallocating or redeploying its forces to other portions of the Construction Work).
- (b) If the Developer satisfies the conditions set out in Section 28.5(a), the Developer will be entitled to an extension of time or relief from obligations (as applicable), as follows:
 - (i) in the case of a delay demonstrated pursuant to Section 28.2 (Notice and Information):
 - (A) the Scheduled Project Substantial Completion Date or, following the Scheduled Project Substantial Completion Date, the Project Substantial Completion Long Stop Date;
 - (B) the Scheduled Project Final Completion Date; or
 - (C) the TCE Expiry Date for the relevant Temporary Construction Easement,

will be extended by such time as is reasonable for such a Relief Event;
 - (ii) subject to Section 28.5(b)(iii), if any Developer Default or breach of this Agreement would not have occurred but for the occurrence of the Relief Event, such Developer Default or breach will be deemed to have not occurred for the purposes of this Agreement;

- (iii) nothing in this Article 28 or in Section 29.2 (No Breach of Obligations) will affect the accrual of Noncompliance Points or the assessment of Deductions during the period in which the Relief Event is subsisting. However, any such Noncompliance Points or Deductions will be deemed to have not occurred for the purposes of:
 - (A) Section 42.2 (Persistent Breach);
 - (B) determining whether a Developer Default occurs under Section 42.1(o) (Developer Default); or
 - (C) determining whether increased monitoring is triggered under Section 22.7 (Increased Monitoring); and
 - (iv) if any part or parts of the Availability Test is or are failed as of any Annual Availability Determination Date (as determined in accordance with Section 2 (*Project Administrative and Management Requirements*) of the Technical Requirements), and such test or tests would not have been failed but for the occurrence of the Relief Event, such failure will be deemed to have not occurred for the purposes of this Agreement.
- (c) Within thirty (30) days after receipt of any final Detailed Relief Event Notice, the Authority shall notify the Developer of its determination as to the Developer's entitlement to any extension of time or other relief under this Section 28.5. If the Authority fails to respond within such thirty (30) day period, the Authority will be deemed to have rejected the Developer's entitlement to any extension of time or other relief under this Article 28.
- (d) Within ten (10) Business Days after:
- (i) the Developer receives notice from the Authority of its determination under Section 29.5(c); or
 - (ii) the Authority is deemed to have rejected the Developer's entitlement to any extension of time or other relief under Section 28.5.
- the Developer shall:
- (A) notify the Authority in writing of whether it accepts the determination or deemed rejection made by the Authority; or
 - (B) submit a Dispute by way of written protest in accordance with Section 54.3(a) (Written Protest to the Authority).
- (e) If the Developer does not submit a Dispute by way of a written protest pursuant to Section 28.5(d)(B) within the ten (10) Business Day period, the Developer will be deemed to have accepted the determination or deemed rejection.
- (f) If the Developer accepts or is deemed to have accepted the Authority's determination or deemed rejection under Section 28.5(d), the Developer will have irrevocably waived and released any claim with respect to the alleged Relief Event.

28.6 Sole Remedy

Except for any rights it may have under Article 29 (Force Majeure Events), the Developer's sole remedy in relation to any Relief Event will be the operation of this Article 28.

29. **FORCE MAJEURE EVENTS**

29.1 **General**

In addition to the provisions of Article 28 (Relief Events), the provisions of this Article 29 apply with respect to Force Majeure Events.

29.2 **No Breach of Obligations**

Subject to Section 28.5(b)(iii), neither Party may bring a claim for a breach of obligations under this Agreement by the other Party or incur any liability to the other Party for any losses or damages incurred by that other Party if a Force Majeure Event occurs and the Affected Party is prevented from carrying out its obligations by that Force Majeure Event.

29.3 **Consultation**

Promptly (and in any event within ten (10) Business Days) after any notification of a Force Majeure Event under Section 28.2 (Notice and Information), the Parties shall consult with each other in Good Faith and use all Reasonable Efforts to agree on appropriate terms to mitigate the effects of the Force Majeure Event and facilitate the continued performance of this Agreement.

29.4 **Failure to Agree; Right to Terminate**

(a) If:

- (i) as a result of a Force Majeure Event, the Affected Party is unable to comply with any of its material obligations under this Agreement for a continuous period of more than one hundred eighty (180) days after the date such Force Majeure Event occurred; and
- (ii) within such one hundred eighty (180) day period, the Parties are unable to agree on appropriate terms to mitigate the effects of the Force Majeure Event and facilitate the continued performance of this Agreement,

either Party may deliver notice to the other Party that it wishes to terminate this Agreement (a "**Force Majeure Termination Notice**"). A Force Majeure Termination Notice must (A) provide a proposed date of termination and (B) be delivered to the other Party at least thirty (30) days before such proposed date of termination.

(b) If:

- (i) the Authority delivers a Force Majeure Termination Notice to the Developer in accordance with Section 29.4(a); or
- (ii) the Developer delivers a Force Majeure Termination Notice to the Authority in accordance with Section 29.4(a) during the D&C Period,

this Agreement will terminate on the date of termination stated in such Force Majeure Termination Notice.

- (c) If the Developer delivers a Force Majeure Termination Notice to the Authority in accordance with Section 29.4(a) during the Operating Period, Section 29.5 (Authority Options) will apply.

29.5 Authority Options

- (a) If the Developer delivers a Force Majeure Termination Notice in accordance with Section 29.4(a) (Failure to Agree; Right to Terminate) during the Operating Period, the Authority shall, within fifteen (15) Business Days of receiving such notice, deliver a notice to the Developer stating that the Authority either:
 - (i) accepts that this Agreement will terminate on the date stated in the Force Majeure Termination Notice; or
 - (ii) requires this Agreement to continue.
- (b) If the Authority issues a notice under Section 29.5(a)(i) or fails to deliver any notice under Section 29.5(a), this Agreement will terminate on the date set out in the Force Majeure Termination Notice delivered by the Developer in accordance with Section 29.4(a) (Failure to Agree; Right to Terminate).
- (c) If the Authority delivers a notice under Section 29.5(a)(ii):
 - (i) this Agreement will not terminate and will continue until the Authority provides written notice (of at least thirty (30) days) to the Developer that it wishes this Agreement to terminate; and
 - (ii) until such time as the Authority terminates this Agreement in accordance with Section 29.5(c)(i):
 - (A) the Developer shall, to the extent practicable, continue to perform the Work; and
 - (B) subject to the Developer complying with Section 29.5(c)(ii)(A), the Authority shall pay to the Developer each Monthly Disbursement from the day after the date on which this Agreement would have terminated under Section 29.5(b) as if the Work were being fully provided in accordance with the requirements of this Agreement and all other amounts, including Losses and expenses caused by any damage or delay (to the extent not covered by insurance proceeds) resulting from the Force Majeure Event.

30. CHANGE IN LAW

30.1 Compliance with Change in Law

The Developer shall ensure that the Work is performed in accordance with the terms of this Agreement following any Change in Law.

30.2 Notification of Change in Law

- (a) If a Change in Law (other than a Qualifying Change in Law) occurs or will occur shortly, either Party may notify the other and include in such notification:
 - (i) an opinion on its likely effects;
 - (ii) any necessary change to the Work, including full detail of the procedure for implementing such changes; and
 - (iii) amendments (if any) required to this Agreement.
- (b) Promptly (and in any event within thirty (30) days) after either Party delivers a notice under this Section 30.2, the Parties shall discuss and agree on the issues referred to in such notice and any ways in which the Developer can mitigate the effect of the relevant Change in Law.

30.3 **Qualifying Changes in Law**

The provisions of Article 27 (Compensation Events) apply with respect to any Qualifying Change in Law.

31. **AUTHORITY CHANGES AND DIRECTIVE LETTERS**

31.1 **Authority Change Request**

- (a) The Authority may, at any time, propose a change in the Work (an "**Authority Change**") by delivering a written notice (an "**Authority Change Request**") to the Developer setting out the following:
 - (i) the Authority's proposed change(s) to the Work or to the Technical Requirements (including any change in the standards applicable to the Work), in sufficient detail to enable the Developer to provide a Developer Estimate in accordance with Section 31.3 (Developer Estimate in Response to Authority Change Requests); and
 - (ii) the proposed method of compensation for the change(s).
- (b) An Authority Change Request may also require the Developer to provide an estimate of the third party costs that the Developer will incur in preparing a Developer Estimate. The Developer shall provide such a third party cost estimate within ten (10) Business Days of receiving the Authority Change Request.

31.2 **Right to Refuse Authority Change Request**

- (a) The Developer may refuse an Authority Change Request which would, if implemented:
 - (i) require the Work to be performed in a way that violates Applicable Law or is inconsistent with Good Industry Practice;
 - (ii) cause any Governmental Approval then in full force and effect to be revoked;
 - (iii) adversely affect the health and safety of any Person; or
 - (iv) materially and adversely change the nature of the Project as a whole or the Developer's rights and obligations under this Agreement.
- (b) An Authority Change Request relating to the design, construction and maintenance of additional crossings, expansions of existing crossings, additional infrastructure related to flood protection or any enhancement of access or security facilities will not of itself entitle the Developer to refuse the Authority Change Request under Section 31.2(a)(iv).

31.3 **Developer Estimate in Response to Authority Change Requests**

- (a) Promptly and, in any event:
 - (i) within fifteen (15) Business Days after the Developer receives an Authority Change Request that does not require the Developer to provide an estimate of the third party costs that the Developer will incur in preparing a Developer Estimate; or
 - (ii) where the Authority Change Request requires the Developer to provide an estimate of the third party costs that the Developer will incur in preparing a Developer Estimate, within fifteen (15) Business Days after the Authority notifies the Developer that such estimate is acceptable,

the Developer shall deliver to the Authority either:

- (A) an estimate of costs and expenses and other matters with respect to such Authority Change Request (a "**Developer Estimate**") that complies with Section 31.3(c); or
 - (B) a notice confirming when the Developer Estimate will be delivered to the Authority.
- (b) In the case of Section 31.3(a)(B), the Developer shall deliver its Developer Estimate within forty-five (45) days after (i) the Developer receives the Authority Change request or (ii) the Authority notifies the Developer that its estimate for third party costs is acceptable (as applicable), or within such longer period as agreed with the Authority (acting reasonably).
- (c) A Developer Estimate must include the following:
 - (i) whether the Developer requires relief from compliance with its obligations under this Agreement during the implementation or as a result of the proposed Authority Change;
 - (ii) any impact on the provision of the Work, including any potential cost impact on future O&M Work;
 - (iii) any amendment that would be required to this Agreement as a result of the proposed Authority Change;
 - (iv) any consents or permits that will be required as a result of the proposed Authority Change;
 - (v) any impact on the design criteria that relates to a potential for loss of life or flood damage from uncontrolled release of water upon breach;
 - (vi) any new Governmental Approvals (including any Section 408 Approval) or amendments to existing Governmental Approvals (including the NEPA Compliance Documentation) required as a result of the proposed Authority Change;
 - (vii) an estimate of (x) any Change in Costs (calculated in accordance with Exhibit 19 (Principles for Calculation of Change in Costs)) and (y) the cost of any Capital Expenditure that is required or no longer required, in each case, as a result of the proposed Authority Change, which estimate must include:
 - (A) a scope of work (including all activities associated with the proposed modification) that must be described in sufficient detail and broken down into suitable components and activities to enable pricing; and
 - (B) a cost proposal that will enable the Authority to review and evaluate the reasonableness of the Developer Estimate;
 - (viii) a detailed timetable for implementation of the Extra Work and, if the Developer believes that the proposed Authority Change would result in a delay to the Work, a Time Impact Analysis (based on the Project Baseline Schedule most recently agreed pursuant to Section 2 (*Project Administrative and Management Requirements*) of the Technical Requirements) demonstrating that the proposed Authority Change will result in an identifiable and measurable disruption to the Work;
 - (ix) the proposed method of certification of any construction aspects of the Extra Work required by the proposed Authority Change;
 - (x) if applicable, the Developer's suggested payment schedule for the proposed Authority Change based on milestones;
 - (xi) if applicable, the Developer's suggested changes to the Availability Payments to be implemented in accordance with Article 39 (Relevant Events and the Financial Model);

- (xii) acceleration costs, but only when the Authority requires the Developer pricing to accommodate an acceleration in any D&C Work;
- (xiii) certification by the Developer stating that:
 - (A) to the best of the Developer's knowledge, the amount of time or compensation requested is justified (both as to entitlement and amount);
 - (B) the amount of time or compensation requested includes all known and anticipated impacts or amounts (direct, indirect and consequential) which may be incurred as a result of the event or matter giving rise to the proposed change; and
 - (C) the cost and pricing data provided is complete, accurate and current; and
- (xiv) such other supporting documentation as may be reasonably requested by the Authority.
- (d) The Developer's requested compensation for the proposed Authority Change in a Developer Estimate will be subject to audit review by the Authority in accordance with Article 49 (Records and Audit).

31.4 Review and Evaluation of Developer Estimate

- (a) Promptly (and in any event within ten (10) Business Days) after the Authority receives a Developer Estimate, the Developer shall meet with the Authority to review, discuss and seek to agree upon the Developer Estimate.
- (b) During such discussions, the Authority may:
 - (i) modify the Authority Change Request; or
 - (ii) subject to Section 31.4(c), to the extent practicable (given the nature of the Extra Work), direct the Developer to seek and evaluate competitive tenders for the relevant capital works in connection with the proposed Authority Change, as applicable.
- (c) The Developer will not be required to seek and evaluate competitive tenders under Section 31.4(b)(ii) if it demonstrates to the reasonable satisfaction of the Authority that engaging a contractor other than the D&C Contractor would have a material adverse effect on any warranties provided by, or to be provided by, the D&C Contractor in connection with the Construction Work.
- (d) If the Authority exercises its rights under Section 31.4(b), the Developer shall, within fifteen (15) Business Days after receiving such modification or direction, or within such longer period as agreed with the Authority (acting reasonably), notify the Authority of any consequential changes to the Developer Estimate.
- (e) Within fifteen (15) Business Days after the meetings referred to in Section 31.4(a) or the date additional information is received pursuant to Section 31.4(c) (as applicable), the Authority shall either:
 - (i) accept the Developer Estimate (as may be modified) by issuing a notice to the Developer (an "Authority Change Order"); or
 - (ii) notify the Developer that the Authority withdraws the Authority Change Request.

31.5 Commencement of Extra Work

- (a) Unless the Authority issues a Directive Letter in accordance with Section 31.9 (Directive Letter), the Developer must not commence any Extra Work described in an Authority Change Request prior to the Authority accepting the Developer Estimate in accordance with Section 31.4(e)(i) (Review and Evaluation of Developer Estimate).

- (b) If the Authority accepts the Developer Estimate (as may be modified) in accordance with Section 31.4(e)(i) (Review and Evaluation of Developer Estimate), the Developer shall use Reasonable Efforts to implement the relevant Extra Work in accordance with the Developer Estimate.

31.6 Method of Payment

If the Authority accepts the Developer Estimate (as may be modified) in accordance with Section 31.4(e)(i) (Review and Evaluation of Developer Estimate), the Authority shall make a payment to the Developer within thirty (30) days of receiving each invoice (complete in all material respects) in accordance with the agreed payment schedule, accompanied by the evidence (where applicable) that the relevant part of the Authority Change has been carried out.

31.7 Decreased Costs

If an Authority Change results in a decrease in the Developer's costs, any payment due from the Authority under this Agreement may be adjusted downwards in accordance with Article 39 (Relevant Events and the Financial Model) to reflect such reduction in the Developer's costs.

31.8 Performance

The Developer shall not suspend performance of the Work during the negotiation of any Authority Change Request, except:

- (a) as may be directed by the Authority in accordance with Section 14.4 (Suspension of Construction Work); or
- (b) to the extent that such suspensions are otherwise expressly permitted under the terms of this Agreement.

31.9 Directive Letter

- (a) Subject to Section 31.2 (Right to Refuse Authority Change Request), if an Authority Change Request has not been finally agreed between the Parties, the Authority may deliver to the Developer a letter directing the Developer to proceed with the performance of the Extra Work proposed in the Authority Change Request (a "**Directive Letter**").
- (b) A Directive Letter must set out the kind, character and limits of the Extra Work that the Developer is required to perform.
- (c) Upon receipt of a Directive Letter, the Developer shall implement and perform the Extra Work as directed by the Authority and may claim a Compensation Event in accordance with Article 27 (Compensation Events).

31.10 Costs of Developer Estimate

- (a) If the Authority withdraws an Authority Change Request or issues a Directive Letter, the Authority shall reimburse the Developer for all reasonable and documented third party costs incurred by the Developer in:
 - (i) preparing the Developer Estimate (subject to Section 31.1(b) (Authority Change Request)); and
 - (ii) complying with its obligations under Section 31.4(c).
- (b) If, pursuant to Section 31.1(b) (Authority Change Request), the Developer has provided an estimate of the third party costs that it will incur in preparing a Developer Estimate, the amount payable by the Authority under Section 31.10(a)(i) will not exceed that estimate, unless otherwise agreed by the Parties.

32. **DEVELOPER CHANGES**

32.1 **Developer Change Request**

The Developer may, at any time, propose a change in the Work (a "**Developer Change**") by delivering a written notice (a "**Developer Change Request**") to the Authority setting out the following:

- (a) the proposed change to the Work in sufficient detail to enable the Authority to evaluate it in full;
- (b) the Developer's reasons for proposing the change to the Work;
- (c) a request to the Authority to consult with the Developer with a view to deciding whether to agree to the change to the Work and, if so, what consequential changes the Authority requires due to the Developer Change;
- (d) any implications of the change to the Work;
- (e) details regarding proposed changes to the Milestone Payments or Availability Payments, if any (and, if so, a detailed cost estimate of such proposed changes);
- (f) any dates by which a decision by the Authority is critical; and
- (g) all of the information referred to in Section 31.3(c) (Developer Estimate in Response to Authority Change Requests).

32.2 **Review and Evaluation of Developer Change Request**

- (a) The Authority shall evaluate each Developer Change Request, taking into account all relevant issues, including whether:
 - (i) the change involves any increase to the Milestone Payments or Availability Payments, or requires any additional payments from the Authority;
 - (ii) the change affects the quality of the Work or the likelihood of successful delivery of the Work;
 - (iii) the change will interfere in an adverse manner with the relationship of the Authority with third parties;
 - (iv) the financial strength of the Developer is sufficient to perform the changed Work;
 - (v) the residual value of the Project is reduced; and
 - (vi) the change materially affects the risk or costs to which the Authority is exposed.
- (b) Promptly (and in any event within thirty (30) days) after receiving a Developer Change Request, the Parties shall meet to discuss the matters referred to in it. During such discussions the Authority and the Developer may propose modifications to the Developer Change Request.
- (c) Within fifteen (15) Business Days after the meetings referred to in Section 32.2(b), the Authority shall either:
 - (i) approve the Developer Change Request by issuing a notice to the Developer (a "**Developer Change Order**"); or
 - (ii) subject to Section 32.5(a) (Developer Change Request to Conform to Change in Law), reject the Developer Change Request.

- (d) If the Authority rejects the Developer Change Request, it will not be obligated to give its reasons for such a rejection.

32.3 Commencement of Extra Work

If the Authority approves the Developer Change Request (as may be modified), in accordance with Section 32.2(c)(i) (Review and Evaluation of Developer Change Request), the Developer shall use Reasonable Efforts to implement the relevant Extra Work in accordance with the Developer Change Request.

32.4 Payments

Unless a Developer Change Order specifically agrees to an increase in the Milestone Payments or Availability Payments or any other payment by the Authority, there shall be no increase in the Milestone Payments or Availability Payments or any other payments due from the Authority as a result of a change to the Work proposed in the Developer Change Request.

32.5 Developer Change Request to Conform to Change in Law

- (a) The Authority must not reject a Developer Change Request that is required in order to conform to a Change in Law.
- (b) The Developer shall bear the costs of introducing a change to the Work as a result of any Change in Law, other than a Qualifying Change in Law.

32.6 Decreased Costs

If a Developer Change Request results in a decrease in the Developer's costs, any Milestone Payment or Availability Payment due from the Authority under this Agreement will be adjusted downwards in accordance with Article 39 (Relevant Events and the Financial Model) so that the benefit of such decrease in costs is shared 50:50 by the Authority and the Developer.

32.7 Performance

The Developer shall not suspend performance of the Work during the negotiation of any Developer Change Request, except:

- (a) as may be otherwise directed by the Authority in accordance with Section 14.4 (Suspension of Construction Work); or
- (b) to the extent that such suspensions are otherwise permitted under the terms of this Agreement.

PART H – INDEMNITIES, INSURANCE AND REINSTATEMENT

33. INDEMNITY FROM THE DEVELOPER

33.1 Indemnity

Subject to Section 33.2 (Exclusions from Indemnity) and Article 34 (Authority-Retained Responsibilities), to the fullest extent permitted by Applicable Law, the Developer shall release, defend, indemnify and hold harmless the Indemnified Parties from and against any and all liability for Losses arising from:

- (a) Third Party Claims;
- (b) loss of or damage to real or personal property owned by or in the possession of an Indemnified Party; and

- (c) personal injury or death of any officers, agents, representatives, or employees of any Authority-Related Entity, in each case, to the extent such Losses arise out of, or as a consequence of, any breach of this Agreement by the Developer or any negligence of the Developer or any Developer-Related Entity.

33.2 Exclusions from Indemnity

The Developer shall not be responsible or be obligated to release, defend, indemnify or hold harmless any Indemnified Party with respect to any liability or Losses under Section 33.1 (Indemnity) to the extent that the same arise as a direct result of:

- (a) an Authority-Retained Responsibility;
- (b) a Compensation Event or Relief Event;
- (c) the presence of Hazardous Materials on any Project Site for which the Authority is, pursuant to Section 12.2 (Generator Status), deemed to be the sole generator and arranger, but only to the extent that the relevant Loss does not arise as a direct result of the negligence of the Developer or a Developer-Related Entity, or the Developer failing to comply with the terms of this Agreement;
- (d) the fraud, negligence, recklessness, bad faith or willful misconduct of an Indemnified Party;
- (e) any Losses suffered by an Indemnified Party under a contract with a third party;
- (f) any breach of this Agreement, a performance or non-performance by an Indemnified Party of its obligations under the JPA, the P3 MOU or the PPA, as applicable; or
- (g) any Losses suffered by an Indemnified Party with respect to use of the Project Data, or any Intellectual Property related to the Project Data, other than any use specifically for the Project.

33.3 Limitation on Indemnity

An indemnity by the Developer under any provision of this Agreement shall be without limitation to any indemnity by the Developer under any other provision of this Agreement.

33.4 Conduct of Third Party Claims Against the Authority

- (a) Where the Authority is entitled to make a claim under this Agreement against the Developer in relation to a Third Party Claim against the Authority, the Authority shall give notice of the relevant claim to the Developer promptly, setting out the full particulars of the claim.
- (b) Subject to the rights of the insurers under applicable insurance policies, the Developer may at its own expense, and with the assistance and cooperation of the Authority, conduct and control the Third Party Claim including its settlement and the Authority shall not, to the extent that the Developer has elected to conduct and control the relevant Third Party Claim, take any action to settle or prosecute the Third Party Claim.
- (c) The Developer shall, if it wishes to have conduct and control of any Third Party Claim, reimburse the Authority for any cost or liability arising out of the conduct and control of the Third Party Claim by the Developer within thirty (30) days of receiving an invoice from the Authority with respect to such costs.
- (d) The Authority shall at all times take all reasonable steps to minimize and mitigate any loss for which the Authority is entitled to bring a claim against the Developer pursuant to this Agreement.

34. AUTHORITY-RETAINED RESPONSIBILITIES

34.1 Authority-Retained Responsibilities

The Authority and the Developer agree that as between the Authority and the Developer (and the other Developer-Related Entities), the Authority is solely responsible for the following key decisions and matters (each an "**Authority-Retained Responsibility**") relating to the scope of this Project and the Comprehensive Project and the interaction of this Project with the SEAI and MAI:

- (a) the decision to undertake the Project and the Comprehensive Project;
- (b) the decision to deliver the Comprehensive Project through a split procurement model with the Authority procuring this Project and the USACE procuring the SEAI and the MAI;
- (c) the decision as to the location and the alignment of the Project ROW and Temporary Construction Easements;
- (d) the decision as to the form of the flood management system and the level of flood protection to be delivered through this Project (as reflected in the Technical Requirements and the H&H Model) and the Comprehensive Project;
- (e) the decision to:
 - (i) deliver, construct and substantially complete the Comprehensive Project in phases during the D&C Period and the Operating Period;
 - (ii) not operate the Red River Structure and Wild Rice River Structure until all conditions under applicable Authority permits have been satisfied;
 - (i) not require the Developer to provide flood protection to the Protected Area prior to Project Substantial Completion Date; and
 - (ii) not require the Developer to provide flood protection for properties that may be affected by flooding from any river or drain that crosses the Project ROW prior to Interim Completion of the applicable Aqueduct or drain inlet to be completed by the Developer with respect to that river or drain;
- (f) the design, construction, operation and maintenance of the SEAI and MAI;
- (g) from time to time the decision as to whether or not to operate the Red River Structure, the Wild Rice River Structure or the Diversion Inlet Structure; and
- (h) the scope and content of the Technical Requirements, which:
 - (i) set out the Authority's requirements with respect to the provision of a comprehensive flood management system for the residents of the Fargo-Moorhead Metropolitan Area ; and
 - (ii) are the sole work product of the Authority and its professional advisers, with input from USACE.

34.2 Acknowledgements

The Parties acknowledge and agree that, despite any other provision of this Agreement to the contrary:

- (a) to the extent that the Technical Requirements fail to provide an effective flood management system for the residents of the Fargo-Moorhead Metropolitan Area, neither the Developer nor any other Developer-Related Entity will have any liability to the Authority or any other third party on the basis that the Technical Requirements are the sole work product of the Authority and its professional advisers, with input from USACE;

- (b) with respect to the Project's ability to provide effective flood management to the residents of the Fargo-Moorhead Metropolitan Area, the Developer's responsibilities (and associated liabilities) are limited to its obligations under this Agreement and nothing in this Agreement is intended to imply that the Developer's responsibilities (and associated liabilities) in relation to the Project are greater than the scope of its obligations under this Agreement;
- (c) neither the Developer nor any other Developer-Related Entity makes any representation or provides any warranty or assurance to the Authority or any Authority-Related Entity with respect to the scope of the Technical Requirements and the extent to which the requirements set out in the Technical Requirements will (if complied with) provide the residents of the Fargo-Moorhead Metropolitan Area with an effective flood management system; and
- (d) the Authority provided the form of the H&H Model (attached at Attachment 3-32 to the Technical Requirements) and the Technical Requirements expressly prohibit the Developer from changing certain elements of that H&H Model (including the geometry outside of the Project ROW, the input hydrology, the model equations and hydraulic coefficients, the basis of calculations and the gate rules).

34.3 Waiver of Claims for Authority-Retained Responsibilities

The Authority:

- (a) knowingly and voluntarily irrevocably waives any rights it may have to assert any present or future claim, or pursue any other remedy at law or in equity (under federal, state or local law), against the Developer; and
- (b) shall not assert, and shall ensure that no Authority Member asserts, any claim, or pursues any other remedy at law or in equity (under federal, state or local law), against the Developer,

in each case, only to the extent that the assertion of any claim or pursuit of any other remedy at law or in equity would contravene the principles set out in Section 34.1 or Section 34.2.

34.4 Third Party Claims Relating to Authority-Retained Responsibilities

- (a) Following the establishment of the Alternative Dispute Resolution Board, the Parties shall use good faith efforts to ensure that any Third Party Claim brought against either Party for real property damage caused by the Comprehensive Project does not proceed to litigation unless that claim remains unresolved following the submission of that claim to the Alternative Dispute Resolution Board. The Alternative Dispute Resolution Board will have the jurisdiction to hear claims from any property owner or party claiming their real property was damaged by flooding alleged to have been caused by the Comprehensive Project. The Alternative Dispute Resolution Board is not intended to address claims related to alleged negligence of:
 - (i) the Authority, its contractors, its agents, its officers, or its employees; or
 - (ii) the Developer or any Developer-Related Entity.
- (b) If a Third Party Claim is brought against the Developer or any Developer-Related Entity that is, in whole or in part, based on one or more Authority-Retained Responsibilities, the Authority shall reimburse the Developer or any Developer-Related Entity for Losses (including any deductible or self-insurance retention) that the Developer or any Developer-Related Entity reasonably and properly incurs as a direct result of that Third Party Claim (excluding Losses covered by the Insurance Policies or with respect to which the Developer or any Developer-Related Entity is deemed to have self-insured in accordance with Article 35 (Insurance and Reinstatement)) to the extent that such Losses are directly attributable to Authority-Retained Responsibilities. For the purposes of this Section 34.4(b), "reasonably and properly" incurred costs and expenses for professional services will be determined on the basis of rates that would reasonably be expected to be paid for such services in North Dakota.

- (c) The Developer shall promptly (and in any event within ten (10) Business Days of the Developer becoming aware) give written notice to the Authority of any incident, potential claim or matter that is reasonably likely to give rise to any Third Party Claim to which Section 34.4(b) may apply.
- (d) If the Developer seeks reimbursement from the Authority pursuant to Section 34.4(b), the following will apply:
 - (i) the Developer shall (A) give written notice to the Authority of the relevant Third Party Claim setting out full particulars of the claim known by the Developer at the time the Third Party Claim arises and (B) promptly supplement that notice if additional factual or legal particulars are discovered;
 - (ii) the Authority may give written notice to the Developer to transfer the defense of any such Third Party Claim to the Authority at any time, in which case the Developer shall promptly transfer the defense of such claim and cooperate with the Authority as necessary or reasonably requested by the Authority to defend such claim;
 - (iii) any costs and expenses reasonably and properly incurred by the Developer in providing any cooperation under Section 34.4(d)(ii) shall be reimbursed by the Authority, provided that for the purposes of this Section 34.4(d)(iii), "reasonably and properly" incurred costs and expenses for professional services will be determined on the basis of rates that would reasonably be expected to be paid for such services in North Dakota and such costs and expenses will not include any margin;
 - (iv) any Party defending such Third Party Claim shall keep the other Party reasonably informed at all times regarding such claim; and
 - (v) the Developer shall not enter into any agreement or settlement with respect to any such Third Party Claim without the prior written approval of the Authority.
- (e) To the extent that the Authority does not pursue defense of a Third Party Claim for Losses that arise out of the Authority-Retained Responsibilities pursuant to Section 34.4(b), the Authority shall use Reasonable Efforts to assist the Developer in defending such Third Party Claim, as reasonably requested by the Developer.
- (f) The Developer shall at all times take all reasonable steps to minimize and mitigate any Loss for which the Developer is entitled to reimbursement under Section 34.4(b).
- (g) The Developer shall be entitled to invoice the Authority for its Losses that arise out of the Authority-Retained Responsibilities pursuant to Section 34.4(b) on a monthly basis and such amounts shall be paid by the Authority within forty-five (45) days of receiving such invoice from the Developer.

35. INSURANCE AND REINSTATEMENT

35.1 Insurance Policies and Coverage

Subject to Article 36 (Uninsurable Risks and Unavailable Insurance Terms), the Developer shall obtain and maintain, or cause to be obtained or maintained, the Insurance Policies identified in this Article 35 and in Exhibit 9 (Required Insurance) in accordance with the requirements set out in this Article 35 and in Exhibit 9 (Required Insurance).

35.2 General Insurance Requirements

(a) Insurers

The Developer shall ensure that all Insurance Policies are obtained from insurers:

- (i) that at the time coverage commences have a current financial strength and financial size category rating of not less than "A-/VIII" according to A.M. Best's Insurance Reports Key Rating Guide (or an

equivalent rating issued by Standard & Poor's), except as approved in writing by the Authority in its reasonable discretion; and

- (ii) that are authorized to do business in North Dakota and Minnesota.

(b) Deductibles and Self-Insured Retentions

Except as otherwise expressly provided in this Agreement, the Developer or its Contractors (as applicable) will be responsible for paying all insurance deductibles and self-insurance retentions and the Authority will have no liability for deductibles, self-insured retentions or claim amounts in excess of the required coverage.

(c) Primary Coverage

The Developer shall ensure that:

- (i) each Insurance Policy provides that the coverage is primary and noncontributory with respect to all named and additional insureds and loss payees as their interests may appear, except for coverage that by its nature cannot be written as primary; and
- (ii) any insurance or self-insurance beyond that specified in this Agreement that is maintained by an insured or any such additional insured must be in excess of such insurance and must not contribute with it.

(d) Verification of Coverage

- (i) Each time the Developer is required to initially obtain or cause to be obtained an Insurance Policy, and not less than five (5) Business Days prior to the expiration date of each Insurance Policy, the Developer shall deliver to the Authority a written certificate(s) of insurance. Each certificate of insurance must:

- (A) be on the most recent ACORD form consistent with the required coverage;
- (B) state the identity of all insurers, named insureds and additional insureds, and state the type and limits of coverage;
- (C) where applicable, include as attachments all additional insured endorsements; and
- (D) be signed by the agent or broker.

- (ii) Promptly (and in any event within ninety (90) days) after the effectiveness of each Insurance Policy, the Developer shall deliver to the Authority:

- (A) a true and complete certified copy of each Project-specific Insurance Policy or modification, or renewal or replacement Insurance Policy and all endorsements; and
- (B) evidence of payment of any premium then due that is acceptable to the Authority (acting reasonably).

- (iii) If the Developer:

- (A) does not provide the Authority with a certificate of insurance and proof of payment within ninety (90) days after the effective date of such Insurance Policy; or
- (B) fails or refuses to obtain or maintain in force the insurance required by this Article 35 and Exhibit 9 (Required Insurance),

the Authority may, upon five (5) Business Days' written notice to the Developer, without prejudice to any other available remedy and without further inquiry as to whether such insurance is actually in force, obtain such an Insurance Policy.

- (iv) The Developer shall reimburse the Authority upon demand for the cost the Authority incurs in obtaining any Insurance Policy pursuant to Section 35.2(d)(iii).
- (v) The Authority may, without obligation or liability, suspend all or any portion of the Work during any time that such proofs of coverage, in compliance with this Article 35, have not been provided as required by this Agreement.

(e) Contractor Insurance Requirements

- (i) The Developer shall cause the D&C Contractor and the O&M Contractor to obtain (prior to commencing any Work) and maintain all insurance that is required by Exhibit 9 (Required Insurance), to the extent that such Contractor is not covered by the Developer-provided liability insurance. The D&C Contractor or O&M Contractor shall have the discretion to decide the specific types and limits of insurance required for each subcontractor.
- (ii) The Developer shall cause the D&C Contractor and all subcontractors to require that its insurer agree to waive any subrogation rights the insurers may have against such additional insureds.
- (iii) If requested by the Authority, the Developer shall promptly (and in any event within five (5) Business Days) provide certificates of insurance evidencing coverage for each Contractor.

(f) Project-Specific Insurance

Except as expressly provided in Exhibit 9 (Required Insurance), all Insurance Policies must be purchased specifically and exclusively for the Project and extend to all aspects of the Work, with coverage limits devoted solely to the Project.

(g) Endorsements and Waivers

- (i) Except as expressly provided in Exhibit 9 (Required Insurance), the Developer shall endeavor that all Insurance Policies contain or are endorsed to comply with the following:
 - (A) each policy must be endorsed to state that coverage cannot be canceled, materially modified or reduced in coverage or in limits (except with respect to payments under the policy which by their nature erode or deplete the limits of such policy) except after thirty (30) days' prior written notice (or ten (10) Business Days' prior written notice for non-payment of premium) by registered or certified mail, return receipt requested, has been given to the Authority. Such endorsement must not include any limitation of liability of the insurer for failure to provide such notice; and
 - (B) each policy must provide coverage on an "occurrence" basis and not a "claims made" basis.
- (ii) The Developer shall ensure that all Insurance Policies (other than workers' compensation and professional liability policies) contain or are endorsed to comply with the following:
 - (A) any failure on the part of a named insured to comply with reporting provisions or other conditions of the policies, any breach of warranty, any action or inaction of a named insured or others, or any change in ownership of all or any portion of the Project or the Developer's Interest will not affect coverage provided to the other named insureds or additional insureds

(and their respective members, directors, officers, employees, agents and Project consultants); and

(B) the certificate of insurance and each liability policy must contain the following endorsement:

"The insurer(s) shall not, without obtaining the express advance written permission from the Metro Flood Diversion Authority (the Authority), raise any defense involving in any way the jurisdiction of a Tribunal over the person of the Authority, the immunity of the Authority, its officers, agents or employees, the governmental nature of the Authority, or the provisions of any statutes respecting suits against the Authority."

(h) **Waivers of Subrogation**

- (i) The Authority and the Developer waive all rights against each other, against each of their employees and Project consultants for any claims to the extent covered and paid by insurance obtained pursuant to this Article 35, except such rights as they may have to the proceeds of such insurance.
- (ii) The Developer shall require all Contractors to provide similar waivers in writing each in favor of all other parties specified above.
- (iii) Each policy for which the Developer is required to provide coverage for the additional insureds must include a waiver of any right of subrogation against the additional insureds (and their respective members, directors, officers, employees and Project consultants).

(i) **No Recourse**

Except to as otherwise expressly provided in this Agreement, the Developer will have no recourse against the Authority for payment of premiums or other amounts with respect to the insurance the Developer is required to provide pursuant to this Agreement.

(j) **Support of Indemnification**

The insurance coverage the Developer is required to provide under this Agreement will support but is not intended to limit the Developer's indemnification obligations otherwise set out under this Agreement.

35.3 **Defense Costs**

Unless otherwise agreed in writing by the Authority, no defense costs shall be included within or erode the limits of coverage of any of the Insurance Policies, except that defense costs may be included within the limits of coverage of professional liability, contractor's pollution, marine liability and marine pollution, and environmental impairment liability policies.

35.4 **Contesting Denial of Coverage**

- (a) If any insurer under an Insurance Policy described in this Article 35 denies coverage with respect to any claims reported to such insurer, the Developer and the Authority shall cooperate in Good Faith to establish whether and to what extent to contest, and how to fund the cost of contesting, the denial of coverage.
- (b) If the reported claim is a matter covered by an indemnity in favor of the Authority or the denial is the result of the Developer's failure to comply with an insurance requirement, the Developer shall bear all costs of contesting the denial of coverage.

35.5 **Lender Insurance Requirements**

- (a) If, under the terms of any Finance Document, the Developer is obligated to, and does, carry insurance coverage with higher limits, lower deductibles or self-insured retentions, or broader coverage than required under this Agreement, the Developer's provision of such insurance will satisfy the applicable requirements of this Agreement provided such policy meets all the other applicable requirements of this Article 35.
- (b) If the Developer carries insurance coverage in addition to that required under this Agreement (except with respect to directors' and officers' liability insurance) the Developer shall include the Authority and its respective members, directors, officers and employees as additional insureds under such additional insurance coverages and under additional insured endorsements, and shall provide to the Authority the proofs of coverage and copy of the policy described in Section 35.2(d) (Verification of Coverage).
- (c) If the Developer demonstrates to the Authority that inclusion of such Persons as additional insureds will increase the premium, the Authority shall elect either to pay the increase in premium or forgo additional insured status.

35.6 Prosecution of Claims

- (a) Unless otherwise directed by the Authority in writing with respect to the Authority's insurance claims, the Developer will be responsible for reporting and processing all potential claims by the Authority or the Developer against the Insurance Policies required to be provided by the Developer under this Agreement.
- (b) The Developer shall:
 - (i) promptly report to the insurer(s) under such policies any and all matters which may give rise to an insurance claim by the Developer or the Authority; and
 - (ii) promptly, using Reasonable Efforts, pursue such insurance claims in accordance with the claims procedures specified in such policies, whether for defense or indemnity or both.
- (c) The Developer shall enforce all legal rights against the insurer under the applicable Insurance Policies and Applicable Laws, including pursuing necessary litigation and enforcement of judgments. The Developer will be deemed to have satisfied this obligation if:
 - (i) a judgment is not collectible through the exercise of lawful and diligent means; or
 - (ii) in relation to the pursuit of litigation, there is no reasonable likelihood of success for the litigation.
- (d) The Developer and its insurer(s) shall not, without obtaining the advance written consent from the Authority, raise any defense involving in any way the jurisdiction of a Tribunal over the person of the Authority, the immunity of the Authority, its directors, officers, agents or employees, the governmental nature of the Authority, or the provisions of any statutes respecting suits against the Authority.
- (e) The Authority shall:
 - (i) promptly notify the Developer of the Authority's incidents, potential claims, and matters which may give rise to an Authority insurance claim, to tender to the insurer the Authority's defense of the claim under such Insurance Policies; and
 - (ii) cooperate with the Developer as necessary for the Developer to fulfill its duties under this Article 35.
- (f) If at any time the Developer:
 - (i) has not performed its obligations with respect to insurance coverage under this Agreement; or

- (ii) is unable to enforce and collect any such insurance for failure to (A) assert claims in accordance with the terms of the Insurance Policies or (B) prosecute claims using Reasonable Efforts,

for purposes of determining (x) the Developer's liability and the limits on the Developer's liability or (y) reductions in compensation due from the Authority to the Developer on account of available insurance, in each case, the Developer shall be treated as if it has elected to self-insure up to the full amount of insurance coverage which would have been available had the Developer performed such obligations.

- (g) Nothing in this Section 35.6 or elsewhere in this Article 35 will be construed to treat the Developer as electing to self-insure where the Developer is unable to collect due to the bankruptcy or insolvency of any insurer which at the time the Insurance Policy is written meets the rating qualifications set out in Section 35.2(a) (Insurers).

- (h) If an insurer providing any of the Insurance Policies required by this Agreement:

- (i) becomes the subject of bankruptcy proceedings;
- (ii) becomes insolvent; or
- (iii) is the subject of an order or directive limiting its business activities given by any Governmental Entity,

the Developer shall use Reasonable Efforts to promptly and at its own cost and expense secure alternative coverage in compliance with the insurance requirements contained in this Article 35 so as to avoid any lapse in insurance coverage.

- (i) If in any instance the Developer has not promptly performed its obligation to report to applicable insurers and process any potential insurance claim tendered by the Authority, the Authority may, but is not obligated to, report the claim directly to the insurer and process the claim.

35.7 Application of Proceeds

All insurance proceeds received for physical property damage to the Project under any Insurance Policies required under Exhibit 9 (Required Insurance), other than any delay-in-start-up or business interruption insurance maintained as part of such Insurance Policies, will be first applied to repair, reconstruct, rehabilitate, restore, renew, reinstate and replace each part or parts of the Project with respect to which such proceeds were received.

35.8 Notices

The Developer shall provide the Authority with the following written notices:

- (a) notice of any claim in excess of \$250,000 made by the Developer or any other party under any insurance obtained in connection with the Project within thirty (30) days of submitting the notice of claim to the insurer; and
- (b) notice of the expiration of any Insurance Policy at least ten (10) Business Days (if due to non-payment of premium) or thirty (30) days (if by its terms or otherwise) prior to such expiration, including notification of the date of such expiration.

35.9 Compliance with Insurance Policies

The Developer shall:

- (a) comply with the terms, conditions and requirements of all Insurance Policies; and

- (b) not do or omit to do anything, or permit (insofar as it is within its power) any other Person to do or omit to do anything, on or with respect to the Project Site or the Project or with respect to the Work that results in or could reasonably be expected to result in the cancellation of any Insurance Policies or that would entitle any insurer to refuse to pay any claim under any Insurance Policy (in whole or in part) or that would otherwise prejudice an Insurance Policy or claim under any Insurance Policy.

35.10 Benchmarking of Insurance Costs (Operating Period)

- (a) This procedure will be used to determine whether the Authority will bear any increase or benefit from any decrease in the cost of Benchmarked Insurances during the Operating Period.
- (b) The Insurance Broker will prepare a report on behalf of both the Developer and the Authority in relation to each Insurance Review Period (the "**Joint Insurance Cost Report**"). The Joint Insurance Cost Report will be prepared at the Developer's expense and should, at a minimum, contain the following information for the relevant Insurance Review Period:
 - (i) a full breakdown of the Actual Benchmarked Insurance Cost;
 - (ii) a full breakdown of the Base Benchmarked Insurance Cost;
 - (iii) a spreadsheet detailing separately:
 - (A) the sum(s) insured and limit of indemnity (i.e., ratable factor) for each of the Benchmarked Insurances;
 - (B) the premium rate for each of the Benchmarked Insurances;
 - (C) the premium paid (or to be paid) for each of the Benchmarked Insurances (excluding both insurance premium tax and broker's fees and commissions);
 - (D) the deductible(s) for each of the Benchmarked Insurances; and
 - (E) except with respect to the initial Insurance Review Period, details of all claims paid or reserved (including incident date, type and amount);
 - (iv) an assessment and quantification of each Project Insurance Change together with reasons for each Project Insurance Change;
 - (v) complete details of any Portfolio Cost Savings;
 - (vi) any other reasons that the Developer believes may have caused a change (by way of increase or decrease with reference to the Base Benchmarked Insurance Cost) in the Actual Benchmarked Insurance Cost;
 - (vii) an opinion of the Insurance Broker as to the reasons why the Actual Benchmarked Insurance Cost has varied from the Base Benchmarked Insurance Cost, specifying the impact of each of the relevant factors and quantifying the amount attributable to each factor specified;
 - (viii) the calculation of the Insurance Cost Differential and any Exceptional Cost or Exceptional Saving arising from that calculation; and
 - (ix) evidence (in form and substance reasonably satisfactory to the Authority) of any changes to circumstances generally prevailing in the Relevant Insurance Markets that are claimed to account for the Insurance Cost Differential.

- (c) The Developer shall ensure that the Insurance Broker, no later than ten (10) Business Days after the commencement of an Insurance Review Period, delivers to each of the Authority and the Developer simultaneously at least two (2) copies of the Joint Insurance Cost Report with respect to the Insurance Review Period (if any) that just ended. The Authority, in its absolute discretion, may independently assess the accuracy of the information in the Joint Insurance Cost Report and retains the right to perform its own independent insurance review, which may include retaining advisors or performing its own assessment as to the impact of claims history on renewal costs. If the Authority, in its absolute discretion, elects to retain an insurance advisor to analyze the extent of eligible premium increases, the Developer shall cooperate in Good Faith with any reasonable requests for additional information from the Authority's insurance advisor.
- (d) No later than thirty (30) days after the Developer's submission of the Joint Insurance Cost Report, the Authority shall make its determination of the amounts subject to the risk allocation described in Section 35.10(e) and Section 35.10(f). In the event of a Dispute, the Authority's determination will be subject to the Dispute Resolution Procedures.
- (e) If, following the completion of the Insurance Premium Benchmarking Procedure, it is agreed or determined that there is an Exceptional Cost, the Authority shall within thirty (30) days of completion of the Insurance Premium Benchmarking Procedure make a one-off lump-sum payment to the Developer equal to eighty-five percent (85%) of the Exceptional Cost.
- (f) If, following the completion of the Insurance Premium Benchmarking Procedure, it is agreed or determined that there is an Exceptional Saving, the Developer shall within thirty (30) Business Days of completion of the Insurance Premium Benchmarking Procedure make a one-off lump-sum payment to the Authority equal to eighty-five percent (85%) of the Exceptional Saving.
- (g) Following the completion of the Insurance Premium Benchmarking Procedure, if it is agreed or determined that there is neither an Exceptional Cost nor an Exceptional Saving, the Developer shall bear or benefit from any Insurance Cost Differential.

35.11 Reinstatement Work

- (a) If any Project Element (other than a Railroad Crossing) suffers any material damage following Interim Completion of that Project Element, the Developer shall repair and reinstate that Project Element in accordance with this Section 35.11.
- (b) The Developer shall deliver to the Authority promptly (and in any event within thirty (30) days, unless the Authority authorizes an extension in writing) after the occurrence of the damage, a plan (the "**Reinstatement Outline**") prepared by the Developer for the carrying out of the repairs or reinstatement work (the "**Reinstatement Work**") necessary to repair, reinstate or replace the relevant part of the Project.
- (c) A Reinstatement Outline must set out the proposed schedule for undertaking the Reinstatement Work, which should be put together with the intent of ensuring the relevant part of the Project is fully operational as soon as reasonably practicable.
- (d) The Authority shall, promptly (and in any event within ten (10) Business Days) after receiving the Reinstatement Outline, provide written notice to the Developer stating:
 - (i) whether or not it approves the Reinstatement Outline (such approval not to be unreasonably withheld or delayed); and
 - (ii) its reasons for any non-approval of the Reinstatement Outline, in sufficient detail to enable the Developer to assess whether the Authority's approval has been unreasonably withheld.

The Authority may only reasonably withhold its approval if the Reinstatement Outline will not ensure that the relevant part of the Project will be fully operational again as soon as reasonably practicable.

- (e) If the Authority gives notice of non-approval in accordance with Section 35.11(d), the Developer shall amend and resubmit the Reinstatement Outline (the "**Amended Reinstatement Outline**") to the Authority for its reconsideration and the Authority shall notify the Developer in writing of its approval or non-approval promptly (and in any event within five (5) Business Days) after the submission of the Amended Reinstatement Outline to the Authority. If the Authority does not approve the Amended Reinstatement Outline, it shall provide reasons for such non-approval in sufficient detail so as to enable the Developer to understand the nature and extent of such non-approval and to assess whether the Authority's approval has been unreasonably withheld. The Authority may only reasonably withhold its approval of an Amended Reinstatement Outline for the same reasons that it may reasonably withhold its approval of a Reinstatement Outline pursuant to Section 35.11(d).
- (f) If the Amended Reinstatement Outline or a Person proposed to carry out the Reinstatement Work is not approved by the Authority in accordance with Section 35.11(e), the Developer may submit the Amended Reinstatement Outline to the Dispute Resolution Procedures in order for it to be determined whether the Authority's approval under Section 35.11(e) was unreasonably withheld.
- (g) The Reinstatement Outline or the Amended Reinstatement Outline (as applicable) as approved by the Authority pursuant to this Section 35.11 or as determined pursuant to the Dispute Resolution Procedures will become the required reinstatement plan (the "**Reinstatement Plan**").
- (h) Subject to Section 35.11(i), the Developer shall carry out the Reinstatement Work in accordance with the Reinstatement Plan and all applicable provisions of this Agreement. Any contractual arrangements to carry out the Reinstatement Work must be in accordance with the requirements of this Agreement.
- (i) In the event of an Emergency, the Developer may carry out reasonable repairs, reinstatements or replacements on the relevant part of the Project without submitting the required Reinstatement Plan or obtaining the Authority's prior written consent.
- (j) If any Noncompliance Points would not have accrued but for the occurrence of any damage requiring Reinstatement Work under this Section 35.11, such Noncompliance Points will be deemed to have not accrued for the purposes of this Agreement, except to the extent that such Reinstatement Work is required as a result of the Developer failing to comply with the requirements of this Agreement or any negligent act or negligent omission of a Developer-Related Entity.

36. **UNINSURABLE RISKS AND UNAVAILABLE INSURANCE TERMS**

36.1 **Uninsurable Risks**

- (a) If a risk usually covered by construction all risks, third party liability, all risks property or statutory insurances, in each case that is required under this Agreement, becomes an Uninsurable Risk the Developer shall notify the Authority promptly (and in any event within fifteen (15) Business Days) after the earlier of:
 - (i) the Developer becoming aware that the risk is likely to be an Uninsurable Risk; and
 - (ii) the risk becoming an Uninsurable Risk,

and, in any event, at least five (5) Business Days before expiration or cancellation of any existing insurance with respect to that risk (irrespective of the reason for the same). The Developer shall provide the Authority with such information as the Authority reasonably requests regarding the Uninsurable Risk.

- (b) If both Parties agree, or it is determined pursuant to the Dispute Resolution Procedures, that a risk is an Uninsurable Risk, the Authority and the Developer shall consider in Good Faith:
 - (i) alternative insurance packages and programs that provide coverage as comparable to that contemplated in Article 35 (Insurance and Reinstatement) as is possible under then-existing insurance market conditions; and
 - (ii) other means by which the risk should be managed or shared (including considering the issue of self-insurance by either Party).
- (c) If the Authority and the Developer do not agree on how to manage or share the relevant Uninsurable Risk within ten (10) days of the date on which the Developer provides notice under Section 36.1(a), the Authority may refer the matter to a mediator acceptable to the Authority and the Developer (acting reasonably) instead of using the Dispute Resolution Procedures.

36.2 Consequences of a Risk Becoming an Uninsurable Risk

- (a) If both Parties agree (acting reasonably), or it is determined pursuant to the Dispute Resolution Procedures, that:
 - (i) a risk is an Uninsurable Risk in accordance with Section 36.1(b) (Uninsurable Risks) and the Parties do not agree on how to manage or share the relevant Uninsurable Risk within thirty (30) days of the date on which the Developer provides notice under Section 36.1(a) (Uninsurable Risks) (irrespective of whether the matter has been referred to mediation under Section 36.1(c) (Uninsurable Risks) in that period); and
 - (ii) the risk being an Uninsurable Risk is not caused by the actions, breaches, omissions or defaults of:
 - (A) the Developer, other than the making of any claim in relation to the Insurance Policies by the Developer or any inadvertent acts of the Developer (where the Developer has used best endeavors to remedy, overcome or otherwise mitigate the effect of any such inadvertent acts); or
 - (B) a Contractor, unless the Developer has used best endeavors to remedy, overcome or otherwise mitigate the effect of the Contractor's action, breach, omission or default,

the Authority shall deliver a notice to the Developer electing to either:
 - (iii) terminate this Agreement and pay the Developer in accordance with Article 44 (Termination for Uninsurability); or
 - (iv) continue this Agreement and on the occurrence of the risk (but only for as long as such risk remains an Uninsurable Risk) the Authority shall (at its option) either:
 - (A) pay the Developer an amount equal to the insurance proceeds that would have been payable had the relevant insurance continued to be available (subject to the limitations, conditions and exclusions set out in the certificates and policies of insurance relating to such coverage previously provided by the Developer, in which case the Developer will remain responsible for the deductibles referred to in Exhibit 9 (Required Insurance)) (the "**Relevant Insurance Amount**") and this Agreement will continue; or
 - (B) pay the Developer an amount equal to the amount calculated in accordance with Article 44 (Termination for Uninsurability) plus (in relation to third party liability insurance only) the

Relevant Insurance Amount for that third party liability insurance, and this Agreement will terminate.

To the extent that the Authority assumes any Uninsurable Risk in accordance with this Section 36.2(a)(iv), the Authority shall provide a full waiver of subrogation to the Developer.

- (b) If, pursuant to Section 36.2(a)(iv), this Agreement continues:
- (i) the Developer's obligations in Article 35 (Insurance and Reinstatement) and Exhibit 9 (Required Insurance) to maintain insurance with respect to the Uninsurable Risk are waived and the Developer will not be considered in breach of its obligations regarding the maintenance of insurance pursuant to this Agreement as a result of the failure to maintain insurance with respect to such Uninsurable Risk for so long as the risk is an Uninsurable Risk (and for such time as is required for the Developer to take out insurance as required under Section 36.2(b)(ii));
 - (ii) the Developer shall use Reasonable Efforts to regularly review the insurance market generally, to ascertain whether an Uninsurable Risk has become insurable and in any event shall approach (or require its insurance brokers to approach) the insurance market at least once every six (6) months to establish whether the risk remains an Uninsurable Risk. Upon the Developer becoming aware that the risk is no longer an Uninsurable Risk, the Developer shall promptly (and in any event within ten (10) Business Days of becoming aware) take out and maintain or ensure the taking out and maintenance of insurance (to be incepted as soon as reasonably practicable) for such risk in accordance with this Agreement; and
 - (iii) the Authority may deduct from the monthly Availability Payments an amount equal to one-twelfth of the annual premium most recently paid (or which would have been paid) by the Developer with respect to the relevant risk prior to it becoming an Uninsurable Risk (using a reasonable estimate of such amount where a precise figure is not available and indexed from the date that the Uninsurable Risk first arose in accordance with Section 5 (Indexation) of Exhibit 15 (Payment Mechanism)) from the date on which the risk became an Uninsurable Risk.

36.3 Unavailability of Insurance Terms

- (a) This Section 36.3 will apply if, upon the initial placement or renewal of any insurance which the Developer is required to maintain, or to ensure the maintenance of, pursuant to this Agreement:
- (i) any Insurance Term (as opposed to the relevant insurance policy as a whole) is not available to the Developer in the worldwide insurance market with reputable insurers of good standing; or
 - (ii) the insurance premium payable for insurance incorporating any Insurance Term is such that the Insurance Term is not generally being incorporated in such insurance obtained in the worldwide insurance market with reputable insurers of good standing by contractors on similar sized civil engineering projects in North America,
- (in either case the relevant Insurance Term being an "**Unavailable Term**").
- (b) The Developer shall notify the Authority promptly (and in any event within fifteen (15) Business Days) after the earlier of:
- (i) the Developer becoming aware that the Insurance Term is likely to be an Unavailable Term; and
 - (ii) the Insurance Term becoming an Unavailable Term,

and, in any event, at least five (5) Business Days before expiration or cancellation of any existing insurance with respect to that risk (irrespective of the reason for the same). The Developer shall provide the Authority with such information as the Authority reasonably requests regarding the unavailability of the Insurance Term and the Parties shall meet to discuss the means by which such unavailability should be managed promptly (and in any event within ten (10) Business Days) after the Developer provides notice under this Section 36.3(b).

(c) Subject to Section 36.4 (Alternative Insurance Term), if both Parties agree (acting reasonably), or it is determined pursuant to the Dispute Resolution Procedures, that:

- (i) an Insurance Term is an Unavailable Term; and
- (ii) the Insurance Term being an Unavailable Term is not caused by the actions, breaches, omissions or defaults of:
 - (A) the Developer, other than the making of any claim in relation to the Insurance Policies by the Developer or any inadvertent acts of the Developer (where the Developer has used best endeavors to remedy, overcome or otherwise mitigate the effect of any such inadvertent acts); or
 - (B) a Contractor, other than any inadvertent acts of a Contractor unless the Developer has used best endeavors to remedy, overcome or otherwise mitigate the effect of the Contractor's inadvertent acts),

the Developer's obligations under Article 35 (Insurance and Reinstatement) or Exhibit 9 (Required Insurance) with respect to that particular Insurance Term are waived and the Developer will not be considered in breach of its obligations regarding the maintenance of insurance incorporating the Unavailable Term for so long as the Insurance Term is an Unavailable Term (and for such time as is required for the Developer to take out insurance as required under Section 36.3(e)).

- (d) The Developer shall use Reasonable Efforts to regularly review the insurance market generally, to ascertain whether an Insurance Term is no longer an Unavailable Term and in any event shall approach (or require its insurance brokers to approach) the insurance market at least once every six (6) months to establish whether the Insurance Term remains an Unavailable Term.
- (e) Upon the Developer becoming aware that an Insurance Term is no longer an Unavailable Term, the Developer shall promptly (and in any event within ten (10) Business Days of becoming aware) take out and maintain or ensure the taking out and maintenance of insurance (to be incepted as soon as reasonably practicable) incorporating such Insurance Term in accordance with this Agreement.

36.4 Alternative Insurance Term

If an alternative or replacement term or condition of insurance is available to the Developer in the worldwide insurance and reinsurance market with reputable insurers of good standing which, if included in the relevant insurance policy, would fully or partially address the Developer's inability to maintain or obtain insurance including an Unavailable Term, at a cost which contractors on similar sized civil engineering projects in North America are (at such time) generally prepared to pay, the Developer shall maintain or ensure the maintenance of insurance including such alternative or replacement term or condition.

PART I – PRINCIPAL DEVELOPER DOCUMENTS, REFINANCING, FINANCIAL MODEL

37. PRINCIPAL DEVELOPER DOCUMENTS

37.1 Key Contracts

The Developer shall perform its obligations under, and observe all of the provisions of, the Key Contracts and must not, without the prior written consent of the Authority:

- (a) terminate or agree to termination of all or any part of any Key Contract, except for default in accordance with its terms;
- (b) amend any Key Contract;
- (c) in any material respect depart from its obligations (or waive or allow to lapse any rights it may have in a material respect) or allow others in any material respect to depart from their obligations (or waive or allow to lapse any rights they may have in a material respect) under any Key Contract; or
- (d) enter into (or permit any other Person to enter into) any agreement replacing all or part of (or otherwise materially and adversely affecting the interpretation of) any Key Contract,

if the proposed course of action may reasonably be expected to have a material adverse effect on the ability of the Developer to perform its obligations under this Agreement.

37.2 Delivery of Changed Principal Developer Documents

If at any time an amendment is made to any Principal Developer Document or the Developer enters into a new Principal Developer Document (or any agreement that affects the interpretation or application of any Principal Developer Document), the Developer shall deliver to the Authority a conformed copy of each such amendment or agreement within ten (10) Business Days of the date of its execution or creation (as applicable) certified as a true copy by an officer of the Developer.

37.3 No Increased Termination Liabilities

- (a) No amendment, waiver or exercise of a right under any Principal Developer Document as of the Financial Closing Date will have the effect of increasing the amount of the Authority's liabilities on Early Termination, unless the Developer has obtained the prior written consent of the Authority (in its absolute discretion) to such increased liability expressly for the purposes of this Section 37.3.
- (b) In the event of any conflict between the provisions of this Section 37.3 and any other provision of this Agreement, the provisions of this Section 37.3 will prevail.

37.4 Performance Security

If the Developer is required under the terms of the Finance Documents to provide or ensure that a Key Contractor provides any Performance Security, including any performance bond, letter of credit, cash collateral or parent guarantee, the Developer shall:

- (a) with respect to any performance bond, ensure that the Authority is named as an additional obligee (on terms reasonably acceptable to the Authority); and
- (b) deliver to the Authority a copy of any such Performance Security promptly upon obtaining it (in any event, on or prior to the Financial Closing Date, as required under Section 2.3(a) (Financial Closing Documents)).

37.5 Critical O&M Contracts

The Developer shall ensure that each Critical O&M Contract:

- (a) includes a provision, enforceable by the Authority, prohibiting the Key Contractor from suspending performance, demobilizing, or terminating the Critical O&M Contract unless it delivers to the Authority a notice of its contractual counterparty's breach or default under that Critical O&M Contract and allows the Authority a reasonable opportunity to cure such breach or default;
- (b) includes a provision, enforceable by the Authority, providing that any purported amendment to the provision referred to in Section 37.5(a) will not be effective unless the Authority has provided its prior written consent to that amendment; and
- (c) does not include any provision that is inconsistent with Section 37.5(a) or Section 37.5(b).

38. REFINANCING

38.1 Requirement for Authority Consent

Subject to Section 38.2(b) (Share of Gain), the Developer may not enter into any Qualifying Refinancing without obtaining the prior written consent of the Authority.

38.2 Share of Gain

- (a) The Authority is entitled to receive a fifty percent (50%) share of any Refinancing Gain arising from a Qualifying Refinancing.
- (b) The Authority must not withhold or delay its consent under Section 38.1 (Requirement for Authority Consent) to obtain a greater than fifty percent (50%) share of a Refinancing Gain.

38.3 Refinancing Details

- (a) The Developer shall promptly (and in any event at least thirty (30) days prior to closing the proposed Qualifying Refinancing) provide the Authority with full details of any proposed Qualifying Refinancing, including:
 - (i) a copy of the proposed financial model relating to it (if any); and
 - (ii) the basis for the assumptions used in the proposed financial model.
- (b) The Authority will respond to any request for consent to enter into a Qualifying Refinancing containing the complete details required in accordance with Section 38.3(a) within fifteen (15) Business Days of receiving such request .
- (c) The Authority will (before, during and at any time after any Refinancing) have unrestricted rights of audit over any financial model and documentation (including any aspect of the calculation of the Refinancing Gain) used in connection with that Refinancing whether the Refinancing is a Qualifying Refinancing or not.

38.4 Receipt of Gain

The Authority may elect to receive its share of any Refinancing Gain as either:

- (a) a single payment in an amount less than or equal to any Distribution made on or about the date of the Refinancing;
- (b) a reduction in the Availability Payment over the remainder of the Term; or
- (c) a combination of the choices in Sections 38.4(a) and 38.4(b).

38.5 Method of Calculation

- (a) Following the Developer's delivery of the details regarding a proposed Qualifying Refinancing pursuant to Section 38.3 (Refinancing Details), the Authority and the Developer shall:
 - (i) agree on the amount of the Refinancing Gain resulting from such Qualifying Refinancing; and
 - (ii) negotiate in Good Faith to agree on the basis for payment of the Authority's share of the Refinancing Gain (taking into account how the Authority has elected to receive its share of the Refinancing Gain under Section 38.4 (Receipt of Gain)).
- (b) The Refinancing Gain will be calculated after taking into account the reasonable and proper professional costs that each Party directly incurs in relation to the Qualifying Refinancing and the Developer's reimbursement obligations under Section 38.8(a) (Costs).
- (c) If the Developer and the Authority fail to agree on the amount of any Refinancing Gain or the basis for the payment of the Authority's share of such Refinancing Gain, the Dispute will be resolved in accordance with the Dispute Resolution Procedures.

38.6 Notifiable Refinancings

Without prejudice to the other provisions of this Article 38, the Developer shall:

- (a) promptly (and in any event at least fifteen (15) Business Days prior to closing the proposed Notifiable Refinancing) notify the Authority of any Notifiable Refinancing prior to undertaking such Notifiable Refinancing; and
- (b) provide full details of a Notifiable Refinancing within thirty (30) days of the date such Notifiable Refinancing is entered into by the relevant parties.

38.7 Authority Assistance for Exempt and Qualifying Refinancings

Upon the reasonable request of the Developer, the Authority shall provide reasonable assistance to the Developer in undertaking:

- (a) any Exempt Refinancing; or
- (b) any Qualifying Refinancing with respect to which the Authority has provided its prior written consent pursuant to Section 38.1 (Requirement for Authority Consent),

including through the provision of documents within its possession or control that are required to comply with any disclosure requirements under Applicable Law in connection with the issuance of any PABs or other capital markets issuance, as well as the delivery of information, legal opinions and continuing disclosure undertakings, as applicable.

38.8 Costs

- (a) The Developer shall reimburse the Authority for all reasonable and proper professional costs incurred by the Authority in relation to any closed Qualifying Refinancing within thirty (30) days of receiving an invoice from the Authority with respect to such costs.
- (b) On or prior to the scheduled date of closing an Exempt Refinancing, the Developer shall reimburse the Authority for all reasonable and proper professional costs incurred by the Authority in relation to such Exempt Refinancing within thirty (30) days of receiving an invoice from the Authority with respect to such costs.

- (c) If for any reason a proposed Exempt Refinancing or proposed Qualifying Refinancing does not close, the Developer shall reimburse the Authority for all reasonable and proper professional costs incurred by the Authority in relation to such Refinancing within thirty (30) days of receiving an invoice from the Authority with respect to such costs.

38.9 Adjustments to the Base Case Financial Model for Qualifying Refinancings

As a condition precedent to the effectiveness of any approval of a Qualifying Refinancing given by the Authority pursuant to this Article 38, the Parties shall agree upon an update to the Base Case Financial Model (including any adjustments to the Base Case Equity IRR and the Key Ratios) to reflect the modified terms of the Developer's financing arrangements and any reduction in the Availability Payments pursuant to Section 38.4 (Receipt of Gain) associated with the Qualifying Refinancing.

39. RELEVANT EVENTS AND THE FINANCIAL MODEL

39.1 Adjustments to the Base Case Financial Model for Relevant Events

- (a) Upon the occurrence of a Relevant Event, the financial consequence will be determined in accordance with this Article 39, except as otherwise expressly provided in this Agreement or if otherwise agreed by the Parties.
- (b) Subject to Section 39.1(c), upon the occurrence of a Relevant Event, the Developer shall adjust the Base Case Financial Model to reflect the impact of the Relevant Event.
- (c) Any adjustments to the Base Case Financial Model pursuant to Section 39.1(b) must not take into account the financial impact up to or after the date of the Relevant Event of those risks which the Developer expressly bears under the terms of this Agreement, including (to the extent expressly borne by the Developer under this Agreement) changes in taxation rates, inflation and the impact of any Deductions made by the Authority pursuant to the Exhibit 14 (Milestone Payments) or Exhibit 15 (Payment Mechanism).
- (d) Any adjustment to the Base Case Financial Model must be carried out in consultation with the Authority and is subject to approval by the Authority in accordance with this Article 39.

39.2 Application to the Base Case Financial Model

Except as otherwise expressly provided in this Agreement, where pursuant to this Agreement, either Party is entitled to payment of any sum the assessment of which requires reference to the Base Case Financial Model, the adjustment to the payments between the Parties under this Agreement:

- (a) will ensure that, by reference to the Base Case Financial Model adjusted under this Article 39, the Developer is left in a no better and no worse position than under the version of the Base Case Financial Model applicable immediately prior to the relevant adjustment; and
- (b) will be ascertained by determining the adjustment to the payments between the Parties under this Agreement required to maintain the Developer in the financial position it would have been in under the version of the Base Case Financial Model applicable immediately prior to the relevant adjustment.

39.3 No Better and No Worse

Any reference in this Agreement to "**no better and no worse**" or to leaving the Developer in a "**no better and no worse position**" will be construed by reference to the Developer's:

- (a) rights, duties and liabilities under or arising pursuant to performance of this Agreement, the Finance Documents and the Key Contracts; and

- (b) ability to perform its obligations and exercise its rights under this Agreement, the Finance Documents and the Key Contracts, so as to ensure that:
 - (i) the Developer is left in a position which is no better and no worse in relation to the Key Ratios and the Equity IRR by reference to the version of the Base Case Financial Model applicable immediately prior to the Relevant Event than had the Relevant Event not occurred; and
 - (ii) the ability of the Developer to comply with this Agreement is not adversely affected or improved as a consequence of the Relevant Event.

39.4 Replacement of the Base Case Financial Model

Any Base Case Financial Model produced following adjustments in accordance with this Article 39 will, when it is approved by the Authority (such approval not to be unreasonably withheld), become the Base Case Financial Model for the purposes of this Agreement until its further amendment in accordance with this Agreement.

39.5 Amendments to Logic or Formulae

- (a) Where it is necessary to amend the logic or formulae incorporated in the Base Case Financial Model to permit adjustments to be made, this will be done to the extent necessary, following mutual agreement between the Parties.
- (b) If any amendment is to be made to the logic or formulae incorporated in the Base Case Financial Model, the Base Case Financial Model must first be run immediately prior to the making of any such amendment to ensure that the Key Ratios from the Base Case Financial Model are maintained at levels that are neither lower nor higher than the Key Ratios existing immediately after making such amendment, and the difference in the Equity IRR after and immediately prior to making such amendment does not differ by more than one (1) basis point (being, 0.01 per cent).

39.6 Financial Model Audits; Accuracy

- (a) As a condition to the Authority providing approval for any version of the Base Case Financial Model that includes amendments to the logic or formulae under Section 39.5 (Amendments to Logic or Formulae), the Developer shall (at its own cost) deliver to the Authority an audit of such amended version of the Base Case Financial Model from an independent audit firm with nationally recognized reputation.
- (b) The Developer will bear the entire risk of any errors in or omissions from the Base Case Financial Model and will not be entitled to any compensation or other relief from the Authority in relation to any loss or damage that it suffers as a result of such error for omission.

39.7 Copies of the Revised Base Case Financial Model

Following any adjustment to the Base Case Financial Model in accordance with this Article 39, the Developer shall promptly (and in any event within five (5) Business Days of finalizing the adjustment) deliver a copy of the revised Base Case Financial Model to the Authority in the same form as the version delivered pursuant to Section 2.3 (Conditions Precedent to the Financial Closing Date), or in such other form as may be agreed between the Parties.

PART J – TERMINATION AND STEP-IN

40. TERMINATION FOR CONVENIENCE

40.1 Right to Terminate for Convenience

The Authority may terminate this Agreement at any time before the last day of the Term in accordance with Section 40.2(a) (Termination for Convenience).

40.2 **Termination for Convenience**

- (a) If the Authority wishes to terminate this Agreement under this Article 40, it shall deliver a Termination Notice to the Developer stating:
 - (i) that the Authority is terminating this Agreement under this Article 40; and
 - (ii) that this Agreement will terminate on the date specified in the Termination Notice, which must be a minimum of thirty (30) days after the date the Developer receives such Termination Notice.
- (b) This Agreement will terminate on the date specified in the Termination Notice referred to in Section 40.2(a).

40.3 **Compensation on Termination**

- (a) If this Agreement is terminated pursuant to this Article 40 prior to the Financial Closing Date, the Authority shall pay compensation to the Developer in accordance with Section 46.2 (Compensation on Termination).
- (b) If this Agreement is terminated pursuant to this Article 40 on or after the Financial Closing Date, the Authority shall pay compensation to the Developer in accordance with Section 1 (Compensation on Termination for Convenience, for Authority Default and Termination by Court Ruling) of Exhibit 20 (Compensation on Termination).

41. **TERMINATION FOR AUTHORITY DEFAULT**

41.1 **Authority Default**

The occurrence of any one or more of the following will constitute an "**Authority Default**":

- (a) the Authority fails to make any payment due to the Developer under this Agreement when due, except to the extent such payment is subject to a Good Faith Dispute;
- (b) any representation or warranty made by the Authority under Section 3.2 (Authority Representations and Warranties) is false, misleading or inaccurate when made, in each case in any material respect, or omits material information when made;
- (c) the Authority fails to perform any of its obligations under this Agreement, which substantially frustrates or renders it substantially impossible for the Developer to perform its obligations under this Agreement for a continuous period of sixty (60) days or more;
- (d) the Authority fails to comply with Section 52.3 (Assignment by the Authority);
- (e) the Authority or any other Governmental Entity confiscates, sequesters, condemns or appropriates the whole or any material part of the Project, or the whole or any material part of the Developer's Interest, excluding the exercise of a right set out in this Agreement;
- (f) a JPA-Related Event occurs; or
- (g) the CCJWRD fails to issue the Definitive P3 Improvement Warrants in the forms attached as Part 3 (Definitive P3 Improvement Warrants) of Exhibit 7 (Master Indenture of Trust and P3 Improvement Warrants) at least sixty (60) days prior to the anticipated date for Project Substantial Completion.

41.2 **Notice and Cure Periods**

- (a) The Developer shall provide written notice ("**Authority Default Notice**") to the Authority upon the occurrence of an Authority Default.

- (b) Upon receipt of an Authority Default Notice, the Authority will have the following cure periods:
 - (i) for an Authority Default under Section 41.1(a) (Non-Payment) or Section 41.1(g) (Definitive P3 Improvement Warrant Nonissuance), a period of thirty (30) days after the Authority receives the Authority Default Notice;
 - (ii) for an Authority Default under Section 41.1(c) (Non-Performance of Obligations) or Section 41.1(f) (JPA-Related Event), a period of sixty (60) days after the Authority receives the Authority Default Notice;
 - (iii) for an Authority Default under Section 41.1(b) (Representations and Warranties) or Section 41.1(e) (Condemnation):
 - (A) a period of thirty (30) days after the Authority receives the Authority Default Notice; or
 - (B) if, despite the Authority's commencement of meaningful steps to cure immediately after receiving the Authority Default Notice, the Authority Default cannot be cured within such thirty (30) day period, the Authority will have such additional period of time, up to a maximum cure period of one hundred twenty (120) days after the Authority receives the Authority Default Notice, as is reasonably necessary to cure the Authority Default; and
 - (iv) for an Authority Default under Section 41.1(d) (Assignment), there is no cure period.
- (c) An Authority Default under Section 41.1(b) (Representations and Warranties) will be regarded as cured when the adverse effects of such Authority Default are cured.

41.3 Termination for Authority Default

- (a) If an Authority Default occurs and it has not been cured within the applicable cure period (if any) set out in Section 41.2 (Notice and Cure Periods), the Developer may deliver a notice to the Authority electing to terminate this Agreement ("**Developer Termination Notice**") at any time during the continuance of that Authority Default.
- (b) A Developer Termination Notice must specify the type of Authority Default which has occurred entitling the Developer to terminate.
- (c) This Agreement will terminate on the date that is thirty (30) days after the date the Authority receives a Developer Termination Notice.

41.4 Compensation on Termination

If this Agreement is terminated pursuant to this Article 41, the Authority shall pay compensation to the Developer in accordance with Section 1 (Compensation on Termination for Convenience, for Authority Default and Termination by Court Ruling) of Exhibit 20 (Compensation on Termination).

42. TERMINATION FOR DEVELOPER DEFAULT

42.1 Developer Default

The occurrence of any one or more of the following will constitute a "**Developer Default**":

- (a) the Developer Abandons the Project;
- (b) the Developer fails to achieve Project Substantial Completion by the Project Substantial Completion Long Stop Date;

- (c) a Restricted Change in Ownership occurs;
- (d) the Developer fails to comply with Article 52 (Assignment and Transfer; Fundamental Changes);
- (e) an Insolvency Event arises with respect to the Developer;
- (f) during the D&C Period, an Insolvency Event arises with respect to the D&C Contractor, any D&C Contractor Member or any D&C Guarantor, unless:
 - (i) the Developer enters into a replacement design and construction contract or guarantee (as applicable) with a reputable counterparty reasonably acceptable to the Authority within ninety (90) days of the relevant Insolvency Event, or within such longer period as agreed with the Authority (acting reasonably) not to exceed one hundred fifty (150) days which is reasonably necessary to effect such replacement, so long as the Developer is diligently pursuing such replacement; or
 - (ii) with respect to any D&C Contractor Member or any D&C Guarantor, the Developer demonstrates to the satisfaction of the Authority that the D&C Contractor Members and D&C Guarantors with respect to which an Insolvency Event has not occurred possess the technical and financial capability to perform all remaining D&C Work in accordance with this Agreement;
- (g) an Insolvency Event arises with respect to an O&M Contractor, unless:
 - (i) the Developer enters into a replacement operation and maintenance contract with a reputable counterparty reasonably acceptable to the Authority within ninety (90) days of the relevant Insolvency Event, or within such longer period as agreed with the Authority (acting reasonably) not to exceed one hundred twenty (120) days which is reasonably necessary to effect such replacement, so long as the Developer is diligently pursuing such replacement; or
 - (ii) in the absence of entering into a replacement operation and maintenance contract, the Developer demonstrates to the satisfaction of the Authority that the Developer possesses the technical and financial capability to perform all remaining O&M Work in accordance with this Agreement;
- (h) the D&C Contract is terminated (other than non-default termination on its scheduled termination date) and the Developer has not entered into a replacement design and construction contract with a reputable counterparty reasonably acceptable to the Authority within ninety (90) days of the termination of the D&C Contract, or within such longer period as agreed with the Authority (acting reasonably) not to exceed one hundred fifty (150) days which is reasonably necessary to effect such replacement, so long as the Developer is diligently pursuing such replacement;
- (i) the O&M Contract is terminated (other than non-default termination on its scheduled termination date) and the Developer has not either:
 - (i) entered into a replacement operation and maintenance contract with a reputable counterparty reasonably acceptable to the Authority within ninety (90) days of the termination of the O&M Contract, or within such longer period as agreed with the Authority (acting reasonably) not to exceed one hundred twenty (120) days which is reasonably necessary to effect such replacement, so long as the Developer is diligently pursuing such replacement; or
 - (ii) in the absence of entering into a replacement operation and maintenance contract, the Developer demonstrates to the satisfaction of the Authority that the Developer possesses the technical and financial capability to perform all remaining O&M Work in accordance with this Agreement;
- (j) the Developer fails to pay any amount due to the Authority under this Agreement when due, except to the extent such payment is subject to a Good Faith Dispute;

- (k) the Developer fails to deposit funds in the Handback Reserve Account or fails to deliver to the Authority a Handback Letter of Credit in accordance with the requirements of this Agreement (except to the extent that the amount of the required deposit or Handback Letter of Credit is subject to a Good Faith Dispute);
- (l) any representation or warranty made by the Developer in this Agreement or any certificate, schedule, report, instrument or other document delivered to the Authority pursuant to this Agreement is false or materially misleading or inaccurate when made, in each case in any material respect, or omits material information when made;
- (m) the Developer fails to comply with any Applicable Law or Governmental Approval in any material respect;
- (n) the Developer fails to promptly comply with any written suspension of Work order issued by the Authority in accordance with Section 14.4 (Suspension of Construction Work) or Section 17.6 (Suspension of O&M Work), except to the extent that such failure arises as a direct result of a Compensation Event or a Relief Event;
- (o) subject to Section 28.5(b)(iii) (Grant of Relief), a Noncompliance Developer Default Trigger occurs;
- (p) the Developer fails to obtain, provide and maintain the Insurance Policies and the Performance Security in accordance with the requirements of this Agreement;
- (q) a Persistent Breach by the Developer occurs;
- (r) any part or parts of the Availability Test is or are failed (as determined in accordance with Section 2 (*Project Administrative and Management Requirements*) of the Technical Requirements) as of any Annual Availability Determination Date; or
- (s) without limiting Sections 42.1(a) – 42.1(r):
 - (i) the Developer breaches any other material obligation under this Agreement, other than:
 - (A) a breach for which a Noncompliance Point was or could have been assessed; or
 - (B) a breach that arises as a direct result of the occurrence of a Compensation Event or Relief Event; or
 - (ii) the Developer makes any written repudiation of this Agreement.

42.2 Persistent Breach

(a) Initial Warning Notice

- (i) If the Developer commits a breach of this Agreement (other than (x) any breach for which a Noncompliance Point could have been assessed, (y) any breach that arises as a direct result of the occurrence of a Compensation Event or a Relief Event or (z) any breach covered in clauses (a) through (p) or clause (r) of Section 42.1 (Developer Default)) that:
 - (A) continues for more than thirty (30) consecutive days; or
 - (B) occurs more than three (3) times in any six (6) month period,the Authority may serve a notice (an "Initial Warning Notice") on the Developer, in accordance with Section 42.2(a)(ii).
- (ii) An Initial Warning Notice must:

- (A) specify that it is an Initial Warning Notice;
- (B) give reasonable details of the relevant breach; and
- (C) state that the relevant breach is a breach which, if it recurs frequently or continues, may result in termination of this Agreement for Persistent Breach.

(b) **Final Warning Notice**

- (i) If, after the date of service of the Initial Warning Notice, the breach specified in the Initial Warning Notice:

- (A) continues for more than thirty (30) consecutive days; or
- (B) recurs three (3) or more times within the six (6) month period after such date,

the Authority may serve another notice (a "**Final Warning Notice**") on the Developer, in accordance with Section 42.2(b)(ii).

- (ii) A Final Warning Notice must:

- (A) specify that it is a Final Warning Notice;
- (B) state that the breach specified has been the subject of an Initial Warning Notice served within the six (6) month period prior to the date of service of the Final Warning Notice; and
- (C) state that if the breach:
 - (aa) continues for more than thirty (30) consecutive days after the date of service of the Final Warning Notice; or
 - (bb) recurs three (3) or more times within the six (6) month period after the date of service of the Final Warning Notice,

a Developer Default will occur under Section 42.1(q) (Developer Default) and this Agreement may be terminated.

(c) **Concurrency of Warning Notices**

An Initial Warning Notice must not be served with respect to any incident or breach for which an Initial Warning Notice or Final Warning Notice has been served and is outstanding.

42.3 Notice and Cure Periods

- (a) The Authority shall provide written notice ("**Developer Default Notice**") to the Developer upon the occurrence of a Developer Default.
- (b) Upon receipt of a Developer Default Notice, the Developer shall have the following cure periods:
 - (i) for a Developer Default under Sections 42.1(a) (Abandonment), 42.1(j) (Non-Payment), 42.1(k) (Handback Reserve Account) and 42.1(p) (Insurance/Performance Security), a period of thirty (30) days after the Developer receives the Developer Default Notice;
 - (ii) for a Developer Default under Sections 42.1(l) (Representations and Warranties), 42.1(m) (Governmental Approvals), 42.1(n) (Suspension Order) or 42.1(s) (Material Breach),

- (A) a period of thirty (30) days after the Developer receives the Developer Default Notice; or
- (B) if, despite the Developer's commencement of meaningful steps to cure immediately after receiving the Developer Default Notice, the Developer Default cannot be cured within such thirty (30) day period the Developer will have such additional period of time, up to a maximum cure period of one hundred fifty (150) days, as is reasonably necessary to cure the Developer Default; and
- (iii) for a Developer Default under Sections 42.1(b) (Project Substantial Completion Long Stop Date), 42.1(c) (Restricted Change in Ownership), 42.1(d) (Assignment), 42.1(e) – 42.1(g) (Insolvency), 42.1(h) (D&C Contract Termination), 42.1(i) (O&M Contract Termination), 42.1(o) (Noncompliance Points), 42.1(q) (Persistent Breach) and 42.1(r) (Availability Tests), there is no cure period.
- (c) A Developer Default under Section 42.1(l) (Representations and Warranties) will be regarded as cured when the adverse effects of such Developer Default are cured.

42.4 Remedial Plan for Developer Default

- (a) If a Developer Default occurs and it has not been cured within any relevant cure period set out in Section 42.3 (Notice and Cure Periods), the Authority may, without prejudice to any other right or remedy available to it, require the Developer to prepare and submit, within thirty (30) days of being notified, a remedial plan ("Remedial Plan").
- (b) A Remedial Plan must set out specific actions and an associated schedule to be followed by the Developer to cure the relevant Developer Default and reduce the likelihood of such defaults occurring in the future. Such actions may include:
 - (i) changes in organizational and management structure;
 - (ii) revising and restating management plans and procedures;
 - (iii) improvements to quality control practices;
 - (iv) increased monitoring and inspections;
 - (v) changes in Key Personnel and other important personnel; and
 - (vi) replacement of Contractors.
- (c) Within thirty (30) days of receiving a Remedial Plan, the Authority shall notify the Developer whether such Remedial Plan is acceptable (in the Authority's absolute discretion). If the Authority notifies the Developer that its Remedial Plan is acceptable, the Developer shall implement such Remedial Plan in accordance with its terms.

42.5 Termination for Developer Default

- (a) If a Developer Default occurs and:
 - (i) the Developer Default has not been cured within any relevant cure period set out in Section 42.3 (Notice and Cure Periods); or
 - (ii) where a Remedial Plan has been accepted by the Authority, the Developer fails to comply with the Remedial Plan or cure the Developer Default, in each case in accordance with the schedule provided in such Remedial Plan,

the Authority may serve a Termination Notice ("**Authority Termination Notice**") on the Developer at any time during the continuance of that Developer Default.

- (b) An Authority Termination Notice must specify the Developer Default that has occurred entitling the Authority to terminate.
- (c) Subject to the terms of the Lenders Direct Agreement, this Agreement will terminate on the date that is thirty (30) days after the date the Developer receives an Authority Termination Notice.

42.6 Compensation on Termination

- (a) Subject to Section 42.6(b), if this Agreement is terminated in accordance with this Article 42, the Authority shall pay compensation to the Developer in accordance with Section 3 (Compensation on Termination for Developer Default Prior to Project Substantial Completion) or Section 4 (Compensation on Termination for Developer Default On or After Project Substantial Completion) (as applicable) of Exhibit 20 (Compensation on Termination).
- (b) If it is finally determined under the Dispute Resolution Procedures that the Authority was not entitled to terminate this Agreement under Section 42.5 (Termination for Developer Default):
 - (i) the Authority will be deemed to have terminated this Agreement for convenience under Article 40 (Termination for Convenience); and
 - (ii) the Authority shall pay compensation to the Developer in accordance with Section 40.3 (Compensation on Termination) (net of any payments already made to the Developer under Section 42.6(a)).

43. TERMINATION FOR EXTENDED FORCE MAJEURE

43.1 Right to Terminate for Extended Force Majeure

This Agreement may be terminated by either Party pursuant to Section 29.4 (Failure to Agree; Right to Terminate) or in accordance with Section 29.5 (Authority Options).

43.2 Compensation on Termination

If this Agreement is terminated pursuant to Section 29.4 (Failure to Agree; Right to Terminate) or Section 29.5 (Authority Options), the Authority shall pay compensation to the Developer in accordance with Section 2 (Compensation on Termination for Extended Force Majeure and Uninsurability) of Exhibit 20 (Compensation on Termination).

44. TERMINATION FOR UNINSURABILITY

44.1 Right to Terminate for Uninsurability

This Agreement may be terminated by the Authority pursuant to Section 36.2 (Consequences of a Risk Becoming an Uninsurable Risk).

44.2 Compensation on Termination

If this Agreement is terminated pursuant to Section 36.2 (Consequences of a Risk Becoming an Uninsurable Risk), the Authority shall pay compensation to the Developer in accordance with Section 2 (Compensation on Termination for Extended Force Majeure and Uninsurability) of Exhibit 20 (Compensation on Termination).

45. **TERMINATION BY COURT RULING**

45.1 **Termination by Court Ruling**

This Agreement will automatically terminate upon the occurrence of either of the following (each a "**Termination by Court Ruling**"):

- (a) issuance of a final, non-appealable order by a court of competent jurisdiction to the effect that this Agreement is void, unenforceable or impossible to perform in its entirety (except where void, unenforceable or impossible to perform by reason of the Developer's acts, omissions, negligence, willful misconduct, fraud or breach of warranty or representation); or
- (b) issuance of a final, non-appealable order by a court of competent jurisdiction upholding the binding effect on the Developer or the Authority of a Change in Law that causes impossibility of either performance of a fundamental obligation or exercise of a fundamental right by the Developer or the Authority under this Agreement.

45.2 **Compensation on Termination**

If this Agreement is terminated pursuant to this Article 45, the Authority shall pay compensation to the Developer in accordance with Section 1 (Compensation on Termination for Convenience, for Authority Default and Termination by Court Ruling) of Exhibit 20 (Compensation on Termination).

46. **TERMINATION FOR FAILURE TO ACHIEVE FINANCIAL CLOSE**

46.1 **Termination for Failure to Achieve Financial Close**

- (a) If Financial Close does not occur by the Financial Closing Deadline and such failure is directly attributable to any of the following:
 - (i) the PABs allocation obtained by the Authority expires, and the Developer was not able to reach Financial Close prior to such expiry due to delays directly attributable to the Authority, or the USDOT reduces the amount of, or otherwise withdraws, such PABs allocation, such that the allocation is less than the allocation of PABs assumed in the Developer Proposal;
 - (ii) if each Developer Condition Precedent has been satisfied and any Authority Condition Precedent has not been satisfied (unless otherwise agreed by the Parties) on or before the Financial Closing Deadline; or
 - (iii) the occurrence of a Compensation Event described in clause (a) (Authority Breach), clause (b) (Authority Violation of Law) or clause (p) (Issuance of Injunction) of the definition of "Compensation Event",

either Party may terminate this Agreement by written notice to the other Party with immediate effect. Within ten (10) Business Days following receipt of such notice in accordance with this Agreement, and so long as no Party is disputing pursuant to Article 54 (Dispute Resolution) whether the other Party has the right to terminate this Agreement, the Authority shall return the Closing Security to the Developer.

- (b) Subject to Section 46.1(a), if any Developer Condition Precedent is not satisfied or waived in writing by the Authority on or before the Financial Closing Deadline, the Authority shall have the right to:
 - (i) terminate this Agreement in its entirety, by written notice to the Developer with immediate effect; and

- (ii) draw and retain the full amount of the Closing Security as the sole remedy of the Authority against the Developer under this Agreement.
- (c) The right of the Authority to draw upon the Closing Security under Section 46.1(b)(ii) is not intended to constitute a penalty, but is intended to be, and will constitute, liquidated damages to compensate the Authority for the cost of forgoing alternative opportunities and for other costs incurred by the Authority in reliance upon the Developer's agreement to enter into the transactions contemplated by this Agreement. The Parties acknowledge that it is difficult to ascertain the amount of actual damages that would be incurred by the Authority in such circumstances, and that such liquidated damages are a reasonable estimate of the presumed actual damages that would be incurred by the Authority.
- (d) If this Agreement terminates pursuant to this Section 46.1, neither Party will have any obligation or liability to the other Party, except:
 - (i) if this Agreement is terminated pursuant to Section 46.1(b), as set out in Section 46.1(b)(ii);
 - (ii) with respect to any antecedent breach of this Agreement;
 - (iii) with respect to Section 51.1 (Confidentiality), which will remain in full force and effect despite the failure to satisfy the conditions precedent to Financial Close set out in Section 2.3 (Conditions Precedent to the Financial Closing Date); and
 - (iv) if either Party terminates this Agreement pursuant to Section 46.1(a), the Authority shall pay the Developer compensation in accordance with Section 46.2 (Compensation on Termination).

46.2 Compensation on Termination

- (a) Subject to Section 46.2(b), if this Agreement is terminated pursuant to Article 40 (Termination for Convenience) prior to the Financial Closing Date, or pursuant to Section 46.1(a) (Termination for Failure to Achieve Financial Close), the Authority shall pay to the Developer an amount calculated at the Early Termination Date (without double-counting) equal to all of the reasonable and proper, documented internal and external expenses incurred by the Developer (without mark-up for overhead or profit) in connection with the following:
 - (i) participation in the RFP process from December 16, 2016 until the achievement of the Commercial Closing Date, and the pursuit of Financial Close;
 - (ii) satisfying the conditions to NTP1; and
 - (iii) if the Authority has issued NTP1, carrying out any Work that the Developer is permitted to perform under this Agreement following issuance of NTP1.
- (b) The maximum amount payable by the Authority under Section 46.2(a) is \$9,000,000.
- (c) The Authority shall, subject to receiving an invoice from the Developer, pay to the Developer any amount payable under Section 46.2(a) on or before the date that is sixty (60) days after the date on which the amount payable under Section 46.2(a) is finally agreed or determined.

47. OBLIGATIONS ON TERMINATION

47.1 General

- (a) The provisions of this Article 47 will apply at the end of the Term.

- (b) Except as expressly provided otherwise in this Article 47, the Developer shall promptly comply with the provisions of this Article 47 independently of, and without regard to, the timing for determining and paying any amounts due to the Developer or the Authority on account of Early Termination.

47.2 Transition Plans

(a) Interim Transition Plan

Within three (3) Business Days after receipt by either Party of a Termination Notice, the Parties shall meet and confer with each other to develop an interim transition plan for the orderly transition of the Work, demobilization (if applicable) and transfer of control of the Project and Project Site to the Authority. The Parties shall use Reasonable Efforts to complete the interim transition plan within ten (10) Business Days after either Party receives a Termination Notice.

(b) Final Transition Plan

The Parties shall use Reasonable Efforts to complete a final transition plan within thirty (30) days after either Party receives a Termination Notice. The final transition plan must:

- (i) be in form and substance reasonably acceptable to the Authority;
- (ii) include an estimate of costs and expenses to be incurred by both Parties in connection with such plan; and
- (iii) include or be consistent with the other provisions of this Article 47.

(c) Delays in Transition Plans

The Developer shall promptly follow all procedures in this Article 47, regardless of any delay in preparation or acceptance of such plans.

47.3 Handback of the Project

- (a) On the Termination Date, or promptly after the Termination Date in accordance with the final transition plan, the Developer shall relinquish, and cause all Persons claiming under or through the Developer to relinquish, to the Authority management, custody and control of the Project and the Project Site in at least the condition required by the Handback Requirements.
- (b) On the date the Developer relinquishes management, custody and control of the Project and the Project Site under this Section 47.3, the Authority will assume responsibility for the Project and the Project Site at its own expense (subject to the right to recover damages under this Agreement).

47.4 Exclusive Termination Rights

This Part J (Termination and Step-In) and Exhibit 20 (Compensation on Termination) contain the entire and exclusive rights of the Authority and the Developer to terminate this Agreement, and any and all other rights to terminate under Applicable Law are waived to the maximum extent permitted by Applicable Law.

48. AUTHORITY AND USACE STEP-IN

48.1 Right to Step-in

(a) Authority Step-in

If the Authority reasonably believes that it needs to take action in connection with the Work because:

- (i) an Emergency has arisen;
- (ii) the Authority believes that USACE intends to exercise its step-in right under the PPA;
- (iii) a Developer Default has occurred and has not been cured within the relevant cure period (if any) set out in Section 42.3 (Notice and Cure Periods); or
- (iv) the Developer has failed to meet any Safety Standard or comply with any Safety Compliance Order within a reasonable period of time under the circumstances,

the Authority may, subject to the Lenders Direct Agreement, take action in accordance with this Article 48.

(b) **USACE Step-in**

The Parties acknowledge that USACE may:

- (i) elect to exercise its step-in right under Article II.I of the PPA at any time; or
- (ii) take action in connection with the Work if an Emergency has arisen,

subject to the terms and conditions of the PPA (in each case, a "USACE Step-in").

48.2 **Notice to the Developer**

- (a) If Section 48.1(a) (Authority Step-in) applies and the Authority wishes to take action, the Authority shall, subject to Section 48.2(b), notify the Developer in writing of the following:
 - (i) the action it wishes to take;
 - (ii) the reason for such action;
 - (iii) the date it wishes to commence such action;
 - (iv) the time period which it believes will be necessary for such action; and
 - (v) to the extent practicable, the effect on the Developer and its obligation to carry out the Work during the period such action is being taken.
- (b) In the case of an Emergency, the Authority may take any action it reasonably believes is necessary in order to mitigate or contain such Emergency without prior notice to the Developer.
- (c) Each Party will promptly notify the other Party if it becomes aware that USACE intends to exercise its step-in rights under the PPA, together with such further details as may be available.

48.3 **Required Action by the Authority**

- (a) Following service of notice under Section 48.2(a) (Notice to the Developer) or upon the occurrence of an Emergency:
 - (i) the Authority may take any action as notified or otherwise permitted under Section 48.2 (Notice to the Developer) and any consequential additional actions it reasonably believes are necessary (each a "Required Action"); and
 - (ii) the Developer shall use Reasonable Efforts to give all assistance requested by the Authority, while the Authority is taking any Required Action.

- (b) The Authority shall provide the Developer with notice of completion of any Required Action. The Authority shall also use Reasonable Efforts to provide the Developer with notice of anticipated completion as far in advance as is reasonably practicable.
- (c) The Authority shall undertake any Required Action in accordance with Good Industry Practice.

48.4 Step-in Without Developer Breach

If the Authority takes Required Action or a USACE Step-in occurs, in each case, other than as a result of the Developer breaching its obligations under this Agreement, for so long as, and to the extent that, the Required Action or USACE Step-in (as applicable) is taken and it prevents or delays the Developer's performance of any of its obligations under this Agreement:

- (a) the Developer will be relieved from performing such obligations under this Agreement; and
- (b) subject to the Developer providing the Authority or USACE (as applicable) with reasonable assistance (at the expense of the Authority to the extent the Developer incurs incremental costs), for the period during which the Authority is taking such Required Action or such USACE Step-in is occurring (as applicable), such Required Action or USACE Step-in (as applicable) will be deemed a Compensation Event.

48.5 Step-in on Developer Breach

If the Authority takes Required Action or a USACE Step-in occurs as a result of the Developer breaching its obligations under this Agreement, for so long as, and to the extent that, such Required Action is being taken or such USACE Step-in is occurring (as applicable) and it prevents the Developer from performing any of its obligations under this Agreement:

- (a) the Developer will be relieved from performing such obligations under this Agreement;
- (b) for the period during which the Authority is taking such Required Action or such USACE Step-in is occurring (as applicable), any Noncompliance Event that would not have occurred but for the occurrence of such Required Action or USACE Step-in (as applicable) will be deemed to have not occurred for purposes of this Agreement; and
- (c) an amount equal to all of the reasonable costs incurred by the Authority in taking such Required Action or by USACE in undertaking such USACE Step-in (as applicable) will be deducted from the Monthly Disbursement.

PART K – MISCELLANEOUS

49. RECORDS AND AUDIT

49.1 Maintenance and Inspection of Records

- (a) The Developer shall:
 - (i) keep and maintain all its books, records and documents relating to the Project, the Project Site or the Work, including copies of all original documents delivered to the Authority:
 - (A) at the Project Office (or such other location as approved by the Authority in writing, in its absolute discretion); and
 - (B) in accordance with the applicable provisions of this Agreement and in accordance with Good Industry Practice; and
 - (ii) notify the Authority where such books, records and documents are kept.

- (b) The Developer shall make all of its books, records and documents available for inspection by the Authority and USACE at the Project Office (or such other location as approved by the Authority in writing, in its absolute discretion) at all times during normal business hours, without charge. The Authority and USACE may conduct any such inspection upon forty-eight (48) hours' prior written notice, or unannounced and without prior notice where there is Good Faith suspicion of fraud or criminal activity. When conducting any inspection, the Authority may make extracts and take notes, subject to its confidentiality obligations under this Agreement.
- (c) The Developer shall provide copies of its books, records and documents to the Authority as and when reasonably requested by the Authority.
- (d) The Developer shall (i) retain all of its books, records and documents until the end of the Term and (ii) retain all of its books, records and documents it produces or receives (if any) regarding the Project for two (2) years following the end of the Term. If any provision of this Agreement specifies any longer time period for retention of particular records, such time period will prevail.
- (e) Despite Section 49.1(d), all records that relate to Disputes being processed or actions brought under the Dispute Resolution Procedures must be retained and made available until any later date that such Disputes and actions are finally resolved. The Developer reserves the right to assert exemptions from disclosure of information that would be exempt under Applicable Law from disclosure or introduction into evidence in legal actions.

49.2 Audits

- (a) In addition to any other specific audit rights that the Authority may have under this Agreement, the Authority and USACE will have such rights to review and audit the Developer, its Contractors and their respective books, records and documents:
 - (i) in the case of the Authority, as the Authority deems necessary for the purposes of verifying compliance with this Agreement, the WIFIA Loan, Applicable Law and Governmental Approvals; and
 - (ii) in the case of USACE, as USACE deems necessary for the purposes of verifying compliance with the PPA, Applicable Law and Governmental Approvals.
- (b) Without limiting Section 49.2(a), the Authority and USACE will have the right to audit the Developer Project Management Plan and compliance with such Developer Project Management Plan, including the right to inspect the Work and to verify the accuracy and adequacy of the Developer Project Management Plan and other relevant provisions of this Agreement.
- (c) The Authority's and USACE's audit rights include the right to observe the business operations of the Developer and its Contractors to confirm the accuracy of the books, records and documents.
- (d) The Developer shall include in the Developer Project Management Plan internal procedures to facilitate review and audit by the Authority and the federal government (including USACE) where applicable.
- (e) The Developer represents and warrants the completeness and accuracy in all material respects of all information it or its agents provides in connection with any audit by the Authority or USACE, and shall use Reasonable Efforts to cause all Contractors to warrant the completeness and accuracy in all material respects of all information such Contractors provide in connection with such audits.
- (f) The Developer's quality and compliance auditing responsibilities shall be set out in the Developer Project Management Plan.

- (g) The Developer shall (and shall ensure that any Contractor will) include appropriate terms in each Contract in order to provide the Authority and USACE with access and audit rights (as applicable) in accordance with the terms of this Article 49.

50. INTELLECTUAL PROPERTY

50.1 Project Data

- (a) The Developer shall:
 - (i) promptly upon request by the Authority and, in any event, upon termination of this Agreement, make available to the Authority and irrevocably licenses the Authority to use, free of charge, all Project Data in the ownership or possession of the Developer or any other Developer-Related Entity that might reasonably be required by the Authority; and
 - (ii) ensure that it obtains all necessary licenses, permissions and consents to ensure that it can license and make the Project Data available to the Authority on these terms,for the purposes of:
 - (A) carrying out the Project and the performance of the Authority's duties under this Agreement; and
 - (B) following termination of this Agreement:
 - (aa) the design or construction of the Project;
 - (bb) the operation, maintenance or improvement of the Project; or
 - (cc) the provision of works or services the same as, or similar to, the Work,(clauses (A), (B)(aa), (B)(bb) and (B)(cc) together, the "**Approved Purposes**").
- (b) For the purposes of this Article 50, "use" will include the acts of copying, modifying, adapting and translating the material in question or incorporating it with other materials, and the term "the right to use" will be construed accordingly.
- (c) As between the Parties, the Project Data, and all Intellectual Property encompassed in the Project Data is, and remains, the property of the Developer-Related Entities and their licensors, despite the Developer licensing and otherwise making that Project Data available to the Authority.

50.2 Intellectual Property License to the Authority

- (a) The Developer (on behalf of itself and each Developer-Related Entity) grants to the Authority a nonexclusive, transferable (subject to Section 50.2(e)), royalty-free, irrevocable, worldwide, fully paid up right and license to use, reproduce, modify, adapt, disclose to and sublicense to other Persons engaged by or on behalf of the Authority (directly or indirectly), the Intellectual Property owned or licensable by any Developer-Related Entity.
- (b) The Authority shall have the right to exercise the license granted under Section 50.2(a) only for the Approved Purposes.
- (c) Subject to the Open Records Laws, the Authority:

- (i) will have no right to sell any Intellectual Property of the Developer or any Developer-Related Entity or to use, reproduce, modify, adapt and disclose, or allow any party to use, reproduce, modify, adapt and disclose, any such Intellectual Property for any other purpose other than the Approved Purposes; and
- (ii) shall ensure that any Person to which it discloses any Intellectual Property pursuant to the licenses granted under this Section 50.2 agrees to be bound by the provisions of this Section 50.2 and the confidentiality obligations set out in Section 51.1 (Confidentiality) of this Agreement with respect to that Intellectual Property.
- (d) The Developer shall continue to have a full and complete right to use any and all duplicates or other originals of its Intellectual Property in any manner it chooses.
- (e) The right to transfer the license is limited to any Governmental Entity that succeeds to the power and authority of the Authority generally or with respect to the Project.
- (f) With respect to any Intellectual Property that is not owned or licensable by a Developer-Related Entity, the Developer shall use Reasonable Efforts to obtain from the owner of that Intellectual Property (or any Person entitled to license that Intellectual Property), concurrently with the execution of any contract, subcontract or purchase order with such Person or with the first use or adaptation of the Intellectual Property in connection with the Project, both for the Developer and the Authority, a nonexclusive, transferable, royalty-free, irrevocable, worldwide, fully paid up right and license to use, reproduce, modify, adapt, disclose to, and sublicense to other Persons engaged by or on behalf of the Developer and the Authority (directly or indirectly), such Intellectual Property solely for the Approved Purposes. Any such license will be subject to the terms of this Article 50.

50.3 Maintenance of Data

- (a) To the extent that any data, materials or documents referred to in this Article 50 are generated by, or maintained on, a computer or similar system, the Developer shall use Reasonable Efforts to obtain for the benefit of the Authority, at no charge or at the lowest reasonable fee, the grant of a license or sublicense for any relevant software to enable the Authority or its nominee to access and otherwise use (subject to the payment by the Authority of the relevant fee, if any) such data for the Approved Purposes. As an alternative, the Developer may provide such data, materials or documents in a format that may be read by software generally available in the market at the relevant time or in hard copy format.
- (b) The Developer shall ensure the back-up and storage in safe custody of the data, materials and documents referred to in Section 50.3(a) in accordance with Good Industry Practice.
- (c) Without prejudice to Section 50.3(b), the Developer shall submit to the Authority Representative for approval its proposals for the back-up and storage in safe custody of such data, materials and documents and the Authority will be entitled to object if the same is not in accordance with Good Industry Practice.
- (d) The Developer shall comply, and shall use Reasonable Efforts to cause all the Developer-Related Entities to comply, with all procedures to which the Authority Representative has given its approval.
- (e) The Developer may change its procedures for such back-up and storage subject to submitting its proposals for change to the Authority Representative, who will be entitled to object on the basis set out above.

50.4 Indemnity

- (a) Subject to Section 50.4(b), the Developer shall release, defend, indemnify and hold harmless the Indemnified Parties at all times from and against all Losses arising as a result of any claim or proceeding made or brought against the Authority, which alleges that the use by the Authority or a Developer-Related Entity of:

- (i) any Intellectual Property provided or licensed to the Authority under the terms of this Agreement; or
 - (ii) any materials, plant, machinery or equipment in connection with the Work or the Project,

infringes any intellectual property of a third party.
- (b) The Developer shall not be required to release, defend, indemnify or hold harmless the Indemnified Parties under Section 50.4(a) to the extent that the relevant infringement:
 - (i) has arisen out of the use of any Intellectual Property by or on behalf of the Authority or any Indemnified Party in a manner that is not in accordance with the terms of this Agreement; or
 - (ii) is a result of any Intellectual Property that has been modified or adapted by the Authority or any Indemnified Party.
- (c) To the extent a Third Party Claim arises out of, or as a consequence of, any alleged infringement of the intellectual property of a third party, Section 33.4 (Conduct of Third Party Claims Against the Authority) will apply.

51. CONFIDENTIALITY AND PUBLIC DISCLOSURE

51.1 Confidentiality

- (a) In this Section 51.1, "**Information**" means all information relating to the other Party which is supplied by or on behalf of the other Party (whether before or after the date of this Agreement), either in writing, orally or in any other form, directly or indirectly from or pursuant to discussions with the other Party, or which is obtained through observations made by the receiving Party, and such term includes all analyses, compilations, studies and other documents whether prepared by or on behalf of a Party which contain or otherwise reflect or are derived from such information.
- (b) Each Party will maintain the confidentiality of any Information, except that Information may be disclosed or provided:
 - (i) by either Party to its and its Affiliates' directors, officers, employees, consultants and agents, including accountants, legal counsel and other advisors;
 - (ii) by the Authority to:
 - (A) USACE and its employees, consultants and agents, including legal counsel or other advisors, pursuant to the PPA or the P3 MOU, or as otherwise deemed necessary by the Authority in connection with the design, construction, maintenance or operation of the Comprehensive Project; and
 - (B) any Governmental Entity or otherwise as the Authority may require for the maintenance or improvement of the Project in the event of, or following, termination of this Agreement;
 - (iii) by the Developer:
 - (A) to the Lenders to the extent such Information is reasonably required by the Lenders in connection with arranging Project Debt or which the Developer is obligated to supply by the terms of the Finance Documents; and
 - (B) to any Contractor to the extent such Information is necessary for the performance by the Developer of its obligations under this Agreement; and

- (iv) by either Party to the extent that:
 - (A) it is required to disclose such Information pursuant to (1) an Applicable Law or (2) a subpoena or similar legal process;
 - (B) the other Party confirms in writing that such Information is not required to be treated as confidential (such confirmation not to be unreasonably withheld or delayed); or
 - (C) such Information is or comes into the public domain in a manner other than through any disclosure prohibited by this Agreement.
- (c) In the case of a disclosure under Sections 51.1(b)(i), 51.1(b)(ii) or 51.1(b)(iii), the Persons to whom such disclosure is made will be (1) informed of the confidential nature of such Information and (2) provided such Information subject to the same or similar requirements to maintain confidentiality as contained in this Agreement.

51.2 North Dakota and Minnesota Open Records Laws

- (a) The Developer acknowledges that the Authority is required to comply with North Dakota Open Records Law and Minnesota Data Practices Act (the "**Open Records Laws**").
- (b) Upon written notification from the Authority that it requires the Developer's assistance in responding to a request under the Open Records Laws for information related to this Agreement that may be in the Developer's possession, constituting or alleged to constitute, a public record in accordance with NDCC Chapter 44-04 or government data in accordance with Minn. Stat. Chapter 13 ("**Requested Information**"), the Developer shall:
 - (i) provide the Authority, within five (5) Business Days after receipt of written notification, access to, and copies of, any document or information in the Developer's possession arising out of this Agreement that the Authority reasonably believes is Requested Information and may be a public record under the Open Records Laws; and
 - (ii) provide such other assistance as the Authority may reasonably request, in order to comply with the Open Records Laws with respect to this Agreement.
- (c) If the Developer considers the Requested Information to include a request for a "Trade Secret", "Confidential Information" or "Proprietary Information" (as those terms are defined by the Open Records Laws) or other information that the Developer considers exempt from production under the Open Records Laws, the Developer must notify the Authority and provide, within three (3) Business Days of receiving the written notification, a written statement signed by a representative of the Developer explaining why the requested material is exempt from public disclosure under the Open Records Laws.
- (d) The Authority will rely upon any written statement provided by the Developer in accordance with Section 51.2(c) in denying an Open Records Law request for the Requested Information unless the Authority determines that the Requested Information is clearly not protected from disclosure under the Open Records Laws. Should the Authority determine that the Requested Information is clearly not protected from disclosure, the Developer shall provide the Requested Information to the Authority within three (3) Business Days of receipt of written notification of the Authority's determination.
- (e) If the Developer fails to provide the Requested Information within the time period required by these provisions, the Developer shall indemnify the Authority and hold the Authority harmless for any damages, penalties, costs, detriment or harm that the Authority may incur (including any statutory damages assessed against the Authority) as a result of the Developer's failure.

- (f) The Authority will reimburse the Developer for any costs associated with complying with these provisions only to the extent allowed under the fee schedule established by the Open Records Laws.
- (g) As between the Parties, the Developer agrees to waive all rights and remedies that may be available to it as a result of the Authority's disclosure of Requested Information pursuant to the Open Records Laws.

52. ASSIGNMENT AND TRANSFER; FUNDAMENTAL CHANGES

52.1 Assignment by the Developer

Subject to Section 52.2 (Security), the Developer shall not assign, transfer, pledge, mortgage or otherwise encumber any of its rights or obligations under this Agreement without the written consent of the Authority.

52.2 Security

The provisions of Section 52.1 (Assignment by the Developer) do not apply to the grant of any security for any financing extended to the Developer (directly or indirectly) under the Finance Documents or to the enforcement of the same.

52.3 Assignment by the Authority

The Authority may, upon prior written notice to the Developer, but without the Developer's consent, assign all or any portion of its rights, title and interests in and to this Agreement, the Project, the Project Site or the Performance Security (if any) to any other Governmental Entity that:

- (a) succeeds to the governmental powers and authority of the Authority; and
- (b) has sources of funding to perform the payment obligations of the Authority under this Agreement that are at least as adequate and secure as the Authority's at the time of the assignment.

52.4 Change of Organization or Name

- (a) The Developer shall not change the legal form of its organization without providing prior written notice to the Authority.
- (b) If either Party changes its name, such Party agrees to promptly (and in any event within ten (10) Business Days of such change) furnish the other Party with written notice of such name change and appropriate supporting documentation.

52.5 Notice of Amendment to JPA

The Authority shall provide the Developer with notice and a copy of any amendment to the JPA promptly following execution thereof.

53. CHANGE IN OWNERSHIP

53.1 Restricted Change in Ownership

- (a) A Restricted Change in Ownership will constitute a Developer Default for the purposes of Article 42 (Termination for Developer Default).
- (b) A "Restricted Change in Ownership" will arise if:
 - (i) prior to the second (2nd) anniversary of Project Final Completion, without the prior written consent of the Authority, any Qualified Investor ceases to own (directly or indirectly) the same percentage of

the issued shares or membership interests in the Developer that it owned (directly or indirectly) on the date of this Agreement, other than as a result of an Additional Equity Investment;

- (ii) any Change in Ownership occurs which involves the transfer of any shares or membership interests to a Prohibited Person; or
 - (iii) any Change in Ownership occurs which would be reasonably likely to have a material adverse effect on the Developer's ability to perform its obligations under this Agreement with respect to the O&M Work, taking into account the financial strength and integrity of the transferee, compared to that of the transferor.
- (c) A Restricted Change in Ownership will not arise pursuant to Section 53.1(a) as a direct result of:
- (i) the grant or enforcement of security in favor of the Lenders over or in relation to any shares or membership interests in the Developer or an Equity Member under a Security Document;
 - (ii) a change in legal or beneficial ownership of any shares that are listed on a recognized stock exchange, including such transactions involving any initial public offering; or
 - (iii) a transfer of interests between managed funds that are under common ownership or control or between the general partner, manager or the parent company of such general partner or manager and any managed funds under common ownership or control with such general partner or manager (or parent company of such general partner or manager), if the relevant funds and the general partner or manager of such funds (or the parent company of such general partner or manager) have been approved by the Authority in writing prior to the date of this Agreement.
- (d) For the purposes of this Section 53.1, a Person will only be deemed to own shares or membership interests in another Person if such Person owns the legal, beneficial and equitable interest in the relevant shares or membership interests of that other Person.

53.2 Notification of Changes in Ownership

- (a) Except with respect to any change in legal or beneficial ownership of any shares:
- (i) that are listed on a recognized stock exchange; or
 - (ii) that are issued pursuant to an employee or management incentive plan,
- the Developer shall provide the Authority with at least thirty (30) days' prior written notice of any Change in Ownership.
- (b) Upon receipt of notice of a Change in Ownership from the Developer under Section 53.2(a), the Authority shall inform the Developer within ten (10) Business Days if the Person to which the Developer plans to transfer legal or beneficial ownership of shares is a Prohibited Person under clause (k) of the definition of Prohibited Person.
- (c) The Developer shall reimburse the Authority for all reasonable out-of-pocket expenses (including reasonable and proper fees of consultants and legal counsel) incurred by the Authority in connection with its review of any Change in Ownership notified to it in accordance with Section 53.2(a) within thirty (30) days of receiving an invoice from the Authority with respect to such costs.

54. DISPUTE RESOLUTION

54.1 General

The Parties agree to use Reasonable Efforts to promptly resolve any Dispute pursuant to the terms of this Article 54.

54.2 Consultation

If any Dispute arises in relation to any aspect of this Agreement, the Developer and the Authority shall consult in Good Faith in an attempt to come to an agreement. Participation in consultation will not excuse a failure to comply with the time limits set out elsewhere in this Article 54.

54.3 Written Protest to the Authority

- (a) Without prejudice to Section 54.2 (Consultation), and subject to Section 54.5 (Expedited Dispute Resolution Process), the Developer shall submit a Dispute by way of a written protest to the Authority. Any such written protest must:
 - (i) outline in detail the basis of the Dispute and the Developer's position relative to the Dispute; and
 - (ii) be accompanied by submission of all relevant documentation.
- (b) The Authority will have ten (10) Business Days following the receipt of such written protest from the Developer to render a written decision on the Dispute, taking into consideration the relevant provisions of this Agreement and the Developer's submission, together with the facts and circumstances involved in the Dispute.
- (c) If the Developer objects to the Authority's written decision, the Developer may file a written rebuttal with the Authority within seven (7) Business Days after its receipt of the written decision, stating clearly and in detail the basis for the objection.
- (d) The Authority will review the Developer's written rebuttal and issue a final written decision to the Developer within seven (7) Business Days after receipt of the rebuttal.
- (e) The Authority's final written decision in response to the Developer's rebuttal is final and conclusive on the Dispute, unless within ten (10) Business Days of the Authority's final written decision, the Developer requests submittal of such Dispute to the proper Dispute Review Board as set out in Section 54.4 (Dispute Review Board).

54.4 Dispute Review Board

- (a) If:
 - (i) the Parties are unable to reach agreement on a Dispute pursuant to Section 54.2 (Consultation); and
 - (ii) in the case of a Dispute raised by the Developer, such Dispute has been:
 - (A) submitted to the Authority under Section 54.3 (Written Protest to the Authority); and
 - (B) the Developer has requested submittal of the Dispute to a Dispute Review Board in accordance with Section 54.3(e) (Written Protest to the Authority),

(unless such procedure has been bypassed pursuant to Section 54.5(a)(i) (Expedited Dispute Resolution Process)), the Authority or the Developer may submit such Dispute to a Dispute Review Board in accordance with this Section 54.4.
- (b) If the Authority and the Developer agree that:
 - (i) the Dispute is of a technical nature and should be resolved by the Technical Dispute Review Board (a "**Technical Dispute**"), such Dispute will be referred to the Technical Dispute Review Board; or

- (ii) the Dispute is of a financial nature and should be resolved by the Financial Dispute Review Board (a "**Financial Dispute**"), such Dispute will be referred to the Financial Dispute Review Board.
- (c) If the Authority and the Developer:
 - (i) are not able jointly to agree that a Dispute is a Technical Dispute or a Financial Dispute; or
 - (ii) agree that a Dispute is both technical and financial in nature and should be resolved by the Technical Dispute Review Board and the Financial Dispute Review Board jointly,

the Dispute will be referred to the Technical Dispute Review Board and the Financial Dispute Review Board jointly. In such case, the two Dispute Review Boards shall cooperate in determining such Dispute.
- (d) The Parties shall not refer Disputes with respect to the legal validity of this Agreement to either Dispute Review Board for determination, nor shall either Dispute Review Board make any determination relating to the legal validity of this Agreement.
- (e) The authority and administrative procedures with respect to each of the Technical Dispute Review Board and Financial Dispute Review Board are set out in Part 2 (Dispute Review Board Procedures) of Exhibit 21 (Dispute Review Board). Unless otherwise agreed by the Parties, any Dispute may be submitted for resolution by the Technical Dispute Review Board or the Financial Dispute Review Board (as applicable) in accordance with the following procedures:
 - (i) Upon submittal by either Party of the matter to Dispute Review Boards, the Dispute Review Board(s) receiving such referral in accordance with Section 54.4(a) (the "**Relevant Dispute Review Board**") will decide when to conduct the hearing. The Relevant Dispute Review Board shall hold the hearing within twenty (20) days of the referral, unless the Parties agree to a longer time period.
 - (ii) Either Party may furnish written evidence or documentation to the Relevant Dispute Review Board regarding the Dispute. If either Party furnishes such information to the Relevant Dispute Review Board, it will furnish copies of such information to the other Party promptly and, in any event, by the earlier of (A) two (2) Business Days after having provided it to the Relevant Dispute Review Board and (B) one (1) day prior to the date that the Relevant Dispute Board convenes a hearing for the Dispute. If the Relevant Dispute Review Board requests any additional documentation or evidence prior to, during, or after the hearing, the relevant Party will provide the requested information to the Relevant Dispute Review Board and to the other Party, in accordance with the deadlines set by the Relevant Dispute Review Board.
 - (iii) The Developer and the Authority will each be afforded a reasonable opportunity to be heard by the Relevant Dispute Review Board and to offer evidence. Neither the Authority nor the Developer may present information at the hearing that was not previously distributed to both the Relevant Dispute Review Board and the other Party.
 - (iv) The Relevant Dispute Review Board's recommendations for resolution of the Dispute, which shall be agreed by a majority of the Relevant Dispute Review Board members, will be given in writing to both the Authority and the Developer within ten (10) Business Days after completion of the hearings. In cases of substantial complexity, both Parties may agree to allow additional time for the Relevant Dispute Review Board to formulate its recommendations.
 - (v) Within ten (10) Business Days of receiving the Relevant Dispute Review Board's recommendations, both the Authority and the Developer will respond to the other and to the Relevant Dispute Review Board in writing, signifying either acceptance or rejection of the Relevant Dispute Review Board's recommendations. If a Party does not respond within the ten (10) Business Day period, that Party will be deemed to have accepted the Relevant Dispute Review Board's recommendations.

- (vi) The recommendations of the Relevant Dispute Review Board will be final and binding only to the extent the Parties accept (or are deemed to have accepted) such recommendations. If the Parties accept (or are deemed to have accepted) any recommendation of the Relevant Dispute Review Board in accordance with this Section 54.4(e)(vi), each Party shall (unless otherwise specified in the relevant recommendation) promptly give effect to such recommendation.
- (vii) If any Dispute remains unresolved, either Party may seek reconsideration of the decision by the Relevant Dispute Review Board only when there is new evidence to present.

54.5 Expedited Dispute Resolution Process

- (a) If any Dispute arises under this Agreement, to the extent that the terms of this Agreement specifically allow for use of the Expedited Dispute Resolution Procedures under this Section 54.5, including in relation to any determination made by the Authority regarding the satisfaction of applicable conditions to (i) Interim Completion of an Interim Completion Element, (ii) Project Substantial Completion or (iii) Project Final Completion:
 - (i) the Developer may elect to bypass the procedure set out in Section 54.3 (Written Protest to the Authority) and refer such Dispute immediately to the Technical Dispute Review Board (with a concurrent copy to the Authority); and
 - (ii) such Dispute will be subject to an expedited Dispute Review Board process which will follow the procedures set out in Section 54.4 (Dispute Review Board), except that:
 - (A) the time periods in that Section will be halved (and, if applicable, rounded down to the nearest full day); and
 - (B) Section 54.4(e)(iv) will not apply.
- (b) The recommendations of the Relevant Dispute Review Board will be final and binding only to the extent the Parties accept (or are deemed to have accepted) such recommendations.
- (c) If the recommendations of the Relevant Dispute Review Board are not accepted:
 - (i) either Party may seek reconsideration of the decision by the Relevant Dispute Review Board only when there is new evidence to present;
 - (ii) each Party will give effect to the recommendations of the Relevant Dispute Review Board, and such recommendations will be provisionally binding, until the Dispute is resolved by mutual agreement or otherwise in accordance with the Dispute Resolution Procedures set forth in this Article 54.

54.6 Mediation

- (a) If a recommendation of the Relevant Dispute Review Board is:
 - (i) not accepted (or deemed to have not been accepted) by both Parties pursuant to Section 54.4(e)(v) (Dispute Review Board); or
 - (ii) accepted by both Parties, but one or both Parties do not give effect to such recommendation in accordance with the requirements of Section 54.4(e)(vi) (Dispute Review Board),

either Party may submit such Dispute to mediation proceedings (a "**Mediation**"). Mediation is intended to assist the Parties in resolving disputes over the correct interpretation of this Agreement.

- (b) The mediator for any Mediation must be selected by mutual agreement of the Parties or, if an agreement cannot be reached by the Parties within seven (7) Business Days of submission of the Dispute to Mediation, the mediator must be selected by the American Arbitration Association ("**AAA**") in accordance with its Commercial Industry Mediation Rules and Procedures then in effect. Any mediator selected by mutual agreement of the Parties or through the AAA selection process must have no current or ongoing relationship with either Party (or an Affiliate of any Equity Member). The Parties agree that only one (1) mediator shall be selected as the AAA mediator.
- (c) Each Mediation must:
 - (i) be administered in accordance with the AAA's Commercial Industry Mediation Rules and Procedures then in effect;
 - (ii) be held in Cass County, North Dakota, unless the Parties mutually agree, in writing, to the Mediation being held in a different location;
 - (iii) be concluded within thirty (30) days of the date of selection of the mediator, or within such other time period as may be agreed by the Parties (acting reasonably having regard to the nature of the Dispute).
- (d) The Parties shall share the mediator's fee and any filing or administrative fees equally.
- (e) No mediator will be empowered to render a binding decision as to any Dispute.
- (f) Any agreement reached by the Parties in Mediation will be:
 - (i) final and binding on the Parties; and
 - (ii) enforceable as settlement agreements in any court having jurisdiction over such Dispute.

54.7 Right to Litigate Dispute

- (a) Subject to Section 54.7(b), neither the Authority nor the Developer may proceed to litigation with respect to any Dispute unless such Dispute remains unresolved following:
 - (i) the submission of such Dispute to the Relevant Dispute Review Board under Section 54.4 (Dispute Review Board); and
 - (ii) the subsequent submission of such Dispute to Mediation under Section 54.6 (Mediation).
- (b) Despite Section 54.7(a), a Party may:
 - (i) seek specific performance of any obligation under this Agreement or injunctive relief following consultation, as set out in Section 54.2 (Consultation);
 - (ii) proceed to litigation if there is a Good Faith determination by the disputing Party that a statute of limitations would expire pending any process referred to in Section 54.7(a).
- (c) All records and written recommendations of the Relevant Dispute Review Board or Mediation will be admissible as evidence in any subsequent proceedings.

54.8 Continuance of Work During Dispute

- (a) During the course of the dispute resolution process:

- (i) the Developer shall continue with the Work (including any Work that is the subject of the Dispute) using Reasonable Efforts, without delay, or otherwise conform to the Authority's decision or order, and will be governed by all applicable provisions of this Agreement; and
 - (ii) the Authority shall continue to make payments of any amounts not in dispute pursuant to the terms of this Agreement.
- (b) Throughout any disputed Work, the Developer shall:
 - (i) keep complete records of extra costs and time incurred; and
 - (ii) provide the Authority, any Dispute Review Board members and any mediator conducting any Mediation access to these and any other records needed for evaluating the Dispute.

54.9 Joinder of Disputes

- (a) If any Dispute arising under this Agreement raises issues that relate to any dispute between the Developer and any Key Contractor, the Developer may join as part of its submissions made to the Relevant Dispute Review Board, or in Mediation, any such dispute between it and any Key Contractor.
- (b) Any submissions made by any Key Contractor must be made within the time limits applicable to the delivery of submissions by the Developer and concern only those matters which relate to the Dispute between the Authority and the Developer under this Agreement.
- (c) The Authority and the Authority Members will have no liability to any Key Contractor arising out of or in connection with any decision of the Relevant Dispute Review Board or with respect to the costs incurred by any Key Contractor as a result of participating in the resolution of any Dispute under this Agreement.

54.10 Costs of Dispute Resolution

Each Party shall bear its own attorneys' fees and costs in any Dispute arising out of or pertaining to this Agreement and neither Party may seek or accept an award of attorneys' fees or costs, except as otherwise expressly provided in this Agreement.

55. SOLE REMEDY AND LIABILITIES

55.1 Common Law Rights of the Authority

Without prejudice to:

- (a) any entitlement of the Authority to specific performance of any obligation under this Agreement;
- (b) any entitlement of the Authority to injunctive relief;
- (c) any other express right of the Authority pursuant to this Agreement; and
- (d) the Authority's right to claim, on or after termination of this Agreement, the amount of its reasonable Losses suffered or incurred by it as a result of rectifying or mitigating the effects of any breach of this Agreement by the Developer pursuant to Exhibit 20 (Compensation on Termination),

the sole remedy of the Authority with respect to Noncompliance Events will be the Authority's ability to assess Noncompliance Points and Deductions, in accordance with Article 22 (Noncompliance Events), Exhibit 14 (Milestone Payments) and Exhibit 15 (Payment Mechanism).

55.2 Consequential Losses

- (a) Except as otherwise expressly provided in this Agreement, neither Party will have the right to claim damages, including punitive and incidental damages, against the other Party for breach of this Agreement, in tort or on any other basis whatsoever, to the extent that any loss claimed by either Party is for Indirect Losses.
- (b) The Parties agree that the limitation in Section 55.2(a) will not apply to or limit either Party's right to recover from the other Party:
 - (i) any Losses of the Developer arising under the Key Contracts as originally executed (or as amended in accordance with the terms of this Agreement), which are not of themselves Indirect Losses;
 - (ii) any Losses (including defense costs) to the extent that they are either covered by the proceeds of insurance carried by the relevant Party or are required to be insured against pursuant to Article 35 (Insurance and Reinstatement), or to the extent the Developer is deemed to have self-insured the Loss pursuant to Article 35 (Insurance and Reinstatement);
 - (iii) Losses arising out of fraud, criminal conduct, intentional misconduct, recklessness or bad faith on the part of the relevant Party;
 - (iv) Losses arising out of any Third Party Claims with respect to a Hazardous Materials Release or Pre-existing Hazardous Materials;
 - (v) amounts payable by the Developer to the Authority under an indemnity set out in this Agreement;
 - (vi) amounts payable by the Authority to the Developer pursuant to Article 27 (Compensation Events);
 - (vii) any Deductions; or
 - (viii) interest, late charges, fees, transaction fees and charges, penalties and similar charges that this Agreement expressly states are due from the relevant Party.

55.3 No Double Recovery

Despite any other provisions of this Agreement to the contrary, neither Party will be entitled to recover compensation or make a claim under this Agreement with respect to any loss that it has incurred to the extent that it has already been compensated with respect to that loss pursuant to this Agreement or otherwise.

55.4 Contractor Losses

Where:

- (a) a Contractor is entitled to claim any compensation or relief from the Developer under any Contract; and
- (b) the Developer subsequently makes a claim against the Authority under this Agreement in relation to such compensation or relief,

the Authority waives any right to defend the Developer's claim on the ground that the Developer is only required to pay compensation or grant relief to the Contractor under the relevant Contract to the extent that the same is recoverable from the Authority.

56. GOVERNING LAW AND JURISDICTION

56.1 Governing Law

This Agreement will be governed by and construed in accordance with the laws of North Dakota.

56.2 Submission to Jurisdiction

The Developer consents to the jurisdiction of any court of North Dakota and any federal courts in North Dakota, waiving any claim or defense that such forum is not convenient or proper. The Developer agrees that any such court shall have in personam jurisdiction over it, and consents to service of process in any manner authorized by Applicable Law.

56.3 Waiver of Jury Trial

THE PARTIES HEREBY KNOWINGLY, IRREVOCABLY, VOLUNTARILY AND INTENTIONALLY WAIVE ANY RIGHTS THAT ANY MAY HAVE TO A TRIAL BY JURY WITH RESPECT TO ANY ACTION, PROCEEDING, COUNTERCLAIM OR DEFENSE BASED ON THIS AGREEMENT, OR ARISING OUT OF, UNDER OR IN ANY CONNECTION WITH THIS AGREEMENT, OR WITH RESPECT TO ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER ORAL OR WRITTEN) OR ACTIONS OF ANY PARTY HERETO RELATING TO THIS AGREEMENT. THIS PROVISION IS A MATERIAL INDUCEMENT FOR ALL PARTIES ENTERING INTO THIS AGREEMENT. THIS PROVISION APPLIES ONLY TO SUITS BETWEEN THE PARTIES ARISING OUT OF OR RELATED TO THIS AGREEMENT AND DOES NOT APPLY TO THIRD PARTY CLAIMS OR SUITS BY OR ON BEHALF OF THE PARTIES FOR PROJECT PROPERTY ACQUISITION AND/OR CONSTRUCTION CONTRACT CLAIMS AND DEFENSES. Each of the Parties (a) certifies that no representative, agent, attorney or any other Person has represented, expressly or otherwise, that such other Person would not, in the event of any suit, action or proceedings relating to this Agreement, seek to enforce the foregoing waiver and (b) acknowledges that it has been induced to enter into this Agreement by, among other things, the mutual waivers and certifications in this Section 56.3.

57. OTHER

57.1 Amendments

This Agreement can only be amended or replaced by a written instrument duly executed by the Parties.

57.2 Waiver

- (a) No waiver of any term, covenant or condition of this Agreement will be valid unless in writing and executed by the obligee Party.
- (b) Either Party's waiver of any breach or failure to enforce any of the terms, covenants, conditions or other provisions of this Agreement at any time will not in any way limit or waive that Party's right to subsequently enforce or compel strict compliance with every term, covenant, condition or other provision of this Agreement, despite any course of dealing or custom of the trade (other than the waived breach or failure in accordance with the terms of such waivers).
- (c) If the Parties make and implement any interpretation of this Agreement without documenting such interpretation by an instrument in writing signed by both Parties, such interpretation and implementation will not be binding in the event of any future Disputes.

57.3 Independent Contractor; No Agent, Joint Venture or Partnership

- (a) The Developer is an independent contractor, and nothing contained in this Agreement will be construed as constituting any relationship with the Authority other than that of developer of the Project and independent contractor.
- (b) The Parties agree that:
 - (i) nothing in this Agreement is intended or will be construed to create any partnership, joint venture, agency, landlord-tenant, lessor-lessee of real property, optionor-optionee, vendor-purchaser, mortgagor-mortgagee or similar relationship between the Authority and the Developer; and

- (ii) in no event will either Party take a position in any tax return, insurance application or questionnaire, financial statement, financial report, regulatory filing, securities filing, loan document, or other writing of any kind that any such relationship exists.
- (c) While the term "public-private partnership" may be used on occasion to refer to contractual relationships of the type created by this Agreement, the Parties do not express any intention to form or hold themselves out in law or in practice as a partnership, joint venture or similar relationship, to share net profits or net losses, or to give the Authority control or joint control over the Developer's financial decisions or discretionary actions concerning the Project and the Work.
- (d) In no event will the relationship between the Authority and the Developer be construed as creating any relationship whatsoever between the Authority and the Developer's employees.
- (e) Neither the Developer nor any of its employees is or shall be deemed to be an employee of the Authority.
- (f) Except as otherwise expressly provided in this Agreement, the Developer has sole authority and responsibility to employ, discharge and otherwise control its employees and has complete and sole responsibility as a principal for its agents, for all Contractors and for all other Persons that the Developer or any Contractor hires to perform or assist in performing the Work.

57.4 No Personal Liability

No officer, agent, representative or employee of the Authority, any Authority-Related Entity, the Developer or any Developer-Related Entity will be personally liable under any provision of this Agreement, or because of the execution or attempted execution of this Agreement, or because of any breach of this Agreement.

57.5 Taxes

The Developer is solely responsible for the payment of taxes accrued or arising out of the performance of its obligations pursuant to this Agreement.

57.6 Successors and Assigns

This Agreement is binding upon and will inure to the benefit of the Authority and the Developer and their respective successors and permitted assigns.

57.7 Survival

Article 3 (Representations and Warranties); Article 54 (Dispute Resolution); Article 33 (Indemnity from the Developer); the express obligations of the Parties following the Termination Date; any obligations to pay amounts under this Agreement; Article 50 (Intellectual Property); Article 57 (Other); and all other provisions which by their inherent character should survive expiration or Early Termination of, or completion of the Work under, this Agreement, will survive the expiration or Early Termination of, or the completion of the Work under, this Agreement.

57.8 Limitation on Third Party Beneficiaries

Nothing contained in this Agreement is intended or will be construed as creating or conferring any rights, benefits or remedies upon, or creating any obligations of the Parties toward, any Person not a party to this Agreement, except rights expressly contained in this Agreement (and in the Lenders Direct Agreement) for the benefit of the Lenders, the Collateral Agent or the Indemnified Parties.

57.9 Notices and Communications

- (a) Notices under this Agreement must be in writing and (i) sent by Aconex EDMS followed by a hard copy; or (ii) if Aconex EDMS is not available or the Parties otherwise agree: (1) delivered personally; (2) sent by certified

mail, return receipt requested; (3) sent by a recognized overnight mail or courier service, with delivery receipt requested or (4) sent by email communication followed by a hard copy, to the following addresses (or to such other address as may from time to time be specified in writing by such Person):

(i) If to the Developer:

Red River Valley Alliance, LLC
55 E. Monroe Street
Chicago, IL 60603

Attn: Esther Madrigal Díez, Developer Representative
Email: esther.madrigal.diez@accion.com

(ii) If to the Authority, except where (iii) applies:

Metro Flood Diversion Authority
207 4th Street North, Suite A
Fargo, ND 58102

Attn: Joel Paulsen, Executive Director
Tel: 701-660-0900
Email: PaulsenJ@FMDiversion.gov

(iii) If to the Authority for notices regarding Disputes, and termination and default notices, to both of the following:

(A) Metro Flood Diversion Authority
207 4th Street North, Suite A
Fargo, ND 58102

Attn: Joel Paulsen, Executive Director
Tel: 701-660-0900
Email: PaulsenJ@FMDiversion.gov

(B) Metro Flood Diversion Authority
207 4th Street North, Suite A
Fargo, ND 58102

Attn: Kris Bakkegard, Director of Engineering
Tel: 701-660-0912
Email: BakkegardK@fmdiversion.gov

(b) Any notice sent by Aconex EDMS will be deemed delivered on the date shown in the Aconex EDMS as the transmission being delivered (provided the hard copy is also delivered pursuant to Section 57.9(a)), if sent personally will be deemed delivered upon receipt, if sent by mail or courier service will be deemed delivered on the date of receipt or on the date receipt at the appropriate address is refused, as shown on the records of the U.S. Postal Service, courier service or other Person making the delivery, and if sent by email communication will be deemed delivered on the date of receipt as shown on the received email transmission (provided the hard copy is also delivered pursuant to Section 57.9(a)). All notices (including by Aconex EDMS or email communication) delivered after 5:00 p.m. Central Time will be deemed delivered on the first (1st) Business Day following delivery.

57.10 Integration of this Agreement

The Authority and the Developer agree and expressly intend that this Agreement (including all Exhibits) constitute a single, integrated agreement whose terms are interdependent and non-divisible, such that no part of this Agreement could be separated from any other part for the purposes of assumption or rejection under Section 365 of title 11 of the United States Bankruptcy Code.

57.11 Entire Agreement

This Agreement contains the entire understanding of the Parties with respect to the subject matter of this Agreement and supersedes all prior agreements, understandings, statements, representations and negotiations between the Parties with respect to their subject matter.

57.12 Severability

- (a) If any clause, provision, Section, subsection or part of this Agreement is ruled invalid (including due to a Change in Law) by a court having proper jurisdiction, the Parties shall:
 - (i) promptly (and in any event within ten (10) Business Days) after such ruling, meet and negotiate a substitute for such clause, provision, Article, Section or part, which will, to the greatest extent legally permissible, effect the original intent of the Parties, including any adjustment to the Authority's compensation to the Developer's account for any change in the Work resulting from such invalidated portion; and
 - (ii) if necessary or desirable, apply to the court or other decision maker (as applicable) which declared such invalidity for an interpretation of the invalidated portion to guide the negotiations.
- (b) The invalidity or unenforceability of any clause, provision, Article, Section, subsection or part will not affect the validity or enforceability of the balance of this Agreement, which will be construed and enforced as if this Agreement did not contain such invalid or unenforceable clause, provision, Article, Section, subsection or part.

57.13 Counterparts

This Agreement may be executed in counterparts, each of which will be deemed an original, but all of which together will constitute one and the same instrument.

57.14 Electronic Signatures

The Parties agree that the electronic signature of a Party to this Agreement shall be as valid as an original signature of such Party and shall be effective to bind such Party to this Agreement. For purposes hereof: (i) "electronic signature" means a manually signed original signature that is then transmitted by electronic means; and (ii) "transmitted by electronic means" means sent in the form of a facsimile or sent via the internet as a portable document format ("pdf") or other replicating image attached to an electronic mail or internet message.

[Signature Pages to Follow]


SIGNATORIES

The Authority

METRO FLOOD DIVERSION AUTHORITY

Chair and Executive Director

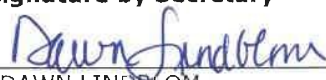
BY: 
SHELLY (MICHELLE) CARLSON
Chair
Metro Flood Diversion Authority

BY: 
JOEL PAULSEN
Executive Director
Metro Flood Diversion Authority

DATE: 8/17/21

DATE: 8/17/2021

Countersignature by Secretary

BY: 
DAWN LINDBLOM
Secretary
Metro Flood Diversion Authority

DATE: 8/17/2021

The Developer

RED RIVER VALLEY ALLIANCE, LLC

BY: _____
Name:
Title:
Red River Valley Alliance, LLC

DATE: _____

BY: _____
Name:
Title:
Red River Valley Alliance, LLC

DATE: _____

BY: _____
Name:
Title:
Red River Valley Alliance, LLC

DATE: _____

SIGNATORIES

The Authority

METRO FLOOD DIVERSION AUTHORITY

Chair and Executive Director

BY: _____ BY: _____
SHELLY(MICHELLE) CARLSON JOEL PAULSEN
Chair Executive Director
Metro Flood Diversion Authority Metro Flood Diversion Authority

DATE: _____ DATE: _____

Countersignature by Secretary

BY: _____
DAWN LINDBLOM
Secretary
Metro Flood Diversion Authority

DATE: _____

The Developer

RED RIVER VALLEY ALLIANCE, LLC

BY: _____
Name: Fernando V. Beguiristáin
Muruzábal
Title: Authorized Signatory
Red River Valley Alliance, LLC

DATE: August 19, 2021

BY: _____
Name: _____
Title: _____
Red River Valley Alliance, LLC

DATE: _____

BY: _____
Name: _____
Title: _____
Red River Valley Alliance, LLC

DATE: _____

SIGNATORIES

The Authority

METRO FLOOD DIVERSION AUTHORITY

Chair and Executive Director

BY: _____ BY: _____
SHELLY(MICHELLE) CARLSON JOEL PAULSEN
Chair Executive Director
Metro Flood Diversion Authority Metro Flood Diversion Authority

DATE: _____ DATE: _____

Countersignature by Secretary

BY: _____
DAWN LINDBLOM
Secretary
Metro Flood Diversion Authority

DATE: _____

The Developer

RED RIVER VALLEY ALLIANCE, LLC

BY: _____
Name:
Title:
Red River Valley Alliance, LLC

DATE: _____

BY: _____

Name: Sharon Novak and Yael Avner
Title: Authorized Signatories
Red River Valley Alliance, LLC

DATE: August 19, 2021

BY: _____
Name:
Title:
Red River Valley Alliance, LLC

DATE: _____

SIGNATORIES

The Authority

METRO FLOOD DIVERSION AUTHORITY

Chair and Executive Director

BY: _____ BY: _____
SHELLY(MICHELLE) CARLSON JOEL PAULSEN
Chair Executive Director
Metro Flood Diversion Authority Metro Flood Diversion Authority

DATE: _____ DATE: _____

Countersignature by Secretary

BY: _____
DAWN LINDBLOM
Secretary
Metro Flood Diversion Authority

DATE: _____

The Developer

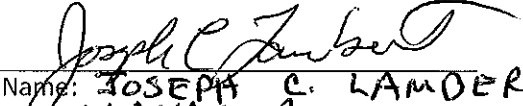
RED RIVER VALLEY ALLIANCE, LLC

BY: _____
Name:
Title:
Red River Valley Alliance, LLC

DATE: _____

BY: _____
Name:
Title:
Red River Valley Alliance, LLC

DATE: _____

BY: 
Name: JOSEPH C. LAMBERT
Title: MANAGER
Red River Valley Alliance, LLC

DATE: August 19, 2021

EXHIBIT 1

Definitions

Capitalized terms and acronyms used in this Agreement have the meanings given in this Exhibit 1 (Definitions):

"AAA" means the American Arbitration Association;

"Abandon" means to abandon all or a material part of the Project, which abandonment will be deemed to have occurred if:

- (a) the Developer demonstrates through statements, acts or omissions an intent not to continue (for any reason other than a Compensation Event or Relief Event that materially interferes with its ability to continue) to design, construct, operate or maintain all or a material part of the Project; or
- (b) no significant Work (taking into account the Project Schedule, if applicable, and any Compensation Event or Relief Event) on the Project is performed for a continuous period of more than sixty (60) days;

"Access" means the non-exclusive right to access and use the Project Site in accordance with the terms of this Agreement, subject to:

- (a) the statutory rights of Governmental Entities and Utility Owners to have access to such part of the Project Site;
- (b) restrictions of use in easement deeds or right of entry permits of record applicable to any Third Party MOU or Governmental Approval;
- (c) restrictions, easements and rights-of-way of record;
- (d) restrictions in the deed or easement granted to the Authority or an Authority Member; and
- (e) restrictions created by any court order;

"Access and Security Plan" means the plan described in Section 3.10.1.1 of the Technical Requirements;

"Access Date" is defined in Section 8.3(a)(i) (Access to the Project Site);

"Account Balances" means, at the Early Termination Date, all amounts standing to the credit of any bank account held by or on behalf of the Developer (excluding the Handback Reserve Account), or the value of any letter of credit issued in substitution for the maintenance of a reserve in any bank account previously held by the Developer (excluding any such letters of credit issued in connection with the Handback Reserve Account);

"Aconex EDMS" means the electronic online document management system used for all submittals, correspondence and notices required by this Agreement;

"Aconex EDMS Operating Plan" means the plan described in Section 2.1.1 of the Technical Requirements;

"Actual Benchmarked Insurance Cost" means, with respect to an Insurance Review Period, the aggregate of the insurance premiums reasonably incurred by the Developer (or by a third party on its behalf) to maintain the Benchmarked Insurance during the Insurance Review Period, but excluding (i) any insurance premium tax or broker's fees and commissions and (ii) any amounts deducted from the Monthly Disbursements by the Authority in accordance with Section 36.2 (Consequences of a Risk Becoming an Uninsurable Risk);

"Additional Equity Investment" means an Equity Investment made solely by the Equity Members or the Qualified Investors after the Financial Closing Date that is not a Committed Equity Investment, or otherwise contractually committed to by the relevant Equity Members or Qualified Investors, as of the Financial Closing Date;

"Additional Milestone Payment" or "AMP" means any payment to be made to the Developer in accordance with Section 23.3 (Additional Milestone Payments) and Exhibit 14 (Milestone Payments);

"Administrative Submittal" means any Submittal identified as "Administrative Submittal" in Attachment 2-3 (*Tabulation of Reviewable Submittals*) to the Technical Requirements;

"Affected Party" is defined in the definition of "Force Majeure Event";

"Affiliate" means, in relation to any Person, any entity which, directly or indirectly, through one or more intermediaries:

- (a) has a ten percent (10%) or more voting or economic interest in such Person; or
- (b) Controls, is Controlled by, or is under common Control with such Person;

"Agency Having Jurisdiction" or "AHJ" means the entity with responsibility for regulation of any particular Work relating to a Project Element conducted under its jurisdiction;

"Agreement" means this agreement (including all its Exhibits), as amended from time to time;

"Alert Code" means a bridge inspection result that requires action as determined in accordance with the *Federal Highway Agency (FHWA) National Bridge Inspection Standards* (NBIS) and/or NDDOT bridge inspection standards;

"Alternative Dispute Resolution Board" means an independent quasi-judicial board comprised of three (3) independent review officers, chosen from a list of individuals having real estate, legal, financial and appraisal experience;

"Amended Reinstatement Outline" is defined in Section 35.11(e) (Reinstatement Work);

"AMP Calculation Date" is defined in Section 23.3(a) (Additional Milestone Payments);

"Annual Availability Determination Date" means each October 15 during the Operating Period;

"Annual Availability Test Report" means each of the reports described in Section 2.2.4.7 and 2.2.4.8 of the Technical Requirements;

"Annual Chance Exceedance" or "ACE" means the percentage chance of a flow event set out in the H&H Model for a particular river, channel or drain being equalled or exceeded in any particular year;

"Applicable Law" means any statute, law, code, regulation, ordinance, rule, common law, judgment, judicial or administrative order, decree, directive, or other requirement having the force of law or other governmental restriction (including those resulting from the initiative or referendum process) or any similar form of decision of or determination by, or any interpretation or administration of any of the foregoing by, any Governmental Entity which is applicable to the Project, Work or any relevant Person, whether taking effect before or after the date of this Agreement. Applicable Law excludes Governmental Approvals;

"Approved Fish Passage Submittal" means any fish passage submittal of the Developer that was approved by the Authority in accordance with Section 5.3.2(a) of the ITP and was included in the Developer Proposal;

"Approved Purposes" is defined in Section 50.1 (Project Data);

"Aqueduct" means the Maple River Aqueduct or the Sheyenne River Aqueduct;

"Archaeological Remains" means any antiquities, fossils, coins, articles of value, precious minerals, cultural artifacts, human burial sites, paleontological and human remains and other similar remains of archaeological or paleontological interest discovered in any part of the Project Site;

"As-Built Drawings" means the Construction Documents submitted and updated by the Developer, revised to incorporate all changes made in the specifications and working drawings during construction, O&M Work and Renewal Work and show the dimensions, geometry, and location and features of each Project Element with respect to the Project;

"Associated Company" means, with respect to a relevant company, a company which is a subsidiary, a holding company or a company that is a subsidiary of the ultimate holding company of that relevant company, and in the case of the Developer, includes each of the Equity Members;

"Audit Program" means the Audit Program described in Section 2.4.5 of the Technical Requirements;

"Authority" means the Metro Flood Diversion Authority, a permanent North Dakota political subdivision and joint powers entity formed through the Joint Powers Agreement;

"Authority Administration Building" or "AAB" means the facilities described in Section 3.3.6 of the Technical Requirements;

"Authority Change" is defined in Section 31.1(a) (Authority Change Request);

"Authority Change Order" is defined in Section 31.4(e)(i) (Review and Evaluation of Developer Estimate);

"Authority Change Request" is defined in Section 31.1(a) (Authority Change Request);

"Authority Conditions Precedent" means the conditions precedent to the Financial Closing Date set out in Section 2.3(a) (Financial Closing Documents), Section 2.3(e) (Authority Opinion), Section 2.3(g) (CCJWRD Opinion), Section 2.3(i) (Representations and Warranties of the Authority), Section 2.3(l) (Authority Financial Close Responsibilities), Section 2.3(m) (Master Indenture of Trust), Section 2.3(n) (Temporary P3 Improvement Warrants), Section 2.3(o) (Authority and CCJWRD Corporate Documents) and 2.3(p) (WIFIA Loan Closing);

"Authority Default" is defined in Section 41.1 (Authority Default);

"Authority Default Notice" is defined in Section 41.2(a) (Notice and Cure Periods);

"Authority Delay Period" is defined in Section 27.8(a) (Finance Costs during the Authority Delay Period);

"Authority Members" means each of the City of Moorhead, the City of Fargo, Clay County, Cass County and the CCJWRD;

"Authority-Provided Approvals" means:

- (a) the NEPA Compliance Documentation;
- (b) the Section 401 Certification;
- (c) the Section 404 Permit;
- (d) the CLOMR; and
- (e) the DCAI Construction Permit;

"Authority-Related Entity" means:

- (a) the Authority;
- (b) the Authority Members;
- (c) USACE;
- (d) BNSF Railway;
- (e) RRVW;
- (f) NDDOT;
- (g) North Dakota State Engineer; and
- (h) North Dakota;

"Authority Representative" means the individual designated in accordance with Section 5.2 (Designation of Representatives);

"Authority-Retained Responsibilities" is defined in Section 34.1 (Authority-Retained Responsibilities);

"Authority Termination Notice" is defined in Section 42.5(a) (Termination for Developer Default);

"Authority Termination Sum" means the amount calculated in accordance with Section 1 (Compensation on Termination for Convenience, for Authority Default and Termination by Court Ruling) of Exhibit 20 (Compensation on Termination);

"Availability Payments" means monthly payments to be made by the Authority to the Developer following the Project Substantial Completion Date subject to the terms specified in this Agreement;

"Availability Test" means subsections 1 through 3 and 4 through 6 of Section 4.4.3.2 of the Technical Requirements;

"Bank Debt Financing" means any debt financing, other than Bond Financing, provided by a bank or similar financial institution;

"Bank Debt Pricing Date" means, with respect to any Bank Debt Financing proposed in the Preliminary Financial Model, the earlier of:

- (a) the Financial Closing Date;
- (b) the date at which the Bank Debt Financing is fixed or hedged by the Developer; or
- (c) such other date as may be mutually agreed by the Authority and the Developer;

"Base Benchmarked Insurance Cost" means, for an Insurance Review Period, the greater of:

- (a) \$3,162,000 (subject to indexation in accordance with Section 5 (Indexation) of Exhibit 15 (Payment Mechanism)); and
- (b) the Actual Benchmarked Insurance Cost for the first Insurance Review Period (indexed annually using CPI from the Project Substantial Completion Date),

in each case, less any Base Benchmarked Insurance Reduction;

"Base Benchmarked Insurance Reduction" means the reduction to be made to the Base Benchmarked Insurance Cost with respect to a risk which has become an Uninsurable Risk or a term or condition which is no longer available and will be an amount that is either:

- (a) the amount by which the Base Benchmarked Insurance Cost would have been a lesser amount had such a risk been an Uninsurable Risk or such a term or condition been unavailable at the date of this Agreement (which amount can be \$0); or
- (b) if it is impossible to determine an amount pursuant to clause (a), an amount that is reasonable to be deducted from the Base Benchmarked Insurance Cost having due regard to:
 - (i) the amount by which the Actual Benchmarked Insurance Cost is less than it would have been as a result of the risk becoming an Uninsurable Risk or the term or condition becoming unavailable (the **"Actual Reduction"**);
 - (ii) the size of the Actual Reduction as a percentage of the Actual Benchmarked Insurance Cost immediately prior to the risk becoming an Uninsurable Risk or the term or condition becoming unavailable; and
 - (iii) the effects of CPI since the date of this Agreement;

"Base Case Equity IRR" means the Base Case Equity IRR set out in cell H77 in the "Overview" tab of the Base Case Financial Model output schedule, as may be updated in accordance with Section 38.9 (Adjustments to the Base Case Financial Model for Qualifying Refinancings);

"Base Case Financial Model" means the base case financial model set out in Exhibit 28 (Base Case Financial Model) (as updated from time to time in accordance with this Agreement);

"Base Interest Rate" means the publicly documented interest rates of each maturity included in the following indices:

- (a) the London Interbank Offered Rate ("**LIBOR**") swap spot curve as provided by Bloomberg;
- (b) the US Spot Treasury Yield Curve;
- (c) the Municipal Market Data ("**MMD**") Benchmark, supplied by Thomson Reuters;
- (d) the Securities Industry and Financial Markets Association ("**SIFMA**") Municipal Swap Index (formerly known as the Bond Market Association Municipal Swap Index); and
- (e) the State and Local Government Series ("**SLGS**") index, provided by the US Treasury,

the Base Interest Rates do not include any additional credit spread, margin or fee components;

"Baseline Credit Spreads" means the "Baseline Credit Spreads" for the range of maturities, ratings and types of Bond Financings determined by the Authority and notified to Proposers pursuant to the ITP;

"Base Maximum Annual Payments" or **"Base MAPs"** means the base:

- (a) "FC Capital MAP";
- (b) "FC Maintenance MAP";
- (c) "NFC Capital MAP"; and
- (d) "NFC Maintenance MAP",

each of the terms in clauses (a) – (d) as described in Exhibit 15 (Payment Mechanism);

"Benchmarked Insurances" means the Insurance Policies set out in Part 2 (Operations & Maintenance Period Insurance Program) of Exhibit 9 (Required Insurance), other than any professional indemnity coverage, marine, railroad and aircraft liability insurance during Operating Period, which are only mandated where "exposure exists" or when required by railroad company (as applicable);

"Best Management Practices" or "BMPs" means the practices and measures accepted as Good Industry Practice for the management of construction sites;

"Betterment" means any upgrading of a Utility in the course of any Utility Adjustment that is not attributable to the construction of the Project and is made solely for the benefit of and at the election of the Utility Owner. The following are not considered Betterments:

- (a) any upgrading which is required for accommodation of the Project, including as a result of the design and construction of the Diversion Channel Line of Protection;
- (b) replacement devices or materials that are of equivalent standards although not identical;
- (c) replacement of devices or materials no longer regularly manufactured with an equivalent or next higher grade or size;
- (d) any upgrading required by Applicable Law;
- (e) replacement devices or materials that are used for reasons of economy (including non-stocked items that may be uneconomical to purchase); and
- (f) any upgrading required by the Utility Owner's applicable standards relating to Utility Adjustments;

"BNSF" means the BNSF Railway Company;

"BNSF Access Date" is defined in Section 8.3(a)(iii) (Access to the Project Site);

"BNSF C&M Agreement" is defined in Exhibit 22 (Utility and Third Party MOUs);

"BNSF Land" means the BNSF ROW and the land being conveyed via the Temporary Construction Easement identified at OIN 8679 in Exhibit 4- 4a (Temporary Construction Easements) of Exhibit 4 (Project Land);

"BNSF Preliminary Activities Memorandum of Understanding" is defined in Exhibit 22 (Utility and Third Party MOUs), subject to Section 11.11 (BNSF Preliminary Activities Memorandum of Understanding);

"BNSF ROW" means land for which BNSF is the AHJ;

"BNSF Temporary Occupancy Permits" is defined in Exhibit 22 (Utility and Third Party MOUs);

"BNSF Timelines and Process Responsibilities Table" means Table 3-22.1 (BNSF Timelines and Process Responsibilities Table) of Attachment 3-22 (Design Criteria for Railroad Crossings) to the Technical Requirements;

"Burlington Northern and Santa Fe Railway" or "BNSF Railway" means a freight railway network that operates sections of railway on the Project Site;

"Bond Financing" means any financing comprising of bonds, including:

- (a) Private Placements;

(b) tax-exempt bonds issued by a Conduit Issuer, the proceeds of which are used for a defined, tax-qualified purpose by a private entity (other than the government entity issuing the bonds), acting as the conduit borrower; or

(c) taxable bonds;

"Bond Pricing Date" means the earlier of:

(a) the Financial Closing Date; and

(b) the date of execution of a bond purchase agreement related to a Bond Financing;

"Buildable Unit" means a work package of the Project, as described in Section 2.5.1 of the Technical Requirements;

"Buildable Unit Design Report" means the revised Buildable Unit Preliminary Design Report required to be submitted with a Final Design;

"Buildable Unit Preliminary Design Report" means the design report described in Section 2.5.2.2 of the Technical Requirements;

"Business Day" means any day that is not a Saturday, a Sunday or a federal public holiday;

"Capital Expenditure" means any expenditure which is treated as a capital expenditure in accordance with GAAP or equivalent auditing standards utilized and generally accepted in the country of incorporation of such party;

"Cass County" or the **"County"** means Cass County, a North Dakota Home Rule County and political subdivision of North Dakota;

"Cass County Joint Water Resource District" or **"CCJWRD"** means the Cass County Joint Water Resource District, a political subdivision of North Dakota;

"Cass County Weed Control District" means the district established to control the spread of noxious weeds in Cass County;

"Cass County ROW" means land for which Cass County is the AHJ;

"Category A Noncompliance Event" means any Noncompliance Event identified as a "Category A" Noncompliance Event in column 6 of Exhibit 16 (Noncompliance Events);

"Category B Noncompliance Event" means any Noncompliance Event identified as a "Category B" Noncompliance Event in column 6 of Exhibit 16 (Noncompliance Events);

"Category C Noncompliance Event" means any Noncompliance Event identified as a "Category C" Noncompliance Event in column 6 of Exhibit 16 (Noncompliance Events);

"CERCLA" means the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. 9601-9675);

"Certificate of Interim Completion" is defined in Section 16.1(e)(ii)(A) (Interim Completion of Project Elements);

"Certificate of Project Final Completion" is defined in Section 16.4(e)(ii)(A) (Project Final Completion);

"Certificate of Project Substantial Completion" is defined in Section 16.3(e)(ii)(A) (Project Substantial Completion);

"Certificate of Readiness" means the certificate described in Section 5.4.2 of the Technical Requirements;

"cfs" means cubic feet per second;

"Change in Costs" means, with respect to any Change in Costs Event, the effect of that event (whether of a one-off or recurring nature, and whether positive or negative) upon the actual or anticipated costs, losses or liabilities of the Developer, including, as relevant, the following:

- (a) the reasonable costs of complying with the requirements of Articles 27 (Compensation Events), 30 (Change in Law) or 39 (Relevant Events and the Financial Model), including the reasonable costs of preparation of designs and estimates;
- (b) the costs of continued employment of, or making redundant, staff who are no longer required;
- (c) the costs of employing additional staff;
- (d) reasonable professional fees;
- (e) the costs to the Developer of financing any such event (and its consequences) including commitment fees and capital costs, interest and hedging costs, lost interest on any of the Developer's own capital employed and any financing required pending receipt of a lump-sum payment;
- (f) the effects of costs on implementation of any insurance reinstatement in accordance with this Agreement, including any adverse effect on the insurance proceeds payable to the Developer (whether arising from physical damage insurance or business interruption insurance (or their equivalent)) with respect to that insurance reinstatement and any extension of the period of implementation of the insurance reinstatement;
- (g) operating costs, or life cycle, maintenance or replacement costs;
- (h) Capital Expenditure;
- (i) the costs required to ensure continued compliance with the Finance Documents;
- (j) any deductible or increase in the level of deductible, or any increase in premium under or with respect to any insurance policy; and
- (k) Losses;

In no circumstances will Change in Costs include any costs or other Losses that arise due to the Developer receiving Milestone Payments or Availability Payments later than the date that it would have received them in the absence of the Change in Costs Event;

"Change in Costs Event" means any event or circumstance that entitles the Developer to be compensated for its Change in Costs;

"Change in Law" means the introduction or repeal (in whole or in part) of, the amendment, alteration or modification to, or the change in interpretation of (in each case including, to the extent applicable, by retroactive effect), any Applicable Laws, standards, practices or guidelines issued or published by any Governmental Entity that occur at any time after the Setting Date and that are either:

- (a) binding on the Developer; or
- (b) if not binding on the Developer, both (i) typically complied with in the construction or relevant maintenance industries and (ii) necessary in order to comply with Good Industry Practice or the provisions of this Agreement;

"Change in Ownership" means:

- (a) any sale, transfer or disposal of any legal, beneficial or equitable interest in any or all of the shares or membership interests in the Developer or any Related Entity;
- (b) with respect to any of the shares or membership interests referred to in clause (a), any change in the direct or indirect control over:
 - (i) the voting rights conferred on those shares or membership interests;
 - (ii) the right to appoint or remove directors; or
 - (iii) the right to receive Distributions; and
- (c) any other arrangements that have or may have or which result in the same effect as clause (a) or clause (b);

"Chief of Engineers Report" is defined in the Recitals;

"City" means each of the City of Fargo, the City of Horace, the City of Moorhead and the City of West Fargo;

"City 3-21 Sales Tax" means the sales and use tax of the City of Fargo, as defined in Article 3-21 of the Fargo City Code, that is pledged by the City of Fargo pursuant to the JPA as security for and for payment of the debt service on the "Debt Obligations" or "Availability Payments", "Milestone Payments" and "P3 Payments" (in each case, as defined in the JPA) pursuant to the JPA;

"City 3-22 Sales Tax" means the sales and use tax of the City of Fargo, as defined in Article 3-22 of the Fargo City Code, that is pledged by the City of Fargo pursuant to the JPA as security for and for payment of the debt service on the "Debt Obligations" or "Availability Payments", "Milestone Payments" and "P3 Payments" (in each case, as defined in the JPA) pursuant to the JPA;

"City of Fargo" means the City of Fargo, a North Dakota Home Rule Charter City and a political subdivision of North Dakota;

"City of Horace" means the City of Horace, a North Dakota Home Rule Charter City and a political subdivision of North Dakota;

"City of Moorhead" means the City of Moorhead, a Minnesota Home Rule City and a political subdivision of Minnesota;

"City of West Fargo" means the City of West Fargo, a North Dakota Home Rule Charter City and a political subdivision of North Dakota;

"Clay County" means Clay County, a political subdivision of Minnesota;

"CLOMR" means the Conditional Letter of Map Revision pending FEMA review of Case Number 19-08-0683R;

"Closing Security" means one or more irrevocable standby letters of credit or demand guarantees in the aggregate amount of \$20 million and each in substantially the form (as applicable) set out in Exhibit 26 (Form of Closing Security) and issued by an Eligible Security Issuer;

"Collateral Agent" means the financial institution listed or otherwise designated to act as trustee or agent on behalf of or at the direction of the Lenders in the Finance Documents with respect to the Project Debt;

"Commercial Closing Date" means the date on which all of the conditions precedent set out in Section 2.2 (Conditions Precedent to Commercial Closing Date) have been satisfied or otherwise waived in accordance with this Agreement;

"Commercial Closing Documents" is defined in Section 2.2(b) (Commercial Closing Documents);

"Committed Equity Investment" means, in the aggregate, (a) any Equity Investment and (b) any Deferred Equity Amounts;

"Communications Plan" means the Authority's plan related to communications, inclusive of Project branding consistency guide;

"Compensation Event" means any of the following events:

- (a) any breach of this Agreement by the Authority, including unreasonable delay to issue a Certificate of Interim Completion, Certificate of Project Substantial Completion or Certificate of Project Final Completion after the Developer satisfies all applicable conditions and requirements for obtaining such a certificate;
- (b) any violation of Applicable Law by the Authority;
- (c) any Qualifying Change in Law;
- (d) any Material Flood Event that occurs prior to the Project Substantial Completion Date;
- (e) the issuance by the Authority of any Directive Letter;
- (f) any Required Action taken by the Authority or USACE Step-in, in each case, in the circumstances described in Section 48.4 (Step-In without Developer Breach);
- (g) any suspension of the Construction Work or O&M Work that constitutes a Compensation Event pursuant to Section 14.4 (Suspension of Construction Work) or Section 17.6 (Suspension of O&M Work);
- (h) any damage, interruption or interference to the Work that is directly caused by a capital works project carried out by the Authority, another Governmental Entity, a Utility Owner or a Third Party (or any contractor on behalf of any such party) on or in the vicinity of the Project Site, excluding any Utility Adjustment Work;
- (i) the issuance by the Authority of any Safety Compliance Order that does not arise as a direct result of any Developer-Related Entity's failure to comply with one or more Safety Standards;
- (j) any Hazardous Materials Release into the Project Site at any time after the Commercial Closing Date, but only to the extent that such release:
 - (i) constitutes a Hazardous Environmental Condition; and
 - (ii) does not constitute a Developer Hazardous Materials Release;
- (k) the discovery of any Undisclosed Utility during the carrying out of the Construction Work;
- (l) the discovery of any Undisclosed Hazardous Environmental Conditions during the carrying out of the Construction Work;
- (m) the discovery of any Undisclosed Endangered Species during the carrying out of the Construction Work;
- (n) the discovery of any Undisclosed Archaeological Remains during the carrying out of the Construction Work;
- (o) the discovery of any Undisclosed Access Restriction;
- (p) the issuance of any preliminary or permanent injunction or temporary restraining order or other similar order, legal restraint or prohibition by a Governmental Entity of competent jurisdiction under Applicable Law that materially and adversely affects the Authority's or the Developer's performance under this Agreement;

- (q) any cancellation, revocation or suspension of an Authority-Provided Approval that is not due, in whole or in part, to a Developer-Related Entity failing to comply with the terms and conditions of the Authority-Provided Approval;
- (r) any amendment or variation to the terms and conditions of any Authority-Provided Approval after the Setting Date not previously agreed to by the Developer (including any variation to the terms and conditions of any extension or renewal of any final Authority-Provided Approval), as compared to those versions of such Authority-Provided Approvals provided to the Developer (including in draft form) as part of the Disclosed Information prior to the Setting Date, except to the extent such amendment or variation is caused by a difference between the Indicative Design and the Final Design;
- (s) the exercise by the Authority of its right under Section 14.5(b) (Right to Uncover) in the circumstances described in Section 14.5(e) (Right to Uncover);
- (t) the execution by the Authority of a Utility MOU or Third Party MOU or, in the case where a Utility MOU or Third Party MOU is not executed, a direction from the Authority or BNSF for the Developer to do Work that is the subject of a draft Utility MOU or draft Third Party MOU on terms that are materially inconsistent with:
 - (i) the most recent version of that draft Utility MOU or draft Third Party MOU provided to the Proposers via the Data Room, as at the Setting Date; or
 - (ii) the Technical Requirements,except, in each case, to the extent any inconsistencies are the result of a difference between the Indicative Design and the Final Design;
- (u) any amendment to the terms of a Utility MOU, Third Party MOU or a Temporary Construction Easement after the date it is executed, except to the extent such amendment is the result of a difference between the Indicative Design and the Final Design;
- (v) a failure by a Utility Owner, Third Party or counterparty to a Temporary Construction Easement to comply with its obligations under the relevant Utility MOU, Third Party MOU or Temporary Construction Easement;
- (w) a failure by a Utility Owner or Third Party to cooperate with the Developer in relation to a Utility Adjustment or Third Party Work (as relevant) that, in each case, constitutes a Compensation Event under Section 11.7(j) (Failure by Utility Owner or Third Party to Cooperate);
- (x) any error in the Relied Upon Geotechnical Data discovered during the Design Work or Construction Work;
- (y) the Authority does not obtain an extension of the Section 404 Permit or reauthorization of the DCAI Construction Permit within twelve (12) months of receiving written notice from the Developer in accordance with Section 10.2(b)(iii) (Authority Responsibility);
- (z) provided the Developer complies with Section 2.5.2.1.2 (*Environmental Change Report*) and 3.11.5.2.1 (*Non-Forested Wetlands Documentation of Change*) of the Technical Requirements, the Authority requires the Developer to amend its design of the Project as a result of the USACE failing to approve a Necessary Section 404 Permit Modification;
- (aa) the failure of BNSF to grant a BNSF Temporary Occupancy Permit or other license necessary so that the Developer may conduct geotechnical studies and preliminary work for Structures (as defined in the BNSF Preliminary Activities Memorandum of Understanding) and Other Work (as defined in the BNSF Preliminary Activities Memorandum of Understanding) within sixty (60) days of the date on which the Developer submits all documents required by BNSF in order for BNSF to grant such permit or license;

- (bb) the BNSF Access Date does not occur within thirty (30) days after the date on which BNSF has approved the designs for Structures (as defined in the BNSF Preliminary Activities Memorandum of Understanding) and Other Work (as defined in the Preliminary Activities Memorandum of Understanding) and the Developer has submitted all documents required by BNSF in order for BNSF to grant all licenses, rights, permits, easements and the like required pursuant to Sections 4.02 and 4.03 of the BNSF Preliminary Activities Memorandum of Understanding;
- (cc) the aggregate time taken by the Authority and BNSF to complete the reviews with respect to "Design Phase A", "Design Phase B", "Design Phase C", "Design Phase D", or "Project Close Phase E" referred to in the BNSF Timelines and Process Responsibilities Table (each a "**Phase**"), exceeds by 30 days the aggregate estimated time for the Authority and BNSF to complete their reviews of that Phase that are set forth in the BNSF Timelines and Process Responsibilities Table, with the estimated time starting on the date the Authority receives the applicable Submittal that is accurate and complete in conformance with this Agreement; or
- (dd) the Authority requires the Developer to modify its design for an Aqueduct to provide fish passage for flows greater than the minimum required flume flows for that Aqueduct set forth in Table 3-3.4 of the Technical Requirements,

except, in each case, to the extent attributable to any breach of this Agreement, Applicable Law or any Governmental Approval by, or any negligent act or negligent omission of, a Developer-Related Entity;

"Compliance Comment " means any comment made by the Authority under Section 7.4(d)(i) (R&C Submittal);

"Compliant" means in accordance with this Agreement, including the Technical Requirements;

"Comprehensive O&M Manual" means the manual described in Section 6 (*Handback Requirements*) of the Technical Requirements;

"Comprehensive Project" is defined in the Recitals;

"Computerized Maintenance Management System" or "CMMS" means the system so described in Section 2.7 of the Technical Requirements;

"Concurrent Noncompliance Events" is defined in Section 22.5 (Concurrent Noncompliance Events);

"Conditions to Assistance" is defined in Section 11.7(g) (Failure by Utility Owner to Cooperate);

"Conduit Issuer" means the Public Finance Authority;

"Construction Certificate" means the Signed and Sealed certificate confirming the associated part of the Work is completed in accordance with the RFC Documents; issued in accordance with Section 2.4.2(7)(w)(v) of the Technical Requirements;

"Construction Documents" means the RFC Documents, the final specifications content sheet, calculations, geotechnical information, Project test and survey data, and other related design and engineering reports, studies and analyses;

"Construction Documents Submittal" means the Submittal described in Section 2.5.3.4.3 of the Technical Requirements;

"Construction Quality Management Plan" means the plan described in Section 2.4.3 of the Technical Requirements;

"Construction Quality Management Team" means the personnel responsible for ensuring the implementation of the Construction Quality Management Plan;

"Construction Submittal" means any Submittal identified as "Construction Submittal" in Attachment 2-3 (*Tabulation of Reviewable Submittals*) to the Technical Requirements;

"Construction Team" means the personnel responsible for the Construction Work;

"Construction Work" means all efforts related to the construction of the Project, including installation, testing, commissioning, demolition, Utility Adjustment Work, rectification of Defects, protection of works prior to completion and any other activities required to facilitate completion of construction;

"Consumer Price Index" ("CPI") means the "Consumer Price Index – U.S. City Averages for all Urban Consumers, Midwest Urban All Items" (BLS Series ID: CUUS0200SA0) (not seasonally adjusted), or its successor, as published by the U.S. Department of Labor, Bureau of Labor Statistics, or its successor. If the CPI is changed so that the base year of the CPI changes, the CPI will be converted in accordance with the conversion factor published by the U.S. Department of Labor, Bureau of Labor Statistics, or its successor. If the CPI is discontinued or substantially altered, the applicable substitute index will be that chosen by the Secretary of the Treasury for the Department of Treasury's Inflation-Linked Treasuries as described at 62 Fed. Reg. 846-847 (Jan. 6, 1997), or if no such securities are outstanding, will be determined by the Parties in accordance with general market practice at that time;

"Contamination and Hazardous Spill Management Plan" means a plan compliant with OSHA guidelines for the release of fluids and other specified substances, as described in Sections 2.11.4 of the Technical Requirements;

"Contract" means any contract, subcontract or other form of agreement to perform any part of the Work or provide any materials, equipment or supplies for any part of the Work, or any such agreement, supplement or amendment at a lower tier, between a Contractor and its lower tier Contractor or a Supplier and its lower tier Supplier, at all tiers. The term **"Contract"** excludes any agreements related to Utility Adjustments;

"Contractor" means any Person with whom the Developer has entered into any Contract to perform any part of the Work or provide any materials, equipment or supplies for the Project, on behalf of the Developer, and any other Person with whom any Contractor has further subcontracted any part of the Work, at all tiers. The term **"Contractor"** will include the D&C Contractor and each O&M Contractor (if any);

"Control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities, by contract or otherwise;

"Core Staff" mean the personnel described under the column 'Position Title' responsible for the Work (including the Design Work, the Construction Work and the O&M Work), as more fully described under the column 'Primary Functions/Duties' in Table 10.2 (Core Staff) of Exhibit 10 (Key Personnel);

"Cost to Complete" means (without double-counting):

- (a) those costs (internal and external) that the Authority reasonably projects that it will incur in carrying out any process to request tenders from any parties interested in entering into a contract with the Authority to achieve Project Final Completion, including all costs related to the preparation of tender documentation, evaluation of tenders and negotiation and execution of relevant contracts; plus
- (b) the costs that the Authority reasonably projects that it will incur in achieving Project Final Completion; plus
- (c) any other Losses that the Authority would, but for the termination of this Agreement, not have incurred prior to Project Final Completion; minus
- (d) any insurance proceeds available to the Authority for the purposes of achieving Project Final Completion;

"County 2010-26 Sales Tax" means a sales and use tax under Cass County's home rule charter enacted by Ordinance No. 2010-26, of which the proceeds are dedicated for payment of expenses incurred for the engineering, land

purchase, construction and maintenance of the Project and other flood control measures, or the payment of special assessments or debt incurred for the Project and other flood control measures as authorized by the Cass County Commission, and that is pledged by Cass County pursuant to the JPA as security for and for payment of debt service on the "Debt Obligations" or "Availability Payments", "Milestone Payments" and "P3 Payments" (in each case, as defined in the JPA) pursuant to the JPA;

"County Road" means a road that is designated or maintained by Cass County;

"CR [XX]" means a County Road so numbered;

"Critical O&M Contract" means an O&M Contract for O&M Work that is identified by the Authority as critical to Project Operation, responding to Water Diversion Events, critical maintenance or safety;

"Critical Path" means the longest, in terms of time, unbroken chain or path of logically connected activities in the Project Baseline Schedule, ending with Project Final Completion;

"Critical Path Impact" means the occurrence of an event that consumes all available Float and extends the time required to achieve Project Substantial Completion;

"Crossing" means a structure or other facility to connect a transportation facility across:

- (a) the Diversion Channel;
- (b) another transportation facility;
- (c) a drain; or
- (d) a watercourse;

"Cultural Resources Professional" means either of the Persons described in Section 3.11.6.4.2 of the Technical Requirements;

"Cure Period" means, for each Category A Noncompliance Event and each Category B Noncompliance Event, the period of days specified as the **"Cure Period"** for that Noncompliance Event in Exhibit 16 (Noncompliance Events);

"Daily Inspection Report" means the report described in Section 2.2.4.2 of the Technical Requirements;

"Data Room" means the electronic data room created and operated by the Authority through the Aconex EDMS to give Proposers access to the Disclosed Information;

"day" means a calendar day;

"D&C Contract" or **"Design and Construction Contract"** means the Contract entered into between the Developer and the D&C Contractor for the performance of all of the D&C Work;

"D&C Contract Price" or **"Design and Construction Price"** means \$1,175,818,060.23;

"D&C Contractor" or **"Design and Construction Contractor"** means ASN Constructors, an unincorporated joint venture consisting of Acciona Construction USA Corp., NACG North Dakota, Inc. and Shikun & Binui – America Inc. (or, if the Developer enters into a new D&C Contract in accordance with the terms of this Agreement, the Contractor under such new D&C Contract);

"D&C Contractor Direct Agreement" or **"Design and Construction Contractor Direct Agreement"** means the agreement substantially in the form attached as Exhibit 25 (Form of D&C Contractor Direct Agreement) between the Authority, the Developer, the D&C Contractor and the D&C Guarantors;

"D&C Contractor Member" or "Design and Construction Contractor Member" means, if the D&C Contractor is:

- (a) a limited liability company, corporation or other incorporated entity; or
- (b) an unincorporated consortium, partnership or other form of joint venture,

each member, shareholder or partner (as applicable) of the D&C Contractor;

"D&C Guarantee" or "Design and Construction Guarantee" means each guarantee provided by a D&C Guarantor in favor of the Developer with respect to the obligations of the D&C Contractor;

"D&C Guarantor" or "Design and Construction Guarantor" means each of Corporación Acciona Infraestructuras S.L., Shikun & Binui Ltd. and North American Construction Group Ltd. (or, if the Developer enters into a new guarantee with respect to the D&C Contract in accordance with the terms of this Agreement, the guarantor under such new D&C Guarantee);

"D&C Period" or "Design and Construction Period" means the period commencing on the Commercial Closing Date and ending on Project Final Completion;

"D&C Work" or "Design and Construction Work" means the Design Work and the Construction Work;

"D&C Work Value" or "Design and Construction Work Value" means an amount equal to the D&C Contract Price minus the aggregate of:

- (a) the Cost to Complete; and
- (b) all Milestone Payments that have been paid to the Developer prior to the Early Termination Date;

"DCAI Construction Permit" means construction permit number 2626 signed by the North Dakota State Engineer on November 25, 2020 for the construction of the Project;

"Debarment Regulations" means:

- (a) Federal Executive Order no. 12549 (February 18, 1986);
- (b) Federal Executive Order no. 12689 (August 16, 1989);
- (c) 31 U.S.C. § 6101 note (Section 2455, Pub. L. 103-355, 108 Stat. 3327); and
- (d) 49 CFR Part 29 "Government-wide Debarment and Suspension (Nonprocurement)";

"Declaration of Probable Flood" means the declaration by the Authority pursuant to Section 5.3 of the Technical Requirements;

"Declaration of Project Operation" means the declaration by the Authority pursuant to Section 5.3 of the Technical Requirements;

"Deductions" means deductions calculated in accordance with Exhibit 14 (Milestone Payments) and Exhibit 15 (Payment Mechanism);

"Defect" means any defect in any of the D&C Work attributable to:

- (a) defective design;

- (b) defective workmanship or defective materials, plant or machinery used in such construction having regard to Good Industry Practice and to appropriate industry standards and codes of practice current at the date of construction;
- (c) the use of materials in the D&C Work which (whether defective or not defective in themselves) prove to be defective in the use to which they are put; or
- (d) defective installation;

"Deferred Equity Amounts" means, on any date, any amount of unfunded equity that (x) has been committed to the Developer as of the Financial Closing Date (including commitments to provide an Equity Investment or Equity Member Debt) and (y) is shown to be utilized in the Base Case Financial Model prior to Project Final Completion;

"Definitive P3 Improvement Warrants" are the long term warrants to be issued by the CCJWRD in the form attached as Part 3 (Definitive P3 Improvement Warrants) of Exhibit 7 (Master Indenture of Trust and P3 Improvement Warrants);

"Deputy Executive Director" means the Deputy Executive Director as defined in the JPA;

"Design Certificate" means Signed and Sealed certificate confirming the design is completed in accordance with this Agreement and the applicable Laws and Regulations, issued in accordance with Section 2.4.2 (7)(w)(v) of the Technical Requirements;

"Design Change" means the process described in Section 2.6.2 of the Technical Requirements;

"Design Deliverable" means any Submittal, Design Submittal or Design Document relating to design of the Project required under this Agreement for information, review, comment, consent, approval or any other purpose;

"Design Documents" means all drawings (including plans, profiles, cross-sections, notes, elevations, typical sections, details and diagrams), schedules, specifications, reports, studies, working drawings, shop drawings, calculations, electronic files, records and Submittals necessary for, or related to, the design of the Project;

"Design Exception" means a deviation in design such that the design does not comply with the prevailing requirements;

"Design Flows" means the full suite of flows in the H&H Model for the individual ACEs, the IDF and the SPF, as described in Section 3 (*Design and Construction Requirements*) of the Technical Requirements;

"Design Quality Management Plan" means the plan described in Section 2.4.2 of the Technical Requirements;

"Design Quality Management Team" means the personnel responsible for ensuring the implementation of the Design Quality Management Plan;

"Design Submittal" means any of the Submittals described in Section 2.5 of the Technical Requirements and any other Submittal identified as "Design Submittal" in Attachment 2-3 (*Tabulation of Reviewable Submittals*) to the Technical Requirements;

"Design Team" means the personnel responsible for the Design Work;

"Design Work" means all efforts related to the investigation, design, redesign, engineering or architecture for the Project;

"Detailed Compensation Event Notice" is defined in Section 27.2(d) (Notice and Information for Compensation Events);

"Detailed Relief Event Notice" is defined in Section 28.2(d) (Notice and Information);

"Developer" means Red River Valley Alliance, LLC;

"Developer Change" is defined in Section 32.1 (Developer Change Request);

"Developer Change Order" is defined in Section 32.2(c)(i) (Review and Evaluation of Developer Change Request);

"Developer Change Request" is defined in Section 32.1 (Developer Change Request);

"Developer Communications Plan" means the plan described in Section 2.2.5.4 of the Technical Requirements;

"Developer Conditions Precedent" means all conditions precedent to the Financial Closing Date, other than the Authority Conditions Precedent;

"Developer Default" is defined in Section 42.1 (Developer Default);

"Developer Default Notice" is defined in Section 42.3 (Notice and Cure Periods);

"Developer Default (D&C Period) Termination Sum" means the amount calculated in accordance with Section 3 (Compensation on Termination for Developer Default Prior to Project Substantial Completion) of Exhibit 20 (Compensation on Termination);

"Developer Default (Operating Period) Termination Sum" means the amount calculated in accordance with Section 4 (Compensation on Termination for Developer Default On or After Project Substantial Completion) of Exhibit 20 (Compensation on Termination);

"Developer Estimate" is defined in Section 31.3(a)(ii)(A) (Developer Estimate in Response to Authority Change Requests);

"Developer Executive Leadership and Management Team" means the personnel described under the column 'Position Title' responsible for the Work (including the Design Work, the Construction Work and the O&M Work), as more fully described under the column 'Primary Functions/Duties' in Table 10.1 (Developer Executive Leadership and Management Team) of Exhibit 10 (Key Personnel);

"Developer Hazardous Materials Release" means any Hazardous Materials Release:

- (a) involving any Hazardous Materials arranged to be brought onto the Project Site or any other location by any Developer-Related Entity, regardless of cause (unless brought onto the Project Site pursuant to a removal of Hazardous Materials, or any Remedial Action with respect to Hazardous Materials, by a Developer-Related Entity in accordance with the requirements of this Agreement);
- (b) to the extent attributable to the breach of any Applicable Law, Governmental Approval or this Agreement (including any acts or omissions that are not in accordance with Good Industry Practice), negligence or willful misconduct by any Developer-Related Entity. The removal of Hazardous Materials, or any Remedial Action with respect to Hazardous Materials, by a Developer-Related Entity in accordance with the requirements of this Agreement will not of itself be a Developer Hazardous Materials Release; or
- (c) without prejudice to the generality of clause (a), to the extent attributable to the use, containment, storage, management, handling, transport and disposal of any Hazardous Materials by any Developer-Related Entity in breach of any of the requirements of this Agreement or any Applicable Law or Governmental Approval.

Hazardous Materials Release involving Pre-existing Hazardous Materials that is caused by flooding of the Project Site will be a Developer Hazardous Materials Release only to the extent that the Hazardous Materials are Disclosed

Hazardous Materials and the Hazardous Materials Release is attributable to the breach of any Applicable Law, breach of any Governmental Approval, breach of this Agreement, negligence, or willful misconduct by any Developer-Related Entity;

"Developer Project Management Plan" means the plan described in Section 2.2.2 of the Technical Requirements;

"Developer Project Operation Plan" means the plan described in Section 5.1 of the Technical Requirements;

"Developer Proposal" means the proposal and commitments made by the Developer, as set out in Exhibit 6 (Developer Proposal);

"Developer-Related Entity" means:

- (a) the Developer;
- (b) the Equity Members;
- (c) the Contractors (including Suppliers);
- (d) any other Persons performing any of the Work for or on behalf of the Developer;
- (e) any other Persons for whom the Developer may be legally or contractually responsible; and
- (f) the employees, agents, officers, directors, representatives, consultants, successors and assigns of any of the foregoing;

"Developer Representative" means the individual designated in accordance with Section 5.2 (Designation of Representatives);

"Developer Termination Notice" is defined in Section 41.3(a) (Termination for Authority Default);

"Developer's Interest" means all right, title and interest of the Developer in, to or derived from this Agreement;

"Directive Letter" is defined in Section 31.9 (Directive Letter);

"Disclosed Geotechnical Information" means the Disclosed Information contained in the files listed in Attachment 3-34 to the Technical Requirements;

"Disclosed Hazardous Materials" means any Hazardous Material that was referenced in the Disclosed Information or could reasonably have been identified or discovered prior to the Setting Date by an appropriately qualified and experienced contractor or engineer exercising due care and skill and Good Industry Practice based on the Disclosed Information, any publicly available information that may have been accessed without breaching the ITP and any access to the Project Site granted prior to the Setting Date;

"Disclosed Information" means all written information provided to the Developer or any Developer-Related Entity by the Authority or any of its employees, agents, officers, directors, representatives or consultants prior to the date of this Agreement, including: (a) the RFP and its contents (excluding the form of this Agreement), and (b) all contents of the Data Room;

"Discretionary Submittal" means:

- (a) any Submittal that is identified as a "Discretionary Submittal" in Attachment 2-3 to the Technical Requirements; and

- (b) any Submittal that is not identified as a "Discretionary Submittal" in Attachment 2-3 to the Technical Requirements but is expressed in this Agreement to be subject to approval or consent of the Authority in its absolute discretion;

"Discriminatory Change in Law" means a Change in Law, the terms of which apply to:

- (a) the Project or the Comprehensive Project, or projects substantially the same as the Project or the Comprehensive Project;
- (b) private operators of diversion channels, railroad bridges, road bridges or aqueducts; or
- (c) the Developer or any Key Contractor,

except where such Change in Law is of general application to other Persons;

"Dispute" means any dispute, disagreement or controversy between the Authority and the Developer concerning their respective rights and obligations under this Agreement, including with respect to any claim, alleged breach or failure to perform and any remedy;

"Dispute Resolution Procedures" means the procedures for resolving disputes in Article 54 (Dispute Resolution);

"Dispute Review Board" means the Dispute Review Board established to aid in the resolution of Disputes pursuant to Section 54.4 (Dispute Review Board);

"Dispute Review Board Agreement" or **"DRB Agreement"** means the agreement in the form attached to this Agreement as Part 1 (Form of Dispute Review Board Agreement) of Exhibit 21 (Dispute Review Board);

"Distributions" means, whether in cash or in kind, any:

- (a) dividend or other distribution with respect to share capital;
- (b) reduction of capital, redemption or purchase of shares or any other reorganization or variation to share capital;
- (c) payments made by the Developer under the Equity Member Funding Agreement (whether of principal, interest, breakage costs or otherwise);
- (d) payment, loan, contractual arrangement or transfer of assets or rights directly to the extent that, in each case, it was put in place after Financial Close and was neither in the ordinary course of business nor on reasonable commercial terms; or
- (e) receipt of any other benefit which is not received in the ordinary course of business and not on reasonable commercial terms;

"Diversion Channel" means the Diversion Channel Project Elements described in Section 3.3.1 of the Technical Requirements;

"Diversion Channel Line of Protection" means the line of protection consisting of flood protection elements (such as floodwalls or levees) that provide certifiable protection for the one percent (1%) annual chance (i.e., hundred (100) year) flood and a top elevation equal to or greater than the highest of that required for one percent (1%) ACE FEMA accreditation, the water surface resulting from Diversion Channel IDF flows, or the water surface resulting from SPF flows plus three (3) feet;

"Diversion Channel Line of Protection Closure" means the implementation of permanent devices to close openings in the Diversion Line of Protection at the Maple River Aqueduct or the Sheyenne River Aqueduct;

"Diversion Channel Mitigation Site Plan" means Attachment D-1 to the Section 404 Permit;

"Diversion Channel Reach" means each of the segments into which the Diversion Channel is divided, including the adjacent Diversion Channel Line of Protection and EMBs to be included in such segments, pursuant to Section 2.5.1 of the Technical Requirements;

"Diversion Channel Vegetation Zone" or **"DCVZ"** means the zone described in Section 3.3.17.2 of the Technical Requirements;

"Diversion Inlet Structure" means the hydraulic control structure described in the design report "FMM Area Flood Risk Management Project Diversion Inlet Structure" and associated documentation, available as Disclosed Information in the Data Room;

"Diversion Inlet Structure Tie-In" means the interface between the Diversion Channel and the work by others to construct the Diversion Inlet Structure and associated work as set forth in Attachment 3-9 (*CR 16 & CR 17 P3 Contract Work Limits*);

"Diversion Outlet" means the Project Element described in Section 3.3.1.9 of the Technical Requirements;

"Document Control Plan" means the plan described in Section 2.1.4 of the Technical Requirements;

"Dollars" or **"\$"** means the lawful money of the United States;

"Drain Inlet" means any one of the Project Elements associated with a Legal Drain within the Project ROW intended to convey water from the Project ROW limit to the LFC;

"Early Termination" means the termination of this Agreement for any reason prior to the Expiry Date;

"Early Termination Date" means the effective date of termination of this Agreement for any reason prior to the Expiry Date, as specified in the relevant provisions of Article 40 (Termination for Convenience), Article 41 (Termination for Authority Default), Article 42 (Termination for Developer Default), Article 43 (Termination for Extended Force Majeure), Article 44 (Termination for Uninsurability), Article 45 (Termination by Court Ruling) or Article 46 (Termination for Failure to Achieve Financial Close);

"Eligible Security Issuer" means:

- (a) with respect to a letter of credit, any Person; and
- (b) with respect to a demand guarantee, any surety bond provider licensed to do business in North Dakota,

which, in each case, has a credit rating for long-term, unsecured debt of not less than "A-/A3" from one of the Rating Agencies, is headquartered in the United States and has an office in North Dakota, South Dakota, Minnesota, Chicago or New York at which the demand guarantee or letter of credit (as applicable) can be presented for payment by facsimile or by electronic means;

"Embedded Levees" means the levees described in Section 3.3.1.5(1)(a)(i) of the Technical Requirements;

"Emergency" means any unplanned event affecting the Project that:

- (a) presents an immediate or imminent risk of:
 - (i) death or injury to any individual;
 - (ii) structural failure;

- (iii) damage to a third party's property or equipment;
 - (iv) damage to the Environment;
 - (v) threat to the long-term integrity of any part of the Project;
- (b) is declared a state of emergency pursuant to State or federal law; or
- (c) is recognized or declared by any law enforcement agency or any other Governmental Entity (other than the Authority and the Authority Members) as an emergency;

"Emergency Management and Disaster Recovery Plan" means the plan described in Section 4.4.4 of the Technical Requirements;

"Emergency Response" means the procedures to be followed when responding to an Emergency;

"Emergency Service Provider" means the AHJ for emergency services;

"Endangered Species" means any species listed by the U.S. Fish and Wildlife Service as threatened or endangered pursuant to the Endangered Species Act, as amended, 16 U.S.C. §§ 1531, et seq., as amended, or any species listed as threatened or endangered pursuant to a North Dakota or Minnesota endangered species act;

"Engineer of Record" or "EOR" means an individual, or individuals, properly registered as an engineer, responsible for preparing the Final Design Documents, all specifications, certification of all shop drawings and the RFC Documents for the Project;

"Environment" means air, soils, surface waters (including wetlands), groundwater, land, stream sediments, surface or subsurface strata, biological resources, including endangered, threatened and sensitive species, natural systems, including ecosystems, and cultural, historic, archaeological and paleontological resources;

"Environmental Compliance Plan" means the report described in Section 2.11.3 of the Technical Requirements;

"Environmental Compliance Report" means the report described in Section 2.11.10.4 of the Technical Requirements;

"Environmental Compliance Specialist" means the Person described in Section 2.11.2 of the Technical Requirements;

"Environmental Management Plan" means the plan described in Section 2.11.1 of the Technical Requirements;

"EPA" means the United States Environmental Protection Agency;

"Equity Investment" means:

- (a) any form of direct investment by Equity Members, including the purchase of newly issued equity shares or other equity interests in or the provision of Equity Member Debt to the Developer; and
- (b) any payment under, or draws on, any instrument guaranteeing the provision of Deferred Equity Amounts, including but not limited to any draws by or on behalf of the Developer of any letter(s) of credit issued by or for the account of an Equity Member with respect to Deferred Equity Amounts;

"Equity IRR" means the nominal post-tax internal rate of return on Equity Investment (on a cash-on-cash basis) over the full Term calculated using the Base Case Financial Model, as the discount rate that, when applied to the Distributions gives a net present value equal to the net present value of the Equity Investment. For the purposes of this definition:

- (a) the phrase post-tax refers only to U.S. federal, state and local income tax liability of the Developer (or, if the Developer is a pass-through entity for tax purposes, its Equity Members) and specifically excludes (i) any foreign income tax and other tax of any kind, and (ii) any federal, state or local withholding tax, including any tax that the Developer is obligated to withhold on Distributions (whether actual or constructive) or other payments or allocations to Equity Members or holders of debt of or equity interests in an Equity Member under 26 U.S.C. §§ 1441 – 1446, despite 26 U.S.C. § 1461;
- (b) in calculating the Equity IRR, a single level of corporate income taxes for a regularly taxed, U.S.-organized, domestic C corporation should be taken into account; and
- (c) the phrase cash-on-cash basis means, with respect to the calculation of a financial return, the calculation of such financial return on the basis of cash actually received in relation to cash actually invested (as opposed to cash committed);

"Equity Member" means each Person that directly holds an equity interest in the Developer;

"Equity Member Debt" means any obligations created, issued or incurred by the Developer for borrowed money that:

- (a) is owed to any Equity Member, any Related Entity, Qualified Investor or any Affiliate of an Equity Member or Affiliate of the Developer, as applicable; and
- (b) is subordinated in priority of payment and security to all Project Debt held by Persons who are not Equity Members, other than any mezzanine debt that is provided by a party referred to in clause (a) on an arm's length basis;

"Equity Member Funding Agreements" means any loan agreement, credit agreement or other similar finance agreement or subordination agreement providing for or evidencing Equity Member Debt;

"Excavated Material" is defined in Section 14.3(a) (Excavated Material);

"Excavated Material Berm" or **"EMB"** means the Project Element described in Section 3.3.1.6 of the Technical Requirements;

"Exceptional Cost" means for an Insurance Review Period, the extent to which there is an Insurance Cost Increase that exceeds thirty percent (30%) of the Base Benchmarked Insurance Cost for that Insurance Review Period;

"Exceptional Saving" means for an Insurance Review Period, the extent to which there is an Insurance Cost Decrease that exceeds thirty percent (30%) of the Base Benchmarked Insurance Cost for that Insurance Review Period;

"Executive Director" means the Executive Director as defined in the JPA;

"Exempt Refinancing" means:

- (a) any Refinancing to the extent that it was taken into account in the calculation of the Base MAPs, and was fully and specifically identified in the Base Case Financial Model and taken into account in the Base Case Equity IRR;
- (b) any amendment, modification or supplement to any Finance Document which does not provide a financial benefit to the Developer;
- (c) the exercise by a Lender of rights, waivers, consents and similar actions in the ordinary course of day-to-day loan administration and supervision, in each case, which do not provide a financial benefit to the Developer;
- (d) any of the following acts by a Lender:

- (i) the syndication in the ordinary course of business of any of such Lender's rights and interests in the Finance Documents;
 - (ii) the sale of a participation, assignment or other transfer by such Lender of any of its rights or interests, with respect to the Finance Documents, in favor of any other Lender or any investor; or
 - (iii) the grant by such Lender of any other form of benefit or interest in either the Finance Documents or the revenues or assets of the Developer, whether by way of security or otherwise, in favor of any other Lender or any investor;
- (e) any amendment or supplement to any Finance Documents in connection with the funding of an Authority Change pursuant to Article 31 (Authority Changes and Directive Letters);
- (f) a re-set of an interest rate (excluding margin) pursuant to the express terms of any Finance Documents; or
- (g) any sale of any equity interests in the Developer by an Equity Member or securitization of the existing rights or interests attaching to any equity interests in the Developer or its direct, one hundred percent (100%) Equity Member, if any;

"Expedited Dispute Resolution Procedures" means the expedited procedures for resolving disputes set out in Section 54.5 (Expedited Dispute Resolution Process);

"Expiry Date" means the first October 1 to occur following the twenty-ninth (29th) anniversary of the Project Substantial Completion Date;

"Extra Work" means any work performed or to be performed by the Developer that is required:

- (a) by the Authority pursuant to an Authority Change or Directive Letter; or
- (b) due to the occurrence of a Compensation Event,

which, in each case, is not otherwise covered or included in the Project by this Agreement, whether it is in the nature of additional work, altered work, deleted work, or otherwise;

"Fargo-Moorhead Metropolitan Area" means the major health, educational, cultural and commercial center serving southeastern North Dakota and west-central Minnesota located within the Red River Basin;

"Federal Record of Decision" means the Record of Decision signed by the Assistant Secretary of the Army (Civil Works), dated April 3, 2012, which formalizes the outcome of the FEIS;

"Federal Requirements Compliance Plan" means the plan described in Section 2.2.7.1 of the Technical Requirements;

"Federal Requirements Compliance Report" means the report described in Section 2.2.7.2 of the Technical Requirements;

"FEIS" means the Final Feasibility Report and Environmental Impact Statement – Fargo-Moorhead Metropolitan Area Flood Risk Management, dated July 2011 and approved by the Chief of Engineers on December 19, 2011, as amended by the Supplemental Environment Assessment, Fargo Moorhead Metropolitan Area Flood Risk Management Project, dated September 2013 and approved by the District Engineer, St. Paul District, on September 19, 2013 and the Final Supplemental Environmental Assessment #2, Fargo Moorhead Metropolitan Area Flood Risk Management Project, dated February 2019 and approved by the District Engineer, St. Paul District on February 28, 2019;

"FEMA" means the Federal Emergency Management Agency of the US Department of Homeland Security;

"FHWA" means the Federal Highway Administration of the US Department of Transportation;

"Final Design" means, depending on the context:

- (a) the Final Design Documents;
- (b) the design concepts set out in the Final Design Documents; or
- (c) the process of developing the Final Design Documents;

"Final Design Documents" means the complete final drawings, including plans, profiles, cross-sections, notes, elevations, typical sections, details and diagrams, design criteria, final BUDR, specifications, reports, studies, calculations, electronic files, records and submittals prepared by the Developer (and that have been Signed and Sealed by the Engineer of Record), necessary or related to construction and maintenance of the Project;

"Final Design Submittal" means the Submittal described in Section 2.5.4.4.2 of the Technical Requirements;

"Final Geotechnical Design Report" means the report described in Section 3.4.1.3 of the Technical Requirements;

"Final Handback Inspection" means the Handback Inspection described in Section 6.1.3.1 of the Technical Requirements;

"Final Warning Notice" is defined in Section 42.2(b)(i) (Final Warning Notice);

"Finance Costs" means with respect to any Authority Delay Period, the aggregate of:

- (a) all amounts of principal that will fall due for payment under the Finance Documents during that Authority Delay Period; and
- (b) all amounts of interest (excluding default interest) that accrue under the Finance Documents during that Authority Delay Period;

"Finance Documents" means the Funding Agreements and the Security Agreements;

"Financial Close" means the satisfaction or waiver of all conditions precedent to the initial disbursement to the Developer or utilization by the Developer of Project Debt proceeds or the effectiveness of the Lenders' commitments, as applicable, under the Finance Documents (other than any condition as to the effectiveness of this Agreement or any conditions relating to the adjustment of the Base MAPs);

"Financial Closing Date" means the date on which all of the conditions precedent in Section 2.3 (Conditions Precedent to the Financial Closing Date) have been satisfied or otherwise waived in accordance with this Agreement;

"Financial Closing Deadline" means the date that is one hundred fifty (150) days after the Selection Date, as such date may be extended pursuant to Section 2.4(c) (Extension of Financial Closing Deadline);

"Financial Closing Documents" is defined in Section 2.3(a) (Financial Closing Documents);

"Financial Dispute" is defined in Section 54.4(b)(ii) (Dispute Review Board);

"Financial Dispute Review Board" means the Dispute Review Board for Financial Disputes;

"Financial Model Closing Protocol" means the detailed financial close model solving protocol which will be developed specific to the Successful Proposer's Preliminary Financial Model, and will reflect the principles detailed in Exhibit 13 (Updates to the Base MAPs) of the Project Agreement;

"Financial Proposal" means the financial proposal submitted by the Successful Proposer on behalf of the Developer to the Authority on April 26, 2021, as amended by the revised financial proposal submittals that were submitted by the Successful Proposer on behalf of the Developer to the Authority on the Financial Proposal Date, in response to the RFP;

"Financial Proposal Date" means May 17, 2021;

"Float" means Free Float and Total Float;

"Flood Control Noncompliance Event" means any Noncompliance Event in Table 1 (Administrative) or Table 3 (Operations and Maintenance – Flood Control) of Exhibit 16 (Noncompliance Events);

"Floodwalls" means the flood protection features described in Section 3.3.1.5(1)(b) of the Technical Requirements;

"Flow and Water Level Measuring Systems" means the systems described in Section 3.3.1.14 of the Technical Requirements;

"FM Flood Risk Management District No. 1" means the special assessment district created by the CCJWRD to finance a portion of the local cost-share of the Comprehensive Project;

"FOIA" means the Freedom of Information Act (5 U.S.C. § 552), as amended;

"Force Majeure Event" means the occurrence of any of the following events after the date of this Agreement that directly causes either Party (the **"Affected Party"**) to be unable to comply with all or a material part of its obligations under this Agreement:

- (a) war, civil war, invasion, violent act of foreign enemy or armed conflict;
- (b) nuclear, chemical or biological contamination unless the source or cause of the contamination is brought to or near the Project Site by the Developer or a Developer-Related Entity, or is a result of any breach by the Developer of the terms of this Agreement;
- (c) ionizing radiation unless the source or cause of the ionizing radiation is brought to or near the Project Site by the Developer or a Developer-Related Entity, or is as a result of any breach by the Developer of the terms of this Agreement;
- (d) a Force Majeure Flood Event;
- (e) an act of Terrorism; or
- (f) a Pandemic Event directly affecting North Dakota, which:
 - (i) is the subject of a Federal travel advisory or restriction or an emergency declaration or other order in response to such Pandemic Event issued after the Setting Date by the Governor of North Dakota, by another state or municipal Governmental Entity in North Dakota or Minnesota, or by a federal Governmental Entity; and
 - (ii) has resulted in a quarantine of, or in legal restrictions on travel to, from, or within North Dakota or legal restrictions on the performance of the Work in North Dakota;

"Force Majeure Flood Event" means any of the following events:

- (a) from the date of issuance of NTP2 until the Project Substantial Completion Date, the gauge height for USGS gauge 05054000 (Red River) meets or exceeds 43 feet; or
- (b) on or after the Project Substantial Completion Date, a water surface elevation at a location in the Diversion Channel exceeds the Diversion Channel Line of Protection at that location;

"Force Majeure Termination Notice" is defined in Section 29.4 (Failure to Agree; Right to Terminate);

"For Information Only Submittal" or **"FIO Submittal"** means any Submittal relating to the Project required under this Agreement for information;

"Free Float" means the amount of time that an activity in the Project Schedule can be delayed from its early start without causing delay to subsequent activities;

"Funding Agreements" means the documents listed in Part 1 of Exhibit 23 (Finance Documents), together with any other document designated by the Parties (acting jointly) as a Funding Agreement. The Equity Member Funding Agreements will not be classified as "Funding Agreements" for the purposes of this Agreement;

"GAAP" means Generally Accepted Accounting Principles in the U.S. as in effect from time to time;

"General Change in Law" means a Change in Law that is not a Discriminatory Change in Law;

"Geotechnical Exploration Plan" means the plan described in Section 3.4.2.1 of the Technical Requirements;

"Good Faith" means observance of reasonable commercial standards of fair dealing in a given trade or business;

"Good Industry Practice" means the exercise of the degree of skill, diligence, prudence and foresight that would reasonably and ordinarily be expected from time to time from a skilled and experienced designer, engineer, constructor, maintenance contractor or operator or developer seeking in Good Faith to comply with its contractual obligations, complying with all Applicable Laws and Governmental Approvals, using accepted design and construction standards and criteria normally used on similar projects in North Dakota (where applicable), and engaged in the same type of undertaking in the United States under similar circumstances and conditions, including environmental conditions;

"Governmental Approval" means all approvals, permits, permissions, consents, licenses, certificates (including sales tax exemption certificates) and authorizations (whether statutory or otherwise) which are required from time to time in connection with the Project to be issued by the Authority or any Governmental Entity, including:

- (a) a North Dakota contractor's license, pursuant to NDCC Chapter 43-07;
- (b) a certificate from and by the North Dakota Office of State Tax Commissioner, pursuant to NDCC § 43-07-11.1;
- (c) if applicable, a certificate of authority from the North Dakota Secretary of State, pursuant to NDCC Chapter 10-19.1;
- (d) if applicable, a sovereign land permit from the North Dakota State Engineer, pursuant to NDCC Chapter 61-33;
- (e) a construction permit from the North Dakota State Engineer in accordance with NDCC § 61-16.1-38;
- (f) a construction-stormwater discharge permit from the North Dakota Department of Environmental Quality;
- (g) access/right-of-way permits from Cass County for areas in which the Project will cross Cass County's right-of-way; and

(h) all Authority-Provided Approvals;

"Governmental Entity" means the government of the United States of America, the States, the cities and counties within the States and any other agency, or subdivision of any of the foregoing, including any federal, state, or municipal government, any court, agency, special district, commission or other authority exercising executive, legislative, judicial, regulatory, administrative or taxing functions of, or pertaining to, the government of the United States of America, the States or the cities and counties within the States, and any AHJ; "Governmental Entity" does not include the Authority acting in its capacity as a party to this Agreement;

"Graded Secondary Trail" means the facility described in Section 3.10.2.2 of the Technical Requirements;

"H&H Model" means the HEC-RAS model provided as Attachment 3-32 to the Technical Requirements and any subsequent modifications made in accordance with this Agreement;

"Handback Amount" is defined in Section 1 of Exhibit 18 (Calculation of Handback Amounts);

"Handback Inspection" means any of the Initial Handback Inspection, the Second Handback Inspection or the Final Handback Inspection;

"Handback Inspection Report" means any of the reports described in Section 6.1.3.1 of the Technical Requirements;

"Handback Letter of Credit" means any letter of credit delivered pursuant to Section 19.2(d) (Handback Letters of Credit);

"Handback Period" means the period beginning on the date that is three (3) years before the scheduled end of the Term and ending on the Termination Date;

"Handback Renewal Work Plan" means the requirements described in Section 6.1.3.1 of the Technical Requirements;

"Handback Requirements" means the requirements in Section 6 (Handback Requirements) of the Technical Requirements;

"Handback Reserve Account" is defined in Section 19.2(a)(i) (Handback Reserve Account);

"Handback Reserve Amount" is defined in Exhibit 18 (Calculation of Handback Amounts);

"Handback Schedule" means the schedule for O&M Work and Renewal Work during the Handback Period to be prepared and updated pursuant to Section 6.1.2 (*Transition Plan*) of the Technical Requirements;

"Handback Year" means each consecutive twelve (12) month period during the Handback Period;

"Hazardous Environmental Condition" means the presence of any Hazardous Materials on, in, under or about a Project Site at concentrations or in quantities that are required to be removed or remediated by any Applicable Law or in accordance with the requirements of this Agreement, any Governmental Entity or any Governmental Approval;

"Hazardous Materials" means any element, chemical, compound, mixture, material or substance, whether solid, liquid or gaseous, which at any time is defined, listed, classified or otherwise regulated in any way under any Applicable Law (including CERCLA), or any other such substances or conditions (including mold and other mycotoxins, fungi or fecal material) which may create any unsafe or hazardous condition or pose any threat or harm to the Environment or human health and safety;

"Hazardous Materials Release" means any spill, leak, emission, release, discharge, injection, escape, leaching, dumping or disposal of Hazardous Materials into the soil, air, surface water, groundwater or Environment, including any exacerbation of an existing release or condition of Hazardous Materials contamination;

"Hedging Agreements" means any Finance Documents entered into for the purposes of hedging the Developer's exposure to floating rate interest risk;

"Hedging Liabilities" means all amounts due from the Developer to the Lenders by reason of the early termination of any Hedging Agreements;

"Hedging Receipts" means all amounts (if any) payable by the Lenders to the Developer by reason of the early termination of any Hedging Agreements;

"Hold Point" means the mandatory verification point beyond which work cannot proceed without the approval of the appropriate Person by means of an inspection request approval;

"HR Account Bank" is defined in Section 19.2(a)(i) (*Handback Reserve Account*);

"Incident" means an unplanned event requiring action on the part of the Developer;

"Incident Response" means the procedures to be followed when responding to an Incident;

"Incident Response and Communication Plan" means the component of the Developer Communications Plan described in Section 2.2.5.4(6) of the Technical Requirements;

"Indemnified Parties" means the Authority, the Authority-Related Entities (other than BNSF Railway and RRVW) and their respective officers, agents, representatives and employees;

"Indicative Design" means the Authority's varying levels of developed designs for certain elements of the Project, which constitute part of the Disclosed Information and is available in the Data Room;

"Indirect Losses" means loss of profits, loss of use, loss of production, loss of business, loss of business opportunity or any claim for consequential loss or for indirect loss of any nature but excluding any of the same that relate to payments expressly provided for under this Agreement;

"Inflow Design Flood" or "IDF" means the Red River peak design flow labeled as the Diversion Channel IDF in the H&H Model;

"Information" is defined in Section 51.1(a) (*Confidentiality*);

"Initial Compensation Event Notice" is defined in Section 27.2(b) (*Notice and Information for Compensation Events*);

"Initial Design Submittal" means the Submittal described in Section 2.5.4.4.1 of the Technical Requirements;

"Initial Eligibility Inspection" means the inspection so described in Attachment 4-2 (*Levee and Channel Eligibility Inspections*) of the Technical Requirements;

"Initial Handback Inspection" means the Handback Inspection described in Section 6.1.3.1 of the Technical Requirements;

"Initial Kickoff Meeting" means the meeting described in Section 2.10.4(1)(a) of the Technical Requirements;

"Initial Partnering Workshop" means the Initial Partnering Workshop described in Section 2.10.3 of the Technical Requirements;

"Initial Relief Event Notice" is defined in Section 28.2(b) (*Notice and Information*);

"Initial Warning Notice" is defined in Section 42.2(a)(i) (*Initial Warning Notice*);

"Innovative Technical Concept" or "ITC" means an innovative concept that deviates from the Technical Requirements or otherwise requires an amendment to the Technical Requirements, that the Authority has approved in accordance with the ITP prior to the date of this Agreement;

"Insolvency Event" means with respect to any Person:

- (a) any involuntary bankruptcy, insolvency, liquidation, company reorganization, restructuring, suspension of payments, scheme of arrangement, appointment of provisional liquidator, receiver or administrative receiver, resolution or petition for winding-up or similar proceeding, under any Applicable Law, in any jurisdiction, except if the same has been dismissed within sixty (60) days;
- (b) any voluntary bankruptcy, insolvency, liquidation, company reorganization, restructuring, suspension of payments, scheme of arrangement, appointment of provisional liquidator, receiver or administrative receiver, resolution or petition for winding-up or similar proceeding, under any Applicable Law, in any jurisdiction; or
- (c) any general inability on the part of that Person to pay its debts as they fall due;

"Inspection and Test Plan" means the plan described in Section 2.4.3(15) of the Technical Requirements;

"Instructions to Proposers" or "ITP" means the Instructions to Proposers included in the RFP, containing directions for the preparation and submittal of information by the Proposers in response to the RFP;

"Insurance Broker" means the Developer's insurance broker, such broker to be a reputable international insurance broker of good standing;

"Insurance Cost Decrease" means the Insurance Cost Differential if the value is less than zero, multiplied by minus one;

"Insurance Cost Differential" means, subject to the Insurance Premium Benchmarking Procedure, the amount calculated as follows:

Insurance Cost Differential = (ABIC – BBIC) - PIC,

where

- (a) ABIC is the Actual Benchmarked Insurance Cost;
- (b) BBIC is the Base Benchmarked Insurance Cost; and
- (c) PIC is any Project Insurance Change;

"Insurance Cost Increase" means the Insurance Cost Differential if the value of the Insurance Cost Differential is greater than zero;

"Insurance Policies" means the insurance policies the Developer is required to carry or ensure are carried pursuant to Article 35 (Insurance and Reinstatement);

"Insurance Premium Benchmarking Procedure" means the procedure set out in Section 35.10 (Benchmarking of Insurance Costs);

"Insurance Proceeds" means all proceeds from insurance payable to the Developer (or that should have been payable to the Developer but for the Developer's breach of any obligation under this Agreement to take out or maintain such insurance) on or after the Early Termination Date;

"Insurance Review Period" means a three (3) year period from the Project Substantial Completion Date and each subsequent three (3) year period commencing on the third (3rd) anniversary of the Project Substantial Completion Date, except where the end of such period lies beyond the end of the Term, in which case the Insurance Review Period will be the period from the end of the penultimate Insurance Review Period to the last day of the Term;

"Insurance Term" means any term or condition required to be in a policy of insurance pursuant to Article 35 (Insurance and Reinstatement) or Exhibit 9 (Required Insurance);

"Intellectual Property" means any and all patents, trademarks, service marks, copyright, database rights, moral rights, rights in a design, know-how, confidential information and all or any other intellectual or industrial property rights whether or not registered or capable of registration and whether subsisting in the United States or any other part of the world together with all or any goodwill relating or attached thereto which is created, brought into existence, acquired, used or intended to be used by any Developer-Related Entity for the purposes of carrying out the Work or otherwise for the purposes of this Agreement;

"Interim Completion" means, in relation to any Interim Completion Element, the satisfaction of all the Interim Completion Conditions for such Interim Completion Element;

"Interim Completion Conditions" are those conditions set out in Part 1 (Conditions to Interim Completion of Interim Completion Elements) of Exhibit 12 (Construction Completion Conditions);

"Interim Completion Element" means:

- (a) each of the Project Elements (excluding the Diversion Channel, Low Flow Channel, EMBs and Diversion Channel Line of Protection); and
- (b) each of the Diversion Channel Reaches (including the applicable portion of the Low Flow Channel and the adjacent EMBs and Diversion Channel Line of Protection) that are established in accordance with Section 3.3 of the Technical Requirements;

"Interstate" means one or more US highways connecting the 48 contiguous states under jurisdiction of the FHWA;

"Interstate-29" or **"I-29"** means the US highway so numbered under jurisdiction of the FHWA;

"Interstate-94" or **"I-94"** means the US highway so numbered under the jurisdiction of the FHWA;

"Joint Insurance Cost Report" is defined in Section 35.10(b) (Benchmarking of Insurance Costs);

"Joint Powers Agreement" or **"JPA"** means the Joint Powers Agreement, dated June 13, 2016, by and among the City of Moorhead, the City of Fargo, Clay County, Cass County and the CCJWRD;

"JPA-Related Event" means any of the following events:

- (a) the JPA is terminated or otherwise ceases to be in full force and effect;
- (b) the JPA is amended, and such amendment has a material adverse impact on the Project or the ability of the Authority to discharge any of its material obligations under this Agreement (including its payment obligations);
- (c) an Authority Member fails to comply with any of its material obligations under the JPA, including any of its funding obligations;
- (d) an Authority Member is suspended, removed or withdraws from the JPA, and such suspension, removal or withdrawal has a material adverse impact on the Project or the ability of the Authority to discharge any of its material obligations under this Agreement (including its payment obligations); and

- (e) the CCIWRD fails to take the required actions to levy the special assessments in accordance with Section 9.08 of the JPA and related warrant documents;

"Key Assets" means all assets and rights to enable the Authority or a successor contractor to own, operate and maintain the Project in accordance with this Agreement including:

- (a) any buildings or other structures;
- (b) any core equipment;
- (c) any books, records or other documents (including operation and maintenance manuals, health and safety manuals and other know-how);
- (d) any spare parts, tools and other assets (together with any warranties with respect to assets being transferred);
- (e) to the extent required in accordance with Article 50 (Intellectual Property), any Intellectual Property; and
- (f) any contractual rights,

but excluding any assets and rights with respect to which the Authority is full legal and beneficial owner;

"Key Contract" means:

- (a) the D&C Contract;
- (b) each O&M Contract for Renewal Work with a Contract value in excess of \$200,000 over the life of the Contract, that is not a Critical O&M Contract;
- (c) each Critical O&M Contract; and
- (d) any guarantee, performance or payment security, or any other support provided with respect to the obligations of a Key Contractor under any of the foregoing (including the D&C Guarantees);

"Key Contractor" means the counterparty to the Developer under any Key Contract;

"Key Personnel" means those individuals of the Developer Executive Leadership and Management Team and the Core Staff and any Persons who replace such individuals in accordance with Section 20.2 (Key Personnel);

"Key Ratios" means the Minimum DSCR, Minimum All-Cost Resiliency and Maximum Gearing at Financial Close set out in the Base Case Financial Model, as may be updated in accordance with Section 38.9 (Adjustments to the Base Case Financial Model for Qualifying Refinancings);

"Lane" means a delineated traffic lane or shoulder of a road or highway;

"Land Management Plan" means the plan described in Section 3.13.2 of the Technical Requirements;

"Lane Closure" means the minimum width of a Lane, in accordance with the AHJ requirements, is not available to traffic. A Lane is not deemed to have a Lane Closure where an alternative Lane is provided via a Shoofly;

"Lead Engineer" means the entity (whether a single incorporated entity or an incorporated or unincorporated joint venture) with primary responsibility for preparation of the detailed plans and specifications for construction of the Project;

"Legal Drain" means any one of the twelve (12) drains described in Section 3.3.1.12 of the Technical Requirements, excluding the associated Drain Inlet;

"Lender" means any Person that:

- (a) provides Project Debt, together with their successors and assigns; or
- (b) is appointed by any Person referred to in clause (a) as its agent or trustee in connection with the Project Debt;

"Lenders Direct Agreement" means the agreement substantially in the form attached as Exhibit 24 (Form of Lenders Direct Agreement) by and among the Authority, the Developer and the Lender (or if there is more than one Lender, the Collateral Agent on behalf of the Lenders);

"Lenders' Liabilities" means, at the relevant time, the aggregate of (without double-counting):

- (a) all principal, interest (including default interest under the Finance Documents, but with respect to default interest, only to the extent that it arises as a result of the Authority making any payment later than the date that it is due under this Agreement or any other default by the Authority under this Agreement), banking fees and premiums on financial insurance policies, agent and trustee fees, costs and expenses and other amounts properly incurred owing or outstanding to the Lenders by the Developer under or pursuant to the Finance Documents on the Early Termination Date, including any prepayment costs, make-whole amounts and breakage costs; plus
- (b) Hedging Liabilities; minus
- (c) Hedging Receipts;

"Lenders' Technical Advisor" means Altus Group Limited;

"Levees" means the levees described in Section 3.3.1.5(1)(a) of the Technical Requirements;

"Like-new" means a condition of an asset that retains its original location, configuration, form and function, with serviceable features, subject to normal wear and tear, free from unrepaired or unrepairable deterioration, not requiring renewal;

"Local Drainage" means drainage in the Project ROW that is not the Sheyenne River, the Maple River, the Rush River, the Lower Rush River, the Red River or the twelve (12) Legal Drains;

"Local Road" means a road that is not maintained by NDDOT or Cass County, including Township or City roads, as applicable;

"Losses" means any loss, damage, injury, liability, obligation, cost, response cost, expense, fee, charge, judgment, penalty or fine. Losses include injury to or death of Persons, damage or loss of property, and harm or damage to natural resources;

"Low Flow Channel" or "LFC" means the Project Element described in Section 3.3.1.3 of the Technical Requirements;

"Lower Rush River" means the river so named in Attachment 1-2 (*Project Configuration*) to the Technical Requirements;

"Lower Rush River Inlet" means the Project Element associated with the Lower Rush River within the Project ROW intended to convey water from the Project ROW limit to the LFC;

"Magellan" is defined in Exhibit 22 (Utility and Third Party MOUs);

"Magellan Memorandum of Understanding" is defined in Exhibit 22 (Utility and Third Party MOUs);

"Maintenance Limits" means the Maintenance Limits described and developed in accordance with Section 4.4.3.21.1 of the Technical Requirements;

"Maintenance Rectification Costs" means, with respect to any termination of this Agreement that occurs after the Project Substantial Completion Date, all Losses that the Authority determines it is reasonably likely to incur as a direct result of the termination of this Agreement, including (without double-counting):

- (a) those costs (internal and external) that the Authority is reasonably likely to incur as a direct result of carrying out any process to request tenders from any parties interested in entering into a contract with the Authority to carry out O&M Work, including all costs related to the preparation of tender documentation, evaluation of tenders and negotiation and execution of relevant contracts; and
- (b) those costs reasonably projected to be incurred by the Authority in relation to:
 - (i) remediation or, if remediation is not possible or would cost more than renewal, renewal of any defective D&C Work or O&M Work;
 - (ii) rectification or cure of any breach of this Agreement by the Developer; and
- (c) on the assumption that this Agreement had not been terminated, the net present value of those costs reasonably projected to be incurred for the remainder of the Term in order to ensure that the Project complies with the requirements of this Agreement, but only to the extent such projected costs exceed the costs assumed in the Base Case Financial Model,

including, for the avoidance of doubt, any amount which, but for the termination of this Agreement, should have been deposited into the Handback Reserve Account in accordance with the terms of this Agreement;

"Maintenance Review Report" means the report detailed in Section 4.4.3.21.9 (*Required Bridge Inspections*) of the Technical Requirements;

"Maintenance Road/Trail" means the facility described in Section 3.10.2.1 of the Technical Requirements;

"Major Defect" means any defects, nonconformances, deficiencies and items of outstanding work arising from or related to the work required to achieve Interim Completion of an Interim Completion Element or Project Substantial Completion, and which will have a material or adverse effect on:

- (a) the normal, uninterrupted and safe use and operation of a Project Element or the Project (as applicable);
- (b) the performance of AHJ; or
- (c) the performance of the O&M Work by the Developer;

"Maple River" means the river so named in Attachment 1-2 (*Project Configuration*) to the Technical Requirements;

"Maple River Aqueduct" means the Project Element, including flumes, spillways and the river channels within the Project ROW, that will convey the flow of the Maple River across and into the Diversion Channel;

"Master Indenture of Trust" means the indenture to be executed by the CCJWRD, the Authority, the City of Fargo, as fiscal agent, and the Bank of North Dakota, as trustee, in the form attached as Part 1 (Master Indenture of Trust) of Exhibit 7 (Master Indenture of Trust and P3 Improvement Warrants);

"Master Specifications Library" means the library of specifications described in Section 2.5.3.3 of the Technical Requirements;

"Master Water Control Manual" means the "Master Water Control Manual, Fargo-Moorhead Metropolitan Area Flood Risk Management Project", which defines rules and provides guidance for direction, operation, and management of water storage for the Comprehensive Project;

"Material Flood Event" shall occur on the first (1st) day that any flood event causes the mean daily USGS recorded elevation at:

- (a) US Geological Survey gauge 05058980 (Sheyenne River on Gol Road near Kindred) to meet or exceed 954.0 feet above National Geodetic Vertical Datum of 1929;
- (b) US Geological Survey gauge 05060000 (Maple River near Mapleton) to meet or exceed 910.5 feet above North American Vertical Datum of 1988;
- (c) US Geological Survey gauge 05054000 (Red River at Fargo) to meet or exceed 901.0 feet above North American Vertical Datum of 1988; or
- (d) US Geological Survey gauge 05060400 (Sheyenne River at Harwood) to meet or exceed 892.3 feet above North American Vertical Datum of 1988;

"Maximum Cumulative Additional Milestone Payments" means the maximum cumulative amount of Additional Milestone Payments that may be payable to the Developer by the Authority as of an AMP Calculation Date, which amounts are set out in Annex 2 (Maximum Cumulative Additional Milestone Payments) to Exhibit 14 (Milestone Payments);

"Measured Flow" means the rate of flow measured in cfs at "Combined CR 16 and CR 17 Crossing" each as determined by the Authority, acting reasonably in accordance with Good Industry Practice;

"Mediation" is defined in Section 54.6(a) (Mediation);

"Midcontinent Independent System Operator" means the independent system operator and regional transmission organization referred to in Attachment 3-25 (*Utility and AHJ Roles and Responsibilities*) providing open-access transmission service and monitoring the high-voltage transmission system in the mid-west US and other areas;

"Milestone Payment" means each of the Substantial Completion Milestone Payment and each Additional Milestone Payment;

"Milestone Schedule" means the dates set out in Attachment 2-4 (*Project Milestone Schedule*) to the Technical Requirements;

"Minn. Stat." means the Minnesota Statutes;

"Minnesota" means the State of Minnesota;

"Minnesota Data Practice Act" means the Minnesota Government Data Practices Act, Minn. Stat. Chapter 13;

"Minor Defect" means any defects, nonconformances, deficiencies and items of outstanding work arising from or related to the work required to achieve Interim Completion of an Interim Completion Element, Project Substantial Completion or Project Final Completion, as applicable, and which will have no material or adverse effect on:

- (a) the normal, uninterrupted and safe use and operation of a Project Element or the Project (as applicable);
- (b) the performance of AHJ; or
- (c) the performance of the O&M Work;

"Mitigation and Associated Infrastructure" or **"MAI"** means the mitigation work and associated infrastructure described in the PPA and not part of the Project;

"MNDOT" means the Minnesota Department of Transportation;

"Monthly Buildable Unit Construction Progress Report" means the report described in Section 2.2.4.1 of the Technical Requirements;

"Monthly Compliance Report" means the report described in Sections 2.8.2.5, 2.8.2.6 and 2.11.10.4 of the Technical Requirements;

"Monthly Construction Progress Report" means the report described in Section 2.2.4.4 of the Technical Requirements;

"Monthly Disbursement" means the actual Availability Payments paid by the Authority to the Developer in any given month, taking into account the calculations, adjustments and Deductions provided for in this Agreement;

"Monthly Performance Report" means each Monthly Performance Report to be delivered by the Developer under Article 23 (Milestone Payments) or Article 24 (Availability Payments), in the form of Exhibit 17 (Monthly Performance Reports);

"Monthly Progress Report" means the report described in Section 2.2.4.1 of the Technical Requirements;

"Municipality" means a city or township that has corporate status and local government;

"National Incident Management System" means a systematic, proactive approach to guide departments and agencies at all levels of government, nongovernmental organizations and the private sector to work seamlessly to prevent, protect against, respond to, recover from, and mitigate the effects of incidents, regardless of cause, size, location, or complexity, in order to reduce the loss of life and property and harm to the environment, such as the system utilized by FEMA, state and local governments;

"National Register of Historic Places" means an official list for the federal government established as part of the National Historic Preservation Act of 1966 (16 U.S.C. 470 et seq., as amended through 2006) and managed by the federal National Park Service under the U.S. Department of the Interior;

"NDCC" means the North Dakota Century Code;

"NDDOT" means the North Dakota Department of Transportation;

"Necessary Section 404 Permit Modification" means a modification to the Section 404 Permit and any related modifications to the adopted NEPA documentation that is required as a result of differences in the Developer's design of the Project to the conceptual plan or project description presented in the Section 404 Permit but only to the extent that the Developer's design complies with the Technical Requirements (disregarding any ITCs);

"NEPA" means the National Environmental Policy Act of 1969, as amended;

"NEPA Compliance Documentation" means:

- (a) the Federal Record of Decision; and
- (b) the FEIS;

"Net Lenders' Liabilities" means the amount calculated (without double-counting) as follows:

- (a) Lenders' Liabilities; minus

- (b) Account Balances; minus
- (c) Insurance Proceeds (excluding proceeds of personal injury, property damage or other third party liability insurance payable to or for the account of a third party);

"no better and no worse" and "no better and no worse position" are defined in Section 39.3 (No Better and No Worse);

"No Fault Termination Sum" means the amount calculated in accordance with Section 2 (Compensation on Termination for Extended Force Majeure and Uninsurability) of Exhibit 20 (Compensation on Termination);

"Non-BNSF Project Site" means the Project Site (other than the BNSF Land and RRVW Land);

"Noncompliance Developer Default Trigger" means an accumulation of assessed Noncompliance Points where:

- (a) the cumulative number of Noncompliance Points assessed under Table 2 (Design and Construction) of Exhibit 16 (Noncompliance Events) during any rolling three (3) month period equals or exceeds eighty-five (85);
- (b) the cumulative number of Noncompliance Points assessed under Table 2 (Design and Construction) of Exhibit 16 (Noncompliance Events) during any rolling twelve (12) month period equals or exceeds two hundred twenty (220);
- (c) the cumulative number of Noncompliance Points assessed under Table 3 (Operations and Maintenance – Flood Control) and Table 4 (Operations and Maintenance – Non-Flood Control) of Exhibit 16 (Noncompliance Events) during any rolling three (3) month period equals or exceeds sixty (60);
- (d) the cumulative number of Noncompliance Points assessed under Table 3 (Operations and Maintenance – Flood Control) and Table 4 (Operations and Maintenance – Non-Flood Control) of Exhibit 16 (Noncompliance Events) during any rolling twelve (12) month period equals or exceeds one hundred fifty-five (155);
- (e) the cumulative number of Noncompliance Points assessed during any rolling three (3) month period equals or exceeds one hundred (100); or
- (f) the cumulative number of Noncompliance Points assessed during any rolling twelve (12) month period equals or exceeds two hundred sixty-five (265);

"Noncompliance Event" means any Developer failure to comply with the obligations of this Agreement that is identified as a Noncompliance Event in Exhibit 16 (Noncompliance Events);

"Noncompliance Increased Monitoring Trigger" means an accumulation of assessed Noncompliance Points where:

- (a) the cumulative number of Noncompliance Points assessed under Table 2 (Design and Construction) of Exhibit 16 (Noncompliance Events) during any rolling three (3) month period equals or exceeds fifty-five (55);
- (b) the cumulative number of Noncompliance Points assessed under Table 2 (Design and Construction) of Exhibit 16 (Noncompliance Events) during any rolling twelve (12) month period equals or exceeds one hundred fifty (150);
- (c) the cumulative number of Noncompliance Points assessed under Table 3 (Operations and Maintenance – Flood Control) and Table 4 (Operations and Maintenance – Non-Flood Control) of Exhibit 16 (Noncompliance Events) during any rolling three (3) month period equals or exceeds forty (40);

- (d) the cumulative number of Noncompliance Points assessed under Table 3 (Operations and Maintenance – Flood Control) and Table 4 (Operations and Maintenance – Non-Flood Control) of Exhibit 16 (Noncompliance Events) during any rolling twelve (12) month period equals or exceeds one hundred five (105);
- (e) the cumulative number of Noncompliance Points assessed during any rolling three (3) month period equals or exceeds sixty-five (65); or
- (f) the cumulative number of Noncompliance Points assessed during any rolling twelve (12) month period equals or exceeds one hundred eighty (180);

"Noncompliance Points" means the points that may be assessed for each Noncompliance Event pursuant to Article 22 (Noncompliance Events);

"Noncompliance Rectification Date" means, for any Noncompliance Event, the date that the Noncompliance Event has been cured and reasonable measures have been taken by the Developer, to the reasonable satisfaction of the Authority, to prevent the reoccurrence of that Noncompliance Event;

"Noncompliance Start Date and Time" means:

- (a) for any Noncompliance Event arising from a Requirement Failure, the date and time at which the applicable Response Time for Nonconformances for that Requirement Failure expires, if the Requirement Failure has not been cured on or before that date; and
- (b) for any other Noncompliance Event, the earlier of the date and time that the Developer:
 - (i) first obtains knowledge of the Noncompliance Event; or
 - (ii) first should have reasonably known of the occurrence of the Noncompliance Event;

"Nonconformance" means:

- (a) Work, process, condition or circumstance not in accordance with this Agreement including the Technical Requirements; or
- (b) an item that does not receive an "Acceptable" rating in the Project Levee and Diversion Channel Inspection Test set forth in the Technical Requirements;

"Nonconformance Report" means a record issued in accordance with Section 2.8 (*Nonconformance*) of the Technical Requirements, detailing the description of an identified Nonconformance, the proposed remedy or curing method, duration and action taken to correct the Nonconformance;

"Nonconformance Tracking System" means the tracking system set forth in Section 2.8 (*Nonconformance*) of the Technical Requirements;

"Nonconforming Work" means any Work that does not conform to the requirements of this Agreement;

"Non-Embedded Levees" means the levees described in Section 3.3.1.5(1)(a)(iii) of the Technical Requirements;

"Non-Federal Sponsors" means the City of Fargo, the City of Moorhead and the Authority;

"Non-Flood Control Noncompliance Event" means any Noncompliance Event in Table 4 (Operations and Maintenance – Non-Flood Control) of Exhibit 16 (Noncompliance Events);

"Non-Material Flood Event" shall occur with respect to a portion of the Project Site where:

- (a) a Non-Material Flood Event Date has occurred;
- (b) the Developer had installed preventative measures to protect such area from overland flooding prior to the occurrence of such Non-Material Flood Event Date;
- (c) the portion of the Project Site is subject to overland flooding (despite the presence of the preventative measures); and
- (d) such overland flooding causes the Developer to be unable to proceed with Construction Work related to a Buildable Unit within such portion of the Project Site between the start and finish dates for such Buildable Unit stated in the latest Project Baseline Schedule submitted to the Authority at least thirty (30) days prior to such Non-Material Flood Event Date;

"Non-Material Flood Event Date" means the first (1st) day that any flood event causes the mean daily USGS recorded elevation at:

- (a) US Geological Survey gauge 05058980 (Sheyenne River on Gol Road near Kindred) to meet or exceed 951.0 feet above National Geodetic Vertical Datum of 1929;
- (b) US Geological Survey gauge 05060000 (Maple River near Mapleton) to meet or exceed 907.7 feet above North American Vertical Datum of 1988;
- (c) US Geological Survey gauge 05054000 (Red River at Fargo) to meet or exceed 895.5 feet above North American Vertical Datum of 1988; or
- (d) US Geological Survey gauge 05060400 (Sheyenne River at Harwood) to meet or exceed 889.7 feet above North American Vertical Datum of 1988;

"North Dakota" or **"ND"** means the State of North Dakota;

"North Dakota Open Records Law" means NDCC Chapter 44-04;

"Notice of Project Final Completion" is defined in Section 16.4(d) (Project Final Completion);

"Notice of Interim Completion" is defined in Section 16.1(d) (Project Final Completion);

"Notice of Project Substantial Completion" is defined in Section 16.3(d) (Project Final Completion);

"Notifiable Refinancing" means any proposed Refinancing that is neither a Qualifying Refinancing, nor an Exempt Refinancing described in clause (c) or clause (d) of the definition of Exempt Refinancing;

"NTP1" is defined in Section 15.1(a) (Preliminary Work and Conditions Precedent to NTP1);

"NTP1 Issuance Date" means the date on which the Authority issues NTP1 in accordance with Section 15.1 (Preliminary Work and Conditions Precedent to NTP1);

"NTP2" is defined in Section 15.2(a) (Remaining Work and Conditions Precedent to NTP2);

"NuStar" is defined in Exhibit 22 (Utility and Third Party MOUs);

"NuStar Memorandum of Understanding" is defined in Exhibit 22 (Utility and Third Party MOUs);

"O&M Contract" or **"Operations and Maintenance Contract"** means any Contract entered into between the Developer and an O&M Contractor for the performance of O&M Work. There may be more than one O&M Contract concurrently in effect;

"O&M Contractor" or "Operations and Maintenance Contractor" means the Contractor under any O&M Contract;

"O&M Deliverables" means the reports, plans, Design Deliverables, and other documents (e.g., O&M Management Plan, Developer Project Management Plan and O&M Quality Management Plan) required to be submitted in respect of the O&M Work;

"O&M Manual" or "Operations and Maintenance Manual" means the manual described in Section 2.7.2 of the Technical Requirements;

"O&M Management Plan" or "Operations and Maintenance Plan" means the plan described in Section 2.7.1 and in Section 4.4.3.21.3 of the Technical Requirements;

"O&M Performance Requirements" or "Operations and Maintenance Performance Requirements" means the minimum performance requirements set out in the Technical Requirements;

"O&M Quality Management Plan" or "Operations and Maintenance Quality Management Plan" means the plan described in Section 2.4.4 of the Technical Requirements;

"O&M Quality Management Team" or "Operations and Maintenance Quality Management Team" means the personnel responsible for ensuring the implementation of the O&M Quality Management Plan;

"O&M Schedule" or "Operations and Maintenance Schedule" means the schedule for the O&M Work to be prepared and updated by the Developer pursuant to Section 4 (*O&M Requirements*) of the Technical Requirements;

"O&M Team" or "Operations and Maintenance Team" means the personnel responsible for the O&M Work;

"O&M Work" or "Operations and Maintenance Work" means all work related to the operation, maintenance, administration, asset management and handback of the Project, including Routine Maintenance and Renewal Work, and excluding Construction Work;

"Open Records Laws" is defined in Section 51.2(a) (North Dakota and Minnesota Open Records Laws);

"Operating Period" means the period starting on the Project Substantial Completion Date plus one (1) day and ending on the Termination Date;

"Operation and Maintenance Submittal" means any Submittal identified as "Operation and Maintenance Submittal" in Attachment 2-3 (*Tabulation of Reviewable Submittals*) to the Technical Requirements;

"Original Design" means the Final Design Documents for which Released for Construction Documents were issued. This term incorporates any Design Changes that are Released for Construction Documents;

"Original Scheduled Project Substantial Completion Date" means the date that is 1,819 days after the Financial Closing Date;

"OSE" or "Office of the State Engineer" means the North Dakota State Engineer;

"Overall Project Monthly Construction Progress Report" means the report described in Section 2.2.4.4.2 of the Technical Requirements;

"P3 MOU" means the public-private partnership memorandum of understanding between the Non-Federal Sponsors and USACE, dated 11 July 2016;

"PABs" means bonds, notes or other evidence of indebtedness issued by the Conduit Issuer pursuant to the provisions of the Internal Revenue Code §§ 142(a)(15) and (m) (which acronym stands for "**private activity bonds**");

"Pandemic Event" means the existence of a communicable disease or virulent illness or public health emergency during performance of the Work, regardless of when it first arose;

"Pandemic Event Change in Law" means a Change in Law that is binding on the Developer in relation to a Pandemic Event that prohibits the performance of any Construction Work on the Project Site after NTP2 for a period exceeding ten (10) Business Days;

"Partially-Embedded Levees" means the levees described in Section 3.3.1.5(1)(a)(ii) of the Technical Requirements;

"Payment Year" means:

- (a) the time period commencing on the Payment Years Start Date and ending on the day prior to the first (1st) anniversary of the Payment Years Start Date; and
- (b) each subsequent year period commencing on an anniversary of the Payment Years Start Date and ending on the day prior to the next anniversary of the Payment Years Start Date, provided that the last Payment Year will end on the Expiry Date;

"Payment Years Start Date" means the earlier of:

- (a) the Original Scheduled Substantial Completion Start Date; and
- (b) the Project Substantial Completion Date;

"Parties" means the Authority and the Developer;

"Partnering" means the processes and ethos described in Section 2.10.3 of the Technical Requirements;

"Pay Units" means the numbered segments of Work identified as "Description of Pay Unit" in Annex 1 of Exhibit 14 (Milestone Payments);

"Pay Unit Amount" means the value associated with each Pay Unit, as set out in Annex 1 (Pay Units) of Exhibit 14 (Milestone Payments);

"PDF Bookmark" means a Portable Document Format (PDF) file with bookmarked links of representative text in the navigation panel. Each bookmark in the navigation panel goes to a different view or page in the document;

"Peak Design Flow" means those flows described in Section 3.3.1.1 of the Technical Requirements;

"Performance Security" means:

- (a) any D&C Guarantee;
- (b) any payment bond, performance bond, letter of credit or cash collateral arrangement put in place to secure the obligations of the D&C Contractor under the D&C Contract; or
- (c) any payment bond, performance bond, letter of credit, cash collateral arrangement or parent guarantee put in place to secure the obligations of an O&M Contractor under an O&M Contract, if any;

"Permitted Revenue-Generating Activity" as defined in Exhibit 32 (Permitted Revenue-Generating Activity);

"Permitted Revenue-Generating Activity Description" as defined in Exhibit 32 (Permitted Revenue-Generating Activity);

"Persistent Breach" means a breach for which a Final Warning Notice has been issued, that:

- (a) continues for more than thirty (30) consecutive days after the date of service of the Final Warning Notice; or
- (b) recurs three (3) or more times within the six (6) month period after the date of service of the Final Warning Notice;

"Person" means an individual, a general or limited partnership, a joint venture, a corporation, a limited liability company, a trust, an unincorporated organization or a governmental authority;

"Pile Load Test" means the test described in Section 3.4.3.11 of the Technical Requirements;

"Pile Load Test Plan" means the plan described in Section 3.4.3.11 of the Technical Requirements;

"Portfolio Cost Savings" means any insurance cost saving which arises from the Developer changing the placement of the Insurance Policies from being on a stand-alone project-specific basis assumed at the date of this Agreement, to being on the basis of a policy (or policies) also covering risks (i) with respect to other projects or (ii) with respect to other matters, which, in either case, are outside the scope of the Project so as to benefit from portfolio savings. A Portfolio Cost Saving is defined as a positive sum and cannot be less than zero;

"PPA" is defined in the Recitals;

"Pre-existing Hazardous Materials" means Hazardous Materials that exist in, on or under the Project Site prior to the date on which the Developer gains vacant possession to a relevant portion of the Project Site, including those that manifest themselves after that date;

"Pre-Refinancing Equity IRR" means the nominal post-tax Equity IRR calculated immediately prior to the Refinancing on a version of the Base Case Financial Model updated for the actual revenue and cost performance of the Project up to the Refinancing date;

"Preference Comment" means any comment made by the Authority on the grounds set out in Section 7.4(d)(ii) (R&C Submittal);

"Preliminary Comprehensive Geotechnical Design Report" means the report described in Section 3.4.2.1 of the Technical Requirements;

"Preliminary Design" means the Design Work described in Section 2.5.2 of the Technical Requirements;

"Preliminary Financial Model" means the version of the Base Case Financial Model attached as Exhibit 28 (Base Case Financial Model) as of the Commercial Closing Date;

"Preliminary Equity IRR" means the Equity IRR from the version of the Base Case Financial Model attached as Exhibit 28 (Base Case Financial Model) as of the Commercial Closing Date

"Preliminary Work" means:

- (a) any Work that the Developer is required to undertake in order to satisfy the conditions precedent listed in Part 2 (Conditions Precedent to NTP2) of Exhibit 11 (Conditions Precedent to Notices to Proceed); and
- (b) Design Work and any other Work related to general administrative activities, preparation of the Developer Project Management Plan and updating the Project Baseline Schedule, permitting activities, investigations (including geotechnical investigations) and surveys, coordination and planning activities associated with Utility Adjustment Work, and coordination and planning activities with respect to the Third Party MOUs;

"Prime Rate" means the prime rate as published in The Wall Street Journal (Eastern Edition), or a mutually agreeable alternative source of the prime rate if it is no longer published in The Wall Street Journal (Eastern Edition) or the method of computation thereof is substantially modified;

"Principal Authority Documents" means the Project Documents to which the Authority is a party and the Master Indenture of Trust;

"Principal Developer Documents" means the Project Documents to which the Developer is a party;

"Private Placement" means the issuance of debt securities that are exempt from registration under US securities law and are sold directly in the private market;

"Programmatic Agreement" means the Programmatic Agreement entered into between USACE and the North Dakota Historic Preservation Officer and the Minnesota State Historic Preservation Officer, dated July 2011, as amended;

"Prohibited Person" means any Person who is:

- (a) debarred, suspended, proposed for debarment with a final determination still pending, declared ineligible or voluntarily excluded (as such terms are defined in any of the Debarment Regulations) from participating in procurement or nonprocurement transactions with the federal government or any department, agency or instrumentality of the federal government pursuant to any of the Debarment Regulations;
- (b) indicted, convicted or had a civil or administrative judgment rendered against such Person for any of the offenses listed in any of the Debarment Regulations and no event has occurred and no condition exists that is likely to result in the debarment or suspension of such Person from contracting with the federal government or any department, agency or instrumentality of the federal government;
- (c) listed on the "Lists of Parties Excluded from Federal Procurement and Nonprocurement Programs" issued by the U.S. General Services Administration;
- (d) located within, or doing business or operating from, a country or other territory subject to a general embargo administered by the United States Office of Foreign Assets Control (OFAC);
- (e) designated on the OFAC list of "Specially Designated Nationals";
- (f) otherwise targeted under economic or financial sanctions administered by the United Nations, OFAC or any other U.S. federal economic sanctions authority or any divestment or sanctions program of either State;
- (g) a banking institution chartered or licensed in a jurisdiction against which the United States Secretary of the Treasury has imposed special measures under Section 311 of the USA PATRIOT Act (Section 311);
- (h) located within or is operating from a jurisdiction that has been designated as non-cooperative with international anti-money laundering principles by the Financial Action Task Force on Money Laundering;
- (i) a financial institution against which the United States Secretary of the Treasury has imposed special measures under Section 311;
- (j) a senior foreign political figure or a prohibited foreign shell bank within the meaning of 31 CFR Section 1010.605; or
- (k) any Person with whom the Authority is engaged in litigation relating to performance of contract or business practices, unless the Authority has first waived (in the Authority's absolute discretion) the prohibition on a transfer to such Person during the continuance of the relevant litigation, by written notice to the transferring equity holder, with a copy to the Developer;

"Project" or "DCAI" or "SWDCAI" is defined in the Recitals;

"Project Asset Inventory" means the inventory of Project Elements and features described in Section 2.7.2(1) of the Technical Requirements;

"Project Baseline Schedule" or "PBS" means the Project Schedule developed in accordance with Section 2.2.6.1 of the Technical Requirements, and includes PBS-1, PBS-2, PBS-3 and PBS-4;

"Project Data" means:

- (a) the Design Documents; and
- (b) any other information, documents or data acquired or brought into existence or used in relation to the Work or this Agreement,

in each case, that is used by or on behalf of any Developer-Related Entity in connection with the provision of the Work or the performance of the Developer's obligations under this Agreement;

"Project Debt" means all outstanding obligations from time to time pursuant to the Finance Documents;

"Project Design Guidelines" means the guidelines described in Section 3.8.1 of the Technical Requirements;

"Project Documents" means this Agreement, the Key Contracts, the Lenders Direct Agreement, the D&C Contractor Direct Agreement and the Finance Documents;

"Project Element Constituent" means an attribute of a Project Element listed in the column entitled "Project Element Constituent" in Part 2 and Part 3 of Attachment 4-1 (*Performance and Measurement Table*) to the Technical Requirements;

"Project Elements" means the Project Elements identified in Attachment 1-3 (*Project Elements and Agency Having Jurisdiction*) to the Technical Requirements and includes all demolition, temporary measures, detours, protection, erosion control and appurtenances required for the construction, maintenance and operation of such Project Element;

"Project Final Completion" means satisfaction of all of the Project Final Completion Conditions;

"Project Final Completion Conditions" are those conditions in Part 4 (Project Final Completion Conditions) of Exhibit 12 (Construction Completion Conditions);

"Project Insurance Change" means any net increase or net decrease in the Actual Benchmarked Insurance Cost relative to the Base Benchmarked Insurance Cost, arising from:

- (a) the claims history (other than any claims history arising from or in connection with an Authority-Retained Responsibility);
- (b) the re-rating of the Developer or any Developer-Related Entity (other than any re-rating due to (i) the acts or omissions of the Authority or (ii) an Authority-Retained Responsibility);
- (c) the effect of any change in deductibles unless the following applies:
 - (i) such change is attributable to circumstances generally prevailing in the Relevant Insurance Markets; and
 - (ii) the deductible further to such change is either greater than or equal to the maximum in Exhibit 9 (Required Insurance); or

- (d) any other issue or factor other than circumstances generally prevailing in the Relevant Insurance Markets, except for any Portfolio Cost Saving,

with such amount to be expressed as a positive number for a net increase and a negative number for a net decrease for the purposes of determining the Insurance Cost Differential;

"Project Milestone" means any of the milestones described in the Milestone Schedule;

"Project Office" means the office established by the Developer, located within Cass County, North Dakota, as described in Section 2.2.1 of the Technical Requirements;

"Project Operation" means operation by the Authority of the Red River Structure or the Wild Rice River Structure to restrict flow into the Protected Area;

"Project Operation Report" means the report described in Section 5.6.2 of the Technical Requirements;

"Project Period" means the period commencing on the date of issuance of NTP1 and ending at the end of the Term;

"Project Preliminary Design Report" or **"PPDR"** means the report described in Section 2.5.2.1 of the Technical Requirements;

"Project ROW" means the permanent right-of-way for the Project, as identified in Exhibit 4 (Project Land);

"Project Schedule" means any of the Project Baseline Schedule, Project Status Schedule Update, O&M Schedule or Renewal Work Schedule being the logic-based critical path schedules of all Work as described in the Technical Requirements, as may be revised and updated in accordance with this Agreement;

"Project Site" means, collectively, the Project ROW and each Temporary Construction Easement prior to the applicable TCE Expiry Date;

"Project Status Schedule Update" means the Project Schedule described in Section 2.2.6.5 of the Technical Requirements;

"Project Substantial Completion" means satisfaction of all the Project Substantial Completion Conditions;

"Project Substantial Completion Conditions" are those conditions in Part 3 (Project Substantial Completion Conditions) of Exhibit 12 (Construction Completion Conditions);

"Project Substantial Completion Date" means the date on which Project Substantial Completion is achieved;

"Project Substantial Completion Implementation Plan" is defined in Section 26.1(c) (Notice);

"Project Substantial Completion Long Stop Date" means the date that is twelve (12) months after the Scheduled Project Substantial Completion Date, as such date may be extended in accordance with this Agreement;

"Proposal Commitments" means the statements, provisions, concepts or designs in the Developer Proposal that can reasonably be interpreted as offering to:

- (a) provide higher (but not lower) quality items than otherwise required by the main body of this Agreement or the other Exhibits to this Agreement; or
- (b) perform services or meet standards in addition to or better than those otherwise required;

"Proposer" means each firm or team of firms who was shortlisted in accordance with the RFQ, as amended in accordance with Section 1.9 of the Instructions to Proposers and invited to submit a proposal to the Authority in response to the RFP;

"Protected Area" means the area generally East of the Diversion Channel of Protection, as described in Attachment 1-1 (*Protected Area—H&H Model*) to the Technical Requirements;

"Protected Side" means the right side of the Diversion Channel bounded by the centerline of the Diversion Channel Line of Protection;

"Protection in Place" means any action taken to avoid damaging a Utility which does not involve removing or relocating that Utility, including staking the location of the Utility, exposing the Utility, avoidance of a Utility's location by construction equipment, installing steel plating or concrete slabs, encasement in concrete, temporarily de-energizing power lines and installing physical barriers. The term includes both temporary measures and permanent installations meeting this definition;

"Punch List" means an itemized list of Minor Defects;

"Qualified Investor" means Acciona Concesiones, S.L., Corporación Acciona Infraestructuras S.L., NACG US Inc., North American Construction Group Ltd., S&B USA Concessions – Fargo LP, and Shikun & Binui Ltd.;

"Qualifying Change in Law" means:

- (a) a Discriminatory Change in Law; or
- (b) a General Change in Law which involves Capital Expenditure,

which, in each case, which was not pending, passed, adopted or otherwise published or notified to the public or the Developer (but not yet effective) as of the Setting Date; or

- (c) Pandemic Event Change in Law;

"Qualifying Refinancing" means any Refinancing that will give rise to a Refinancing Gain greater than zero that is not an Exempt Refinancing;

"Quality Management Plan" or **"QMP"** means the plan and all its component parts, as described in Section 2.4 of the Technical Requirements;

"R&C Submittal" means

- (a) any Submittal that is identified as an "R&C Submittal" in Attachment 2-3 to the Technical Requirements; and
- (b) any Submittal that is not identified as an "R&C Submittal" in Attachment 2-3 to the Technical Requirements but is expressed in this Agreement to be subject to the review and comment of the Authority, but which is not a Discretionary Submittal;

"Railroad Crossing" means each of the railroad crossings identified as part of the Project in the Technical Requirements;

"Rating Agency" means any credit rating agency registered with the Securities and Exchange Commission as a nationally recognized statistical rating organization (NRSRO);

"Reasonable Efforts" means all those steps (if any) in the power of the relevant Party that are capable of producing the desired result, being steps which a prudent, determined and commercially reasonable Person desiring to achieve

that result would take. Reasonable Efforts does not mean that, subject to its other express obligations under this Agreement, the relevant Party is required to expend funds, except for those necessary to meet the reasonable costs reasonably incidental or ancillary to the steps to be taken by the relevant Party (including its reasonable travel expenses, correspondence costs and general overhead expenses);

"Reconciliation" is defined in Section 27.8(c) (Finance Costs during the Authority Delay Period);

"Record Drawings Deliverable" means an organized set of plans, details, specifications, calculations and related documentation that accurately represent what the Developer constructed, and the conditions encountered during construction, all as described in the Technical Requirements, including in Section 2.5.7, and includes RFC Documents, Design Changes and As-Built Drawings;

"Red River" or **"RRN"** means the Red River of the North and the river so named in Attachment 1-2 (*Project Configuration*) to the Technical Requirements;

"Red River Outlet" means the Diversion Outlet;

"Red River Structure" means the hydraulic control structure to be procured by USACE, as described in the FEIS;

"Redundancy Payment" means the payment of all wages earned, accrued unused vacation time, and any other payments required by Applicable Law or required by the employer's employment agreement with the employees;

"Refinancing" means:

- (a) any amendment, novation, supplement or replacement of any Finance Document;
- (b) the issuance by the Developer of any indebtedness in addition to the initial Project Debt, secured or unsecured;
- (c) the exercise of any right, or the grant of any waiver or consent, under any Finance Document;
- (d) the disposition of any rights or interests in, or the creation of any rights of participation with respect to, any Finance Document or the creation or granting of any other form of benefit or interest in either a Finance Document or the contracts, revenues or assets of the Developer whether by way of security or otherwise; or
- (e) any other arrangement put in place by the Developer or another Person which has an effect which is similar to any of clause (a) to (d) or which has the effect of limiting the Developer's or any Associated Company's ability to carry out any of clause (a) to (d);

"Refinancing Gain" means an amount equal to the greater of zero and $\{(A-B)-C\}$, where:

- A = the net present value using the Base Case Equity IRR as the discounting rate of the Distributions projected immediately prior to the Refinancing (taking into account the effect of the Refinancing (including any breakage costs of any prior Refinancing) and using the Base Case Financial Model as updated (including as to the performance of the Project up to the date of the Refinancing) so as to be current immediately prior to the Refinancing) to be made over the remaining term of this Agreement following the Refinancing;
- B = the net present value using the Base Case Equity IRR as the discounting rate of the Distributions projected immediately prior to the Refinancing (but without taking into account the effect of the Refinancing and using the Base Case Financial Model as updated (including as to the performance of the Project up to the date of the Refinancing) so as to be current immediately prior to the Refinancing) to be made over the remaining term of this Agreement following the Refinancing; and
- C = any adjustment required to raise the Pre-Refinancing Equity IRR to the Base Case Equity IRR (if the Pre-Refinancing Equity IRR is lower than the Base Case Equity IRR, the adjustment is calculated as the amount

that, if received by Equity Members at the estimated date of the Refinancing, would increase the Pre-Refinancing Equity IRR to be the same as the Base Case Equity IRR);

"Regulatory Events" mean the Design Flows set forth in Section 3.3.1.1.3 of the Technical Requirements;

"Reinstatement Outline" is defined in Section 35.11(b) (Reinstatement Work);

"Reinstatement Plan" is defined in Section 35.11(g) (Reinstatement Work);

"Reinstatement Work" is defined in Section 35.11(b) (Reinstatement Work);

"Related Entity" means each of Concessions Fargo Holdings, LLC, S&B USA Concessions – Fargo LP, and NACG Red River Holdings, LLC;

"Released for Construction Documents" or **"RFC Documents"** means all drawings, specifications, revisions thereto, and any other items necessary to construct the Work, Signed and Sealed by the Engineer of Record, which have been released for construction in accordance with Section 2.6.1 of the Technical Requirements;

"Relevant Dispute Review Board" is defined in Section 54.4(e)(i) (Dispute Review Board);

"Relevant Event" means any of the following:

- (a) an Authority Change for which the Authority has issued an Authority Change Order, and that results in a change to any Milestone Payments or Base MAPs;
- (b) a Developer Change that the Authority has approved by issuing a Developer Change Order, and that results in a change to any Milestone Payments or Base MAPs; or
- (c) a Compensation Event that results in a change to any Milestone Payments or Base MAPs;

"Relevant Insurance Amount" is defined in Section 36.2(a)(iv)(A) (Consequences of a Risk Becoming an Uninsurable Risk);

"Relevant Insurance Markets" means the insurance markets that insure the majority of civil engineering related projects in North America;

"Relied Upon Geotechnical Data" means:

- (a) the information included in the Disclosed Geotechnical Information that discloses the physical location (horizontal and vertical) of any subsurface investigation;
- (b) each laboratory test and each geotechnical field test result (including standard penetration tests, cone penetration tests, soil permeability tests, and piezometer water level readings) included in the Disclosed Geotechnical Information; and
- (c) each classification of soil type or soil stratification included in the soil boring logs in the Disclosed Geotechnical Information;

"Relief Event" means:

- (a) any Change in Law that is not a Qualifying Change in Law;
- (b) any Force Majeure Event;
- (c) any Non-Material Flood Event that occurs prior to the Project Substantial Completion Date;

- (d) any fire, explosion or earthquakes;
- (e) any tornado or named windstorm and ensuing storm surges;
- (f) any riot or civil commotion;
- (g) any blockade or embargo;
- (h) any:
 - (i) official or unofficial strike;
 - (ii) lockout;
 - (iii) go-slow; or
 - (iv) other labor dispute,generally affecting the construction industry or a significant sector of it;
- (j) any accidental loss or damage to the Project Site or any roads servicing them (including obstructed waterways); and
- (k) any delay in obtaining any Governmental Approval (other than any Authority-Provided Approval) to the extent that such delay is beyond the reasonable control of any Developer-Related Entity,

except, in each case, to the extent attributable to any breach of this Agreement, Applicable Law or any Governmental Approval by, or any negligent act or negligent omission of, a Developer-Related Entity;

"Remaining Work" means any Work that is not Preliminary Work;

"Remedial Action" means any remediation or removal of a Hazardous Environmental Condition that the Developer is responsible for pursuant to Article 12 (Hazardous Materials);

"Remedial Plan" is defined in Section 42.4(a) (Remedial Plan for Developer Default);

"Renewal Work" means all work related to the maintenance, repair, reconstruction, rehabilitation, restoration, renewal or replacement of any worn-out, obsolete, deficient, damaged or under-performing component of the Project (that is not Routine Maintenance) so that such component does not prematurely deteriorate and remains fully functional;

"Renewal Work Plan" means the plan described in Section 2.7.1 of the Technical Requirements;

"Renewal Work Schedule" means the schedule for the Renewal Work to be prepared and updated by the Developer pursuant to Section 2.2.6.9 of the Technical Requirements;

"Reporting Period" as defined in Exhibit 17 (Monthly Performance Reports);

"Request for Assistance" is defined in Section 11.7(c) (Failure by Utility Owner to Cooperate);

"Request for Information" or **"RFI"** means a request for clarification or amendment of a Released for Construction Document;

"Request for Proposals" or **"RFP"** is defined in the Recitals;

"Request for Qualifications" or "RFQ" is defined in the Recitals;

"Requested Information" is defined in Section 51.2(b) (North Dakota and Minnesota Open Records Laws);

"Required Action" is defined in Section 48.3(a)(i) (Required Action by the Authority);

"Requirement Failure" means each requirement failure listed in Attachment 4-1 (*Performance and Measurement Table*) of the Technical Requirements;

"Resilience Program" means the Authority's management and tracking approach to implementing the Institute for Sustainable Infrastructure (ISI) Envision framework on the Project;

"Resilience Program Plan" means the plan described in Section 3.14 of the Technical Requirements;

"Reserved Material" means material stockpiled or delivered by the Developer in accordance with Section 3.3.1.6.4 of the Technical Requirements for future use by the Authority or others;

"Response Time for Nonconformances" means the period of time allocated to remedy a Nonconformance, indicated under column "Response Time for Nonconformances" of Attachment 4-1 (*Performance and Measurement Table*) of the Technical Requirements;

"Restricted Change in Ownership" is defined in Section 53.1(b) (Restricted Change in Ownership);

"Reviewable Submittal" means any Submittal that is a Discretionary Submittal or R&C Submittal;

"River Inlets" means the Rush River Inlet and the Lower Rush River Inlet;

"Road Closure" means that a road is closed to through traffic;

"Road Crossings" means each of the road crossings identified as part of the Project in the Technical Requirements;

"Routine Maintenance" means work undertaken to preserve the current condition of assets, including any inspection, that is routine in nature and includes matters that are typically included as an annual or biannual recurring cost for maintenance of comparable assets to those forming part of the Project;

"RRVW" means Red River Valley and Western Railroad Company;

"RRVW Land" means the parcels identified at OIN 1236A and 1236B in Exhibit 4- 3a (Project ROW Non-Diversion Authority Parcels) of Exhibit 4 (Project Land);

"Rush River" means the river so named in Attachment 1-2 (*Project Configuration*) to the Technical Requirements;

"Rush River Inlet" means the Project Element associated with the Rush River within the Project ROW intended to convey water from the Project ROW limit to the LFC;

"Safety Compliance" means any and all improvements, repair, reconstruction, rehabilitation, restoration, renewal, replacement and changes in configuration or procedures with respect to the Project to correct a specific safety condition of the Project that the Authority or a Governmental Entity has reasonably determined to exist by investigation or analysis (including if the condition exists despite prior compliance with Safety Standards);

"Safety Compliance Order" a written order or directive from the Authority to the Developer to implement Safety Compliance;

"Safety Plan" means the plan described in Section 2.3.2 of the Technical Requirements;

"Safety Standards" means those provisions of the Technical Requirements that are measures to protect public safety or worker safety. Provisions of the Technical Requirements primarily directed at durability of materials or equipment, where the durability is primarily a matter of life cycle cost rather than protecting public or worker safety, are not Safety Standards;

"Schedule Activity" means the smallest division of the Work at each WBS level to be tracked in the PBS. Schedule Activities are activities critical in ensuring the timely completion of each Buildable Unit, Interim Completion Element, Project Substantial Completion, Renewal Work and Handback Requirements. Schedule Activities include quality assurance tasks, environmental tasks, fabrication of structural steel and precast and prestressed concrete structures, material and equipment procurement, Utility Adjustment Work, deliveries to the site or storage locations, maintenance of traffic tasks, vegetation procurement, planting and establishment, commissioning, rectification of Nonconforming Work;

"SBA" is defined in Exhibit 22 (Utility and Third Party MOUs);

"SBA Memorandum of Understanding" is defined in Exhibit 22 (Utility and Third Party MOUs);

"Scheduled Project Final Completion Date" means the date that is six (6) months after the Project Substantial Completion Date, as such date may be extended in accordance with this Agreement;

"Scheduled Project Substantial Completion Date" means the Original Scheduled Project Substantial Completion Date, as such date may be extended in accordance with this Agreement;

"Scope of Work Document" means the document described in Section 6.2.13.3 of the Technical Requirements;

"Second Handback Inspection" means the Handback Inspection described in Section 6.1.3.1 of the Technical Requirements;

"Section 401 Certification" means the certification dated October 20, 2016, as amended on August 11, 2020, granted by North Department of Health (now known as the North Dakota Department of Environmental Quality) under Section 401 of the Clean Water Act, as amended (33 U.S.C. 23 § 1151);

"Section 404 Permit" means the permit dated December 14, 2016, as amended on September 29, 2020, granted by the USACE under Section 404 of the Clean Water Act, as amended (33 U.S.C. 1344), which includes narrative descriptions, based upon information in the FEIS and Supplemental Environmental Assessments, which were used by the USACE to complete the Section 404 Permit assessment and identify permit conditions, including preliminary illustrations and dimensions of major facilities. These preliminary descriptions were used to develop "General Conditions" and "Special Conditions" included in the Section 404 Permit (related to compensatory mitigation, best management practices and construction conditions, wildlife resource protection conditions, and cultural resources protection conditions) to be applied to construction and operation of the final project description;

"Section 408 Approval" means an approval granted by USACE under Section 14 of the Rivers and Harbors Act of 1899, as amended (33 U.S.C. 408);

"Security Documents" means the documents listed in Section 2 (Security Documents) of Exhibit 23 (Finance Documents), together with any other document designated by the Parties (acting jointly) as a Security Document;

"Sedimentation, Erosion and Scour Report" means the report described in Section 3.5.2 of the Technical Requirements;

"Selection Date" is defined in the Recitals;

"Service Line" means (a) a Utility line, the function of which is to directly connect the improvements on an individual property to another Utility line located off such property, which other Utility line connects more than one such

individual line to a larger system or (b) any cable or conduit that supplies an active feed from a Utility Owner's facilities to activate or energize the Authority's or a local agency's lighting and electrical systems, traffic control systems, communications systems or irrigation systems;

"Setting Date" means February 24, 2021, being the date that is thirty (30) days before the Technical Proposal Date;

"Sheyenne River" means the river so named in Attachment 1-2 (*Project Configuration*) to the Technical Requirements;

"Sheyenne River Aqueduct" means the Project Element, including flumes, spillways and river channels within the Project ROW, that will convey the flow of the Sheyenne River across the Diversion Channel;

"Shoofly" means a temporary road or railroad track built to bypass a construction site;

"Shop Drawings and Samples" means shop drawings, laying drawings, erection drawings, fabrication drawings, product information, catalog information, samples, mock-ups, plans (e.g., traffic management and dewatering), test procedures and results, descriptions of services, descriptions of specific means and methods and related documentation prepared prior to the various aspects of the Project being conducted or incorporated into the Work, including any resubmittals;

"Sign and Seal" means the act of ensuring a document is Signed and Sealed;

"Signed and Sealed" means the signature and seal of a professional engineer licensed in North Dakota on a document indicating that the licensee takes professional responsibility for the work and, to the best of the licensee's knowledge and ability, the work represented in the document is accurate, in conformance with applicable codes at the time of submission and has been prepared in conformity with normal and customary standards of practice and with a view to the safeguarding of life, health, property and public welfare. The licensed professional engineer certifies that the documents have been signed and sealed in accordance with laws, rules and regulations of North Dakota;

"Southern Embankment and Associated Infrastructure" or **"SEAI"** means the southern embankment work and associated infrastructure described in the PPA and not part of the Project;

"Staging Area" means the area upstream of the SEAI, the Red River Control Structure, the Wild Rice River Structure, and the Diversion Inlet Structure that is available to temporarily store water during Project Operation;

"Standard & Poor's" means Standard & Poor's Ratings Services, a division of S&P Global;

"Standard Project Flood" or **"SPF"** means the flood for the Sheyenne River Basin labeled as the "SPF" in the H&H Model;

"State Historic Preservation Officer" or **"SHPO"** means the officer appointed by the Archaeology and Historic Preservation Division of the State Historical Society of North Dakota to identify and protect historic properties;

"States" means North Dakota and Minnesota;

"Stormwater Pollution Prevention Plan" or **"SWPPP"** means the plan described in Section 3.8.2.3 of the Technical Requirements;

"Subcontractor Breakage Costs" means Losses that have been or will be reasonably and properly incurred by the Developer under a Key Contract as a direct result of the termination of this Agreement (and which will not include lost profit or lost opportunity), but only to the extent that:

- (a) the Losses are incurred in connection with the Project and with respect to the Work required to be provided or carried out, including:

- (i) any materials or goods ordered or subcontracts placed that cannot be cancelled without such Losses being incurred;
 - (ii) any expenditure incurred in anticipation of the provision of services or the completion of Work in the future; and
 - (iii) the cost of demobilization including the cost of any relocation of equipment used in connection with the Project;
- (b) the Losses are incurred under arrangements or agreements that are consistent with terms that have been entered into in the ordinary course of business and on an arm's length basis; and
- (c) the Developer and the relevant Key Contractor have each used their Reasonable Efforts to mitigate such Losses;

"Submittal" means any document, work product or other written or electronic product or item required under the Technical Requirements to be delivered or submitted to the Authority or an AHJ for approval, review, comment or otherwise;

"Substantial Completion Milestone Payment" means the payment to be made to the Developer in accordance with Section 23.2 (Substantial Completion Milestone Payment) and Exhibit 14 (Milestone Payments);

"Successful Proposer" is defined in the Recitals;

"Supplemental Environmental Assessment" means either of:

- (a) the Supplemental Environmental Assessment, Fargo-Moorhead Metropolitan Area Flood Risk Management Project, dated September 2013, and approved by the U.S. Army Engineer, St. Paul, on September 19, 2013; or
- (b) the Final Supplemental Environmental Assessment #2, Fargo-Moorhead Metropolitan Area Flood Risk Management Project, dated February 2019, and approved by the District Engineer, St. Paul District on February 28, 2019;

"Supplier" means any Person not performing work at or on a Project Site which supplies machinery, equipment, materials, hardware, software, systems or any other appurtenance to the Project to the Developer or to any Contractor in connection with the performance of the Work. Persons who merely transport, pick up, deliver or carry materials, personnel, parts or equipment or any other items or Persons to or from a Project Site will not be deemed to be performing Work at such Project Site;

"TCE Expiry Date" means the date that is indicated in the column entitled "TCE Expiry Date" in Exhibit 4-4a (Temporary Construction Easements) of Exhibit 4 (Project Land) for each respective Temporary Construction Easement, as may be extended in accordance with Section 8.4 (Temporary Construction Easements);

"Technical Advisory Group" means the group of Persons described in Section 2.10.2 of the Technical Requirements;

"Technical Dispute" is defined in Section 54.4(b)(i) (Dispute Review Board);

"Technical Dispute Review Board" means the Dispute Review Board for Technical Disputes;

"Technical Proposal Date" means March 24, 2021;

"Technical Requirements" means the Technical Requirements set out in Exhibit 5 (Technical Requirements);

"Temporary Construction Easement" or "TCE" is defined in Section 8.4(a) (Temporary Construction Easements);

"**Temporary P3 Improvement Warrants**" are the temporary warrants to be issued by the CCIWRD in the form attached as Part 2 (Temporary P3 Improvement Warrants) of Exhibit 7 (Master Indenture of Trust and P3 Improvement Warrants);

"**Term**" is defined in Section 2.1 (Term);

"**Termination by Court Ruling**" is defined in Section 45.1 (Termination by Court Ruling);

"**Termination Date**" means:

- (a) the Expiry Date; or
- (b) if applicable, the Early Termination Date;

"**Termination Notice**" means any termination notice delivered under the terms of this Agreement, including an Authority Termination Notice and Developer Termination Notice;

"**Termination Sum**" means the Authority Default Termination Sum, the Developer Default (D&C Period) Termination Sum, the Developer Default (Operating Period) Termination Sum or the No Fault Termination Sum (each as defined in Exhibit 20 (Compensation on Termination));

"**Terrorism**" means activities against Persons or property of any nature that satisfy the following three requirements:

- (a) such activities involve the following or preparation for the following:
 - (i) use or threat of force or violence; or
 - (ii) commission or threat of an act that interferes with or disrupts an electronic, communication, information or mechanical system;
- (b) one or both of the following applies:
 - (i) it appears that the intent is to intimidate or coerce the Authority, a Governmental Entity or the civilian population or any segment of the civilian population, or to disrupt any segment of the economy; or
 - (ii) it appears that the intent is to intimidate or coerce the Authority or a Governmental Entity, or to further political, ideological, religious, social or economic objectives or to express (or express opposition to) a philosophy or ideology;
- (c) such activities are criminally defined as terrorism for purposes of North Dakota, federal or international Applicable Law;

"**Test Excavation Instrumentation Plan**" means the plan described in Section 3.4.3.13 of the Technical Requirements;

"**Third Party**" means each counterparty to the Authority under a Third Party MOU;

"**Third Party Claims**" means any and all claims, disputes, disagreements, causes of action, demands, suits, actions, investigations or administrative proceedings brought by a Person that is not an Indemnified Party or the Developer with respect to damages, injuries, liabilities, obligations, losses, costs, penalties, fines or expenses (including attorneys' fees and expenses) sustained or incurred by such Person;

"**Third Party Completion Acceptance**" means agreement by the Developer and the AHJ that the Developer has completed the required scope of work in accordance with the approved Final Design and approved changes during construction for an Interim Completion Element;

"**Third Party Delay Notice**" is defined in Section 11.7(b) (*Failure by Utility Owner or Third Party to Cooperate*);

"**Third Party MOU**" means each numbered memorandum of understanding, agreement, permit, license, or other document listed in Part 2 of Exhibit 22 (Utility and Third Party MOUs) subject to Section 11.11 (BNSF Preliminary Activities Memorandum of Understanding);

"**Third Party Work**" means all efforts and costs necessary to accomplish the Work required under the Third Party MOU, including all coordination, design, design review, permitting, construction, inspection and maintenance of records, whether provided by the Developer or by the applicable Third Party;

"**Time Impact Analysis**" or "**TIA**" means a time impact analysis prepared in accordance with Section 2.2.6.7 of the Technical Requirements and based on the Project Baseline Schedule most recently agreed pursuant to Section 2 (*Project Administrative and Management Requirements*) of the Technical Requirements;

"**Total Float**" means the amount of time that an activity in a Project Schedule can be delayed from its early start without causing delay to a Project Milestone;

"**Township**" means each of Wiser Township, North Dakota; Harwood Township, North Dakota; Berlin Township, North Dakota; Raymond Township, North Dakota; Mapleton Township, North Dakota; Warren Township, North Dakota; Stanley Township, North Dakota; Pleasant Township, North Dakota; and Barnes Township, North Dakota;

"**Township ROW**" means land for which a Township is the AHJ;

"**Traffic Incident Management Plan**" means the plan to respond to a non-recurring event along a road or travelled way per the National Incident Management System practices;

"**Traffic Management Plan**" or "**TMP**" means the plan described in Section 3.7.2 and Section 4.4.3.21.2 of the Technical Requirements;

"**Transition Plan**" means the plan described in Section 6.1.2 of the Technical Requirements;

"**Tribunal**" means a court, tribunal, agency, special district, commission or other authority exercising judicial or regulatory functions;

"**Unavailable Term**" is defined in Section 36.3(a) (Unavailability of Insurance Terms);

"**Undisclosed Access Restriction**" means any restriction on Access to the Project Site as a result of:

- (a) the statutory rights of Governmental Entities and Utility Owners to have access to such part of the Project Site;
- (b) restrictions of use in easement deeds or right of entry permits of record applicable to any Third Party MOU or Governmental Approval;
- (c) restrictions, easements and rights-of-way of record; or
- (d) restrictions in the deed or easement granted to the Authority or an Authority Member,

in each case which, as of the Setting Date, were neither:

- (i) known to the Developer; nor
- (ii) reasonably capable of being identified or discovered by an appropriately qualified and experienced contractor or engineer exercising due care and skill and Good Industry Practice based on the Disclosed Information, any publicly available information that may have been accessed without breaching the ITP and any access to the Project Site granted prior to the Setting Date;

"Undisclosed Archaeological Remains" means any Archaeological Remains that, as of the Setting Date, were neither:

- (a) known to the Developer; nor
- (b) reasonably capable of being identified by an appropriately qualified and experienced contractor or engineer exercising due care and skill and Good Industry Practice, including through review and analysis of the Disclosed Information, any publicly available information (including the FEIS or Programmatic Agreement) that may have been accessed without breaching the ITP and any access to the Project Site granted prior to the Setting Date;

"Undisclosed Endangered Species" means any Endangered Species discovered at the Project Site, the temporary, continual or habitual presence of which, as of the Setting Date, was neither:

- (a) known to the Developer; nor
- (b) reasonably expected to be found temporarily, continually or habitually at the Project Site based on review and analysis of the Disclosed Information, any publicly available information (including the FEIS) that may have been accessed without breaching the ITP and any access to the Project Site granted prior to the Setting Date;

"Undisclosed Hazardous Environmental Condition" means any Hazardous Environmental Condition that existed on any part of the Project Site prior to the date on which the Authority provided Access to such part of the Project Site to the Developer, excluding any Hazardous Environmental Condition, that could reasonably have been identified or discovered prior to the Setting Date by an appropriately qualified and experienced contractor or engineer exercising due care and skill and Good Industry Practice based on the Disclosed Information, any publicly available information that may have been accessed without breaching the ITP and any access to the Project Site granted prior to the Setting Date;

"Undisclosed Utility" means any Utility present on the Project Site that was not identified or was materially incorrectly shown, identified or described in the Disclosed Information, in each case excluding any Utility that:

- (a) was installed on a part of the Project Site after right of entry was granted to the Developer in relation to the relevant part of the Project Site in accordance with the terms of this Agreement; or
- (b) is a Service Line; or
- (c) could reasonably have been identified or discovered prior to the Setting Date by an appropriately qualified and experienced contractor or engineer exercising due care and skill and Good Industry Practice, including through review and analysis of the Disclosed Information, any publicly available information that may have been accessed without breaching the ITP and any access to the Project Site granted prior to the Setting Date;

"Uninsurable Risk" means a risk for which:

- (a) insurance is not available to the Developer with respect to the Project in the worldwide insurance or reinsurance markets on the terms required in this Agreement with reputable insurers of good standing; or
- (b) the insurance premium payable for insuring that risk on the terms required in this Agreement is at such level that the risk is not generally being insured against in the worldwide insurance or reinsurance markets with reputable insurers of good standing by contractors in relation to comparable infrastructure projects in North America;

"Unprotected Area" means the area generally to the West of the Diversion Channel ROW set forth on Attachment 1-1 (*Protected Area and Unprotected Area*) to the Technical Requirements;

"Unprotected Side" means the left side of the Diversion Channel bounded by the centerline of the Diversion Channel Line of Protection;

"**USACE**" means the United States Army Corps of Engineers;

"**USACE Step-in**" is defined in Section 48.1(b) (USACE Step-in);

"**USDOT**" means the U.S. Department of Transportation;

"**Useful Life**" means, for all or part of a Project Element, the period following its first installation, or following its last reconstruction, rehabilitation, restoration, renewal or replacement, until the Project Element will next require reconstruction, rehabilitation, restoration, renewal or replacement;

"**Utility**" means a privately, publicly, or cooperatively owned line, facility, or system for transmitting or distributing communications, power, electricity, light, heat, gas, oil, crude products, water, steam, waste, a combined stormwater and sanitary system, or other similar commodities, including wireless telecommunications, television transmission signals and publicly owned fire and police signal systems, which directly or indirectly serve the public. The term Utility excludes (a) streetlights and traffic signals and (b) ITS (intelligent transportation systems) and IVHS (intelligent vehicle highway systems) facilities. The necessary appurtenances to each Utility facility will be considered part of such Utility. Without limitation, any Service Line connecting directly to a Utility will be considered an appurtenance to that Utility, regardless of the ownership of such Service Line;

"**Utility Adjustment**" means each relocation (temporary or permanent), abandonment, Protection in Place, removal (of previously abandoned Utilities as well as of newly abandoned Utilities), replacement, reinstallation, or modification of existing Utilities necessary to accommodate construction, operation, maintenance or use of the Project or the Work. The term Utility Adjustment will not refer to any of the work associated with facilities owned by any railroad. The Utility Adjustment Work for each crossing of the Project ROW by a Utility that crosses the Project ROW more than once will be considered a separate Utility Adjustment. For any Utility installed longitudinally within the Project ROW, the Utility Adjustment Work for each continuous segment of that Utility located within the Project ROW will be considered a separate Utility Adjustment;

"**Utility Adjustment Work**" means all efforts and costs necessary to accomplish the required Utility Adjustments during the D&C Period, including all coordination, design, design review, permitting, construction, inspection and maintenance of records, whether provided by the Developer or by the Utility Owners;

"**Utility Completion Acceptance**" means agreement by the Developer and the Utility Owner that the Developer has completed the required scope of work in accordance with the approved Final Design and approved changes during construction for a Buildable Unit pertaining to Utility Adjustment Work.

"**Utility Delay Notice**" is defined in Section 11.7(b) (Failure by Utility Owner to Cooperate);

"**Utility MOU**" means each Memorandum of Understanding listed in Part 1 of Exhibit 22 (Utility and Third Party MOUs);

"**Utility Owner**" means the owner or operator of any Utility (including both privately held and publicly held entities, cooperative Utilities, and municipalities and other governmental agencies);

"**Utility ROW**" means land for which a Utility Owner is the AHJ;

"**Utility Supplemental Plan**" means a plan submitted in accordance with Section 3.3.4.1 of the Technical Requirements;

"**Vegetation Free Zone**" or "**VFZ**" means the zone described in Section 3.3.1.7.2 of the Technical Requirements;

"**Vegetation Management Plan**" or "**VMP**" means the plan described in Section 3.3.1.7.1 of the Technical Requirements;

"**Vegetation Zone**" or "**VZ**" means the zone described in Section 3.3.1.7.2 of the Technical Requirements, Attachment 3-8 (*Vegetation Zones*) and Attachment 3-20 (*Vegetation Zone Species*);

"Waste Management Plan" means the plan described in Sections 2.11.10.1.4 and 2.11.11.1.2 of the Technical Requirements;

"Water Diversion Event" means both of the following have occurred:

- (a) the Wild Rice River Structure and the Red River Structure have been operated to restrict the natural flow of those rivers; and
- (b) in connection with the circumstances described in clause (a) of this definition, water has been subsequently released or allowed to flow through the Diversion Inlet Structure, such that the Measured Flow has exceeded 5,000 cfs;

"Weekly Construction Progress Report" means the report described in Section 2.2.4.3 of the Technical Requirements;

"WIFIA" means the Water Infrastructure Finance and Innovation Act of 2014 (33 U.S.C. §3901 et seq.);

"WIFIA Loan" means the loan made to the Authority to finance the SWDCAI under the federal credit program administered by the EPA to accelerate investment in water infrastructure pursuant to WIFIA;

"Wild Rice River Structure" means the hydraulic control structure to be procured by USACE, as described in the FEIS;

"Witness Point" means an identified point in a process where the appropriate Person may review, witness or inspect the method or process of ongoing work;

"Work" means the Design Work, Construction Work, O&M Work and all other work, services and obligations required to be furnished, performed and provided by the Developer under this Agreement;

"Work Breakdown Structure" or "WBS" means the work breakdown structure described in Attachment 2-2 (*Work Breakdown Structure*) the Technical Requirements;

"Work Limits" means collectively, the Project ROW, each Temporary Construction Easement prior to the applicable TCE Expiry Date, and each easement or right of way to the extent allowed by the relevant Third Party MOU or Utility MOU and set forth in Attachment 3-25 (*Utility And Agency Having Jurisdiction Roles & Responsibilities*);

"Work Plan" means a method statement setting forth the processes and procedures that the Developer will employ to perform a particular Work package;

"Work Zone Traffic Control Plan" means the plan described in Section 3.7.2.1 and Section 4.4.3.21.3 of the Technical Requirements;

"Worksite Traffic Supervisor" means the Person responsible for supervising the implementation of the Traffic Management Plan;

"WRRDA" means the Water Resources Reform and Development Act of 2014, Public Law 113-121, as amended.

EXHIBITS 2-32 CONTENTS

EXHIBIT 2.	DEVELOPER OWNERSHIP
EXHIBIT 3.	INITIAL DESIGNATION OF AUTHORIZED REPRESENTATIVES
EXHIBIT 4.	PROJECT LAND
EXHIBIT 5	TECHNICAL REQUIREMENTS
EXHIBIT 6.	DEVELOPER PROPOSAL
EXHIBIT 7.	MASTER INDENTURE OF TRUST AND P3 IMPROVEMENT WARRANTS
EXHIBIT 8.	CERTIFICATION REGARDING USE OF CONTRACT FUNDS FOR LOBBYING
EXHIBIT 9.	REQUIRED INSURANCE
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EXHIBIT 11.	CONDITIONS PRECEDENT TO NOTICES TO PROCEED
EXHIBIT 12.	CONSTRUCTION COMPLETION CONDITIONS
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EXHIBIT 20.	COMPENSATION ON TERMINATION
EXHIBIT 21.	DISPUTE REVIEW BOARD
EXHIBIT 22.	UTILITY AND THIRD PARTY MOUS
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EXHIBIT 2

DEVELOPER OWNERSHIP



Fargo Organizational Chart

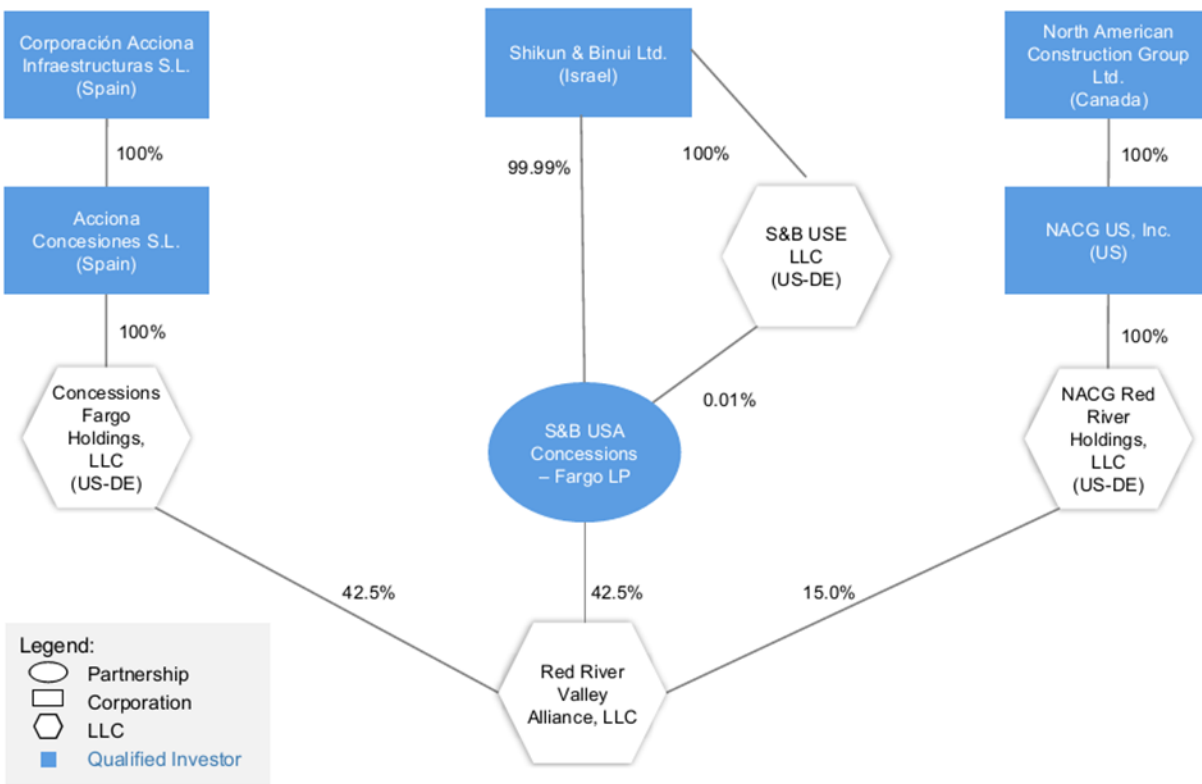


EXHIBIT 3

INITIAL DESIGNATION OF AUTHORIZED REPRESENTATIVES

1. **Authority Representative**

Kris Bakkegard, Director of Engineering

2. **Developer Representative**

Esther Madrigal Díez, Project Manager

EXHIBIT 4

PROJECT LAND

This Exhibit 4 (*Project Land*) consists of the Exhibit 4 (*Project Land*) transmitted by the Authority to the Developer via Aconex (Mail Number FMDA-TRN-000336) at 12:59:59 PM CDT on August 18, 2021 and assigned Aconex Document Nos. MFDA-PO-AGR-0007, MFDA-PO-AGR-0008 , MFDA-PO-AGR-0009 , MFDA-PO-AGR-0010 , MFDA-PO-AGR-0011 and MFDA-PO-AGR-0012 evidenced by the below screenshot.

FARGO-MOORHEAD AREA DIVERSION PROJECT

8/18/2021

Aconex

Kris Bakkegard
DIVERSION AUTHORITY

Transmittal of execution version of Exhibit 4 (Project Land) to Project...
TRANSMITTAL FMDA-TRN-000336

Esther Madrigal Díez
RED RIVER VALLEY ALLIANCE

Re: Transmittal of execution version of Exhibit 4 (Project Land) to Pro...
GENERAL CORRESPONDENCE RRVA_LLC-GNC-000003



MAIL TYPE
Transmittal

MAIL NUMBER
FMDA-TRN-000336

REFERENCE NUMBER
FMDA-TRN-000336

Transmittal of execution version of Exhibit 4 (Project Land) to Project Agreement

From Kris Bakkegard - Diversion Authority

To Ms Esther Madrigal Díez - Red River Valley Alliance

Cc (11) Mr Julio Marcos - Acciona / Infrared (+10 more...)

Sent Wednesday, August 18, 2021 12:59:59 PM CDT (GMT -05:00)

Reason Issued for Information

Acknowledge by 8/18/21

Status **Responded**

DOCUMENT ATTACHMENTS (6)

(0 selected)

File	Document No	Revision	Revision Date	Title	Status
	MFDA-PO-AGR-0007	0	8/13/21	PA Volume 6 Exhibit 4	Final
	MFDA-PO-AGR-0008	0	8/13/21	PA Volume 6 Exhibit 4 - 4-1b zip file	Final
	MFDA-PO-AGR-0009	0	8/13/21	PA Volume 6 Exhibit 4 - Attachment 3-14 dwg file	Final
	MFDA-PO-AGR-0010	0	8/13/21	PA Volume 6 Exhibit 4 - Attachment 3-14 zip file	Final
	MFDA-PO-AGR-0011	0	8/13/21	PA Volume 6 Exhibit 4 - Attachment 3-30 dwg file	Final
	MFDA-PO-AGR-0012	0	8/13/21	PA Volume 6 Exhibit 4 - Attachment 3-30 zip file	Final

MESSAGE

This transmittal encloses the execution version of Exhibit 4 (Project Land) to the Project Agreement for the Fargo-Moorhead Metropolitan Area Flood Risk Management Project - Diversion Channel And Associated Infrastructure between the Metro Flood Diversion Authority and Red River Valley Alliance, LLC.

Please confirm receipt and that it is the agreed form.

https://us1.aconex.com/Logon?mainTarget=%2FViewCorrespondence%3FCorrespondence_ID%3D1228094453%26CORRESPONDENCE_MAILBO... 1/1

EXHIBIT 5

TECHNICAL REQUIREMENTS

This Exhibit 5 (*Technical Requirements*) consists of the Exhibit 5 (*Technical Requirements*) transmitted by the Authority to the Developer via Aconex (Mail Number FMDA-TRN-000343) at 5:07:05 PM CDT on August 19, 2021 and assigned Aconex Document Nos. MFDA-PO-AGR-0013, MFDA-PO-AGR-0017 and MFDA-PO-AGR-0025 evidenced by the below screenshot.

FARGO-MOORHEAD AREA DIVERSION PROJECT

8/19/2021

Aconex

Kris Bakkegard
DIVERSION AUTHORITY

Transmittal of execution version of Exhibit 5 (Technical Requirements...
TRANSMITTAL

5:07 PM
FMDA-TRN-000343

Esther Madrigal Diez
RED RIVER VALLEY ALLIANCE

Re: Transmittal of execution version of Exhibit 5 (Technical Requirem...
GENERAL CORRESPONDENCE

5:12 PM
RRVA_LLC-GNC-000005



MAIL TYPE
Transmittal

MAIL NUMBER
FMDA-TRN-000343

REFERENCE NUMBER
FMDA-TRN-000343

Transmittal of execution version of Exhibit 5 (Technical Requirements) to Project Agreement

From Kris Bakkegard - Diversion Authority

To Ms Esther Madrigal Diez - Red River Valley Alliance

Cc (11) Mr Julio Marcos - Acciona / Infrared (+10 more...)




Sent Thursday, August 19, 2021 5:07:05 PM CDT (GMT -05:00)

Reason Issued for Information

Acknowledge by 8/19/21

Status **Responded**

DOCUMENT ATTACHMENTS (3)

(0 selected)					
File	Document No	Revision	Revision Date	Title	Status
	MFDA-PO-AGR-0013	0	8/13/21	PA Volume 3 - Exhibit 5 Technical Requirements	Final
	MFDA-PO-AGR-0017	0	8/15/21	PA Volume 4 - Exhibit 5 Technical Requirements Attachments	Final
	MFDA-PO-AGR-0025	0	8/19/21	PA_Volume_5_Attachment 3-25_Appendix A&B_Execution_Version	Final

MESSAGE

This transmittal encloses the execution version of Exhibit 5 (Technical Requirements) to the Project Agreement for the Fargo-Moorhead Metropolitan Area Flood Risk Management Project - Diversion Channel And Associated Infrastructure between the Metro Flood Diversion Authority and Red River Valley Alliance, LLC.

Please confirm receipt and that it is the agreed form.

https://us1.aconex.com/Login?mainTarget=%2FViewCorrespondence%3FCorrespondence_ID%3D1228112592%26CORRESPONDENCE_MAILBOX... 1/1

EXHIBIT 6

DEVELOPER PROPOSAL

This Exhibit 6 (*Developer Proposal*) consists of the Exhibit 6 (*Developer Proposal*) transmitted by the Authority to the Developer via Aconex (Mail Number FMDA-TRN-000337) at 1:02:58 PM CDT on August 18, 2021 and assigned Aconex Document Nos. MDFA-PO-AGR-0015 and MDFA-PO-AGR-0016 evidenced by the below screenshot.

FARGO-MOORHEAD AREA DIVERSION PROJECT

8/18/2021

Aconex

Kris Bakkegard
DIVERSION AUTHORITY

Transmittal of execution version of Exhibit 6 (Developer Proposal) to ...
TRANSMITTAL

1:02 PM
FMDA-TRN-000337

Esther Madrigal Díez
RED RIVER VALLEY ALLIANCE

Re: Transmittal of execution version of Exhibit 6 (Developer Proposal) ...
GENERAL CORRESPONDENCE

1:13 PM
RRVA_LLC-GNC-000004



MAIL TYPE
Transmittal

MAIL NUMBER
FMDA-TRN-000337

REFERENCE NUMBER
FMDA-TRN-000337

Transmittal of execution version of Exhibit 6 (Developer Proposal) to Project Agreement

From Kris Bakkegard - Diversion Authority

To Ms Esther Madrigal Díez - Red River Valley Alliance

Cc (11) Mr Julio Marcos - Acciona / Infrared (+10 more...)

Sent Wednesday, August 18, 2021 1:02:58 PM CDT (GMT -05:00)

Reason Issued for Information

Acknowledge by 8/18/21

Status **Responded**

DOCUMENT ATTACHMENTS (2)

(0 selected)					
File	Document No	Revision	Revision Date	Title	Status
	MFDA-PO-AGR-0015	0	8/13/21	PA Exhibit 6 - RRVA Technical Proposal exc AppxO	Final
	MFDA-PO-AGR-0016	0	8/13/21	PA Exhibit 6 - RRVA Technical Proposal exc AppxO	Final

MESSAGE

This transmittal encloses the execution version of Exhibit 6 (Developer Proposal) to the Project Agreement for the Fargo-Moorhead Metropolitan Area Flood Risk Management Project - Diversion Channel And Associated Infrastructure between the Metro Flood Diversion Authority and Red River Valley Alliance, LLC.

Please confirm receipt and that it is the agreed form.

https://us1.aconex.com/Login?mainTarget=%2FViewCorrespondence%3FCorrespondence_ID%3D1228094453%26CORRESPONDENCE_MAILBO... 1/1

EXHIBIT 7

MASTER INDENTURE OF TRUST AND P3 IMPROVEMENT WARRANTS

PART 1 – MASTER INDENTURE OF TRUST

This Exhibit 7, Part 1 (*Master Indenture of Trust*) consists of the Exhibit 7, Part 1 (*Master Indenture of Trust*) transmitted by the Authority to the Developer via Aconex (Mail Number FMDA-TRN-000334) at 10:50:13 AM CDT on August 18, 2021 and assigned Aconex Document No. MDFA-GN-AGR-0001 evidenced by the below screenshot.

FARGO-MOORHEAD AREA DIVERSION PROJECT

8/18/2021

Aconex

Kris Bakkegard
DIVERSION AUTHORITY

Transmittal of execution version of Exhibit 7 (Master Indenture of Tru...
TRANSMITTAL 10:50 AM
FMDA-TRN-000334

Esther Madrigal Díez
RED RIVER VALLEY ALLIANCE

Re: Transmittal of execution version of Exhibit 7 (Master Indenture of...
GENERAL CORRESPONDENCE 10:58 AM
RRVA_LLC-GNC-000001



MAIL TYPE
Transmittal

MAIL NUMBER
FMDA-TRN-000334

REFERENCE NUMBER
FMDA-TRN-000334

Transmittal of execution version of Exhibit 7 (Master Indenture of Trust and P3 Improvement Warrants) to Project Agreement

From Kris Bakkegard - Diversion Authority

To Ms Esther Madrigal Díez - Red River Valley Alliance

Cc (11) Mr Julio Marcos - Acciona / Infrared (+10 more...)




Sent Wednesday, August 18, 2021 10:50:13 AM CDT (GMT-05:00)

Reason Issued for Information

Acknowledge by 8/18/21

Status Responded

DOCUMENT ATTACHMENTS (3)

(0 selected)						
File	Document No	Revision	Revision Date	Title	Status	
	MFDA-GN-AGR-0001	1	8/10/21	Exhibit 7, Part 1 - Master Indenture of Trust	Final	
	MFDA-GN-AGR-0002	1	8/10/21	Exhibit 7, Part 2 - Temporary P3 Improvement Warrants	Final	
	MFDA-GN-AGR-0003	1	8/10/21	Exhibit 7, Part 3 - Definitive P3 Improvement Warrants	Final	

MESSAGE

This transmittal encloses the execution version of Exhibit 7 (*Master Indenture of Trust and P3 Improvement Warrants*) to the Project Agreement for the Fargo-Moorhead Metropolitan Area Flood Risk Management Project - Diversion Channel And Associated Infrastructure between the Metro Flood Diversion Authority and Red River Valley Alliance, LLC.

Please confirm receipt and that it is the agreed form.

https://us1.aconex.com/Logon?mainTarget=%2FViewCorrespondence%3FCorrespondence_ID%3D1228094453%26CORRESPONDENCE_MAILBO... 1/1

PART 2 – TEMPORARY P3 IMPROVEMENT WARRANTS

This Exhibit 7, Part 2 (*Temporary P3 Improvement Warrants*) consists of the Exhibit 7, Part 2 (*Temporary P3 Improvement Warrants*) transmitted by the Authority to the Developer via Aconex (Mail Number FMDA-TRN-000334) at 10:50:13 AM CDT on August 18, 2021 and assigned Aconex Document No. MDFA-GN-AGR-0002 evidenced by the below screenshot.

FARGO-MOORHEAD AREA DIVERSION PROJECT

8/18/2021

Aconex

Kris Bakkegard
DIVERSION AUTHORITY

Transmittal of execution version of Exhibit 7 (Master Indenture of Tru...
TRANSMITTAL

10:50 AM
FMDA-TRN-000334

Esther Madrigal Diez
RED RIVER VALLEY ALLIANCE

Re: Transmittal of execution version of Exhibit 7 (Master Indenture of...
GENERAL CORRESPONDENCE

10:58 AM
RRVA_LLC-GNC-000001



MAIL TYPE
Transmittal

MAIL NUMBER
FMDA-TRN-000334

REFERENCE NUMBER
FMDA-TRN-000334

Transmittal of execution version of Exhibit 7 (Master Indenture of Trust and P3 Improvement Warrants) to Project Agreement

From Kris Bakkegard - Diversion Authority

To Ms Esther Madrigal Diez - Red River Valley Alliance

Cc (11) Mr Julio Marcos - Acciona / Infrared (+10 more...)

Sent Wednesday, August 18, 2021 10:50:13 AM CDT (GMT-05:00)




Reason Issued for Information

Acknowledge by 8/18/21

Status Responded

DOCUMENT ATTACHMENTS (3)

(0 selected)

File	Document No	Revision	Revision Date	Title	Status
	MFDA-GN-AGR-0001	1	8/10/21	Exhibit 7, Part 1 - Master Indenture of Trust	Final
	MFDA-GN-AGR-0002	1	8/10/21	Exhibit 7, Part 2 - Temporary P3 Improvement Warrants	Final
	MFDA-GN-AGR-0003	1	8/10/21	Exhibit 7, Part 3 - Definitive P3 Improvement Warrants	Final

MESSAGE

This transmittal encloses the execution version of Exhibit 7 (*Master Indenture of Trust and P3 Improvement Warrants*) to the Project Agreement for the Fargo-Moorhead Metropolitan Area Flood Risk Management Project - Diversion Channel And Associated Infrastructure between the Metro Flood Diversion Authority and Red River Valley Alliance, LLC.

Please confirm receipt and that it is the agreed form.

https://us1.aconex.com/Logon?mainTarget=%2FViewCorrespondence%3FCorrespondence_ID%3D1228094453%26CORRESPONDENCE_MAILBO... 1/1

PART 3 – DEFINITIVE P3 IMPROVEMENT WARRANTS

This Exhibit 7, Part 3 (*Definitive P3 Improvement Warrants*) consists of the Exhibit 7, Part 3 (*Definitive P3 Improvement Warrants*) transmitted by the Authority to the Developer via Aconex (Mail Number FMDA-TRN-000334) at 10:50:13 AM CDT on August 18, 2021 and assigned Aconex Document No. MDFA-GN-AGR-0003 evidenced by the below screenshot.

FARGO-MOORHEAD AREA DIVERSION PROJECT

8/18/2021

Aconex

Kris Bakkegard
DIVERSION AUTHORITY

Transmittal of execution version of Exhibit 7 (Master Indenture of Tru...
TRANSMITTAL

10:50 AM
FMDA-TRN-000334

Esther Madrigal Diez
RED RIVER VALLEY ALLIANCE

Re: Transmittal of execution version of Exhibit 7 (Master Indenture of...
GENERAL CORRESPONDENCE

10:58 AM
RRVA_LLC-GNC-000001



MAIL TYPE
Transmittal




MAIL NUMBER
FMDA-TRN-000334

REFERENCE NUMBER
FMDA-TRN-000334

Transmittal of execution version of Exhibit 7 (Master Indenture of Trust and P3 Improvement Warrants) to Project Agreement

From: Kris Bakkegard - Diversion Authority
To: Ms Esther Madrigal Diez - Red River Valley Alliance
Cc (11): Mr Julio Marcos - Acciona / Infrared (+10 more...)
Sent: Wednesday, August 18, 2021 10:50:13 AM CDT (GMT-05:00)
Reason: Issued for Information
Acknowledge by: 8/18/21
Status: Responded

DOCUMENT ATTACHMENTS (3)

(0 selected)						
File	Document No	Revision	Revision Date	Title	Status	
	MFDA-GN-AGR-0001	1	8/10/21	Exhibit 7, Part 1 - Master Indenture of Trust	Final	
	MFDA-GN-AGR-0002	1	8/10/21	Exhibit 7, Part 2 - Temporary P3 Improvement Warrants	Final	
	MFDA-GN-AGR-0003	1	8/10/21	Exhibit 7, Part 3 - Definitive P3 Improvement Warrants	Final	

MESSAGE

This transmittal encloses the execution version of Exhibit 7 (*Master Indenture of Trust and P3 Improvement Warrants*) to the Project Agreement for the Fargo-Moorhead Metropolitan Area Flood Risk Management Project - Diversion Channel And Associated Infrastructure between the Metro Flood Diversion Authority and Red River Valley Alliance, LLC.
Please confirm receipt and that it is the agreed form.

https://us1.aconex.com/Logon?mainTarget=%2FViewCorrespondence%3FCorrespondence_ID%3D1228094453%26CORRESPONDENCE_MAILBO... 1/1

EXHIBIT 8

CERTIFICATION REGARDING USE OF CONTRACT FUNDS FOR LOBBYING

The undersigned certifies, on behalf of the *[insert name of Developer/relevant Key Contractor/D&C Contractor Member/Equity Member]*, to the best of his or her knowledge and belief that:

- (1) No federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any federal contract, the making of any federal grant, the making of any federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any federal contract, grant, loan, or cooperative agreement.
- (2) If any funds other than federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.
- (3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers that exceed \$100,000 (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by 31 U.S.C. 1352. Any person who fails to file the required certification will be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

Name:

Title:

Entity Making Certification:

Date:

EXHIBIT 9

REQUIRED INSURANCE

1. D&C PERIOD INSURANCE PROGRAM

1.1 Builders' Risk

At all times from the issuance of NTP2 until Project Substantial Completion, the Developer shall procure and maintain, or cause the D&C Contractor to procure and maintain, builders' risk insurance that satisfies the following:

Builder's Risk			
Minimum Limits	Maximum Deductibles	Principal Exclusions	Principal Cover
<ul style="list-style-type: none"> \$300,000,000 loss limit to include Flood, Earth Movement and Terrorism coverage as provided by the Terrorism Risk Insurance Act (TRIA), or Lesser limits may be considered based on (i) an acceptable insurable assets listing, or (ii) an approved probable maximum loss study. <p>Sublimits:</p> <ul style="list-style-type: none"> Foundations, including pilings, but excluding normal settling, shrinkage, or expansion of \$20,000,000 \$20,000,000 physical damage resulting from machinery accidents but excluding normal and natural wear and tear, corrosion, erosion, inherent vice or latent defect in the machinery \$250,000 valuable papers, plans, blueprints and specifications 	<p>Per occurrence:</p> <ul style="list-style-type: none"> Earth Movement \$1,000,000 LEG3 with a \$1,000,000 deductible is preferred. If anything other than L3 is to be utilized, Authority must approve, and such approval should not be unreasonably withheld. Flood – 2% VARATOL for flood in A/V Zones maximum \$5,000,000 All Other Risks – \$1,000,000 	<ul style="list-style-type: none"> Cyber Risk Faulty workmanship, construction or design, but resultant damage to be insured to a minimum LEG3 standard War Nuclear or radioactive contamination, Mold, fungi and fungal derivatives Penalties and Consequential Loss Asbestos Pollution 	<p>"All risk" completed Value form including coverage for the permanent and/or Temporary Works executed and in the course of execution, materials, supplies, equipment and other goods (excluding Contractors Plant and Equipment) including owner supplied items / free issue materials or any other property including temporary buildings and their contents for which the Insured is responsible or for which they hold themselves responsible or any of the Insureds has agreed to insure or have instructions to insure which are used or intended for use in connection with the Project with no early occupancy restriction.</p> <p>Cover for "Resultant Damage" to a "LEG3" Standard</p> <p>Coverage is required to be in place from NTP2 to Project Substantial Completion</p>

Builder's Risk			
<ul style="list-style-type: none"> • \$30,000,000 demolition and debris removal coverage • \$10,000,000 expense to reduce loss • \$10,000,000 building ordinance compliance • \$20,000,000 damage to adjacent roadway and structures within the Project Site to be incorporated into the Construction Work which are damaged as a result of an insured loss, subject to Developer including this coverage in the PML Study 			
Extensions of Coverage Required			
<ul style="list-style-type: none"> • Property inland transit (\$5,000,000 sublimit) • Extra and Expediting Expenses (\$10,000,000 sublimit) • Off Premises Utilities Interruption (\$2,000,000 sublimit) • Accounts Receivable (\$1,000,000 sublimit) • Claims Adjustment fees Sublimit of \$500,000 • Testing and Commissioning (8 weeks) • Replacement cost valuation • Temporary Offsite Locations (except manufacturers' or suppliers' premises) (\$10,000,000 sublimit) • Cost of carrying project financing (\$TBD/day) and D&C Contractor extended overhead (\$TBD/day) included in Soft Costs coverage to the extent values are included in the DSU value insured. • Joint Loss Payee Agreement or Joint Loss Payee Endorsement 			
Named Insureds			
<ul style="list-style-type: none"> • Developer • The Authority • Contractors and subcontractors 			

Builder's Risk
<ul style="list-style-type: none">• Consultants and sub consultants for Project Site activities only• Other parties identified by contract
Other requirements <ul style="list-style-type: none">• No provision permitted allowing a coinsurance penalty, except flood losses.• Insurance primary without right of contribution of any other insurance carried by any Named Insured• Breach of any policy condition by an insured party, shall not invalidate coverage for any other insured party that was unaware of such breach• Non-Cancellable except thirty (30) days' prior written notice of cancellation or ten (10) days for non-payment of premium to additional insureds and loss payees as required.

1.2 Commercial General Liability (Including Excess Liability)

At all times from the issuance of NTP1 until Project Substantial Completion, the Developer shall procure and maintain, or cause to be procured and maintained, commercial general liability insurance that satisfies the following:

Commercial General Liability (Including Excess Liability)			
Minimum Limits	Maximum Deductibles	Principal Exclusions	Principal Cover
<ul style="list-style-type: none"> • Not less than \$100,000,000 per occurrence • \$100,000,000 general aggregate • \$100,000,000 Completed Operations Aggregate • \$10,000 Medical Expense Limit (any one person) • Removal of Contractual Liability exclusion with respect to work within 50 feet of railroad property (CG 24 17) 	<ul style="list-style-type: none"> • \$1,000,000 per occurrence 	<p>Per ISO CG 00 01 12/07 or equivalent form and the following:</p> <ul style="list-style-type: none"> • Nuclear • Recording and Distribution of Material in Violation of Law • Fungi or Bacteria Exclusion • Total Pollution Exclusion with Building Heating Equipment and Hostile Fire Exceptions • Asbestos • Professional liability CG 22 79 or equivalent 	<p>General liability insurance covering all construction operations on an occurrence basis against claims the Named Insured becomes legally obligated to pay resulting from bodily injury (including death), personal injury, property damage (including loss of use) occurring upon, in or about the project, and including <i>Products and Completed Operations Liability</i> extension. Coverage shall be maintained continuously from the date of the first activities at the Project Site, until the Project Substantial Completion Date, at which time the <i>Products and Completed Operations</i> extension will take effect.</p> <p>Coverage is required to be in place from NTP1 to Project Substantial Completion.</p> <p>Coverage from NTP1 to NTP2 can be evidenced through a master program of the Developer or D&C Contractor.</p>

Commercial General Liability (Including Excess Liability)

Extensions of Coverage Required

- The general aggregate limit must reinstate annually
- Contractual liability
- Premises and operations
- Products and Completed Operations Liability extension for a period of 10 years after the Project Substantial Completion Date or if later, the expiration of any applicable statutes of limitation or repose.
- Terrorism coverage as provided by the Terrorism Risk Insurance Act
- Underground, Explosion and Collapse
- Defense costs (in addition to liability limits)
- Fellow Employee exclusion deleted
- Incidental medical malpractice
- Work performed within 50 feet of a railroad
- Professional services exclusion with an exception for construction management means and methods
- Broad from property damage
- Contingent employer's liability (contractual exception to Employers Liability Exclusion to apply), or equivalent
- Cross liability/ severability of interests (separation of insured provision)
- Stop gap liability

Named Insureds

- Developer
- D&C Contractor

Additional Insureds

- The Authority
- Lenders and their Agents as required
- Cass Rural Water User's District
- Sprint Communications Company, L.P.

Commercial General Liability (Including Excess Liability)

- Each Indemnified Party, defined in the Project Agreement as Additional Insureds (except where prohibited by law or standard insurance practice)
- Additional Insured coverage for the Authority and Each Indemnified Party shall be evidenced by the CG 20 10 07 04 form and CG 20 37 07 04 form. Additional Insured coverage to meet all other requirements shall utilize the CG 20 10 04 13 and CG 20 37 04 13 forms, or equivalent (to ensure coverage for both operations and completed operations), must contain no additional limitations, conditions, restrictions or exceptions to coverage beyond those that apply under such policy generally, and the interests and protections of each additional insured must not be affected by any misrepresentation, act or omission of a named insured or any breach by a named insured of any provision in the policy which would otherwise result in forfeiture or reduction of coverage

Other requirements

- Developer shall also require any Contractors employed on or about the Site to procure and keep in force, or cause to be procured and kept in force, reasonable levels of general liability insurance with extensions of coverage that are typical for the nature of the work being performed, and contain only those exclusions that are typical for the nature of the work being performed, but in no event less than \$1,000,000 per occurrence and \$2,000,000 in the aggregate for bodily injury, personal injury and property damage liability. It is recommended that all subcontractors be required to provide at least a \$2,000,000 excess liability policy.
- The Authority and the Indemnified Parties shall be additional insureds except where prohibited by Law. Insurance is primary without right of contribution of any other insurance carried by any Named Insured
- Any excess liability policies must follow form with the primary policy. Limits shall be shared by all insured and additional insured parties for the term of the Project.
- Any failure on the part of a named insured to comply with reporting provisions or other conditions of the policies, any breach of warranty, any action or inaction of a named insured or others, or any change in ownership of all or any portion of the Project or Developer's interest shall not affect coverage provided to the other Named Insureds or Additional Insureds.
- The insurance shall apply separately to each named insured and additional insured against whom a claim is made or suit is brought, except with respect to the limits of the insurer's liability.
- Coverage for blasting, demolition, excavating, under-pinning, pile driving, shoring, caisson work, work below ground surface, tunnelling, grading, and similar operations associated with the Works, as applicable must be included
- Thirty (30) days' prior written notice of cancellation or ten (10) days for non-payment of premium to the Authority.
- The policy must cover liability arising out of the acts or omissions of the Developer's employees and employees of Contractors engaged in the Work on the terms and to the extent the Developer or relevant Contractor is provided coverage under such liability policy.

1.3 Workers Compensation

At all times from the issuance of NTP1 until Project Substantial Completion, the Developer shall procure and maintain, or cause to be procured and maintained, workers compensation insurance that satisfies the following:

Workers Compensation			
Amount	Maximum Deductibles	Principal Exclusions	Principal Cover
Workers' compensation insurance, as required by any Governmental Authority or legal requirement, subject to the statutory limits of the North Dakota and All Other States.	Up to \$1,000,000 or as allowed by North Dakota Statute		Workers Compensation covering injury to workers. Where applicable, provide cover for US Longshore and Harbor Workers Act, and Jones Act. Coverage is required to be in place from NTP1 to Project Substantial Completion. Coverage from NTP1 to NTP2 can be evidenced through a master program of the Developer or D&C Contractor.
Named Insureds <ul style="list-style-type: none">• Every Contractor, subcontractor, or others performing work on the project must each provide evidence of North Dakota worker compensation coverage as required by law			
Other requirements <ul style="list-style-type: none">• Project Specific coverage is not required• The Developer remains responsible for ensuring that all contractors and other service providers working on the project site have Workers Compensation and Employers Liability coverage at all times that complies with North Dakota Law.			

1.4 Commercial Automobile Liability

At all times from the issuance of NTP1 until Project Substantial Completion, the Developer shall procure and maintain, or cause to be procured and maintained, commercial automobile liability insurance that satisfies the following:

Commercial Automobile Liability			
Minimum Limits	Maximum Deductibles	Principal Exclusions	Principal Cover
<ul style="list-style-type: none"> \$1,000,000 combined single limit per occurrence and in the aggregate Excess liability must apply over primary Auto for all layers 	\$1,000,000 Liability per occurrence	<ul style="list-style-type: none"> Per ISO Form CA 00 01 03 06 or equivalent or newer form and: Nuclear 	Business Automobile Liability insurance covering accidental death, bodily injury and property damage liability arising from the ownership, maintenance or use of all owned, non-owned and hired vehicles connected with performance of the Work, including loading and unloading for all vehicles operated by Developer or D&C Contractor used in connection with the Project. Coverage is required to be in place from NTP1 to Project Substantial Completion.
Extensions of Coverage Required <ul style="list-style-type: none"> Motor Carrier Act Endorsement-Hazardous Materials Clean-up (MCS-90) for Contractors who will at any time transport Hazardous Materials CA 9948 Broadened Transportation Pollution Liability for covered vehicles 			
Named Insureds <ul style="list-style-type: none"> Developer D&C Contractor Additional Insureds <ul style="list-style-type: none"> The Authority Lenders as required Indemnified Parties Sprint Communications Company, L.P. 			

Commercial Automobile Liability
Other requirements <ul style="list-style-type: none">• Excess liability policies must follow form with primary policy• Subcontractors which are not an affiliate of the Developer or D&C Contractor shall be permitted to carry limits of not less than \$2,000,000. Acceptance of lower limits than stated herein must be disclosed promptly in writing to The Authority.• In no event will Automobile liability limits of less than \$500,000 per accident be permitted for any subcontractor.• Thirty (30) days' prior written notice of cancellation or ten (10) days for non-payment of premium to additional insureds• Project specific coverage is not required

1.5 Professional Liability

At all times from the issuance of NTP1 until Project Substantial Completion, the Developer shall ensure that the D&C Contractor procures and maintains professional liability insurance that satisfies the following:

Professional Liability			
Minimum Limits	Maximum Deductible/Retention	Principal Exclusions	Principal Cover
<ul style="list-style-type: none">• Project Specific \$25,000,000 per claim and in the aggregate that will apply over the duration of the Project and the extended reporting period• Minimum period of 10 years for design, construction and extended reporting with a retroactive date at or prior to the date services were first performed.• Developer, D&C Contractor shall cause the Engineer of Record that is providing lead design service to procure and keep in force professional liability insurance limits not less than \$10,000,000 per claim and \$10,000,000 aggregate• For sub-consultants, Developer, D&C Contractor shall cause each and every Contractor that is providing professional design services or other professional service activities for the Project to procure and keep in force professional liability insurance limits not less than \$1,000,000 per claim and \$1,000,000 aggregate	Maximum deductible or self-insured retention (SIR) not to exceed \$1,000,000	<ul style="list-style-type: none">• Express warranties or guarantees unless such liability would have attached to the Named Insured in the absence of such warranty or guarantee• Cost to repair or replace any faulty construction workmanship, assembly, erection, fabrication, installation or remediation• Nuclear Liability• Judgments and awards deemed uninsurable by law• Liability assumed under contract, unless such liability would have attached to the Named Insured in the absence of such agreement• Insured versus Insured	Claims Made Project Specific Errors & Omissions (Professional Liability) Insurance in connection with the design and construction of the Project from NTP1 to Project Substantial Completion with a minimum combined total period of 10 years for design, construction and extended reporting.

Professional Liability
Named Insureds <ul style="list-style-type: none">• D&C Contractor
Other requirements <ul style="list-style-type: none">• Retroactive date: Full retroactive coverage from date of first design activity• Thirty (30) days' prior written notice of cancellation or ten (10) days for non-payment of premium to additional insureds• Owner's Indemnification Endorsement to be included in the project specific policy only

1.6 Contractors Pollution Liability

At all times from the issuance of NTP1 until Project Substantial Completion, the Developer shall procure and maintain, or cause to be procured and maintained, contractors pollution liability insurance that satisfies the following:

Contractors Pollution Liability			
Minimum Limits	Maximum Deductible/Retention	Principal Exclusions (including but not limited to)	Principal Cover
<ul style="list-style-type: none"> • \$10,000,000 per pollution incident and aggregate for all claims, inclusive of defense and all costs and expenses • Core coverage will be placed on an occurrence form basis. 	<ul style="list-style-type: none"> • \$1,000,000 per claim inclusive of defense and all costs and expenses 	<ul style="list-style-type: none"> • Terrorism • War • Intentional Noncompliance • Prior Knowledge • Employers' • Liability/Workers Comp • Professional Liability • Nuclear Liability • Property Damage to Motor Vehicles during Transportation • Professional Liability 	<p>Coverage for third party bodily injury, property damage and remediation costs arising out of pollution conditions in connection with the "Covered Operations" performed by or on behalf of Developer and Contractors pursuant to the Project Agreement.</p> <p>Coverage for mold to be included.</p> <p>Coverage is also extended to contemplate new pollution conditions resulting from maintenance activities performed during the construction phase.</p> <p>Coverage is required to be in place from NTP1 to Project Substantial Completion.</p> <p>Coverage from NTP1 to NTP2 can be evidenced through master program of the Developer or D&C Contractor.</p>
<p>Extensions of Coverage Required</p> <ul style="list-style-type: none"> • Policy term to extend for no less than 15 years, including extended completed operations coverage. • Emergency response • Non-Owned Disposal Site Extension • Off-Site Transportation • Coverage for natural resource, damages, asbestos, lead based paint and illicit abandonment at project site is included 			

Contractors Pollution Liability

- Bodily Injury definition – deemed to include mental anguish, shock, mental injury or illness and medical monitoring costs whether or not accompanied by physical injury or illness by any person or persons
- Property Damage definition to include diminution in value of third party property when accompanied by physical damage
- No exclusions for radioactive matter or naturally occurring radioactive materials except where subject to the Price Anderson Act
- Coverage for punitive/exemplary damages, civil fines and penalties, where insurable by law
- Contractual Liability but only to the extent liability would exist in the absence of such contract

Named Insured

- Developer
- D&C Contractor and subcontractors

Additional Insureds

- The Authority
- Lenders and their agents as required
- Each scheduled Indemnified Party (Additional Insured)
- Sprint Communications Company, L.P.

Other requirements

- This coverage shall be primary and noncontributory with respect to all Named Insureds and Additional Insureds
- Waiver of Subrogation
- Severability of Insureds provision
- The policy shall have no exclusions that limit pollution liability claims and actions by the Authority against the Developer or any D&C Contractor.
- Thirty (30) days' prior written notice of cancellation or ten (10) days for non-payment of premium to additional insureds

1.7 Marine Liability and Marine Pollution (as applicable)

Whenever the exposure exists during the period from the issuance of NTP1 until Project Substantial Completion, the Developer shall procure and maintain, or cause to be procured and maintained, marine liability and marine pollution insurance that satisfies the following:

Marine Liability and Marine Pollution (as applicable)			
Minimum Limits	Maximum Deductible/Retention	Principal Exclusions	Principal Cover
<ul style="list-style-type: none"> Broad form protection & indemnity - \$5 million Jones Act coverage - \$5 million Vessel Pollution Liability - \$5 million 	\$500,000 per occurrence	<ul style="list-style-type: none"> Terrorism War Intentional Noncompliance Prior Knowledge Employers' Liability/Workers Comp Professional Liability Nuclear Liability Property Damage to Motor Vehicles during Transportation Professional Liability 	<p>Bodily injury and third party property damage arising out of the operation of vessels in connection with the Project</p> <p>Coverage is required to be placed as applicable, when the exposure exists, from NTP1 for Project Substantial Completion.</p>
<p>Named Insureds</p> <ul style="list-style-type: none"> Any owner or operator of vessels <p>Additional Insureds</p> <ul style="list-style-type: none"> Developer D&C Contractor The Authority Lenders and their agents as required 			
<p>Other requirements</p> <ul style="list-style-type: none"> Project Specific coverage is not required 			

Marine Liability and Marine Pollution (as applicable)

- Thirty (30) days' prior written notice of cancellation or ten (10) days for non-payment of premium to additional insureds

1.8 Railroad Protective Liability (as applicable)

Whenever required by a railroad company during the period from NTP1 until Project Substantial Completion, the Developer shall procure and maintain, or cause to be procured and maintained, railroad protective liability insurance that satisfies the following:

Railroad Protective Liability (as applicable)			
Amount	Deductible	Principal Exclusions	Principal Cover
As required by each railroad	As required by each railroad	N/A	Coverage is required to be placed as applicable, per any written requirements from a railroad company, from NTP1 to Project Substantial Completion.

1.9 Aircraft Liability (as applicable)

Whenever the exposure exists during the period from the issuance of NTP1 until Project Substantial Completion, the Developer shall procure and maintain, or cause to be procured and maintained, aircraft liability insurance that satisfies the following:

Aircraft Liability (as applicable)			
Minimum Limits	Maximum Deductible	Principal Exclusions	Principal Cover
<ul style="list-style-type: none">• \$10,000,000 Fixed Wing or Rotary Aircraft• \$1,000,000 Drones	\$250,000 Maximum	Not Applicable	Bodily injury and third party property damage arising out of the operation of aircraft in connection with the Project Coverage is required to be placed as applicable, when the exposure exists, from NTP1 for Project Substantial Completion.
Named Insureds <ul style="list-style-type: none">• Developer• Contractor and subcontractors Additional Insureds <ul style="list-style-type: none">• The Authority• Lenders and their agents as required			
Other requirements <ul style="list-style-type: none">• Thirty (30) days' prior written notice of cancellation or ten (10) days for non-payment of premium to additional insureds			

2. OPERATING PERIOD INSURANCE PROGRAM**2.1 "All Risk" Property**

At all times from Project Substantial Completion to the Termination Date, the Developer shall procure and maintain, or cause to be procured and maintained, "all risk" property insurance that satisfies the following:

"All Risk" Property			
Minimum Limits	Maximum Deductibles	Principal Exclusions	Principal Cover
<ul style="list-style-type: none">• \$50,000,000 loss limit per occurrence• Expediting expenses/extra expense \$10,000,000• Demolition, increased cost of construction including undamaged property \$20,000,000• Debris removal \$20,000,000	<ul style="list-style-type: none">• \$1,000,000 per claim• \$1,000,000 Named Windstorm	<ul style="list-style-type: none">• Terrorism• Cyber risk• Faulty workmanship, construction or design• War• Nuclear or radioactive contamination, except re radioactive isotopes intended for scientific, medical, industrial or commercial use• Mold, fungi and fungal derivatives• Asbestos• Pollution• Piling Works	<p>"All Risks" Property insurance covering all subject to the loss limit.</p> <p>Coverage is required to be in place at all times from Project Substantial Completion to the Termination Date.</p>
Extensions of Coverage Required <ul style="list-style-type: none">• Off premises Services Interruption (physical damage, business interruption and extra expense) (minimum \$10,000,000 sublimit)• Valuable Papers (minimum \$250,000 sublimit)• Accounts Receivable (minimum \$250,000 sublimit)• Prevention of Access (with a minimum limit of 8 weeks)• Ingress/Egress (with a minimum limit of 8 weeks)• Natural or man-made earth movement, including earthquake, landslide or subsidence• Interim payment in the event of loss			

"All Risk" Property
<ul style="list-style-type: none">• Replacement Cost
Named Insureds <ul style="list-style-type: none">• Developer• The Authority• Other parties with an insurable interest
Other requirements <ul style="list-style-type: none">• Thirty (30) days' prior written notice of cancellation or ten (10) days for non-payment of premium to additional insureds

2.2 Commercial General Liability (Including Excess Liability)

At all times from Project Substantial Completion to the Termination Date, the Developer shall procure and maintain, or cause to be procured and maintained, commercial general liability insurance that satisfies the following:

Commercial General Liability (Including Excess Liability)			
Minimum Limits	Maximum Deductible/Retention	Principal Exclusions	Principal Cover
<ul style="list-style-type: none">• \$100,000,000 per occurrence and in the annual aggregate during O&M period• \$300,000 Damage to Premises Rented to You• \$25,000 Medical Expense Limit (Any one person)• Removal of Contractual Liability exclusion with respect to work within 50 feet of Railroad property (CG 2417)	\$1,000,000 per occurrence	<p>Per ISO CG 00 01 12/07 form and the following:</p> <ul style="list-style-type: none">• Nuclear• Recording and Distribution of Material in Violation of Law• Fungi or Bacteria Exclusion• Total Pollution Exclusion with Building Heating Equipment and Hostile Fire Exceptions• Asbestos• Professional liability CG 22 79 or equivalent	<p>General Liability insurance covering all operations and maintenance on an occurrence basis against claims the named Insured becomes legally obligated to pay resulting from bodily Injury (including death), personal Injury, property damage (including loss of use) occurring upon, in or about the Project, and including products and completed operations liability extension.</p> <p>Coverage is required to be in place at all times from Project Substantial Completion to the Termination Date.</p>
Extensions of Coverage Required <ul style="list-style-type: none">• Premises and operations• Products and Completed Operations Liability• Terrorism coverage as provided by the Terrorism Risk Insurance Act• Underground, explosion and collapse• Defense costs (in addition to liability limits)• Fellow employee exclusion deleted• Incidental medical malpractice• Work performed within 50 feet of a railroad• Professional services exclusion with and exception for construction management means and methods			

Commercial General Liability (Including Excess Liability)
<ul style="list-style-type: none">• Independent contractors• Blanket contractual liability• Broad from property damage• Cross liability/ severability of interests (separation of insured provision)• Employees as Insureds• Stop gap liability
<p>Named Insureds</p> <ul style="list-style-type: none">• Developer• O&M Contractor <p>Additional Insureds</p> <ul style="list-style-type: none">• The Authority• Lenders and their agents as required• Each Indemnified Party, defined in the Project Agreement as Additional Insureds (except where prohibited by law or standard insurance practice)• Additional Insured coverage for the Authority and each Indemnified Party shall be evidenced by the CG 20 10 07 04 form and CG 20 37 07 04 form. Additional Insured coverage to meet all other requirements shall utilize the CG 20 10 04 13 and CG 20 37 04 13 forms, or equivalent
<p>Other requirements</p> <ul style="list-style-type: none">• Developer shall also require any Contractors employed on or about the Project Site during the Operating Period to procure and keep in force, or cause to be procured and kept in force, reasonable levels of general liability insurance with extensions of coverage that are typical for the nature of the work being performed, and contain only those exclusions that are typical for the nature of the work being performed, but in no event less than \$1,000,000 per occurrence and \$2,000,000 in the aggregate for bodily injury, personal injury and property damage liability. The Authority and the Indemnified Parties shall be additional insureds except where prohibited by Law or standard insurance practice. Insurance is primary without right of contribution of any other insurance carried by any Named Insured.• Any excess liability policies must follow form with the primary policy.• The policy limits may apply on an annual basis• Defense costs outside of limits• Any failure on the part of a named insured to comply with reporting provisions or other conditions of the policies, any breach of warranty, any action or inaction of a named insured or others, or any change in ownership of all or any portion of the Project or Developer's interest shall not affect coverage provided to the other Named Insureds or Additional Insureds

Commercial General Liability (Including Excess Liability)

- The insurance shall apply separately to each named insured and additional insured against whom a claim is made or suit is brought, except with respect to the limits of the insurer's liability
- Coverage for blasting, demolition, excavating, under-pinning, pile driving, shoring, caisson work, work below ground surface, tunnelling, grading, and similar operations associated with the Works, as applicable must be included
- Non-Cancellable except (30) days' prior written notice or (10) days for non-payment of premium knowledge of occurrence Endorsement, i.e., requirement to report will commence when knowledge is held by a designated project person(s) - to be identified by Developer
- The policy must cover liability arising out of the acts or omissions of the Developer's employees and employees of Contractors engaged in the Work on the terms and to the extent the Developer or relevant Contractor is provided coverage under such liability policy
- Project Specific coverage is not required
- Thirty (30) days' prior written notice of cancellation or ten (10) days for non-payment of premium to the Authority

2.3 Workers Compensation

At all times from Project Substantial Completion to the Termination Date, the Developer shall procure and maintain, or cause to be procured and maintained, workers compensation insurance that satisfies the following:

Workers Compensation			
Amount	Deductible	Principal Exclusions	Principal Cover
<ul style="list-style-type: none">Workers' compensation insurance, as required by any Governmental Authority or legal requirement, subject to the statutory limits of the North Dakota and all other states.Statutory North Dakota and Minnesota Workmen's Compensation Insurance	Up to \$1,000,000 or as allowed by North Dakota Statute	Not applicable	Workers Compensation covering injury to workers. Where applicable, provide cover for US Longshore and Harbor Workers Act, and Jones Act Coverage is required to be in place at all times from Project Substantial Completion to the Termination Date.
Named Insureds <ul style="list-style-type: none">Every Contractor, subcontractor, or other performing work on the project must each provide evidence of North Dakota worker compensation coverage as required by lawContractorEligible Contractors and subcontractors			
Other requirements <ul style="list-style-type: none">Developer shall require any Contractors employed on or about the Project Site during the Operating Period to procure and keep in force workmen's compensation in compliance with statutory requirements, and employers' liability insurance as specified above.Project specific coverage is not required.			

2.4 Pollution Liability

At all times from Project Substantial Completion to the Termination Date, the Developer shall procure and maintain, or cause to be procured and maintained, pollution liability insurance that satisfies the following:

Pollution Liability			
Minimum Limits	Maximum Deductible/Retention	Principal Exclusions (including but not limited to)	Principal Cover
<ul style="list-style-type: none">• \$2,000,000 per pollution incident and aggregate for all claims, inclusive of defense and all costs and expenses• Core coverage will be placed on an occurrence form basis	\$1,000,000 per claim inclusive of defense and all costs and expenses	<ul style="list-style-type: none">• Terrorism• War• Intentional Noncompliance• Prior Knowledge• Employers' Liability/Workers Comp• Professional Liability• Nuclear Liability• Property Damage to Motor Vehicles during Transportation• Professional Liability	<p>Coverage for third party bodily injury, property damage and remediation costs arising out of pollution conditions in connection with the "Covered Operations" performed by or on behalf of Developer and Contractors pursuant to the Project Agreement</p> <p>Coverage is also extended to contemplate new pollution conditions resulting from maintenance activities associated with operating the diversion channel</p> <p>Coverage is required to be in place at all times from Project Substantial Completion to the Termination Date.</p>
Extensions of Coverage Required <ul style="list-style-type: none">• Emergency response• Non-Owned Disposal Site Extension, including transportation• Coverage for natural resource, damages, asbestos, lead based paint and illicit abandonment at project site is included• Bodily Injury definition - deemed to include mental anguish, shock, mental injury or illness and medical monitoring costs whether or not accompanied by physical injury or illness by any person or persons• Property Damage definition to include diminution in value of third party property when accompanied by physical damage• No exclusions for radioactive matter or naturally occurring radioactive materials except where subject to the Price Anderson Act• Coverage for punitive/exemplary damages, civil fines and penalties, where insurable by law• Contractual Liability for insured contracts			

Pollution Liability
<p>Named Insureds</p> <ul style="list-style-type: none">• Developer• O&M Contractor <p>Additional Insureds</p> <ul style="list-style-type: none">• The Authority• Lenders and their agents as required• Each scheduled Indemnified Party
<p>Other requirements</p> <ul style="list-style-type: none">• This coverage shall be primary and noncontributory with respect to all Named Insureds and Additional Insureds• Waiver of Subrogation• Severability of Insureds provision• The policy shall have no exclusions that limit pollution liability claims and actions by The Authority against the Developer or any O&M Contractor.• Thirty (30) days' prior written notice of cancellation or ten (10) days for non-payment of premium to the Authority• Project specific coverage is not required

2.5 Commercial Automobile Liability

At all times from Project Substantial Completion to the Termination Date, the Developer shall procure and maintain, or cause to be procured and maintained, commercial automobile liability insurance that satisfies the following:

Commercial Automobile Liability			
Minimum Limits	Maximum Deductible	Principal Exclusions	Principal Cover
<ul style="list-style-type: none"> During O&M and Warranty Period no less than \$1,000,000 combined single limit per occurrence and in the aggregate Excess liability must apply over primary Auto for all layers 	\$1,000,000 per occurrence	<ul style="list-style-type: none"> Per ISO Form CA 00 01 or equivalent Nuclear 	Business Automobile Liability insurance covering accidental death, bodily injury and property damage liability arising from the ownership, maintenance or use of all owned, non-owned and hired vehicles connected with performance of the Work, including loading and unloading for all vehicles operated by Developer or O&M Contractor used in connection with the Project. Coverage is required to be in place at all times from Project Substantial Completion to the Termination Date.
Named Insureds <ul style="list-style-type: none"> O&M Contractor Additional Insureds <ul style="list-style-type: none"> Developer Lenders and their agents as required The Authority Indemnified Parties 			

Commercial Automobile Liability

Other requirements

- Excess liability policies must follow form with primary policy
- Subcontractors which are not Affiliates of the Developer or O&M Contractor shall be permitted to carry limits of not less than \$1,000,000. Acceptance of lower limits than stated herein must be disclosed promptly in writing to the Authority.
- In no event will automobile liability limits of less than \$500,000 per accident be permitted for any subcontractor.
- Thirty (30) days' prior written notice of cancellation or ten (10) days for non-payment of premium to additional insureds
- Project Specific coverage is not required

2.6 Marine Liability and Marine Pollution (as applicable)

Whenever the exposure exists during the Operating Period, the Developer shall procure and maintain, or cause to be procured and maintained, marine liability and marine pollution insurance that satisfies the following:

Marine Liability and Marine Pollution (as applicable)			
Minimum Limits	Maximum Deductible/Retention	Principal Exclusions	Principal Cover
<ul style="list-style-type: none">• Broad form protection & indemnity - \$5 million• Jones Act coverage - \$5 million• Vessel Pollution Liability - \$5 million	<ul style="list-style-type: none">• \$500,000 per occurrence	Not applicable	<p>Bodily injury and third party property damage arising out of the operation of vessels in connection with the Project.</p> <p>Coverage is required to be placed as applicable, when the exposure exists during the Operating Period.</p>
Named Insureds <ul style="list-style-type: none">• Any owner or operator of vessels Additional Insureds <ul style="list-style-type: none">• Developer• O&M Contractor• The Authority• Lenders and their agents as required			
Other requirements <ul style="list-style-type: none">• Thirty (30) days' prior written notice of cancellation or ten (10) days for non-payment of premium to additional insureds• Project Specific coverage is not required			

2.7 Railroad Protective Liability (as applicable)

Whenever required by a railroad company during the Operating Period, the Developer shall procure and maintain, or cause to be procured and maintained, railroad protective liability insurance that satisfies the following:

Railroad Protective Liability (as applicable)			
Amount	Maximum Deductibles	Principal Exclusions	Principal Cover
As required by each railroad	As required by each railroad	N/A	Coverage is required to be placed as applicable, per any written requirements from a railroad company during the Operating Period.

2.8 Aircraft Liability (as applicable)

Whenever the exposure exists during the period from Project Substantial Completion to the Termination Date, the Developer shall procure and maintain, or cause to be procured and maintained, aircraft liability insurance that satisfies the following:

Aircraft Liability (as applicable)			
Minimum Limits	Maximum Deductibles	Principal Exclusions	Principal Cover
<ul style="list-style-type: none">• \$10,000,000 Fixed Wing or Rotary Aircraft• \$1,000,000 Drones	\$250,000 Maximum	Not Applicable	<p>Bodily injury and third party property damage arising out of the operation of aircraft in connection with the Project.</p> <p>Coverage is required to be placed as applicable, when the exposure exists during the Operating Period.</p>
Named Insureds <ul style="list-style-type: none">• Developer• O&M Contractor and subcontractors Additional Insureds <ul style="list-style-type: none">• The Authority• Lenders and their agents as required			
Other requirements <ul style="list-style-type: none">• Project Specific coverage is not required• Thirty (30) days' prior written notice of cancellation or ten (10) days for non-payment of premium to additional insureds			

3. ADDITIONAL COVERAGES REQUIRED FOR NEW CONSTRUCTION WORK PERFORMED DURING THE OPERATING PERIOD

Whenever new construction work is performed during the period from Project Substantial Completion to the Termination Date, the Developer shall procure and maintain, or cause to be procured and maintained, builders' risk and professional liability insurance that satisfy the following:

3.1 Builders' risk (as applicable)

Builder's Risk (as applicable)			
Minimum Limits	Maximum Deductibles	Principal Exclusions	Principal Cover
New construction projects are to be insured to full contract value, including Flood, Earth Movement and Terrorism coverage as provided by the Terrorism Risk Insurance Act	Per occurrence: <ul style="list-style-type: none"> • Earth Movement \$1,000,000 • Flood: 2% VARATOL for flood in A/V Zones maximum \$2,500,000 • All Other Risks – \$1,000,000 	<ul style="list-style-type: none"> • Cyber Risk • Faulty workmanship, construction or design, but resultant damage to be insured to a LEG3 standard • War • Nuclear or radioactive contamination, • Mold, fungi and fungal derivatives • Penalties and Consequential Loss Asbestos • Pollution 	Coverage is required to be in place during any new construction
Named Insureds <ul style="list-style-type: none"> • Developer • The Authority • Contractors and subcontractors • Consultants and sub consultants for Project Site activities only • Other parties identified by contract 			
Other requirements <ul style="list-style-type: none"> • No provision permitted allowing a coinsurance penalty, except flood losses. • Insurance primary without right of contribution of any other insurance carried by any Named Insured • Breach of any policy condition by an insured party, shall not invalidate coverage for any other insured party that was unaware of such breach 			

Builder's Risk (as applicable)	
<ul style="list-style-type: none">• Non-Cancellable except (30) days' prior written notice of cancellation or (10) days for non-payment of premium to additional insureds and loss payees as required.	

3.2 Professional Liability (as applicable)

Professional Liability (as applicable)			
Minimum Limits	Maximum Deductible/Retention	Principal Exclusions	Principal Cover
<ul style="list-style-type: none">• \$5,000,000 per claim and in the aggregate• Minimum period of 10 years for design, construction and extended reporting with a retroactive date at or prior to the date services were first performed is required for project specific coverage.	Maximum deductible or self-insured retention (SIR) not to exceed \$1,000,000	<ul style="list-style-type: none">• Express warranties or guarantees unless such liability would have attached to the Named Insured in the absence of such warranty or guarantee• Cost to repair or replace any faulty workmanship, assembly, construction, erection, fabrication, installation or remediation• Nuclear Liability• Judgments and awards deemed uninsurable by law• Liability assumed under contract, unless such liability would have attached to the Named Insured in the absence of such agreement• Insured versus Insured	Professional liability insurance in connection with new construction work is required if the work includes and professional services or design build services.
Named Insureds O&M Contractor			
Other requirements <ul style="list-style-type: none">• Retroactive date: Full retroactive coverage from date of first design activity• Coverage may be evidenced by either a project specific or practice policy• Thirty (30) days' prior written notice of cancellation or ten (10) days for non-payment of premium to additional insureds			

EXHIBIT 10**KEY PERSONNEL****Table 10.1 – Developer Executive Leadership and Management Team**

The individuals listed in this Table 10.1 should be the individuals submitted for these roles in the Developer Proposal or as otherwise approved by the Authority in accordance with this Agreement.

Position Title	Primary Functions/Duties	Period during which Position is to be Filled	Minimum Qualifications/Experience	Name of Initial Individual
Developer's Project Manager	Responsible for the overall control of the Developer's Work, the performance and resourcing for the overall design, construction, operations and maintenance, contract management and administration, and all other Project functions on behalf of the Developer. The Developer's Project Manager will represent the Developer to the Authority for all Project matters. The Developer's Project Manager is assigned to the Project full time, through the full term of this Agreement.	Entire Term of this Agreement	Must be a Project Management Professional or Program Management Professional certified by the Project Management Institute (at Financial Close). A master's degree in business administration (MBA) or civil engineering. More than 15 years of directly related professional experience with at least one assignment, full time for at least 2 years, as the program manager of a P3 program that is complete and that implemented capital improvements with a constructed value of \$100M, or more.	Esther Madrigal Díez
Developer's Local Affairs Project Manager	Reports to the Developer's Project Manager and is responsible for local management of the Developer's Work and for local day-to-day coordination of all aspects of the D&C Work with the Authority, full time.	D&C Period	Must be a Project Management Professional or Program Management Professional certified by the Project Management Institute (at Financial Close). A master's degree in business administration (MBA) or civil engineering. More than 15 years of directly related professional experience with at least one	Stephane Celerier

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			assignment as the project manager or program manager of a project or program that is complete and that implemented capital improvements with a constructed value of \$100M, or more.	
Developer's Project Quality Monitor	Reports to the Developer's Project Manager and is responsible for the oversight of the Project quality management system. Available to meet with the Authority staff as reasonably required.	2 (two) years starting at the Commercial Closing Date, or as agreed with the Authority (whichever is the shorter). Minimum 20% full time equivalency. In Project Office attendance at a minimum once per every month.	Minimum of 10 years quality management experience in complex multi-disciplinary design and construction projects. Experience includes at least one completed assignment as quality manager for a construction project over \$100M in value and the preparation and implementation of quality management plans similar in scope to those of this Agreement.	Caroline Miwa
Developer's Project Quality Manager (with the Authority's approval, this position and the Operations Quality Manager can be fulfilled by one individual for specific periods of time)	Reports to the Developer's Project Manager and is responsible for implementing and overseeing the Developer's quality management processes. The Developer's Project Quality Manager is responsible for ensuring the QMP is comprehensively prepared and implemented within the required schedule constraints, revising or updating the QMP when deficiencies are identified or Project needs dictate, and requiring and scheduling audits of	Entire Term of this Agreement	Must be a licensed professional engineer in North Dakota (at Financial Close) with a minimum of 10 years quality management experience in complex multi-disciplinary design and construction projects. Experience includes at least one completed assignment as quality manager for a construction project over \$100M in value and the preparation and implementation of quality management plans similar in scope to those of this Agreement.	Rodney W. Ambrosie

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	the implementation of the QMP throughout the Work. The Developer's Project Quality Manager will report QA/QC activities and results to the Authority and manage the Work quality managers.			
Safety Coordinator	Reports directly to Developer's Lead Engineering Firm's Project Manager, D&C Contractor's Project Manager and Operating Period Supervisor when their phase of the Work is active; develop and prepare the Safety Plan; define develop, and implement safety and security policies and procedures and emergency response and preparedness policies and procedures; train staff relative to safety, security, and emergency policies and procedures; maintain Project safety records; compile data, records, and associated reports for delivery to the Authority. Manage lower tier safety coordinators. Revise or update the Safety Plan when deficiencies are identified or Project needs dictate. Require field verification of safety procedures.	Entire Term of this Agreement	Must be a safety specialist with a minimum of 20 years of experience in preparing and implementing construction and O&M safety programs. At least two years of formal and demonstrable safety training. At least one past project assignment, full time for at least 2 years, as the safety coordinator or safety manager of a program that is complete and that implemented a minimum of \$200M in capital improvements. At least one past project assignment, full time for at least 2 years, as the safety coordinator or safety manager of an O&M operation with at least 20 staff. Experience preparing and implementing safety plans similar to the Safety Plan required for this Agreement.	Gerald J. Kuipers

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Lead Engineering Firm's Project Manager	Reports to the Developer's Project Manager and is responsible for the performance and resourcing of all tiers of the Developer's engineering and design team. The Lead Engineering Firm's Project Manager will report Design Work and related D&C Period matters and associated results and issues to the Authority and manage all non-construction aspects of the Work during the D&C Period.	D&C Period	Must be a licensed professional engineer in North Dakota (at Financial Close) with a minimum of 15 years of experience as a project manager for complex multi-disciplinary design projects. At least one project assignment as the project manager of a completed project with a constructed value over \$100M.	Raj Mannem
Lead Engineering Firm's Design Manager	Reports to the Lead Engineering Firm's Project Manager, and is responsible for ensuring that the Project design is completed, and design criteria requirements and Design Deliverables comply with the Technical Requirements and meet industry standards. The Lead Engineering Firm's Design Manager is responsible for managing the design processes throughout all tiers of the Developer's Design Team, coordinating with the Authority and AHJs, and organizing, managing, and administering Project design requirements. Also responsible for coordinating Design	D&C Period	Must be a licensed professional engineer in North Dakota (at Financial Close) with a minimum of 15 years of experience as a design manager for complex multi-disciplinary design projects with at least one assignment as the project manager of a completed project with a constructed value over \$100M.	Mike Dobry

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	Team support during construction.			
Lead Engineering Firm's Design Quality Manager	Reports to the Developer's Project Quality Manager and is responsible for implementing and overseeing the Developer's quality management processes during the Design Work. The Lead Engineering Firm's Design Quality Manager is responsible for preparing Design Quality Management Plan and ensuring its implementation within the required schedule constraints, revising or updating the Design Quality Management Plan when deficiencies are identified or Project needs dictate, verifying application of the Design Quality Management Plan at all tiers of the Developer's design organization, and leading audits of the Design Quality Management Plan throughout the Work. The Lead Engineering Firm's Design Quality Manager will report Design Work QA/QC activities and results to the Authority and manage lower tier design quality managers.	D&C Period	Must be a licensed professional engineer in North Dakota (at Financial Close) and have a minimum of 10 years of experience in design quality management of complex multi-disciplinary design projects, including preparation of quality management plans, design reviews, and verification that Signed and Sealed design documents comply with design quality management plans and project requirements.	Ryan Berg
D&C Contractor's	Reports to the Developer's Project Manager and is responsible for the	D&C Period after Design Work starts	Must have more than 20 years of directly related professional experience in complex multi-disciplinary	Augustín Hospital García

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Project Manager	performance and resourcing of Project construction throughout all tiers of the Developer's team. The D&C Contractor's Project Manager will report Construction Work and related D&C Period matters and associated results and issues to the Authority and manage all Construction Work during the D&C Period. The D&C Contractor's Project Manager will coordinate design phase constructability reviews and coordinate with AHJs to facilitate the inclusion of their requirements during construction.		construction projects. At least one project assignment, full time for at least 2 years, as the construction project manager or construction program manager for a project which is complete with a constructed value of at least \$400M or for at least four separate construction projects that are complete each of which had a constructed value of at least \$100M.	
D&C Contractor's Construction Manager	Reports to the D&C Contractor's Project Manager and is responsible for ensuring that the Project construction is completed in full conformance with the RFC Documents, the Construction Quality Management Plan, and this Agreement. Also responsible for managing the Developer's construction team throughout all tiers of the Developer's organization. and administering the requirements of this Agreement. Conducts D&C Period constructability reviews and coordinates	D&C Period	Must have more than 20 years of directly related professional experience in complex multi-disciplinary construction projects. At least one project assignment, full time for at least 2 years, as the construction project manager or construction program manager for a project which is complete with a constructed value of at least \$400M or for at least four separate construction projects that are complete each of which had a constructed value of at least \$100M.	Greg Yavicoli

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	participation of lower-tier construction staff. Manages lower tier construction staff.			
D&C Contractor's Construction Quality Manager	Reports to the Developer's Project Quality Manager and is responsible for implementing and overseeing the Developer's quality management processes during the Construction Work. The D&C Contractor's Construction Quality Manager is responsible for preparing the Construction Quality Management Plan and implementing it within the required schedule constraints, revising or updating the Construction Quality Management Plan when deficiencies are identified or Project needs dictate, verifying application of the Construction Quality Management Plan at all tiers of the Developer's design organization, and leading audits of the Construction Quality Management Plan throughout the Work. The D&C Contractor's Construction Quality Manager will report Construction Work QA/QC activities and results to the Authority and manage lower tier construction quality managers.	Required throughout the duration of all construction-related activities on the Project	Must be a licensed professional engineer in North Dakota (at Financial Close) and have a minimum of 15 years of experience as a construction quality manager for complex multi-disciplinary construction projects. Experience must include at least one completed assignment as quality manager for a project which is complete with a constructed value of at least \$400M or for at least four separate construction projects that are complete each of which had a constructed value of at least \$100M following USACE or AASHTO construction specifications, including preparation of quality management plans, sequencing quality activities related to construction work, managing and resourcing construction teams, implementing construction quality management processes, and facilitating and verifying corrective activities for non-conforming work.	Lyle A Peplinski

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D&C Contractor's Quality Control Manager	Reports to the D&C Construction Quality Manager and is responsible for quality control requirements set out in the Construction Quality Management Plan and for preparing, reviewing and implementing Inspection and Test Plans. Ensures that quality inspection personnel have the required qualifications and experience and he/she and the quality inspection personnel are independent of the D&C Contractor's production and supervision staff. Manages all quality control related activities, including ensuring laboratory accreditations, certifications are maintained in accordance with Good Industry Practice and the provisions of the Agreement.	Required throughout the duration of all construction related activities on the Project	Must be a licensed professional engineer in ND (at Financial Close) and have a minimum 10 years of experience as a professional engineer and 10 years of experience as a construction quality control manager for complex multi-disciplinary construction projects. Experience must include at least one completed assignment as construction quality control manager for a project which is complete with a constructed value of at least \$400M or for at least four separate construction projects that are complete each of which had a constructed value of at least \$100M following USACE or AASHTO construction specifications	Robert Bly
Developer's Public Information Officer	Lead the Developer's responsibilities for public involvement activities on a day-to-day basis; develop, revise, and update the Developer's Communication Plan, serve as a primary point of contact between the Developer and the Authority on items related to public information, public involvement, and/or emergency	Must be available upon the Commercial Closing Date for the entire Term of this Agreement	Must be experienced, comfortable, and competent in dealing with the media and have a minimum of 10 years of professional experience in public involvement activities and the ability to competently perform the duties listed.	Sadie Rudolph

	communications; act as clearinghouse for the receipt of, and response to, written or verbal comments or concerns regarding the Project; facilitate communications between the Developer, Authority, and public; coordinate and supervise Developer's personnel in performing the activities described in the relevant sections of the Developer's Communication Plan; develop an understanding and appreciation of the Authority's and public's concerns and reactions related to the Project; interact with public and represent the interests of the Project at associated meetings and other formal and informal events; maintain communications with the Authority, and any appropriate governmental agency, during an emergency or Project-related incident.			
D&C Contractor's Land Manager	Reports to the D&C Contractor's Project Manager. Responsible for managing and maintaining TCE's and lands within the Project ROW; interfacing with the applicable stakeholders,	Must be available immediately upon the Commercial Closing Date and then until the later of reinstatement and handback of all TCE's or	Must have a minimum of 10 years of professional experience in managing farm and land properties in North Dakota, including managing land owners' and tenants' requirements and expectations.	Jon Norstog

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	adjacent landowners and owners of land subject to TCE's; ensuring compliance with all laws and regulations of any federal, state, county and AHJ; ensuring the requirements of the Agreement with respect to TCE's and Project ROW are met; preparing and implementing the Land Management Plan	Project Final Completion		
Operations Manager (with the Authority's approval, this position and the Operations Supervisor can be fulfilled by one individual until the first Interim Completion of an Interim Completion Element is achieved)	Reports to the Developer's Project Manager and is responsible for administering, managing, and performing the O&M Work and conform to this Agreement for the Term, full-time through the Operating Period and during the Handback Period; serve as the point of contact/liaison with the Authority; provide overall management and leadership of the O&M Work; deliver and comply with the terms of this Agreement relative to the O&M Work and Renewal Work; prepare and submit Operating Period reports to Authority; support and implement Developer's safety policy and procedures; support and implement O&M Quality Management Plan; prepare, revise	Entire Term of this Agreement	Must have more than 10 years of directly related professional experience in complex multi-disciplinary O&M projects. At least one project assignment, full time for at least 4 years, as the O&M manager of an operational project that had at least 20 staff. Qualifying experience must include administrative management functions as well as day-to-day O&M team management. Experience as an O&M manager employed by a public entity does not qualify for the 4-year assignment.	Al Zaporzan

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	and update O&M Management Plan and O&M Manual; prepare, supervise, and manage Developer's annual O&M budget for the Project; manage the Handback procedures and requirements of this Agreement.			
Operations Quality Manager (with the Authority's approval, this position and the Developer's Project Quality Manager can be fulfilled by one individual for specific periods of time)	Reports to the Developer's Project Quality Manager and is responsible for preparing the O&M Quality Management Plan and implementing it within the required schedule constraints; revising or updating the O&M Quality Management Plan when deficiencies are identified or Project needs dictate; verifying application of the O&M Quality Management Plan at all tiers of the Developer's O&M organization; leading audits of the O&M Quality Management Plan throughout the Work. The Operations Quality Manager assigns inspection and quality management staff and associated duties. Conducts day-to-day conformance reviews of quality management staff duties. The Operations Quality Manager will report O&M Work QA/QC activities and results to the Authority and manage lower tier inspectors	Entire Term of this Agreement.	Must have a minimum of 10 years of experience in preparing and implementing quality management plans for O&M activities.	Rodney W. Ambrosie

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	and quality management staff.			
Utilities and 3rd Parties Manager	Reports to the D&C Contractor's Project Manager and is responsible for ensuring that the project elements for Third Parties including ND DOT, Cass County, BNSF, RRVW, the Water Resource Districts, and affected Utilities are designed and constructed in conformance with the RFC Documents, the Construction Quality Management Plan, this Agreement, and the Third Parties' design standards and requirements. Also responsible for coordinating approval of Design Submittals with the appropriate Third Party. Also responsible for coordination of construction activities with Third Parties including notifications of lane closures, detours, and necessary utility outages.	D&C Period	Must be a licensed professional engineer in North Dakota (at Financial Close) with a minimum of 15 years of experience in design and construction of linear civil projects including modification or relocation of existing transportation systems to accommodate new construction, coordination of construction activities with BNSF, and management of the design and construction of water, oil/gas, and telecommunication utility relocations.	Phil Gravel
Environmental Compliance Specialist	Reports to the Developer's Project Manager and coordinates with the Developer's Local Affairs Project Manager, Buildable Unit Design Managers, the D&C Contractor's Project Manager, the D&C Contractor's Construction Manager, and the Operations	Entire Term of this Agreement	Must have a BA/BS in biological or physical sciences, or civil, mechanical, or construction management engineering with a minimum of 15 years' experience in preparing NEPA documents or similar documents for state environmental documentation for construction of water, wastewater, or stormwater	Steven Menden

	<p>Manager; and is responsible for ensuring that the design, construction, and operations are consistent with NEPA, Clean Water Act, Clean Air Act, Endangered Species Act, National Historic Preservation Act, North Dakota Sovereign Land Permits, and other federal, state, and local government requirements. Prepares the Environmental Management Plan, monthly Environmental Compliance Reports, and environmental compliance reports to be included with permit applications and with reports notifying federal and state agencies of the completion of construction. Prepares environmental compliance reports, such as periodic water quality, air quality, and wetlands restoration reports to be submitted to the federal and/or state agencies during operations. Evaluates program effectiveness and leads procedures to address violations of environmental compliance.</p>		<p>conveyance facilities. Experience in obtaining permits for at least five assignments for construction of water, wastewater, or stormwater conveyance facilities in similar conditions with cultural resources, wetlands, and a range of land uses from urban to agricultural. Registered engineer licenses are not required, but would be preferable.</p>	
<p>Resilience Program Coordinator (with the</p>	<p>Reports to the Developer's Project Manager and serves as a primary point of</p>	<p>D&C Period</p>	<p>Must be experienced, comfortable and competent in a coordination role. Must hold a minimum of two years</p>	<p>Gabriel Espinosa Proaño</p>

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Authority's approval, position can be combined or can be part time)	contact between the Developer and the Authority on items related to the Resilience Program. This includes providing information upon request.		of experience in coordination and management of documentation in a design or construction setting.	
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Table 10.2 – Core Staff

Position Title	Primary Functions/Duties	Period during which Position is to be Filled	Minimum Qualifications/Experience	Name of Initial Individual
Operations Supervisor (with the Authority's approval, this position and the Operations Manager can be fulfilled by one individual until the first Interim Completion of an Interim Completion Element is achieved)	Reports to the Operations Manager and is responsible for the O&M Work and Renewal Work for the Project throughout the Term, full-time through the Operating Period and during the Handback Period; serves as a secondary point of contact/liaison with the Authority; serves as the primary point of contact/liaison for emergency services (i.e., police, fire, ambulance, and related emergency services); determines and manages O&M Work such that the Project remains functional and available throughout the Term; determines O&M strategies, policies, procedures, needs and schedule for the O&M Work; supervises and monitors staff and subcontractors performing O&M Work; implements and operates Developer-defined CMMS and SCADA system; maintains inventory, compiles data, records, and associated reports for delivery to the Authority; maintains and implements Developer's safety policy and procedures and O&M Quality Management Plan; maintains spare	Entire Term of this Agreement.	Must be a professional O&M technician with a minimum of 20 years of experience maintaining public works facilities, including flood control and hydraulic structures, roadways and bridges, and parks and recreation facilities. Experience must include at least 5 years in a lead O&M role, including supervising at least 20 staff for the 5 year period.	Al Zaporzan

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Position Title	Primary Functions/Duties	Period during which Position is to be Filled	Minimum Qualifications/Experience	Name of Initial Individual
	parts and material storage; assists in preparation of O&M Manual, annual O&M Management Plan, budget, and monthly reporting. Executes Work required for Handback.			
Buildable Unit Design Managers	Reports to the Lead Engineering Firm's Design Manager and is responsible for ensuring that the design is completed, and design criteria requirements and Design Deliverables comply with the Technical Requirements for one or more Buildable Units; responsible for coordinating with the Authority and AHJs, managing the respective Design Team, in its entirety, and administering all design requirements of this Agreement for the assigned Buildable Unit Design Deliverables.	D&C Period from start of Design Work until Design Deliverables RFC for assigned Buildable Unit(s)	Must be a licensed professional engineer in North Dakota (at Financial Close) and have a minimum of 15 years of experience in design projects with similar characteristics for aqueducts and bridges and a minimum of 10 years of experience in design projects with similar characteristics as those of the assigned for Buildable Units that are not associated with aqueducts and bridges. At least one assignment as the design manager of a completed project with a constructed value over \$10M.	Jorge Perez Armino Steven Bohrn Angela McLean Roshaan Greime Bill Kussmann Marlon Mackowick Daniel Sanchez Rob Smith Larry Zamojski
Buildable Unit Design Quality Manager	Reports to the Lead Engineering Firm's Design Quality Manager and is responsible for implementing the Design Quality Management Plan for design production processes and resulting Design Deliverables for one or more Buildable Units; responsible for coordinating with the Authority, the AHJs, and	D&C Period from start of Design Work until Design Deliverables RFC for assigned Buildable Unit(s); during construction if assigned	Must be a licensed professional engineer in North Dakota (at Financial Close) and have a minimum of 10 years of experience in design QA/QC, including preparation of quality management plans, design reviews, and verification that Signed and Sealed design documents comply with design quality management	Ryan Berg Mark Schroeder Michelle Walters Tom Wilson

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Position Title	Primary Functions/Duties	Period during which Position is to be Filled	Minimum Qualifications/Experience	Name of Initial Individual
	the Lead Engineering Firm's Design Quality Manager to modify the QMP for a specific Buildable Unit to meet the requirements of the AHJ.	as a resident engineer.	plan and project requirements.	
Discipline Staff and Specialists	Developer's key subject matter specialists and design professionals who report to the Lead Engineering Firm's Project Manager, the Lead Engineering Firm's Design Manager, the Buildable Units Design Managers, as appropriate, have expertise in the various disciplines and specialties required for the Work, and responsible for preparing the various plans and completing the required analyses and Design Deliverables in accordance with the Technical Requirements and this Agreement. Also responsible for construction phase support, including design clarifications, Project Site visits, Shop Drawings and Samples review, and other D&C Period support, as needed to complete the Work.	D&C Period	All discipline staff and specialists must have specific experience, within their discipline or specialty, in the design of projects similar to their assignment on the Project. Discipline Staff and Specialists with lead roles in the D&C Work, or who will Sign and Seal Design Deliverables must be licensed professional engineers in North Dakota (at Financial Close) and have a minimum of 15 years of experience in design projects with similar characteristics as those assigned for the Work.	Jared Baldwin Matt Baughman Alex Belous David Bonin Mike Chelminski Andrew Feia Raymond Finocchiaro Ramli Halim Randy Hanson Bill Hood Shaun Kenny Jeff Madejczyk Donald Martin Elise Neufeld Kim Neyrinck Phil Pantel

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Position Title	Primary Functions/Duties	Period during which Position is to be Filled	Minimum Qualifications/Experience	Name of Initial Individual
				Daniel Smith Masaaki Ward Jason Warne Vahid Zanzanizadeh

EXHIBIT 11

CONDITIONS PRECEDENT TO NOTICES TO PROCEED

PART 1 - CONDITIONS PRECEDENT TO NTP1

1. COMMERCIAL CLOSE

The Commercial Closing Date has occurred.

2. INSURANCE

The professional liability insurance policy required to be obtained under Exhibit 9 (Required Insurance) has been obtained and is in full force and effect in accordance with Article 35 (Insurance and Reinstatement), and the Developer has delivered to the Authority written verification of such insurance coverage as required by Article 35 (Insurance and Reinstatement).

3. DEVELOPER PROJECT MANAGEMENT PLAN AND 'A' SUBMITTALS

- (a) The Developer has developed and delivered to the Authority those parts of the Developer Project Management Plan noted as 'A' in the column entitled 'Required by' in Attachment 2-1 (Developer Project Management Plan) to the Technical Requirements and such Submittals have been resolved.
- (b) The Developer has submitted to the Authority those Submittals noted as 'A' in the column entitled 'Submission' in the Attachment 2-3 (Tabulation Of Reviewable Submittals) to the Technical Requirements and each such Submittal has been resolved.

For the purpose of (a) and (b) above, "resolved" means:

- (i) in the case of a Discretionary Submittal, the Submittal has been approved or accepted by the Authority under Section 7.3 (Discretionary Submittal); and
- (ii) in the case of an R&C Submittal:
 - (A) the Authority has responded with "no comments" or is deemed to have responded with "no comment" under Section 7.4(c) (R&C Submittal); or
 - (B) the Authority has provided comments with no Compliance Comments; or
 - (C) any disputed Compliance Comments provided by the Authority have been resolved in accordance with Section 7.5 (Submittals Disputes).

4. ACONEX EDMS

The interface of the Aconex EDMS is fully operational.

5. KEY PERSONNEL

The following Key Personnel have been identified and engaged:

- (a) Developer's Project Manager
- (b) Developer's Local Affairs Project Manager

- (c) Developer's Project Quality Manager
- (d) Safety Coordinator
- (e) Lead Engineering Firm's Project Manager
- (f) Lead Engineering Firm's Design Manager
- (g) Lead Engineering Firm's Design Quality Manager
- (h) D&C Contractor's Project Manager
- (i) Developer's Public Information Officer
- (j) D&C Contractor's Land Manager
- (k) Utilities and 3rd Parties Manager
- (l) Environmental Compliance Specialist
- (m) Buildable Unit Design Managers
- (n) Buildable Unit Design Quality Manager
- (o) Discipline Staff and Specialists required for the Design Work
- (p) Operations Manager
- (q) Operations Quality Manager
- (r) Operations Supervisor

6. COST LOADED PBS-1

The Authority has approved the PBS-1, as amended to reflect Addendum #9 issued by the Authority on May 4, 2021, submitted to the Authority on August 23, 2021.

PART 2 - CONDITIONS PRECEDENT TO NTP2

1. **NTP1**

NTP1 has been issued.

2. **FINANCIAL CLOSE**

The Financial Closing Date has occurred.

3. **INSURANCE**

All Insurance Policies required to be obtained under Exhibit 9 (Required Insurance) for the Construction Period have been obtained and are in full force and effect in accordance with Article 35 (Insurance and Reinstatement) and the Developer has delivered to the Authority written verification of insurance coverage as required by Article 35 (Insurance and Reinstatement).

4. **GOVERNMENTAL APPROVALS**

- (a) All Governmental Approvals necessary to start the first portion of the Construction Work to be undertaken have been obtained and the Developer has provided to the Authority fully executed copies of such Governmental Approvals (other than the Authority Provided Approvals). Necessary Section 404 Permit Modifications are not required to have been obtained as a condition precedent to NTP2.
- (b) All Governmental Approvals (if any) required to perform O&M Work from NTP2, other than any Governmental Approvals that will not be required for performance of the O&M Work until a later date, are in place, have been provided to the Authority and are not subject to appeal.

5. **GOVERNMENTAL APPROVAL CONDITIONS**

To the extent that any Governmental Approvals contain conditions that must be satisfied before the first portion of the Construction Work can start, satisfaction of such conditions and demonstration of the same to the Authority.

6. **DEVELOPER PROJECT MANAGEMENT PLAN AND 'B' SUBMITTALS**

- (a) The Developer has developed and delivered to the Authority those parts of the Developer Project Management Plan noted as 'B' in the column entitled 'Required by' in Attachment 2-1 (Developer Project Management Plan) to the Technical Requirements and such Submittals have been resolved.
- (b) The Developer has submitted to the Authority those Submittals noted as 'B' in the column entitled 'Submission' in the Attachment 2-3 (Tabulation Of Reviewable Submittals) to the Technical Requirements and each such Submittal has been resolved.

For the purpose of (a) and (b) above, "resolved" means:

- (iii) in the case of a Discretionary Submittal, the Submittal has been approved or accepted by the Authority under Section 7.3 (Discretionary Submittal); and
- (iv) in the case of an R&C Submittal:

- (A) the Authority has responded with "no comments" or is deemed to have responded with "no comment" under Section 7.4(c) (R&C Submittal); or
- (B) the Authority has provided comments with no Compliance Comments; or
- (C) any disputed Compliance Comments provided by the Authority have been resolved in accordance with Section 7.5 (Submittals Disputes).

7. PROJECT BASELINE SCHEDULE

The Developer has developed and delivered to the Authority, and updated, the Project Baseline Schedule (PBS-2 and PBS-3) in accordance with Section 2.2 of the Technical Requirements.

8. PROJECT OFFICE

The Developer has established the Project Office in accordance with Section 2.2.1 of the Technical Requirements.

9. NONCONFORMANCE TRACKING SYSTEM

The Nonconformance Tracking System has been developed in accordance with Section 2.8.2 (*Nonconformance Tracking System*) of the Technical Requirements, it is fully operational and the Authority has been given live access to this system.

10. GPS ACCESS

The Developer has provided the Authority with access to the Developer's GPS signal systems in accordance with Section 3.6(4) of the Technical Requirements.

11. KEY PERSONNEL

The following Key Personnel have been identified and engaged:

- (a) D&C Contractor's Construction Manager
- (b) D&C Contractor's Construction Quality Manager
- (c) D&C Contractor's Quality Control Manager
- (d) Resilience Program Coordinator
- (e) Discipline Staff and Specialists required for the Construction Work

12. WORKSHOPS AND MEETINGS

- (a) The Initial Partnering Workshop has occurred in accordance with Section 5.1 (*Initial Partnering Workshop*) of the Technical Requirements.
- (b) The Initial Kickoff Meeting has occurred in accordance with Section 2.10.4 (*Kickoff Meetings and Routine Progress Meetings*) of the Technical Requirements.

EXHIBIT 12

CONSTRUCTION COMPLETION CONDITIONS

PART 1 - CONDITIONS TO INTERIM COMPLETION OF INTERIM COMPLETION ELEMENTS

1. NOTICE OF INTERIM COMPLETION

The Developer has issued a Notice of Interim Completion to the Authority in accordance with Section 16.1(d) (Interim Completion of Project Elements) of the Agreement.

2. COMPLETED DESIGN AND CONSTRUCTION WORK

- (a) The Developer has completed all of the Design Work and Construction Work with respect to the relevant Interim Completion Element in accordance with this Agreement, the Final Design Documents and the Construction Documents, except with respect to any Punch List items.
- (b) Where applicable, interfaces with adjacent Buildable Units are complete and properly conducted or configured.
- (c) Where applicable, native grass cover, prairie grass or other vegetation required for the Project has been seeded or planted in accordance with the Vegetation Management Plan.
- (d) All Third Party Work relating to the relevant Interim Completion Element has achieved Third Party Completion Acceptance.
- (e) In respect of the Authority Administration Building, a certificate of occupancy has been obtained from the AHJ.

3. UTILITY ADJUSTMENT WORK

All Utility Adjustment Work relating to the relevant Interim Completion Element has been completed in accordance with all relevant agreements and utility clearances with respect to such Utility Adjustment Work and a certificate of Utility Completion Acceptance for each Utility Buildable Unit forming part of the Interim Completion Element has been received.

4. DEMOBILIZATION

All demobilization from the relevant parts of the Project ROW is complete, including the removal of temporary work and equipment used in the performance of the Construction Work, but not required for the O&M Work, with respect to that Interim Completion Element.

5. SUBMITTALS

The Developer has submitted to the Authority all Submittals noted as 'C' in the column entitled 'Submission' in the Attachment 2-3 (Tabulation Of Reviewable Submittals) to the Technical Requirements with respect to the relevant Interim Completion Element and each such Submittal has been resolved.

For the purpose of this Section 5, "resolved" means:

- (i) in the case of a Discretionary Submittal, the Submittal has been approved or accepted by the Authority under Section 7.3 (Discretionary Submittal); and

(ii) in the case of an R&C Submittal:

- (A) the Authority has responded with "no comments" or is deemed to have responded with "no comment" under Section 7.4(c) (R&C Submittal); or
- (B) the Authority has provided comments with no Compliance Comments; or
- (C) any disputed Compliance Comments provided by the Authority have been resolved in accordance with Section 7.5 (Submittals Disputes).

6. GOVERNMENTAL APPROVAL CONDITIONS

All of the conditions of the Governmental Approvals relating to the D&C Work for the relevant Interim Completion Element have been satisfied in full.

7. GOVERNMENTAL APPROVALS FOR O&M WORK

All Governmental Approvals (if any) required to perform the O&M Work with respect to the relevant Interim Completion Element are in place, have been provided to the Authority and are not subject to appeal.

8. GOVERNMENTAL ENTITY REQUIREMENTS

If any Governmental Entity with jurisdiction requires any form of certification of design, engineering or construction with respect to the relevant Interim Completion Element, including any certification from the Engineer of Record for the Project, the Developer has caused such certificates to be delivered and has concurrently issued identical certificates to the Authority.

9. DEVELOPER PROJECT MANAGEMENT PLAN

The Developer has developed and delivered to the Authority, and the Authority has approved, those parts of the Developer Project Management Plan noted as 'C' in the column entitled 'Required By' in Attachment 2-1 (*Developer Project Management Plan*) to the Technical Requirements.

10. O&M MANUAL

The Developer has developed and delivered to the Authority for review and comment, in accordance with the Technical Requirements, all portions of the O&M Manual required with respect to the relevant Interim Completion Element.

11. CMMS

The CMMS is fully operational and the Authority has been given live access to this system.

12. INSURANCE

All Insurance Policies required under Article 35 (Insurance and Reinstatement) for the O&M Work to be performed with respect to the relevant Interim Completion Element have been obtained and are in full force and effect, and the Developer has delivered to the Authority verification of insurance coverage as required by Article 35 (Insurance and Reinstatement).

13. NO MAJOR DEFECTS

There are no open Major Defects with respect to the relevant Interim Completion Element.

14. REPORTS AND PROJECT SCHEDULE

Construction progress reports, the Project Baseline Schedule and the PBS Schedule Update are complete and up to date.

15. NO OVERDUE AMOUNTS

The Developer has certified to the Authority in writing that no overdue amounts owing to any Contractor or Supplier with respect to the relevant Interim Completion Element remain unpaid (except for amounts being disputed in Good Faith and for which the Developer or the relevant Contractor (as applicable) has established adequate reserves).

PART 2 – INTENTIONALLY OMITTED

PART 3 - PROJECT SUBSTANTIAL COMPLETION CONDITIONS

1. NOTICE OF PROJECT SUBSTANTIAL COMPLETION

The Developer has issued a Notice of Project Substantial Completion to the Authority in accordance with Section 16.3(d) (*Project Substantial Completion*) of the Agreement.

2. INTERIM COMPLETION FOR ALL INTERIM COMPLETION ELEMENTS AND ALL REMAINING DESIGN WORK AND CONSTRUCTION WORK

- (a) Interim Completion has occurred and a Certificate of Interim Completion has been issued with respect to all Interim Completion Elements for the Project.
- (b) The Developer has completed all of the Design Work and Construction Work (that are not or do not form part of the Interim Completion Elements) in accordance with this Agreement, the Final Design Documents and the Construction Documents, except with respect to any Punch List items.

3. NO MAJOR DEFECTS

There are no open Major Defects with respect to the Design Work and Construction Work referred to in Section 2(b) of this Part 3 (*Project Substantial Completion Conditions*).

4. FUNCTIONAL SYSTEM AND H&H MODEL

- (a) The combination of all of the Project Elements for the Project are fully operational as a single comprehensive system, and capable of being operated full-time, uninterrupted, and continuously in the manner contemplated by the Technical Requirements. The SEAI and MAI being incomplete will not prevent the Developer from achieving Project Substantial Completion.
- (b) The Developer jointly with the Authority has carried out an Initial Inspection and all applicable checklist items have been rated "Acceptable" or better.
- (c) An Availability Test has been carried out and all parts of the Availability Test are passed.
- (d) All ancillary items including equipment, supplies, spare parts and manuals are in place.
- (e) All establishment and commissioning procedures have been successfully completed.

5. VEGETATION

To the extent applicable, vegetative cover for all Project Elements is being established and maintained consistent with the design and construction requirements for vegetative cover and the Vegetation Management Plan.

6. FLOW AND WATER LEVEL MEASUREMENT

The Developer has conducted verification of the accuracy of the flow and water level measuring system, which system includes:

- (a) use of survey methods for water level measurement; and
- (b) proposing a method, applicable timing and associated equipment for flow measurement.

7. SUBMITTALS

The O&M Management Plan for the Operating Period and the O&M Manual have been submitted, reviewed and accepted by the North Dakota State Engineer.

The Developer has submitted to the Authority:

- (a) those Submittals noted as 'D' in the column entitled 'Submission' in the Attachment 2-3 (Tabulation Of Reviewable Submittals) to the Technical Requirements;
- (b) the H&H Model required in Section 3.3.1.2(12)(a) of the Technical Requirements;
- (c) the PMF WSE Module required in Section 3.3.1.2(12)(b) of the Technical Requirements; and
- (d) the certification required by Section 3.3.1.2(12)(c) of the Technical Requirements

and each such Submittal has been resolved.

For the purpose of this Section 7, "resolved" means:

- (i) in the case of a Discretionary Submittal, the Submittal has been approved or accepted by the Authority under Section 7.3 (Discretionary Submittal); and
- (ii) in the case of an R&C Submittal:
 - (A) the Authority has responded with "no comments" or is deemed to have responded with "no comment" under Section 7.4(c) (R&C Submittal); or
 - (B) the Authority has provided comments with no Compliance Comments; or
 - (C) any disputed Compliance Comments provided by the Authority have been resolved in accordance with Section 7.5 (Submittals Disputes).

PART 4 - PROJECT FINAL COMPLETION CONDITIONS

1. NOTICE OF PROJECT FINAL COMPLETION

The Developer has issued a Notice of Project Final Completion to the Authority in accordance with Section 16.4(d) (Project Final Completion) of the Agreement.

2. PROJECT SUBSTANTIAL COMPLETION

Project Substantial Completion has occurred.

3. PUNCH LIST

All Punch List items have been completed in accordance with the requirements of this Agreement.

4. SUBMITTALS

The Developer has submitted to the Authority those Submittals noted as 'E' in the column entitled 'Submission' in the Attachment 2-3 (Tabulation Of Reviewable Submittals) to the Technical Requirements and each such Submittal has been resolved.

For the purpose of this Section 4, "resolved" means:

- (i) in the case of a Discretionary Submittal, the Submittal has been approved or accepted by the Authority under Section 7.3 (Discretionary Submittal); and
- (ii) in the case of an R&C Submittal:
 - (A) the Authority has responded with "no comments" or is deemed to have responded with "no comment" under Section 7.4(c) (R&C Submittal); or
 - (B) the Authority has provided comments with no Compliance Comments; or
 - (C) any disputed Compliance Comments provided by the Authority have been resolved in accordance with Section 7.5 (Submittals Disputes).

5. RECORD DRAWINGS DELIVERABLES

The Authority has received a complete set of the Record Drawings Deliverables for the Project, in the form required under this Agreement.

6. GOVERNMENTAL ENTITY REQUIREMENTS

If any Governmental Entity with jurisdiction requires any form of certification of design, engineering or construction with respect to the Project, including any certification from the Engineer of Record for the Project, the Developer has caused such certificates to be delivered and has concurrently issued identical certificates to the Authority.

7. GOVERNMENTAL APPROVAL CONDITIONS

All of the conditions of the Governmental Approvals relating to the Project that relate to Design Work or Construction Work have been satisfied in full.

8. GOVERNMENTAL APPROVALS FOR O&M WORK

All Governmental Approvals (if any) required to perform O&M Work with respect to the Project, other than any Governmental Approvals that will not be required for performance of the O&M Work until a later date, are in place, have been provided to the Authority and are not subject to appeal.

9. **O&M MANUAL**

The Developer has developed and delivered to the Authority for review and comment, in accordance with the Technical Requirements, the O&M Manual with respect to the Project.

10. **NO OVERDUE AMOUNTS**

The Developer has certified to the Authority in writing that no overdue amounts owing to any Contractor or Supplier with respect to the Project remain unpaid (except for amounts being disputed in Good Faith and for which the Developer or relevant Contractor (as applicable) has established adequate reserves).

EXHIBIT 13

UPDATE TO THE BASE MAPS

Steps 1 to 9 of this Exhibit 13 apply with respect to each of the Base Capital MAPs (being, the FC Capital MAP and the NFC Capital MAP) and any reference to "Base Capital MAP" in Steps 1 to 9 of this Exhibit 13 will apply with respect to each Base Capital MAP, as applicable.

1. The Developer shall update the Preliminary Financial Model to reflect any changes in:
 - (a) the Financial Closing Date, the Scheduled Project Substantial Completion Date, and anticipated Expiry Date; and
 - (b) any changes in the final commercial structure and terms of the Project agreed by the parties, excluding those resulting from benchmark rates or credit spread fluctuations.
2. The Preliminary Financial Model will then be updated for Base Interest Rates as of the Bond Pricing Date or Bank Debt Pricing Date (as applicable), including any change in term structure and pro-rata change in coupon structure, and solved for the lowest possible Base Capital MAP amount while holding the Preliminary Equity IRR constant and meeting all key metrics. The resulting Base Capital MAP will be **MAP_{bid}**.
3. If, pursuant to the ITP, the Developer did not request, or was ineligible for, credit spread protection, then **MAP_{final}** will be equal to **MAP_{bid}**. If **MAP_{final} = MAP_{bid}** the Developer shall proceed to Step 8 of this Exhibit 13. Otherwise the Developer shall follow Steps 3 through 9 of this Exhibit 13.
4. If the Baseline Credit Spreads were not used in the Preliminary Financial Model, the Preliminary Financial Model resulting from Step 2 will be updated for the appropriate Baseline Credit Spreads and required coupon structure and solved for the lowest possible Base Capital MAP amount while holding Preliminary Equity IRR constant and meeting all key metrics. The resulting Base Capital MAP will be **MAP_{baseline}**.
5. Setting **MAP_{high}** and **MAP_{low}**
 - i. If the Baseline Credit Spreads were not used in the Preliminary Financial Model:
MAP_{high} = maximum of (MAP_{bid}, MAP_{baseline}) and MAP_{low} = minimum of (MAP_{bid}, MAP_{baseline}).
 - ii. If the Baseline Credit Spreads were used in the Preliminary Financial Model:
 - (b) **MAP_{high} = MAP_{bid} and MAP_{low} = MAP_{bid}.**
6. The Preliminary Financial Model will be updated for the actual bond pricing and the actual coupon and term structure as of the Bond Pricing Date, and solved for the lowest possible Base Capital MAP amount while holding the Preliminary Equity IRR constant and meeting all key metrics. The resulting Base Capital MAP will be **MAP_{pricing date}**.
7. Calculation of **MAP_{final}**
 - i. If **MAP_{high} ≥ MAP_{pricing date} ≥ MAP_{low}**
MAP_{final} = MAP_{bid}

ii. If **MAP_{pricing date}** > **MAP_{high}**

$$\mathbf{MAP_{final} = MAP_{bid} + 85\% * (MAP_{pricing\ date} - MAP_{high})}$$

iii. If **MAP_{pricing date}** < **MAP_{low}**

$$\mathbf{MAP_{final} = MAP_{bid} - 85\% * (MAP_{low} - MAP_{pricing\ date})}$$

8. The Financial Model will be run to solve for a revised Equity IRR, inputting:

- (a) **MAP_{final}** for each of the Base Capital MAPs;
- (b) actual credit spreads, coupon and term structure as of the Bond Pricing Date; and
- (c) all other changes in terms of financing assumed between those indicated in the Preliminary Financial Model and the terms set out in the Finance Documents as of the Financial Closing Date.

9. Upon completion of Step 8, the following will apply:

- (a) the resulting financial model will become the Base Case Financial Model;
- (b) the resulting post-tax internal rate of return on equity will constitute the Base Case Equity IRR; and
- (c) the resulting key ratios will constitute the Key Ratios as of Financial Close.

EXHIBIT 14

MILESTONE PAYMENTS

1. MILESTONE PAYMENT WITH RESPECT TO PROJECT SUBSTANTIAL COMPLETION

1.1 Substantial Completion Milestone Payment

Upon the Project Substantial Completion Date, the Developer will, subject to Article 23 (Milestone Payments), be entitled to a payment equal to the Substantial Completion Milestone Payment ("MP_{SC}") calculated as follows:

$$MP_{SC} = \text{MaxMP}_{SC} - \text{MPD}_{SC}$$

Where:

MaxMP_{SC} = the Maximum Substantial Completion Milestone Payment Amount, being \$127,265,187; and

MPD_{SC} = the Substantial Completion Milestone Payment Deduction calculated in accordance with Section 1.2 (Substantial Completion Milestone Payment Deduction) of this Exhibit 14.

1.2 Substantial Completion Milestone Payment Deduction

The Substantial Completion Milestone Payment Deduction ("MPD_{SC}") will be calculated as follows:

$$\text{MPD}_{SC} = \sum \text{MPSCNP} \times \text{NCPV}$$

Where:

MPSCNP = the Noncompliance Points that are assessed for Noncompliance Events prior to the Project Substantial Completion Date in accordance with Article 22 (Noncompliance Events) and Exhibit 16 (Noncompliance Events); and

NCPV = the unit value for each Noncompliance Point, being \$9,000.

2. ADDITIONAL MILESTONE PAYMENTS WITH RESPECT TO PAY UNIT COMPLETION

Upon each AMP Calculation Date, the Developer will, subject to Article 23 (Milestone Payments), be entitled to payment of an Additional Milestone Payment ("AMP") equal to the sum of the Pay Unit Amounts (as set out in Annex 1 (Pay Units) to this Exhibit 14) for each Pay Unit that the Developer has completed on or prior to that AMP Calculation Date in accordance with Section 16.1 (Interim Completion of Project Elements) and that has not been included as part of a claim for any previous AMP.

ANNEX 1 – PAY UNITS

The Pay Unit downstream limits and upstream limits are general descriptions. Pay Units are to consist of one or more whole Buildable Units. Do not split Buildable Units among Pay Units without linking Pay Units (i.e. if two or more Pay Units are combined into a single Buildable Unit, those Pay Units must be submitted together when the Buildable Unit is substantially complete). Exhibit 5 (*Technical Requirements*) describes allowable limits of Diversion Reaches. Make reasonable assumptions, generally consistent with the limits described in the table and the WBS, in assigning portions of Construction Work to each Pay Unit.

Pay Unit Number	Description of Pay Unit	Downstream Limit	Upstream Limit	Pay Unit Amount (\$)
1	Diversion Outlet	Centerline of Red River	Upstream end of transition to the uniform adjacent Diversion Channel geometry	7,344,833
2	Diversion Channel Reach, including applicable Buildable Units in the reach pertaining to the Low Flow Channel, EMBs, Diversion Channel Line of Protection, Local Drainage, Utilities, and the Maintenance Road/Trail. Include erosion control features recommended in the Sedimentation, Erosion, and Scour Reports as described in Section 2.5.3 Sedimentation, Erosion, and Scour Analyses	Upstream limit of Pay Unit 1	Pay Unit 11 - Drain 29 Inlet	14,590,302
3	Diversion Channel Reach, including applicable Buildable Units in the reach pertaining to the Low Flow Channel, EMBs, Diversion Channel Line of Protection, Local Drainage, Utilities, and the Maintenance Road/Trail. Include erosion control features as recommended in the Sedimentation, Erosion, and Scour Reports as described in Section 2.5.3 Sedimentation, Erosion, and Scour Analyses Include 25th St. SE connection Parcel 2368. Include 171th Ave. S.E. Crossing at Drain 30. Include 172nd Ave. S.E. Connection to realigned CR4. Include 24th St SE Connection to realigned CR4	Upstream limit of Pay Unit 2	Pay Unit 12 - Drain 30 Inlet	23,787,986
4	Diversion Channel Reach, including applicable Buildable Units in the reach pertaining to the Low Flow Channel, EMBs, Diversion Channel Line of Protection, Local Drainage, Utilities, and the Maintenance Road/Trail. Include erosion control features as recommended in the Sedimentation, Erosion, and Scour Reports as described in Section 2.5.3 Sedimentation, Erosion, and Scour Analyses Include 27th Street. S.E. Connection to CR81	Upstream limit of Pay Unit 3	Pay Unit 30 - BNSF Hillsboro Subdivision Line Crossing	16,776,000
5	Diversion Channel Reach, including applicable Buildable Units in the reach pertaining to the Low Flow Channel, EMBs, Diversion Channel Line of Protection, Local Drainage, Utilities, and the Maintenance Road/Trail. Include erosion control features as recommended in the Sedimentation, Erosion, and Scour Reports as described in Section 2.5.3 Sedimentation, Erosion, and Scour Analyses	Pay Unit 22 - I-29 Southbound Crossing	Pay Unit 13 - Rush River Inlet	27,560,256
6	Diversion Channel Reach, including applicable Buildable Units in the reach pertaining to the Low Flow Channel, EMBs, Diversion Channel Line of Protection, Local Drainage, Utilities, and the Maintenance Road/Trail. Include erosion control features as recommended in the Sedimentation, Erosion, and Scour Reports as described in Section 2.5.3 Sedimentation, Erosion, and Scour Analyses	Upstream limit of Pay Unit 5	Pay Unit 15 - Lower Rush River Inlet	16,886,949
7	Diversion Channel Reach, including applicable Buildable Units in the reach pertaining to the Low Flow Channel, EMBs, Diversion Channel Line of Protection, Local Drainage,	Upstream limit of Pay Unit 6	Pay Unit 33 BNSF Prosper Subdivision Line Crossing	38,755,024

FARGO-MOORHEAD AREA DIVERSION PROJECT

Pay Unit Number	Description of Pay Unit	Downstream Limit	Upstream Limit	Pay Unit Amount (\$)
	Utilities, and the Maintenance Road/Trail. Include erosion control features as recommended Interim Completion in the Sedimentation, Erosion, and Scour Reports as described in Section 2.5.3 Sedimentation, Erosion, and Scour Analyses			
8	Diversion Channel Reach, including applicable Buildable Units in the reach pertaining to the Low Flow Channel, EMBs, Diversion Channel Line of Protection, Local Drainage, Utilities, and the Maintenance Road/Trail. Include erosion control features as recommended in the Sedimentation, Erosion, and Scour Reports as described in Section 2.5.3 Sedimentation, Erosion, and Scour Analyses Include 35th St. SE to parcel 938	Upstream limit of Pay Unit 7	Pay Unit 16 - Raymond Township North Drain Inlet	18,096,295
9	Diversion Channel Reach, including applicable Buildable Units in the reach pertaining to the Low Flow Channel, EMBs, Diversion Channel Line of Protection, Local Drainage, Utilities, and the Maintenance Road/Trail. Include erosion control features as recommended in the Sedimentation, Erosion, and Scour Reports as described in Section 2.5.3 Sedimentation, Erosion, and Scour Analyses Include 37th St. SE East of Diversion Channel. Include CR10 (12th Ave NW Connect to multiple parcels).	Upstream limit of Pay Unit 8	Pay Unit 18 - Drain 14B Inlet	23,266,525
10	Diversion Channel Reach, including applicable Buildable Units in the reach pertaining to the Low Flow Channel, EMBs, Diversion Channel Line of Protection, Local Drainage, Utilities, and the Maintenance Road/Trail. Include erosion control features as recommended in the Sedimentation, Erosion, and Scour Reports as described in Section 2.5.3 Sedimentation, Erosion, and Scour Analyses	Upstream limit of Pay Unit 9	Pay Unit 19 - Drain 14C Inlet	26,062,443
11	Drain 29 Inlet	Project ROW	Adjacent Diversion Channel Reach Pay Units	1,717,383
12	Drain 30 Inlet	Project ROW	Adjacent Diversion Channel Reach Pay Units	3,193,006
13	Rush River Inlet	Project ROW	Adjacent Diversion Channel Reach Pay Units	8,041,484
14	Berlin Township Drain Inlet	Project ROW	Adjacent Diversion Channel Reach Pay Units	4,258,118
15	Lower Rush River Inlet	Project ROW	Adjacent Diversion Channel Reach Pay Units	8,862,507
16	Raymond Township North Drain Inlet	Project ROW	Adjacent Diversion Channel Reach Pay Units	3,193,006
17	Raymond Township South Drain Inlet	Project ROW	Adjacent Diversion Channel Reach Pay Units	3,181,911
18	Drain 14B Inlet	Project ROW	Adjacent Diversion Channel Reach Pay Units	3,581,328
19	Drain 14C Inlet	Project ROW	Adjacent Diversion Channel Reach Pay Units	8,940,172
20	Maple River Aqueduct, except that it is not required to be in service.	N/A	N/A	41,248,560
21	I-29 Northbound Crossing	N/A	N/A	11,123,724
22	I-29 Southbound Crossing	N/A	N/A	11,123,724
23	I-94 Eastbound Crossing	N/A	N/A	11,001,680
24	I-94 Westbound Crossing	N/A	N/A	11,001,680

FARGO-MOORHEAD AREA DIVERSION PROJECT

Pay Unit Number	Description of Pay Unit	Downstream Limit	Upstream Limit	Pay Unit Amount (\$)
25	CR 22 Crossing	N/A	N/A	5,986,779
26	CR 32 Crossing	N/A	N/A	8,327,806
27	CR 81 Crossing	N/A	N/A	14,706,217
28	Combined CR 4 and CR 31 Crossing and Collector Roadway Improvements	N/A	N/A	9,014,526
29	Construction of the BNSF Hillsboro Subdivision Line Crossing Shoofly (Buildable Unit as described in Section 3.3.3.6 Railroad)	N/A	N/A	4,249,352
30	BNSF Hillsboro Subdivision Line Crossing	N/A	N/A	11,134,819
31	Removal of the BNSF Hillsboro Subdivision Line Crossing Shoofly outside of BNSF ROW. (Buildable Unit as described in Section 3.3.3.6 Railroad)	N/A	N/A	1,697,522
32	Construction of the BNSF Prosper Subdivision Line Crossing Shoofly (Buildable Unit as described in Section 3.3.3.6 Railroad)	N/A	N/A	3,195,335
33	BNSF Prosper Subdivision Line Crossing	N/A	N/A	8,416,565
34	Removal of the BNSF Prosper Subdivision Line Crossing Shoofly outside of BNSF ROW. (Buildable Unit as described in Section 3.3.3.6 Railroad)	N/A	N/A	1,275,915
35	Construction of the BNSF KO Subdivision Line Eastbound Crossing Shoofly (Buildable Unit as described in Section 3.3.3.6 Railroad)	N/A	N/A	3,472,708
36	BNSF KO Subdivision Line Eastbound Crossing	N/A	N/A	9,126,639
37	Removal of the BNSF KO Subdivision Line Eastbound Crossing Shoofly outside of BNSF ROW. (Buildable Unit as described in Section 3.3.3.6 Railroad)	N/A	N/A	1,386,864
38	Construction of the BNSF KO Subdivision Line Westbound Crossing Shoofly (Buildable Unit as described in Section 3.3.3.6 Railroad)	N/A	N/A	3,472,708
39	BNSF KO Subdivision Line Westbound Crossing	N/A	N/A	9,126,639
40	Removal of the BNSF KO Subdivision Line Westbound Crossing Shoofly outside of BNSF ROW. (Buildable Unit as described in Section 3.3.3.6 Railroad)	N/A	N/A	1,386,864
41	Diversion Channel Reach, including applicable Buildable Units in the reach pertaining to the Low Flow Channel, EMBs, Diversion Channel Line of Protection, Local Drainage, Utilities, and the Maintenance Road/Trail. Include erosion control features as recommended in the Sedimentation, Erosion, and Scour Reports as described in Section 2.5.3 Sedimentation, Erosion, and Scour Analyses	Upstream limit of Pay Unit 10	Pay Unit 57 - 38th Street West Crossing	43,570,217
42	Diversion Channel Reach, including applicable Buildable Units in the reach pertaining to the Low Flow Channel, EMBs, Diversion Channel Line of Protection, Local Drainage, Utilities, and the Maintenance Road/Trail. Include erosion control features as recommended in the Sedimentation, Erosion, and Scour Reports as described in Section 2.5.3 Sedimentation, Erosion, and Scour Analyses	Upstream limit of Pay Unit 41	Pay Unit 49 - Mapleton Township Drain Inlet	30,411,649
43	Diversion Channel Reach, including applicable Buildable Units in the reach pertaining to the Low Flow Channel, EMBs, Diversion Channel Line of Protection, Local Drainage, Utilities, and the Maintenance Road/Trail. Include erosion control features as recommended in the Sedimentation, Erosion, and Scour Reports as described in Section 2.5.3 Sedimentation, Erosion, and Scour Analyses Include 15th Street SW from CR 8 to 32nd Ave W.	Upstream limit of Pay Unit 42	Pay Unit 50 - Drain 21C Inlet	38,044,950
44	Diversion Channel Reach, including applicable Buildable Units in the reach pertaining to the Low Flow Channel, EMBs, Diversion Channel Line of Protection, Local Drainage, Utilities, and the Maintenance Road/Trail. Include erosion control features as	Upstream limit of Pay Unit 43	Pay Unit 53 - CR 6 Crossing	23,377,474

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Pay Unit Number	Description of Pay Unit	Downstream Limit	Upstream Limit	Pay Unit Amount (\$)
	recommended in the Sedimentation, Erosion, and Scour Reports as described in Section 2.5.3 Sedimentation, Erosion, and Scour Analyses			
45	Diversion Channel Reach, including applicable Buildable Units in the reach pertaining to the Low Flow Channel, EMBs, Diversion Channel Line of Protection, Local Drainage, Utilities, and the Maintenance Road/Trail. Include erosion control features as recommended in the Sedimentation, Erosion, and Scour Reports as described in Section 2.5.3 Sedimentation, Erosion, and Scour Analyses	Upstream limit of Pay Unit 44	Pay Unit 51 - Drain 50 Inlet	33,399,491
46	Diversion Channel Reach, including applicable Buildable Units in the reach pertaining to the Low Flow Channel, EMBs, Diversion Channel Line of Protection, Local Drainage, Utilities, and the Maintenance Road/Trail. Include erosion control features as recommended in the Sedimentation, Erosion, and Scour Reports as described in Section 2.5.3 Sedimentation, Erosion, and Scour Analyses	Upstream limit of Pay Unit 45	Pay Unit 47 - Diversion Inlet Structure Tie-In	19,017,173
47	Diversion Inlet Structure Tie-In	Upstream limit of Pay Unit 46	Diversion Inlet Structure Interface	9,827,274
48	CR 16/17 Crossing	N/A	N/A	6,584,740
49	Mapleton Township Drain Inlet	Project ROW	Adjacent Diversion Channel Reach Pay Units	3,193,006
50	Drain 21C Inlet include 15 th St. SW Improvements CR8 – 32 nd Ave.	Project ROW	Adjacent Diversion Channel Reach Pay Units	3,193,006
51	Drain 50 Inlet	Project ROW	Adjacent Diversion Channel Reach Pay Units	3,193,006
52	Sheyenne River Aqueduct, except that it is not required to be in service.	N/A	N/A	36,144,900
53	CR 6 Crossing	N/A	N/A	6,484,885
54	CR 10 Crossing	N/A	N/A	6,584,740
55	CR 20 Crossing	N/A	N/A	6,484,885
56	32nd Avenue West Crossing	N/A	N/A	6,484,885
57	38th Street West Crossing	N/A	N/A	6,507,075
58	Authority Administration Building	N/A	N/A	8,631,843
59	52nd Avenue W Crossing	N/A	N/A	5,494,777
60	CR 14 Crossing	N/A	N/A	7,189,260

ANNEX 2 – MAXIMUM CUMULATIVE ADDITIONAL MILESTONE PAYMENTS

Date	Maximum Cumulative Additional Milestone Payments (in nominal dollars)
31 Dec 2021	0
31 Jan 2022	0
28 Feb 2022	0
31 Mar 2022	0
30 Apr 2022	0
31 May 2022	0
30 Jun 2022	0
31 Jul 2022	0
31 Aug 2022	0
30 Sep 2022	0
31 Oct 2022	0
30 Nov 2022	0
31 Dec 2022	0
31 Jan 2023	29,735,656
28 Feb 2023	52,037,397
31 Mar 2023	74,339,139
30 Apr 2023	96,640,881
31 May 2023	118,942,622
30 Jun 2023	141,244,364
31 Jul 2023	163,546,106
31 Aug 2023	185,847,847
30 Sep 2023	208,149,589
31 Oct 2023	230,451,331
30 Nov 2023	252,753,073
31 Dec 2023	275,054,814
31 Jan 2024	297,356,556
29 Feb 2024	319,658,298
31 Mar 2024	341,960,039
30 Apr 2024	364,261,781
31 May 2024	386,563,523
30 Jun 2024	408,865,264
31 Jul 2024	431,167,006
31 Aug 2024	453,468,748
30 Sep 2024	475,770,490
31 Oct 2024	498,072,231
30 Nov 2024	520,373,973

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Date	Maximum Cumulative Additional Milestone Payments (in nominal dollars)
31 Dec 2024	542,675,715
31 Jan 2025	564,977,456
28 Feb 2025	587,279,198
31 Mar 2025	609,580,940
30 Apr 2025	631,882,681
31 May 2025	654,184,423
30 Jun 2025	676,486,165
31 Jul 2025	698,787,906
31 Aug 2025	721,089,648
30 Sep 2025	743,391,390
31 Oct 2025	743,391,390
30 Nov 2025	743,391,390
31 Dec 2025	743,391,390
31 Jan 2026	743,391,390
28 Feb 2026	743,391,390
31 Mar 2026	743,391,390
30 Apr 2026	743,391,390
31 May 2026	743,391,390
30 Jun 2026	743,391,390
31 Jul 2026	743,391,390
31 Aug 2026	743,391,390
30 Sep 2026	743,391,390
31 Oct 2026	743,391,390
30 Nov 2026	743,391,390
31 Dec 2026	743,391,390
31 Jan 2027	743,391,390
28 Feb 2027	743,391,390
31 Mar 2027	743,391,390
30 Apr 2027	743,391,390
31 May 2027	743,391,390
30 Jun 2027	743,391,390
31 Jul 2027	743,391,390
31 Aug 2027	743,391,390
30 Sep 2027	743,391,390
31 Oct 2027	743,391,390
30 Nov 2027	743,391,390
31 Dec 2027	743,391,390

EXHIBIT 15**PAYMENT MECHANISM****1. MONTHLY AVAILABILITY PAYMENT**

The monthly Availability Payment ("**AP_m**") for any month (m) after the Project Substantial Completion Date will be calculated as follows:

$$AP_m = MFCP_m + MNFCP_m$$

Where:

MFCP_m = the Monthly Flood Control Payment for month (m), calculated in accordance with Section 2 (Monthly Flood Control Payment) of this Exhibit 15; and

MNFCP_m = the Monthly Non-Flood Control Payment for month (m), calculated in accordance with Section 3 (Monthly Non-Flood Control Payment) of this Exhibit 15.

2. MONTHLY FLOOD CONTROL PAYMENT**2.1 Monthly Flood Control Payment (MFCP_m)**

The Monthly Flood Control Payment ("**MFCP_m**") for any month (m) after the Project Substantial Completion Date will be calculated as follows:

$$MFCP_m = MaxFP_m + VP_m - MFCND_{m-1}$$

Where:

MFCP_m = 0, if $MFCND_{m-1} \geq (MaxFP_m + VP_m)$

MaxFP_m = the Maximum Monthly Fixed Payment for month (m), calculated in accordance with Section 2.2 (Maximum Monthly Fixed Payment) of this Exhibit 15;

VP_m = the Variable Payment for month (m), calculated in accordance with Section 2.4 (Variable Payment) of this Exhibit 15; and

MFCND_{m-1} = the Monthly Flood Control Noncompliance Deduction for Month (m-1), calculated in accordance with Section 2.5 (Monthly Flood Control Noncompliance Deduction) of this Exhibit 15.

2.2 Maximum Monthly Fixed Payment (MaxFP_m)

- (a) Subject to clause (b), the Maximum Monthly Fixed Payment ("**MaxFP_m**") for any month (m) after the Project Substantial Completion Date will be calculated as follows:

$$MaxFP_m = \frac{d_m}{d_y} \times MaxFP_y$$

Where:

d_m = the number of days in month (m) from the start of month (m) (or the Project Substantial Completion Date, if later) to the end of month (m) (or the Termination Date, if earlier);

d_y = the number of days in Payment Year (y); and

MaxFP_y = the Maximum Annual Fixed Payment for Payment Year (y).

- (b) If any one or more of the Availability Tests is or are failed (as determined in accordance with Section 2 (*Project Administrative and Management Requirements*) of the Technical Requirements) as of an Annual Availability Determination Date, the Maximum Monthly Fixed Payment (" MaxFP_m ") for the month following the Annual Availability Determination Date and each subsequent month up to and including the month of the next Annual Availability Determination Date will be **zero (0)**.

2.3 Maximum Annual Fixed Payment (MaxFP_y)

The Maximum Annual Fixed Payment (" MaxFP_y ") for any Payment Year (y) after the Project Substantial Completion Date will be calculated as follows:

$$\text{MaxFP}_y = (\text{FCCP}_B \times \text{Esc}_y) + \text{FCMP}$$

Where:

FCCP_B = the base FC Capital MAP, being \$19,041,021;

FCMP = the base FC Maintenance MAP, being \$4,436,470 (indexed in accordance with Section 5 (*Indexation*) of this Exhibit 15); and

Esc_y = the Escalation Factor for Payment Year (y), calculated in accordance with Section 4 (*Escalation Factor*) of this Exhibit 15.

2.4 Variable Payment (VP_m)

- (a) Following the Project Substantial Completion Date the Variable Payment (" VP_m ") for each month (m) will be calculated in accordance with the following:
- (i) except as set out in clause (ii) or (iii), VP_m will be zero;
 - (ii) if there is one or more Declarations of Probable Flood for a flood season, a single Variable Payment of \$25,000 (indexed in accordance with Section 5 (*Indexation*) of this Exhibit 15) will be payable for the first (and only the first) full month after the first Declaration of Probable Flood, whether or not there is a subsequent Water Diversion Event; and
 - (iii) if there is a Water Diversion Event, a single Variable Payment (" VP_m ") for the first (and only the first) full month after the conclusion of the Water Diversion Event will be determined in accordance with the following formula by reference to the maximum Measured Flow during that Water Diversion Event:

$$\text{VP}_m = X + (Y \times \text{MMF})$$

Where:

VP_m = the Variable Payment payable with respect to the Water Diversion Event.

X = either:

(i) where there was a prior Declaration of Probable Flood with respect to that flood season, \$25,000 (indexed in accordance with Section 5 (Indexation) of this Exhibit 15); or

(ii) where there was no prior Declaration of Probable Flood with respect to that flood season, \$50,000 (indexed in accordance with Section 5 (Indexation) of this Exhibit 15).

Y = \$10 (indexed in accordance with Section 5 (Indexation) of this Exhibit 15).

MMF = the maximum Measured Flow during that Water Diversion Event in cfs.

- (b) A Water Diversion Event will be deemed to have concluded once the Measured Flow for that Water Diversion Event falls below 5,000 cfs.

2.5 **Monthly Flood Control Noncompliance Deduction (MFCND_m)**

The Monthly Flood Control Noncompliance Deduction ("**MFCND_m**") for m(m) will be calculated as follows:

$$MFCND_m = \sum MFCNP_m \times NCPV$$

Where:

MFCNP_m = the number of Noncompliance Points that are assessed for Flood Control Noncompliance Events in month (m) in accordance with Article 22 (Noncompliance Events) and Exhibit 16 (Noncompliance Events); and

NCPV = the unit value for each Noncompliance Point of \$9,000 (indexed in accordance with Section 5 (Indexation) of this Exhibit 15).

3. **MONTHLY NON-FLOOD CONTROL PAYMENT**

3.1 **Monthly Non-Flood Control Payment (MNFCP_m)**

The Monthly Non-Flood Control Payment ("**MNFCP_m**") for any month (m) after the Project Substantial Completion Date will be calculated as follows:

$$MNFCP_m = \text{Max}NFCP_m - MNFCND_{m-1}$$

Where:

MNFCP_m = 0, if $MNFCND_{m-1} \geq \text{Max}NFCP_m$

MaxNFCP_m = the Maximum Monthly Non-Flood Control Payment for month (m), calculated in accordance with Section 3.2 (Maximum Monthly Non-Flood Control Payment) of this Exhibit 15; and

MNFCND_{m-1} = the Monthly Non-Flood Control Noncompliance Deduction for month (m-1), calculated in accordance with Section 3.4 (Monthly Non-Flood Control Noncompliance Deduction) of this Exhibit 15.

3.2 Maximum Monthly Non-Flood Control Payment (MaxNFCP_m)

The Monthly Non-Flood Control Payment Amount ("**MaxNFCP_m**") for any month (m) after the Project Substantial Completion Date will be calculated as follows:

$$MaxNFCP_m = \frac{d_m}{d_y} \times MaxNFCP_y$$

Where:

d_m = the number of days in month (m) from the start of month (m) (or the Project Substantial Completion Date, if later) to the end of month (m) (or the Termination Date, if earlier);

d_y = the number of days in Payment Year (y); and

MaxNFCP_y = the Maximum Annual Non-Flood Control Payment for Payment Year (y).

3.3 Maximum Annual Non-Flood Control Payment (MaxNFCP_y)

The Maximum Annual Non-Flood Control Payment ("**MaxNFCP_y**") for any Payment Year (y) after the Project Substantial Completion Date will be calculated as follows:

$$MaxNFCP_y = (NFCCP_B \times Esc_y) + NFCMP$$

Where:

NFCCP_B = the base NFC Capital MAP, being \$6,347,007;

NFCMP = the base annual NFC Maintenance MAP, being \$1,775,496 (indexed in accordance with Section 5 (Indexation) of this Exhibit 15); and

Esc_y = the Escalation Factor for Payment Year (y), calculated in accordance with Section 4 (Escalation Factor) of this Exhibit 15.

3.4 Monthly Non-Flood Control Noncompliance Deduction (MNFCND_m)

The Monthly Non-Flood Control Noncompliance Deduction ("**MNFCND_m**") for any month (m) after the Project Substantial Completion Date will be calculated as follows:

$$MNFCND_m = \sum MNFCNP_m \times NCPV$$

Where:

MNFCNP_m = the number of Noncompliance Points that are assessed for Non-Flood Control Noncompliance Events in month (m) in accordance with Article 22 (Noncompliance Events) and Exhibit 16 (Noncompliance Events).

NCPV = the unit value for each Noncompliance Point of \$9,000 (indexed in accordance with Section 5 (Indexation) of this Exhibit 15).

4. **ESCALATION FACTOR**

The Escalation Factor ("**Esc_y**") for any Payment Year (y) will be calculated as follows:

$$Esc_y = 1.0225^{y-1}$$

Where:

y = the numbered Payment Year, with Payment Year number 1 commencing on the Payment Years Start Date, and each subsequent numbered Payment Year commencing on each anniversary of the Payment Years Start Date. For Payment Year number 30 and higher, y will equal 30.

5. **INDEXATION**

Any values that are subject to indexation in accordance with this Section 5 of this Exhibit 15 will be adjusted on the Payment Years Start Date and on each anniversary of the Payment Years Start Date by application of the following factor:

$$\frac{CPI_y}{CPI_{Base}}$$

Where:

CPI_y = the most recently available full-year CPI figure as of 6:00 a.m. Central Time on the first day of each Payment Year; and

CPI_{Base} = the most recently available full-year CPI figure as of 6:00 a.m. Central Time on May 17, 2021.

EXHIBIT 16

NONCOMPLIANCE EVENTS

1. ADMINISTRATIVE¹

References in this Table 1 are to Sections to the main body of this Agreement and are provided for information only and not deemed to be exhaustive.

ID No	Noncompliance Events	Sub-Heading	Each breach or failure to comply with the following obligations constitute a Noncompliance Event	Reference	Category	Cure Period (days)	No. of Points
1	Review of Submittals	No Work Prior to Review	Submit a Reviewable Submittal to the Authority prior to commencement or permitting the commencement of any Work that is the subject of, governed by or dependent upon a Reviewable Submittal	Section 7.3(b) & 7.4(b)	B	1	1
2	Review of Submittals	Resolution of Compliance Comment and Preference Comment	Make all changes necessary to the Work (in a manner complying with the Agreement) to accommodate and resolve a Compliance Comment or Preference Comment (as applicable) (i) If the Developer fails to deliver an explanation to the Authority in accordance with Section 7.5(a); or (ii) in the event a Submittal dispute is resolved in favor of the Authority under Section 7.5(c) with full acceptance of all responsibility for such changes at the Developer's risk.	Section 7.5(b)(ii)	B	7	2
3	Review of Submittals	Resolution of Compliance Comment and Preference Comment	Prior to commencing any action for which a Reviewable Submittal is required to be reviewed in accordance with Article 7 (<i>Review of Submittals</i>), respond to all of the Authority's comments and objections to such Reviewable Submittal provided in accordance with Section 7 and make modifications to the Reviewable Submittal as necessary to fully reflect and resolve all such Compliance Comments and use Reasonable Efforts to accommodate or otherwise resolve all Preference Comments, in accordance with the review processes set out in Section 7.	Article 7	B	14	3
4	Project Site	Temporary Construction Easements	For each Temporary Site to (i) restore the land subject to each Temporary Construction Easement to its original condition, and ensure that it complies with any other applicable requirements of the Agreement; and (ii) hand back to the Authority by the later of the applicable TCE Expiry Date or Project Substantial Completion Date	Section 8.4(h)	B	14	4
5	Project Site	Access and Inspection Rights for the Authority and Other Persons	Grant access to the Authority and any third parties that may from time to time have access rights to the Project Site, including the Third Parties, Utility Owners and USACE in accordance with Section 8.5.	Section 8.5(a)	A	7	1

¹ Following Project Substantial Completion, the Noncompliance Events in Section 1 (Administrative) are classified as Flood Control Noncompliance Events.

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ID No	Noncompliance Events	Sub-Heading	Each breach or failure to comply with the following obligations constitute a Noncompliance Event	Reference	Category	Cure Period (days)	No. of Points
6	Governmental Approvals	Copies of Governmental Approvals	Promptly, within five (5) Business Days after submitting an application or obtaining a Governmental Approval deliver to the Authority true and complete copies of (i) any application for Governmental Approval submitted by the Developer (including any application to amend an existing Governmental Approval); and (ii) any new or amended Governmental Approval obtained by the Developer.	Section 10.4(a)	B	7	1
7	Utilities and Third Parties	Costs of Utility Adjustment Work and Third Party Work	Maintain and provide to the Authority a complete set of cost records in accordance with the recordkeeping and audit requirements of this Agreement and Applicable Law	Section 11.6(f)	A	14	2
8	Hazardous Materials	General Obligations	Provide the Authority with a reasonable opportunity to inspect areas and locations that require Remedial Action within a reasonable time period before any Remedial Action (other than with respect to a Developer Hazardous Materials Release) is taken for which the Developer has responsibility that would inhibit the Authority's ability to ascertain the nature and extent of the relevant Hazardous Environmental Condition	Section 12.1(b)	A	7	2
9	Hazardous Materials	General Obligations	Promptly provide written notice to the Authority if Developer discovers any Hazardous Materials regulated under CERCLA on the Project Site	Section 12.1(g)	A	1	5
10	Hazardous Materials	Third Party Claims	Promptly within five (5) Business Days notify the Authority of incidents, potential claims and matters that are reasonably likely to give rise to any Third Party Claim referred to in Section 12.3(b).	Section 12.3(c)	A	7	1
11	Notices to Proceed	Preliminary Work and Conditions Precedent to NTP1	Defer commencement of the Preliminary Work until the Authority has issued a notice ("NTP1") to the Developer authorizing such commencement. Each day that the Noncompliance occurs is considered a Noncompliance Event	Section 15.1(a)	C	0	2
12	Notices to Proceed	Remaining Work and Conditions Precedent to NTP2	Defer commencement of the Remaining Work until the Authority has issued a notice ("NTP2") to the Developer authorizing such commencement. Each day that the Noncompliance occurs is considered a Noncompliance Event	Section 15.2(a)	C	0	2
13	Completion	Interim Completion of Project Element	Deliver a complete set of As-Built Drawings for an Interim Completion Element within ninety (90) days following the date on which Interim Completion is achieved	Section 16.1(g)	B	1	2
14	Completion	Interim Completion of Project Element	Complete all Punch List Items for an Interim Completion Element within ninety (90) days of the date on which the Developer receives a Certificate of Interim Completion for such Interim Completion Element	16.1(h)	B	1	2

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ID No	Noncompliance Events	Sub-Heading	Each breach or failure to comply with the following obligations constitute a Noncompliance Event	Reference	Category	Cure Period (days)	No. of Points
15	Operation and Maintenance	Utility Accommodation	Within five (5) Business Days of a request from the Authority, provide copies of the most recent Project design information and As-Built Drawings, as applicable, to the Authority for forwarding to the applicants	Section 17.3(b)(ii)	B	7	1
16	Handback	Handback Reserve Account - Establishment and Security	Establish a reserve account, no later than the first Business Day of the Handback Period, to be held and controlled by a third party to be agreed between the Parties. Each day that the Noncompliance occurs is considered a Noncompliance Event.	Section 19.2(a)(i)	C	0	3
17	Handback	Handback Reserve Account - Establishment and Security	Provide to the Authority the details of the Handback Reserve Account within three (3) Business Days of establishing the Handback Reserve Account, including the name, address and contact information for the depository institution and the account number	Section 19.2(a)(ii)	B	2	2
18	Handback	Handback Reserve Account - Funding	Deliver to the Authority a report setting out Developer calculations of the Handback Reserve Amount in accordance with Exhibit 19 no later than sixty (60) days prior to the commencement of the Handback Year	Section 19.2(b)(i)	B	7	2
19	Contractors and Key Personnel	Key Personnel	Retain, or ensure that the relevant Key Contractor will, retain, employ and utilize the individuals specifically listed as Key Personnel in Table 10.1 of Exhibit 10 (or replacements approved in accordance with Section 20.2) to fill the corresponding positions and not change or substitute any Key Personnel except: (i) due to retirement, death, disability, incapacity or voluntary or involuntary termination of employment; or (ii) with prior written consent of the Authority	Section 20.2(b) & (d)	A	28	3
20	Contractors and Key Personnel	Key Personnel	Notify the Authority in writing of any proposed replacement for any Key Personnel position, and ensure that any replacement satisfies the "Minimum Qualifications and Experience" for that position set out in Exhibit 10 and ensure that each individual filling a Key Personnel position will dedicate the amount of time necessary for the proper prosecution and performance of the Work.	Section 20.2(d) & (e)	A	7	1
21	Contractors and Key Personnel	Key Personnel	Comply with the requirements to provide the Authority with office and cell phone numbers, as well as email addresses, for all Key Personnel and also provide contact details for Key Personnel who the Authority can contact twenty-four (24) hours per day, seven (7) days per week, who will be able to promptly contact other Key Personnel as necessary	Section 20.2(e)(iv)	A	1	2

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ID No	Noncompliance Events	Sub-Heading	Each breach or failure to comply with the following obligations constitute a Noncompliance Event	Reference	Category	Cure Period (days)	No. of Points
22	Noncompliance Events	Notification of Noncompliance Events by the Developer	Notify the Authority in writing of the occurrence and rectification of any Noncompliance Event as soon as reasonably practicable within forty-eight (48) hours after the applicable Noncompliance Start Date, in accordance with the requirements of Section 22.2(b) and Section 22.2(c)	Section 22.2(a), (b) & (c)	A	1	2
23	Noncompliance Events	Records of Noncompliance Events	Keep and, upon request, provide the Authority with current Noncompliance Events records	Section 22.6	A	28	3
24	Milestone Payments	Monthly Performance Reports Prior to Project Substantial Completion	Submit to the Authority correct and accurate Monthly Performance Reports in accordance with the requirements of Section 23.5	Section 23.5	A	14	3
25	Availability Payments	Invoicing and Monthly Performance Reports Following Project Substantial Completion	Submit invoices together with Monthly Performance Reports in accordance with the requirements of Section 24.2	Section 24.2	A	7	1
26	Delays and Supervening Events	Notice	Submit to the Authority a Project Substantial Completion Implementation Plan setting out specific actions and an associated schedule to be followed by the Developer in order to meet the Project Substantial Completion Long Stop Date within thirty (30) days of submitting a notice to the Authority pursuant to Section 26.1(a). Each day that the Noncompliance occurs is considered a Noncompliance Event.	Section 26.1(c)	C	0	3
27	Authority Changes and Directive Letters	Commencement of Extra Work	Not commence Extra Work described in an Authority Change Request prior to the Authority accepting the Developer Estimate in accordance with Section 31.4(e)(i). Each day that the Noncompliance occurs is considered a Noncompliance Event.	Section 31.5(a)	C	0	3
28	Authority Changes and Directive Letters	Performance	Not suspend performance of the Work during the negotiation of any Authority Change Request, except: (a) as may be directed by the Authority in accordance with Section 14.4; or (b) to the extent that such suspensions are otherwise expressly permitted under the terms of the Agreement. Each day that the Noncompliance occurs is considered a Noncompliance Event.	Section 31.8	C	0	3

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ID No	Noncompliance Events	Sub-Heading	Each breach or failure to comply with the following obligations constitute a Noncompliance Event	Reference	Category	Cure Period (days)	No. of Points
29	Authority Changes and Directive Letters	Directive Letter	Upon receipt of a Directive Letter, commencement of the Extra Work as directed by the Authority	Section 31.9(c)	A	7	1
30	Developer Changes	Performance	Not suspend performance of the Work during the negotiation of any Developer Change Request. Each day that the Noncompliance occurs is considered a Noncompliance Event.	Section 32.7	C	0	3
31	Insurance and Reinstatement	Verification of Coverage	Submit documents verifying insurance coverage and payment of insurance premiums and renewals in accordance with Section 35.	Section 35.2(d)	A	7	3
32	Insurance and Reinstatement	Notices	Provide the Authority with the following written notices: (a) notice of any claim in excess of \$100,000 made by the Developer or any other party under any insurance obtained in connection with the Project within thirty (30) days of submitting the notice of claim to the insurer; and (b) notice of the expiration of any Insurance Policy at least ten (10) Business Days (if due to non-payment of premium) or thirty (30) days (if by its terms or otherwise) prior to such expiration, including notification of the date of such expiration.	Section 35.8	B	7	2
33	Principal Developer Documents	Delivery of Changed Principal Developer Documents	Deliver to the Authority a conformed copy of each such amendment or agreement within ten (10) Business Days of the date of its execution or creation (as applicable) certified as a true copy by an officer of the Developer	Section 37.2	B	7	1
34	Refinancing	Notifiable Refinancings	Promptly within fifteen (15) Business Days prior to closing notify the Authority of any proposed Notifiable Refinancing prior to undertaking a Notifiable Refinancing and provide full details of the Notifiable Refinancing within thirty (30) days of the date such Notifiable Refinancing is entered into by the relevant parties	Section 38.6	B	1	2
35	Relevant Events and the Financial Model	Financial Model Audits; Accuracy	Deliver to the Authority an audit of such amended version of the Base Case Financial Model from an independent audit firm with nationally recognized reputation	Section 39.6(a)	A	28	2
36	Relevant Events and the Financial Model	Copies of the Revised Base Case Financial Model	Promptly within five (5) Business Days deliver a copy of the revised Base Case Financial Model to the Authority in the same form as the version delivered pursuant to Section 2.4 or in such other form as may be agreed between the Parties.	Section 39.7	B	7	1
37	Records and Audit	Maintenance and Inspection of Records	Keep, maintain and make available to the Authority and USACE (as applicable) at the specified location, within the specified time of request and for the specified retention period, any book, record or document in accordance with Section 49.	Section 49.1	B	7	3

FARGO-MOORHEAD AREA DIVERSION PROJECT

ID No	Noncompliance Events	Sub-Heading	Each breach or failure to comply with the following obligations constitute a Noncompliance Event	Reference	Category	Cure Period (days)	No. of Points
38	Change in Ownership	Notification of Changes in Ownership	Provide the Authority with at least thirty (30) Business Days' prior written notice of any Change in Ownership	Section 53.2(a)	B	1	2
39	Completion	Project Final Completion	Achieve Project Final Completion by the Scheduled Project Final Completion Date in satisfaction of all of the Project Final Completion Conditions	Section 16.4(a)	B	1	2
40	Local Workforce Development	Apprentice Utilization Goal	Failure to report achievement of the Apprentice Utilization Goal set forth in Attachment 2-8 (<i>Local Workforce Development</i>) for two consecutive three-month periods.	Attachment 2-8 Section 1.2 Section 1.3	B	90	3

2. DESIGN AND CONSTRUCTION

References in this Table 2 to "Performance and Measurement Table" mean Attachment 4-1 (*Performance and Measurement Table*) to the Technical Requirements and are provided for information only and not deemed to be exhaustive.

ID No	Noncompliance Events	Sub-Heading	Each breach or failure to comply with the following obligations constitute a Noncompliance Event if the Developer fails to permanently remedy within the Response Time for Nonconformances	Reference	Category	Cure Period (days)	No. of Points
41	Design and Construction	Design and Construction Requirements	Comply with a requirement in Performance and Measurement Table of the Technical Requirements for which the entry for Remedy Category is Red-A-7	Attachment 4.1	A	7	2
42	Design and Construction	Design and Construction Requirements	Comply with a requirement in Performance and Measurement Table of the Technical Requirements for which the entry for Remedy Category is Red-B-1	Attachment 4.1	B	1	2
43	Design and Construction	Design and Construction Requirements	Comply with a requirement in Performance and Measurement Table of the Technical Requirements for which the entry for Remedy Category is Red-B-7	Attachment 4.1	B	7	3
44	Design and Construction	Design and Construction Requirements	Comply with a requirement in Performance and Measurement Table of the Technical Requirements for which the entry for Remedy Category is Red-C-0. Each day that the Noncompliance occurs is considered a Noncompliance Event.	Attachment 4.1	C	0	2
45	Design and Construction	Design and Construction Requirements	Comply with a requirement in Performance and Measurement Table of the Technical Requirements for which the entry for Remedy Category is Amber-A-1	Attachment 4.1	A	1	3
46	Design and Construction	Design and Construction Requirements	Comply with a requirement in Performance and Measurement Table of the Technical Requirements for which the entry for Remedy Category is Amber-A-7	Attachment 4.1	A	7	2
47	Design and Construction	Design and Construction Requirements	Comply with a requirement in Performance and Measurement Table of the Technical Requirements for which the entry for Remedy Category is Amber-B-1	Attachment 4.1	B	1	1
48	Design and Construction	Design and Construction Requirements	Comply with a requirement in Performance and Measurement Table of the Technical Requirements for which the entry for Remedy Category is Amber-B-7	Attachment 4.1	B	7	2
49	Design and Construction	Design and Construction Requirements	Comply with a requirement in Performance and Measurement Table of the Technical Requirements for which the entry for Remedy Category is Green-A-7	Attachment 4.1	A	7	2

FARGO-MOORHEAD AREA DIVERSION PROJECT

ID No	Noncompliance Events	Sub-Heading	Each breach or failure to comply with the following obligations constitute a Noncompliance Event if the Developer fails to permanently remedy within the Response Time for Nonconformances	Reference	Category	Cure Period (days)	No. of Points
50	Design and Construction	Design and Construction Requirements	Comply with a requirement in Performance and Measurement Table of the Technical Requirements for which the entry for Remedy Category is Green-B-1	Attachment 4.1	B	1	1
51	Design and Construction	Design and Construction Requirements	Comply with a requirement in Performance and Measurement Table of the Technical Requirements for which the entry for Remedy Category is Green-B-7	Attachment 4.1	B	7	2

3. OPERATION AND MAINTENANCE - FLOOD CONTROL

References in this Table 3 to "Performance and Measurement Table" mean Attachment 4-1 (Performance and Measurement Table) to the Technical Requirements and are provided for information only and not deemed to be exhaustive.

ID No.	Noncompliance Events	Sub-Heading	Each breach or failure to comply with the following obligations constitute a Noncompliance Event if the Developer fails to permanently remedy within the Response Time for Nonconformances	Reference	Category	Cure Period (days)	No. of Points
52	Operations and Maintenance	Maintenance Requirements	Comply with a requirement in Performance and Measurement Table of the Technical Requirements for which the entry for Remedy Category is Red-A-1	Attachment 4.1	A	1	2
53	Operations and Maintenance	Maintenance Requirements	Comply with a requirement in Performance and Measurement Table of the Technical Requirements for which the entry for Remedy Category is Red-B-1	Attachment 4.1	B	1	2
54	Operations and Maintenance	Maintenance Requirements	Comply with a requirement in Performance and Measurement Table of the Technical Requirements for which the entry for Remedy Category is Amber-A-21	Attachment 4.1	A	21	3
55	Operations and Maintenance	Maintenance Requirements	Comply with a requirement in Performance and Measurement Table of the Technical Requirements for which the entry for Remedy Category is Amber-B-1	Attachment 4.1	B	1	1
56	Operations and Maintenance	Maintenance Requirements	Comply with a requirement in Performance and Measurement Table of the Technical Requirements for which the entry for Remedy Category is Amber-B-7	Attachment 4.1	B	7	2
57	Operations and Maintenance	Maintenance Requirements	Comply with a requirement in Performance and Measurement Table of the Technical Requirements for which the entry for Remedy Category is Green-A-7	Attachment 4.1	A	7	1
58	Operations and Maintenance	Maintenance Requirements	Comply with a requirement in Performance and Measurement Table of the Technical Requirements for which the entry for Remedy Category is Green-B-1	Attachment 4.1	B	1	1
59	Operations and Maintenance	Maintenance Requirements	Comply with a requirement in Performance and Measurement Table of the Technical Requirements for which the entry for Remedy Category is Green-B-7	Attachment 4.1	B	7	1
60	Operations and Maintenance	Maintenance Requirements	Comply with a requirement in Performance and Measurement Table of the Technical Requirements for which the entry for Remedy Category is Green-B-21	Attachment 4.1	B	21	2

FARGO-MOORHEAD AREA DIVERSION PROJECT

ID No.	Noncompliance Events	Sub-Heading	Each breach or failure to comply with the following obligations constitute a Noncompliance Event if the Developer fails to permanently remedy within the Response Time for Nonconformances	Reference	Category	Cure Period (days)	No. of Points
61	Operations and Maintenance	Maintenance Requirements	Comply with a requirement in Performance and Measurement Table of the Technical Requirements for which the entry for Remedy Category is White-A-1	Attachment 4.1	A	1	1
62	Operations and Maintenance	Maintenance Requirements	Comply with a requirement in Performance and Measurement Table of the Technical Requirements for which the entry for Remedy Category is White-A-7	Attachment 4.1	A	7	1
63	Operations and Maintenance	Maintenance Requirements	Comply with a requirement in Performance and Measurement Table of the Technical Requirements for which the entry for Remedy Category is White-B-7	Attachment 4.1	B	7	1
64	Operations and Maintenance	Maintenance Requirements	Comply with a requirement in Performance and Measurement Table of the Technical Requirements for which the entry for Remedy Category is White-B-21	Attachment 4.1	B	21	2

4. OPERATION AND MAINTENANCE - NON-FLOOD CONTROL

References in this Table 4 to "Performance and Measurement Table" mean Attachment 4-1 (Performance and Measurement Table) to the Technical Requirements and are provided for information only and not deemed to be exhaustive.

ID No.	Noncompliance Events	Sub-Heading	Each breach or failure to comply with the following obligations constitute a Noncompliance Event if the Developer fails to permanently remedy within the Response Time for Nonconformances	Reference	Category	Cure Period (days)	No. of Points
65	Operations and Maintenance	Maintenance Requirements	Comply with a requirement in Performance and Measurement Table of the Technical Requirements for which the entry for Remedy Category is Red-B-1	Attachment 4.1	B	1	1
66	Operations and Maintenance	Maintenance Requirements	Comply with a requirement in Performance and Measurement Table of the Technical Requirements for which the entry for Remedy Category is Red-B-7	Attachment 4.1	B	7	2
67	Operations and Maintenance	Maintenance Requirements	Comply with a requirement in Performance and Measurement Table of the Technical Requirements for which the entry for Remedy Category is Red-C-0. Each day that the Noncompliance occurs is considered a Noncompliance Event.	Attachment 4.1	C	0	3
68	Operations and Maintenance	Construction Requirements	Comply with a requirement in Performance and Measurement Table of the Technical Requirements for which the entry for Remedy Category is Amber-A-1	Attachment 4.1	A	1	1
69	Operations and Maintenance	Maintenance Requirements	Comply with a requirement in Performance and Measurement Table of the Technical Requirements for which the entry for Remedy Category is Amber-B-1	Attachment 4.1	B	1	1
70	Operations and Maintenance	Maintenance Requirements	Comply with a requirement in Performance and Measurement Table of the Technical Requirements for which the entry for Remedy Category is Amber-B-7	Attachment 4.1	B	7	2
71	Operations and Maintenance	Maintenance Requirements	Comply with a requirement in Performance and Measurement Table of the Technical Requirements for which the entry for Remedy Category is Amber-B-14	Attachment 4.1	B	14	3
72	Operations and Maintenance	Maintenance Requirements	Comply with a requirement in Performance and Measurement Table of the Technical Requirements for which the entry for Remedy Category is Amber-B-28	Attachment 4.1	B	28	3
73	Operations and Maintenance	Maintenance Requirements	Comply with a requirement in Performance and Measurement Table of the Technical Requirements for which the entry for Remedy Category is Green-A-1	Attachment 4.1	A	1	1
74	Operations and Maintenance	Maintenance Requirements	Comply with a requirement in Performance and Measurement Table of the Technical Requirements for which the entry for Remedy Category is Green-A-7	Attachment 4.1	A	7	1

FARGO-MOORHEAD AREA DIVERSION PROJECT

ID No.	Noncompliance Events	Sub-Heading	Each breach or failure to comply with the following obligations constitute a Noncompliance Event if the Developer fails to permanently remedy within the Response Time for Nonconformances	Reference	Category	Cure Period (days)	No. of Points
75	Operations and Maintenance	Maintenance Requirements	Comply with a requirement in Performance and Measurement Table of the Technical Requirements for which the entry for Remedy Category is Green-B-1	Attachment 4.1	B	1	1
76	Operations and Maintenance	Maintenance Requirements	Comply with a requirement in Performance and Measurement Table of the Technical Requirements for which the entry for Remedy Category is Green-B-7	Attachment 4.1	B	7	1
77	Operations and Maintenance	Maintenance Requirements	Comply with a requirement in Performance and Measurement Table of the Technical Requirements for which the entry for Remedy Category is Green-B-21	Attachment 4.1	B	21	2
78	Operations and Maintenance	Maintenance Requirements	Comply with a requirement in Performance and Measurement Table of the Technical Requirements for which the entry for Remedy Category is White-A-7	Attachment 4.1	A	7	1
79	Operations and Maintenance	Maintenance Requirements	Comply with a requirement in Performance and Measurement Table of the Technical Requirements for which the entry for Remedy Category is White-B-1	Attachment 4.1	B	1	1
80	Operations and Maintenance	Maintenance Requirements	Comply with a requirement in Performance and Measurement Table of the Technical Requirements for which the entry for Remedy Category is White-B-7	Attachment 4.1	B	7	1

EXHIBIT 17

MONTHLY PERFORMANCE REPORTS

PART 1 - FORM OF MONTHLY PERFORMANCE REPORT TO BE DELIVERED PRIOR TO PROJECT SUBSTANTIAL COMPLETION

Monthly Performance Report

[DATE]

I, [NAME], authorized signatory of [●], deliver this monthly performance report (the "**Monthly Performance Report**") in connection with the Project Agreement for the Fargo-Moorhead Metropolitan Area Flood Risk Management Project – Diversion Channel and Associated Infrastructure, between the Metro Flood Diversion Authority and [●], dated [●] (the "**Project Agreement**"). Capitalized terms used but not otherwise defined in this Monthly Performance Report will have the respective meanings given in the Project Agreement. This Monthly Performance Report is delivered pursuant to Section 23.5 (*Monthly Performance Reports Prior to Project Substantial Completion*) of the Project Agreement.

On behalf of the Developer, I certify the following with respect to the period from [DATE] to [DATE] (the "**Reporting Period**"):

1. **NONCOMPLIANCE POINTS**1.1 **Noncompliance Points Assessed for Reporting Period**

- (a) The aggregate Noncompliance Points assessed under Table 1 (Administrative) of Exhibit 16 (Noncompliance Events) for the Reporting Period is [insert number].
- (b) The aggregate Noncompliance Points assessed under Table 2 (Design and Construction) of Exhibit 16 (Noncompliance Events) for the Reporting Period is [insert number].
- (c) The aggregate Noncompliance Points assessed under Table 3 (Operations and Maintenance – Flood Control) of Exhibit 16 (Noncompliance Events) for the Reporting Period is [insert number].
- (d) The aggregate Noncompliance Points assessed under Table 4 (Operations and Maintenance – Non-Flood Control) of Exhibit 16 (Noncompliance Events) for the Reporting Period is [insert number].

1.2 **Cumulative Noncompliance Points Triggers**

Noncompliance Points	Cumulative Points
The cumulative number of Noncompliance Points assessed under <u>Table 2 (Design and Construction)</u> of <u>Exhibit 16 (Noncompliance Events)</u> during the three (3) month period ending on the date of this Monthly Performance Report	
The cumulative number of Noncompliance Points assessed under <u>Table 2 (Design and Construction)</u> of <u>Exhibit 16 (Noncompliance Events)</u> during the twelve (12) month period ending on the date of this Monthly Performance Report	

The cumulative number of Noncompliance Points assessed under <u>Table 3 (Operations and Maintenance – Flood Control)</u> and <u>Table 4 (Operations and Maintenance – Non-Flood Control)</u> of <u>Exhibit 16 (Noncompliance Events)</u> during the three (3) month period ending on the date of this Monthly Performance Report	
The cumulative number of Noncompliance Points assessed under <u>Table 3 (Operations and Maintenance – Flood Control)</u> and <u>Table 4 (Operations and Maintenance – Non-Flood Control)</u> of <u>Exhibit 16 (Noncompliance Events)</u> during the twelve (12) month period ending on the date of this Monthly Performance Report	
The cumulative number of Noncompliance Points assessed during the three (3) month period ending on the date of this Monthly Performance Report	
The cumulative number of Noncompliance Points assessed during the twelve (12) month period ending on the date of this Monthly Performance Report	

2. **ANNEX 1**

Attached to this Monthly Performance Report as Annex 1 is:

- (a) a description of each Noncompliance Event with respect to the Reporting Period;
- (b) for each Noncompliance Event that occurred during the Reporting Period (as applicable):
 - (i) the Noncompliance Start Date;
 - (ii) the category of Noncompliance Event;
 - (iii) the Cure Period;
 - (iv) the Noncompliance Rectification Date; and
 - (v) the number of Noncompliance Points accrued,each determined in accordance with the Project Agreement.

I confirm that all matters certified in this Monthly Performance Report are true, correct and complete on the date of this Monthly Performance Report.

[●]

By:

Name:

Title:

By:

Name:

Title:

ANNEX 1

NONCOMPLIANCE EVENTS

ID No.	Breach Description	Start Date	Category	Cure Period	Rectification Date	Points Accrued	Flood Control (FC/NFC)

**PART 2 – FORM OF MONTHLY PERFORMANCE REPORT TO BE DELIVERED FOLLOWING
PROJECT SUBSTANTIAL COMPLETION**

Monthly Performance Report

[DATE]

I, [NAME], authorized signatory of [●], deliver this monthly performance report (the "**Monthly Performance Report**") in connection with the Project Agreement for the Fargo-Moorhead Metropolitan Area Flood Risk Management Project – Diversion Channel and Associated Infrastructure, between the Metro Flood Diversion Authority and [●], dated [●] (the "**Project Agreement**"). Capitalized terms used but not otherwise defined in this Monthly Performance Report will have the respective meanings given in the Project Agreement. This Monthly Performance Report is delivered pursuant to Section 24.2 (*Invoicing and Monthly Performance Reports Following Project Substantial Completion*) of the Project Agreement.

On behalf of the Developer, I certify the following with respect to the period from [DATE] to [DATE] (the "**Reporting Period**"):

1. NONCOMPLIANCE POINTS**1.1 Noncompliance Points for Reporting Period**

- (a) The aggregate "Flood Control"-related Noncompliance Points for the Reporting Period is [insert number].
- (b) The aggregate "Non-Flood Control"-related Noncompliance Points for the Reporting Period is [insert number].

1.2 DEDUCTIONS

The Deductions for the Reporting Period are equal to \$[●].

1.3 Cumulative Noncompliance Points

Noncompliance Points	Cumulative Points
The cumulative number of Noncompliance Points assessed under <u>Table 2 (Design and Construction)</u> of <u>Exhibit 16 (Noncompliance Events)</u> during the three (3) month period ending on the date of this Monthly Performance Report	
The cumulative number of Noncompliance Points assessed under <u>Table 2 (Design and Construction)</u> of <u>Exhibit 16 (Noncompliance Events)</u> during the twelve (12) month period ending on the date of this Monthly Performance Report	
The cumulative number of Noncompliance Points assessed under <u>Table 3 (Operations and Maintenance – Flood Control)</u> and <u>Table 4 (Operations and Maintenance – Non-Flood Control)</u> of <u>Exhibit 16 (Noncompliance Events)</u> during the three (3) month period ending on the date of this Monthly Performance Report	

Noncompliance Points	Cumulative Points
The cumulative number of Noncompliance Points assessed under <u>Table 3 (Operations and Maintenance – Flood Control)</u> and <u>Table 4 (Operations and Maintenance – Non-Flood Control)</u> of <u>Exhibit 16 (Noncompliance Events)</u> during the twelve (12) month period ending on the date of this Monthly Performance Report	
The cumulative number of Noncompliance Points assessed during the three (3) month period ending on the date of this Monthly Performance Report	
The cumulative number of Noncompliance Points assessed during the twelve (12) month period ending on the date of this Monthly Performance Report	

2. **ANNEX 1**

Attached to this Monthly Performance Report as Annex 1 is:

- (a) a description of each Noncompliance Event resulting in a Deduction with respect to the Reporting Period;
- (b) for each Noncompliance Event that occurred during the Reporting Period (as applicable):
 - (i) the Noncompliance Start Date;
 - (ii) the category of Noncompliance Event;
 - (iii) the Cure Period;
 - (iv) the Noncompliance Rectification Date; and
 - (v) the number of Noncompliance Points accrued,each determined in accordance with the Project Agreement.

3. **ANNEX 2**

Attached to this Monthly Performance Report as Annex 2 is the calculation of the amounts set out in Section 1.2 (Deductions) of this Monthly Performance Report, using the methodology set out in Exhibit 15 (Payment Mechanism) to the Project Agreement.

4. **ANNEX 3**

Attached to this Monthly Performance Report as Annex 3 is a statement of any adjustments to reflect previous over-payments and/or under-payments, and any other information that could be used by the Authority to verify the amounts stated in Section 1.2 (Deductions) of this Monthly Performance Report.

I confirm that all matters certified in this Monthly Performance Report are true, correct and complete on the date of this Monthly Performance Report.

[●]

By:

Name:

Title:

By:

Name:

Title:

ANNEX 1

NONCOMPLIANCE EVENTS

ID No.	Breach Description	Start Date	Category	Cure Period	Rectification Date	Points Accrued	Flood Control (FC/NFC)

ANNEX 2

[CALCULATION OF DEDUCTIONS]

ANNEX 3
[ADJUSTMENTS]

EXHIBIT 18**CALCULATION OF HANDBACK AMOUNTS**

This Exhibit sets forth the methodology for calculating the Handback Reserve Amount.

1. HANDBACK AMOUNT

The handback amount (the "**Handback Amount**") means the aggregate amount, which will be calculated prior to the beginning of each Handback Year and at the end of the Term, of the estimated cost (in real dollars) to improve, repair, renew or replace each Project Element so as to ensure that each Project Element meets the requirements of Section 4 (*Operations and Maintenance Requirements*) and Section 6 (*Handback Requirements*) of the Technical Requirements.

2. FUNDING

2.1 As required by Article 19 (*Handback*), no later than sixty (60) days prior to commencement of each Handback Year, the Developer shall deliver to the Authority a report setting out its calculations of:

- (a) the Handback Amount with respect to the remaining Handback Period; and
- (b) the amount required to be reserved in the Handback Reserve Account (the "**Handback Reserve Amount**") for such Handback Year, which will be calculated as follows:
 - (i) if, as of the date of calculation, the aggregate amount of the maximum aggregate Availability Payments projected to be paid to the Developer, during the period commencing on such date and ending upon the expiration of the Term, is less than two times the Handback Amount calculated on such date, then the Handback Reserve Amount will be equal to the Handback Amount; or
 - (ii) if, as of any date of calculation, the aggregate amount of the maximum aggregate Availability Payments projected to be paid to the Developer, during the period commencing on such date and ending upon the expiration of the Term, is more than or equal to two times the Handback Amount calculated on such date, then the Handback Reserve Amount will be equal to the percentage of the Handback Amount set out below for the applicable Handback Year.

Handback Years	Handback Reserve Amount
First Handback Year (i.e., the 12-month period beginning on the first Business Day of the Handback Period)	60% of the Handback Amount
Second Handback Year	90% of the Handback Amount
Third Handback Year	120% of the Handback Amount

EXHIBIT 19

PRINCIPLES FOR CALCULATION OF CHANGE IN COSTS

Any Change in Costs will be calculated in accordance with the following principles:

1. OMISSION AND SUBSTITUTION OF WORK

Where a Change in Costs Event involves the omission of work and its substitution with new work, the incremental costs incurred by the Developer must exclude the value of the new work to the extent that the value of the new work is the same as the value of the work omitted.

2. INCREMENTAL COSTS AND REVENUES ONLY

Changes in Costs must be determined on an incremental basis where:

- (a) in the case of an increase in costs, only costs that would not be incurred but for the Change in Costs Event are taken into account; and
- (b) in the case of a reduction in costs, only savings that would not have accrued but for the Change in Costs Event are taken into account.

3. FAIR AND REASONABLE, ARM'S LENGTH ARRANGEMENTS

All increases and decreases in costs included in the calculation must:

- (a) be fair and reasonable; and
- (b) reflect commercial arm's length arrangements.

4. NONCOMPLIANCE WITH MITIGATION AND OTHER OBLIGATIONS

All Changes in Costs will:

- (a) exclude any incremental costs which would not have been incurred or suffered; and
- (b) include any cost savings which would have been derived,

had the Developer complied with its obligations (including its obligations to mitigate) under this Agreement.

5. MARGINS

- (a) The Developer is not entitled to claim any margin on costs that it incurs.
- (b) No Key Contractor is entitled to claim a percentage rate of margin on the costs that it incurs in excess of the percentage rate of margin under the relevant Key Contract at Financial Close.

6. NO UNNECESSARY CONTRACTING LAYERS

No entity which is a D&C Contractor Member, or an Affiliate of a D&C Contractor Member, may perform work arising out of a Change in Costs Event as a subcontractor to a Key Contractor or to any other contractor further down the contracting chain without the Authority's consent (such

consent not to be unreasonably withheld if that entity is already engaged in relation to such work).

EXHIBIT 20

COMPENSATION ON TERMINATION

1. COMPENSATION ON TERMINATION FOR CONVENIENCE, FOR AUTHORITY DEFAULT AND TERMINATION BY COURT RULING

On termination of this Agreement pursuant to Article 40 (Termination for Convenience), Article 41 (Termination for Authority Default) or Article 45 (Termination by Court Ruling), the Authority shall, subject to and in accordance with Section 5 (Miscellaneous Compensation Provisions) of this Exhibit 20, pay to the Developer an amount (the "**Authority Termination Sum**") calculated at the Early Termination Date (without double-counting) as follows:

- (a) all amounts shown in the Base Case Financial Model as payable by the Developer from the Early Termination Date, either in dividends or other distributions on any equity ownership interest in the Developer or as payments of interest or repayments of principal made by the Developer under the Equity Member Funding Agreements, each amount discounted back at the Equity IRR in the Base Case Financial Model from the date on which it is shown to be payable in the Base Case Financial Model to the Termination Date; plus
- (b) Lenders' Liabilities; plus
- (c) Subcontractor Breakage Costs; plus
- (d) Redundancy Payments for employees of the Developer that have been or will be reasonably incurred by the Developer as a direct result of termination of this Agreement; minus
- (e) Account Balances; minus
- (f) Insurance Proceeds (excluding proceeds of personal injury, property damage or other third party liability insurance payable to or for the account of a third party); minus
- (g) Deferred Equity Amounts; minus
- (h) any Deductions accrued prior to the Early Termination Date that have not been taken into account in the calculation of any Milestone Payment or Availability Payment previously paid by the Authority.

2. COMPENSATION ON TERMINATION FOR EXTENDED FORCE MAJEURE AND UNINSURABILITY

On termination of this Agreement pursuant to Article 43 (Termination for Extended Force Majeure) or Article 44 (Termination for Uninsurability), the Authority shall, subject to and in accordance with Section 5 (Miscellaneous Compensation Provisions) of this Exhibit 20, pay to the Developer an amount (the "**No Fault Termination Sum**") calculated at the Early Termination Date (without double-counting) as follows:

- (a) all amounts paid to the Developer by way of equity to the capital of the Developer less dividends and other distributions paid to the Equity Members (except to the extent deducted under paragraph (b)), which will never be a negative number; plus

- (b) the principal amount of all Equity Member Debt less an amount equal to the aggregate of all payments of interest made by the Developer under the Equity Member Funding Agreements prior to the Termination Date; plus
- (c) Lenders' Liabilities; plus
- (d) Subcontractor Breakage Costs; plus
- (e) Redundancy Payments for employees of the Developer that have been or will be reasonably incurred by the Developer as a direct result of termination of this Agreement; minus
- (f) Account Balances; minus
- (g) Insurance Proceeds (excluding proceeds of personal injury, property damage or other third party liability insurance payable to or for the account of a third party); minus
- (h) any Deductions accrued prior to the Early Termination Date that have not been taken into account in the calculation of any Milestone Payment or Availability previously paid by the Authority.

3. **COMPENSATION ON TERMINATION FOR DEVELOPER DEFAULT PRIOR TO PROJECT SUBSTANTIAL COMPLETION**

On termination of this Agreement pursuant to Article 42 (Termination for Developer Default) prior to the Project Substantial Completion Date, the Authority shall, subject to and in accordance with Section 5 (Miscellaneous Compensation Provisions) of this Exhibit 20, pay to the Developer an amount (the "**Developer Default (D&C Period) Termination Sum**") equal to the lower of:

- (a) the D&C Work Value; and
- (b) the Net Lenders' Liabilities.

4. **COMPENSATION ON TERMINATION FOR DEVELOPER DEFAULT ON OR AFTER PROJECT SUBSTANTIAL COMPLETION**

On termination of this Agreement pursuant to Article 42 (Termination for Developer Default) on or after the Project Substantial Completion Date, the Authority shall, subject to and in accordance with Section 5 (Miscellaneous Compensation Provisions) of this Exhibit 20, pay to the Developer an amount (the "**Developer Default (Operating Period) Termination Sum**") calculated at the Early Termination Date (without double-counting) as follows:

- (a) eighty percent (80%) of Lenders' Liabilities; minus
- (b) Maintenance Rectification Costs; minus
- (c) Account Balances; minus
- (d) Insurance Proceeds (excluding proceeds of personal injury, property damage or other third party liability insurance payable to or for the account of a third party); minus
- (e) Deferred Equity Amounts; minus

- (f) any Deductions accrued prior to the Early Termination Date that have not been taken into account in the calculation of any Milestone Payment or Availability Payment (as relevant); plus
- (g) the balance standing to the credit of the Handback Reserve Account on the Early Termination Date.

5. MISCELLANEOUS COMPENSATION PROVISIONS

5.1 Set-Off on Termination

The Authority may not set off any amount against the Authority Termination Sum or the No Fault Termination Sum if the effect of such set off would be to reduce the amount payable to the Developer to less than an amount equal to the Net Lenders' Liabilities.

5.2 Payment of Termination Sum by Authority

The Authority shall pay any Termination Sum within one hundred eighty (180) days after such amount is finally agreed or determined, other than with respect to any termination for Developer Default, together with any interest that may accrue under the Finance Documents between the Early Termination Date and the date of payment of the Termination Sum by the Authority.

5.3 Payment of Termination Sum by Developer

If the Developer Default (D&C Period) Termination Sum or Developer Default (Operating Period) Termination Sum is less than zero, the Developer shall pay an amount equal to absolute value of the Developer Default (D&C Period) Termination Sum or Developer Default (Operating Period) Termination Sum (as applicable) to the Authority within sixty (60) days after such amount is finally agreed or determined.

5.4 Transfer of Key Assets

As a condition precedent to the payment of any Termination Sum, the Authority may require the Developer to transfer its rights, title and interest in and to the Key Assets to the Authority.

5.5 Exclusivity of Remedy

Any Termination Sum irrevocably paid by the Authority to the Developer will be in full and final settlement of each Party's rights and claims against the other for breaches and termination of this Agreement whether under contract, tort, restitution or otherwise, but without prejudice to:

- (a) any accrued liability of either Party to the other that arose prior to the Early Termination Date, but not from the termination itself (including any Milestone Payment or Availability Payment accrued but not yet paid to the Developer), to the extent such liability has not already been taken into account in the calculation of the Termination Sum; and
- (b) any liabilities arising with respect to any breach by either Party after the Early Termination Date of any obligation under this Agreement that survives the Early Termination Date, to the extent not taken into account in the calculation of the Termination Sum.

EXHIBIT 21

DISPUTE REVIEW BOARD

PART 1 - FORM OF DISPUTE REVIEW BOARD AGREEMENT

THIS DISPUTE REVIEW BOARD AGREEMENT (this "**DRB Agreement**") is made on [●], 20[●]:

BETWEEN:

- (1) The **METRO FLOOD DIVERSION AUTHORITY** (the "**Authority**"), a permanent North Dakota political subdivision and joint powers entity formed through the Joint Powers Agreement, dated June 13, 2016, by and among the City of Moorhead, the City of Fargo, Clay County, Cass County and the Cass County Joint Water Resource District;
- (2) [●], a [●] (the "**Developer**"); and
- (3) [●], [●] and [●] (collectively, the "**Board Members**").

RECITALS:

- (A) The Authority and the Developer have entered into the Project Agreement for the Fargo-Moorhead Metropolitan Area Flood Risk Management Project – Diversion Channel and Associated Infrastructure, dated [●], as may be amended from time to time (the "**Project Agreement**"), in connection with the development, design, construction, financing, operation and maintenance of the Diversion Channel and Associated Infrastructure Work Package (the "**Project**") of the Fargo-Moorhead Metropolitan Area Flood Risk Management Project, as more fully described in the Project Agreement.
- (B) Article 54 (*Dispute Resolution*) of the Project Agreement provides for the establishment and operation of a Technical Dispute Review Board to assist in resolving any Dispute of a technical nature and a Financial Dispute Review Board to assist in resolving any Dispute of a financial nature, in each case that may arise among the Authority, the Developer and others with respect to the Project.

THE PARTIES AGREE as follows:

1. ESTABLISHMENT OF BOARD

- 1.1 The [Financial Dispute]/[Technical Dispute] Review Board (the "**Board**") will begin operation upon execution of this DRB Agreement by the Authority, the Developer and all three (3) Board Members. [The Board Members' tenure will terminate upon completion of all work required to be performed by the Board under this DRB Agreement (unless sooner terminated in accordance with this DRB Agreement or Applicable Law).]²/[The initial Board Members' tenure will terminate six (6) months after Project Final Completion (unless sooner terminated in accordance with this DRB Agreement or Applicable Law), with new Board Members to be appointed from such date through the Operating Period.]³

² Include in the DRB Agreement for the Financial Dispute Review Board.

³ Include in the DRB Agreement for the Technical Dispute Review Board.

- 1.2 Each member of the Board represents, warrants and covenants on his or her behalf that he or she complies with the criteria and limitations for membership described in Part 2 (Dispute Review Board Procedures) of Exhibit 21 (*Dispute Review Board*) to the Project Agreement.
- 1.3 All three (3) Board Members must have submitted and received approval of disclosure statements according to the requirements of Section 1.6 (*Disclosure Statements*) of Part 2 (*Dispute Review Board Procedures*) of Exhibit 21 (*Dispute Review Board*) to the Project Agreement.
- 1.4 If during the term of this DRB Agreement, a Board Member has a discussion regarding employment or enters into any agreement for employment with the Authority, an Authority-Related Entity, the Developer or a Developer-Related Entity, the Board Member shall promptly (and in any event within two (2) Business Days) disclose such discussion or agreement to both the Authority and the Developer and the Board Member will be disqualified from serving on the Board.

2. BOARD RESPONSIBILITIES

- 2.1 The Board shall fairly and impartially consider and provide written decisions for resolution of disputes in accordance with Article 54 (*Dispute Resolution*) of the Project Agreement and Part 2 (*Dispute Review Board Procedures*) of Exhibit 21 (*Dispute Review Board*) to the Project Agreement. The Board Members shall perform the services necessary to participate in the Board's actions in accordance with this DRB Agreement.
- 2.2 Board Members will be kept informed monthly of Project-related activities and other developments by means of regular progress reports, minutes of progress meetings, and other relevant information prepared by the Authority and the Developer.
- 2.3 All Board Members are to act independently in the consideration of facts and conditions surrounding any Dispute.
- 2.4 Subject to Section 2.5, neither the Developer, nor the Authority may seek advice from or consult with any Board Member, on an ex parte basis. Each of the Authority and the Developer may seek advice from or consult with the entire Board during any Board meeting, after first giving notice to all interested parties. Any Board Member who has ex parte contact with the Authority or the Developer (or a representative of either party) will be subject to removal from the Board for cause.
- 2.5 A Board Member may withdraw from the Board upon delivery of written notice of withdrawal to the Authority, the Developer and the other Board Members. The notice must specify a withdrawal date at least thirty (30) days following the date of delivery of the notice.
- 2.6 A Board Member may be terminated by the Authority or the Developer if at any time that Board Member:
 - (a) fails to meet the relevant qualifications set out in Sections 1.2 (*Board Membership*) through Section 1.5 (*Additional Criteria Applicable to any Dispute Review Board Members*) of Part 2 (*Dispute Review Board Procedures*) of Exhibit 21 (*Dispute Review Board*) to the Project Agreement; or
 - (b) is otherwise disqualified pursuant to Section 1.10 (*Disqualification and Replacement of Board Members*) of Part 2 (*Dispute Review Board Procedures*) of Exhibit 21 (*Dispute Review Board*) to the Project Agreement.

- 2.7 Should the need arise to appoint a replacement Board Member, the replacement member will be appointed in the same manner as provided by the Project Agreement for appointment of the original member. The selection of a replacement Board Member will begin promptly upon notification of the necessity for a replacement and must be completed within thirty (30) days of such notice. The change in Board membership will be evidenced by the new member's signature on this DRB Agreement.
- 2.8 The personal services of the Board Member are a condition to receiving payment under this DRB Agreement.
- 2.9 No Board Member may assign or transfer any of his or her work, rights or obligations under this DRB Agreement without the prior written consent of both the Authority and the Developer.
- 2.10 Each Board Member shall keep matters related to this DRB Agreement confidential.
- 2.11 Each Board Member, in the performance of his or her duties on the Board, is acting as an independent contractor and not as an employee of either the Authority or the Developer. Board Members will not be entitled to any employee benefits.

3. HEARINGS AND DECISIONS

- 3.1 Each Dispute under the Project Agreement will be heard and decided by the Board in accordance with the procedures and timelines established in Section 54.4 (*Dispute Review Board*) of the Project Agreement.
- 3.2 Within the limits set by Section 54.4 (*Dispute Review Board*) of the Project Agreement, the Board will have the right to establish its own procedures and time limits, including the right to establish or to waive evidentiary rules and procedures. Each party involved in the Dispute will retain the right to discovery, within the parameters set by the Board.

4. PROVISION OF DOCUMENTS TO BOARD

- 4.1 The Authority shall provide to each Board Member one (1) copy of each Project-related document in accordance with Section 2.2 (*The Authority's Responsibilities*) of Part 2 (*Dispute Review Board Procedures*) of Exhibit 21 (*Dispute Review Board*) to the Project Agreement.
- 4.2 The Developer shall provide to each Board Member one (1) copy of each Project-related document it has, other than those provided by the Authority, in accordance with Section 2.1 (*The Developer's Responsibilities*) of Part 2 (*Dispute Review Board Procedures*) of Exhibit 21 (*Dispute Review Board*) to the Project Agreement.

5. PAYMENT

- 5.1 The Authority and the Developer shall each pay their portion of the costs related to the services rendered by each Board Member in accordance with Section 3 (*Basis of Payment*) of Part 2 (*Dispute Review Board Procedures*) of Exhibit 21 (*Dispute Review Board*) to the Project Agreement.
- 5.2 Invoices for payment for Board Member work completed under this DRB Agreement will be submitted monthly. Such invoices must be in a format approved by the Authority and the Developer, and accompanied by a general description of activities performed during the relevant period.
- 5.3 The value of work performed for payment will be established using the billing rate and hours expended by the Board Member, together with direct, reasonable, non-salary expenses. Billings

for expenses will include an itemized listing supported by copies of the original bills, invoices, expense accounts and miscellaneous supporting data.

- 5.4 Each Board Member shall keep available for inspection, for a period of seven (7) years after final payment, the cost records and accounts pertaining to this DRB Agreement.

6. MISCELLANEOUS

- 6.1 This DRB Agreement will commence upon execution by the Developer, the Authority and all three (3) Board Members.

- 6.2 This DRB Agreement will terminate automatically upon termination of the Project Agreement.

- 6.3 Capitalized terms used but not defined in this DRB Agreement will have the meanings given in the Project Agreement.

- 6.4 The parties to this DRB Agreement intend for (a) Article 54 (*Dispute Resolution*) of the Project Agreement, (b) Part 2 (*Dispute Review Board Procedures*) of Exhibit 21 (*Dispute Review Board*) to the Project Agreement and (c) the other terms of this DRB Agreement, to be complementary. Except as otherwise specifically provided in this DRB Agreement, if there is any conflict between this DRB Agreement and Article 54 (*Dispute Resolution*) of the Project Agreement or Part 2 (*Dispute Review Board Procedures*) of Exhibit 21 (*Dispute Review Board*) to the Project Agreement, Article 54 (*Dispute Resolution*) and Part 2 (*Dispute Review Board Procedures*) of Exhibit 21 (*Dispute Review Board*) to the Project Agreement will control.

- 6.5 Notices under this DRB Agreement must be sent as provided in Section 57.9 (*Notices and Communications*) of the Project Agreement. The addresses for the Board Members are set out on the signature pages of this DRB Agreement.

- 6.6 This DRB Agreement will be governed by and construed in accordance with the laws of North Dakota.

- 6.7 The parties consent to the jurisdiction of any court of North Dakota and any federal courts in North Dakota, waiving any claim or defense that such forum is not convenient or proper. The parties agree that any such court will have *in personam* jurisdiction over it, and consents to service of process in any manner authorized by Applicable Law.

- 6.8 THE PARTIES HEREBY KNOWINGLY, IRREVOCABLY, VOLUNTARILY AND INTENTIONALLY WAIVE ANY RIGHTS THAT ANY MAY HAVE TO A TRIAL BY JURY WITH RESPECT TO ANY ACTION, PROCEEDING, COUNTERCLAIM OR DEFENSE BASED ON THIS DRB AGREEMENT, OR ARISING OUT OF, UNDER OR IN ANY CONNECTION WITH THIS DRB AGREEMENT, OR WITH RESPECT TO ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER ORAL OR WRITTEN) OR ACTIONS OF ANY PARTY HERETO RELATING TO THIS DRB AGREEMENT. THIS PROVISION IS A MATERIAL INDUCEMENT FOR ALL PARTIES ENTERING INTO THIS DRB AGREEMENT. THIS PROVISION APPLIES ONLY TO SUITS BETWEEN THE PARTIES ARISING OUT OF OR RELATED TO THIS DRB AGREEMENT AND DOES NOT APPLY TO THIRD PARTY CLAIMS OR SUITS BY OR ON BEHALF OF THE PARTIES FOR PROJECT PROPERTY ACQUISITION AND/OR CONSTRUCTION CONTRACT CLAIMS AND DEFENSES. Each of the Parties (a) certifies that no representative, agent, attorney or any other Person has represented, expressly or otherwise, that such other Person would not, in the event of any suit, action or proceedings relating to this DRB Agreement, seek to enforce the foregoing waiver and (b) acknowledges that it has been induced to enter into this DRB Agreement by, among other things, the mutual waivers and certifications in this Section 6.8.

6.9 The Developer irrevocably consents to service of process by personal delivery, certified mail, postage prepaid or overnight courier in relation to any proceedings before any court located in North Dakota. Each of the Board Members irrevocably appoints the person named below as its respective agent for service of process in any proceedings before any court located in North Dakota:

- (a) [Board Member #1] irrevocably appoints [●];
- (b) [Board Member #2] irrevocably appoints [●]; and
- (c) [Board Member #3] irrevocably appoints [●].

This clause does not affect any other method of service allowed by Applicable Law.

6.10 If any person appointed as process agent is unable for any reason to act as agent for service of process, the Developer or the relevant Board Member, as the case may be, shall promptly appoint another agent on terms acceptable to the Authority. Failing this, the Authority may appoint another agent for this purpose. The Developer and each of the Board Members agree that failure by its respective process agent to notify it of any process will not invalidate the relevant proceedings. This clause does not affect any other method of service allowed by Applicable Law.

The parties are signing this DRB Agreement on the date stated in the introductory clause.

[Signature Pages to Follow]

SIGNATORIES

AUTHORITY

**METRO FLOOD DIVERSION
AUTHORITY**

By:)
Name:)
Title:)

DEVELOPER

By:)
Name:)
Title:)

BOARD MEMBER #1

Signed by [●])
[●])
)
)

[Include Address, Tel, Email]

BOARD MEMBER #2

Signed by [●])
[●])
)
)

[Include Address, Tel, Email]

BOARD MEMBER #3

Signed by [●])
[●])
)
)

[Include Address, Tel, Email]

PART 2 - DISPUTE REVIEW BOARD PROCEDURES

1. ESTABLISHMENT OF DISPUTE REVIEW BOARD

1.1 Purpose

The Parties shall establish the Technical Dispute Review Board and the Financial Dispute Review Board to provide special expertise and assist in and facilitate the timely and equitable resolution of Disputes between the Authority and the Developer, as set out under Section 54.4 (Dispute Review Board) and any Dispute Review Board agreement ("**DRB Agreement**") for the Technical Dispute Review Board and any DRB Agreement for the Financial Dispute Review Board.

1.2 Board Membership

- (a) Each Dispute Review Board will consist of one (1) member selected by the Authority, one (1) member selected by the Developer, and a third member selected in accordance with Section 1.8 (Nomination and Approval of Third Member) of this Part 2.
- (b) The third member will act as chair of the Dispute Review Board.
- (c) Once established, each Dispute Review Board will remain active and in full force and effect until all Disputes submitted to such Dispute Review Board have been decided by it.

1.3 Neutral and Impartial

The members of each Dispute Review Board shall be neutral, act impartially, and not have any conflict of interest, as further described in Section 1.5 (Additional Criteria for any Dispute Review Board Members) of this Part 2.

1.4 Experience Criteria for any Dispute Review Board Members

- (a) Each party-selected member of the Technical Dispute Review Board must be a nationally recognized expert in matters pertinent to the technical nature of the Project.
- (b) Each party-selected member of the Financial Dispute Review Board must be a nationally recognized expert in matters pertinent to financial issues relevant to the Project.
- (c) The chair of each Dispute Review Board must be a nationally recognized expert in matters pertinent to the resolution of commercial disputes outside of litigation and must have previous experience serving on one (1) or more dispute review boards, preferably as chair.

1.5 Additional Criteria for any Dispute Review Board Members

In addition to the criteria set out in this Section 1.4 (Experience Criteria for any Dispute Review Board Members) of this Part 2, each member of any Dispute Review Board must meet the following criteria:

- (a) No member (or any current primary or full-time employer of such member) will have an ownership interest in any party involved in the Project (including involvement by way of contractual relationship with the Authority, any Authority-Related Entity, the Developer or any Developer-Related Entity), or a financial interest in the Project, except for payment for services on any Dispute Review Board.

- (b) Except for fee-based consulting services on other projects, no member will have been previously employed by, or have had financial ties to, any party involved in the Project within a period of eight (8) years prior to award of this Agreement.
- (c) No member will have provided to either Party (or any Affiliate of any Equity Member) fee-based consulting services within the two (2) years prior to award of this Agreement, where the consulting fees paid by that Party have exceeded 20% of that member's total consulting revenue in either year.
- (d) No member may have had a close professional or personal relationship with any key member of any party involved in the Project which, in the judgment of either Party, could suggest partiality, or give an appearance of impropriety.
- (e) No member will have had prior involvement in the Project, of a nature which could compromise his or her ability to participate impartially in the activities of any Dispute Review Board.
- (f) During his or her tenure as a member of any Dispute Review Board, no member will be employed, including fee-based consulting services, by any party involved in the Project, except with express approval of both Parties.
- (g) During his or her tenure as a member of any Dispute Review Board, no member will engage in any discussion or make any agreement with any Party regarding employment after the Project is completed.
- (h) No member will currently be a member of any other Dispute Review Board that involves issues related to either of the Parties.

1.6 Disclosure Statements

Before their appointments are final, the first two (2) prospective members of any Dispute Review Board shall submit complete disclosure statements for the approval of both the Authority and the Developer. Each statement must include a resume of experience, together with a declaration describing all past, present and anticipated or planned future relationships (including indirect relationships through the prospective member's primary or full-time employer) to this Project and with any party involved in the Project. This disclosure must also include any financial relationship relative to the criteria in Section 1.5 (Additional Criteria for any Dispute Review Board Members) of this Part 2, and disclosure of close relationships, either professional or personal, with any party involved in the Project. The third member of any Dispute Review Board shall supply such a statement to the first two (2) members and to the Authority and the Developer before his or her appointment is final.

1.7 Selection of First Two Members

The Authority and the Developer shall each select a proposed member for each Dispute Review Board and convey the selected member's name and reference information to the other Party within three (3) weeks after execution of this Agreement. If either Party reasonably believes that the member appointed by the other Party does not meet the criteria for membership as set out in this Part 2, that Party shall notify the other Party of such failure and the reason for such failure. If either Party's member fails to meet the criteria, the other Party may require substitution of that member pursuant to Section 1.10 (Disqualification and Replacement of Board Members) of this Part 2.

1.8 Nomination and Approval of Third Member

- (a) Immediately after the Authority and the Developer selections for Dispute Review Board members are final, the Authority will provide a list of five (5) proposed members acceptable to both the Authority and the Developer and will notify the first two (2) members of such Dispute Review Board to begin the process of selecting the third member.
- (b) The first two (2) members shall select the third member from the list provided by the Authority and shall ensure that the third member meets all of the relevant criteria provided in this Part 2. The first two (2) members shall select the third member within two (2) weeks after they receive the notice from the Authority to begin the selection process.
- (c) If the first two (2) members of any Dispute Review Board do not select a third member within such two (2) week period, the Authority and the Developer shall select the third member by mutual agreement within a further two (2) weeks. In so doing, the Authority and the Developer may, but are not required to, consider other nominees offered by the first two (2) members of any Dispute Review Board. If the Authority and the Developer fail to agree on the appointment of the third member of the relevant Dispute Review Board within such two (2) week period, such person may be appointed by the International Institute for Conflict Prevention and Resolution, upon the request of either Party.

1.9 Execution of DRB Agreement

The Authority, the Developer and all three (3) members of any Dispute Review Board shall execute a DRB Agreement substantially in the form attached as Part 1 (Form of Dispute Review Board Agreement) of this Exhibit 21 within four (4) weeks after the selection of the third member.

1.10 Disqualification and Replacement of Board Members

If any member of any Dispute Review Board:

- (a) has a discussion regarding employment or enters into any employment agreement with the Developer, a Developer-Related Entity, the Authority or any Authority-Related Entity during his or her tenure on any Dispute Review Board;
- (b) is discovered not to meet the relevant criteria set out in this Part 2; or
- (c) cannot continue to serve because of death, illness or permanent disability,

that member will be disqualified from serving on any Dispute Review Board. In the event of such a disqualification, a replacement member meeting the criteria in this Part 2 will be selected by the Authority if the disqualified member was originally selected by the Authority, by the Developer if the disqualified member was originally selected by the Developer or by mutual agreement between the Authority and the Developer if the disqualified member was the third member.

2. THE AUTHORITY'S AND THE DEVELOPER'S RESPONSIBILITIES

2.1 The Developer's Responsibilities

- (a) Except for its participation in any Dispute Review Board's activities as provided in its DRB Agreement, the Developer shall not solicit advice or consultation from any Dispute Review Board or any member on matters dealing in any way with the Project, the conduct of the Work or resolution of problems.
- (b) The Developer shall provide to each Dispute Review Board member a set of all pertinent documents which are or may become necessary for any Dispute Review Board to perform its function, except documents furnished by the Authority. Pertinent documents include any drawings or sketches, calculations, procedures, schedules, estimates or other documents used in the performance of the Work or in justifying or substantiating the Developer's position regarding a particular Dispute. The Developer shall also provide a copy of such documents to the Authority.

2.2 The Authority's Responsibilities

- (a) Except for its participation in any Dispute Review Board's activities as provided in its DRB Agreement, the Authority shall not solicit advice or consultation from any Dispute Review Board or any members on matters dealing in any way with the Project, the conduct of the Work or resolution of problems.
- (b) The Authority shall provide the following services and items:
 - (i) Documents. The Authority shall provide to each Dispute Review Board member and the Developer a copy of this Agreement, written instructions issued by the Authority to the Developer, or other documents pertinent to the performance of this Agreement and necessary for either Dispute Review Board to perform its function.
 - (ii) Coordination and Services. The Authority, in cooperation with the Developer, shall coordinate the operations of any Dispute Review Board. The Authority shall arrange or provide conference facilities in Fargo, North Dakota, and provide secretarial and copying services for any Dispute Review Board.

2.3 Reports to any Dispute Review Board

Each month, the Authority and the Developer shall provide any Dispute Review Board members with (a) progress reports, (b) minutes of progress meetings and (c) other relevant information they each prepare in order to keep any Dispute Review Board informed of Project-related activity and other developments.

3. BASIS OF PAYMENT

- 3.1 The Authority and the Developer are each responsible for paying the fees and expenses of any Dispute Review Board member it selected without recourse to the other Party. The Developer shall also pay the fees and expenses invoiced by the third member of any Dispute Review Board, after approval by both Parties, and the Developer will then invoice the Authority for 50% of the payment it made to the third member of any Dispute Review Board. The Authority will review and process payment of the invoice promptly upon receipt.

- 3.2 The Authority will prepare and mail progress reports and minutes of progress meetings, will provide administrative services, such as conference facilities and secretarial services for

meetings with any Dispute Review Board for any Dispute hearing, and will bear the cost of these services. If any Dispute Review Board desires special services, such as legal consultation, accounting or data research, both the Authority and the Developer must agree, and the costs will be shared by them as mutually agreed.

EXHIBIT 22

UTILITY AND THIRD PARTY MOUS

PART 1 – UTILITY MOUS

WATER UTILITIES

1. Memorandum of Understanding between the Authority and Cass Rural Water Users District ("**Cass Rural Water**").

GAS/PETROLEUM UTILITIES

2. Memorandum of Understanding between the Authority and Cenex Pipeline, LLC. ("**Cenex**").
3. Memorandum of Understanding between the Authority and Magellan Pipeline Company, L.P. ("**Magellan**") (the "**Magellan Memorandum of Understanding**").
4. Memorandum of Understanding between the Authority and NuStar Pipeline Operating Partnership, L.P. ("**NuStar**") (the "**NuStar Memorandum of Understanding**").
5. Memorandum of Understanding between the Authority and WBI Transmission, Inc. ("**WBI**").

NATURAL GAS & ELECTRIC UTILITY

6. Memorandum of Understanding between the Authority and Northern States Power Company d/b/a Xcel Energy ("**Xcel**").

ELECTRIC UTILITIES

7. Memorandum of Understanding between the Authority and Cass County Electric Cooperative, Inc. ("**Cass County Electric**").
8. Memorandum of Understanding between the Authority and Minnkota Power Cooperative, Inc. ("**Minnkota Power**").
9. Memorandum of Understanding between the Authority and Otter Tail Power Company ("**Otter Tail Power**").
10. Memorandum of Understanding between the Authority and the United States, Department of Energy, Western Area Power Administration ("**WAPA**").
11. Memorandum of Understanding between the Authority and Moorhead Public Service Commission ("**MPS**").

COMMUNICATIONS UTILITIES

12. Memorandum of Understanding between the Authority and AT&T, Corp. ("**AT&T**").
13. Memorandum of Understanding between the Authority and Qwest Corporation d/b/a CenturyLink QC ("**CenturyLink**").
14. Memorandum of Understanding between the Authority and Dakota Carrier Network ("**DCN**").

15. Memorandum of Understanding between the Authority and Midcontinent Communications ("MidCo").
16. Memorandum of Understanding between the Authority and Sprint Communications Company, L.P. ("Sprint").
17. Memorandum of Understanding between the Authority and SBA Towers IX, LLC ("SBA") (the "SBA Memorandum of Understanding").

PART 2 – THIRD PARTY MOUS

RAILROADS

1. Preliminary Engineering Services Agreement between the Authority and BNSF dated September 9, 2020.
2. Temporary occupancy permits, right of entry agreements or similar agreements to be entered into by the Developer or the D&C Contractor and BNSF as referred to in Table 3-22.1 of Attachment 3-22 ("**BNSF Temporary Occupancy Permits**").
3. Construction and Maintenance Agreement(s) to be entered into between the Authority or the Developer or the D&C Contractor (as indicated in Table 3-22.1 of Attachment 3-22 to the Technical Requirements) and BNSF ("**BNSF C&M Agreement**").

Acknowledgments regarding Drafts:

The Parties acknowledge that the two draft documents listed below were provided to the Developer prior to the Setting Date for the purposes of setting a baseline against which the Proposers could prepare and price their Proposals but that the BNSF Preliminary Activities Memorandum of Understanding will not be executed:

- a draft Preliminary Activities Memorandum of Understanding between the Authority and BNSF. (the "**BNSF Preliminary Activities Memorandum of Understanding**"); and
- a draft BNSF Construction and Maintenance Agreement between the Authority and BNSF.

Subject to Section 11.11 (BNSF Preliminary Activities Memorandum of Understanding) of the Project Agreement, the Parties agree that for the purposes of paragraph (t) of the definition of "Compensation Event" the two draft documents listed above are deemed to constitute the "draft Third Party MOUs" with respect to the Third Party MOUs listed as 2 and 3 above, notwithstanding that the BNSF Preliminary Activities Memorandum of Understanding will not be executed.

TRANSPORTATION

4. Memorandum of Understanding between the Authority and Cass County, North Dakota ("**Cass County**").
5. Memorandum of Understanding between the Authority and the North Dakota Department of Transportation ("**ND DOT**").
6. Memorandum of Understanding between the Authority, Cass County and the CCJWRD.

CITIES AND TOWNSHIPS

7. Memorandum of Understanding between the Authority and Berlin Township, North Dakota ("**Berlin Township**").
8. Memorandum of Understanding between the Authority and Harwood Township, North Dakota ("**Harwood Township**").
9. Memorandum of Understanding between the Authority and Mapleton Township, North Dakota ("**Mapleton Township**").

10. Memorandum of Understanding between the Authority and Raymond Township, North Dakota ("**Raymond Township**").
11. Memorandum of Understanding between the Authority and Warren Township, North Dakota ("**Warren Township**").
12. Memorandum of Understanding between the Authority and the City of West Fargo, North Dakota ("**West Fargo**").
13. Memorandum of Understanding between the Authority and Wiser Township, North Dakota ("**Wiser Township**").
14. Memorandum of Understanding between the Authority and the City of Horace, North Dakota ("**Horace**").
15. Memorandum of Understanding between the Authority and the City of Mapleton, North Dakota ("**Mapleton**").

WATER RESOURCE DISTRICTS

16. Memorandum of Understanding between the Authority and Southeast Cass Water Resource District and Maple River Water Resource District and Rush River Water Resource District and North Cass Water Resource District and Cass County Joint Water Resource District ("**WRDs**").

EXHIBIT 23

FINANCE DOCUMENTS

1. **Funding Agreements**

[List to be inserted as part of financial close amendment]

2. **Security Documents**

[List to be inserted as part of financial close amendment]

EXHIBIT 24

FORM OF LENDERS DIRECT AGREEMENT

Lenders Direct Agreement

Metro Flood Diversion Authority
as Authority

and

[•]
as Developer

and

[•]
as Collateral Agent

and

Bank of North Dakota
as Trustee

and

City of Fargo, North Dakota
as Fiscal Agent

THIS LENDERS DIRECT AGREEMENT (this "**Lenders Direct Agreement**") is made on [●], 20[●]:

BETWEEN:

- (1) The **METRO FLOOD DIVERSION AUTHORITY**, a permanent North Dakota political subdivision and joint powers entity formed through the Joint Powers Agreement, dated June 13, 2016, by and among the City of Moorhead, the City of Fargo, Clay County, Cass County and the Cass County Joint Water Resource District (the "**Authority**");
- (2) [●], a [●] (the "**Developer**");
- (3) [●], as collateral agent for the Lenders (the "**Collateral Agent**");
- (4) The **BANK OF NORTH DAKOTA**, as the trustee under the Master Indenture of Trust (the "**Trustee**"); and
- (5) The **CITY OF FARGO, NORTH DAKOTA**, as fiscal agent, a Home Rule City and political subdivision of North Dakota (the "**Fiscal Agent**").

RECITALS:

- (A) The Authority and the Developer have entered into the Project Agreement for the Fargo-Moorhead Metropolitan Area Flood Risk Management Project – Diversion Channel and Associated Infrastructure, dated [●], as may be amended from time to time (the "**Project Agreement**"), in connection with the design, construction, financing, operation and maintenance of the Diversion Channel and Associated Infrastructure Work Package (the "**Project**") of the Fargo-Moorhead Metropolitan Area Flood Risk Management Project (the "**Comprehensive Project**"), as more fully described in the Project Agreement.
- (B) The Authority has entered into the Master Indenture of Trust with CCJWRD, Bank of North Dakota as trustee, and the City of Fargo as fiscal agent in connection with the issue and payment of debt service on Debt Obligations (as defined in the Master Indenture of Trust), the payment of Milestone Payments, P3 Payments (as defined in the Master Indenture of Trust), and Availability Payments due under the Project Agreement in accordance with the terms and conditions of the Master Indenture of Trust.
- (C) The Collateral Agent is the collateral agent for the various providers (the "**Lenders**") of senior debt (the "**Senior Debt**") to the Developer pursuant to the Finance Documents, the proceeds of which will be provided to the Developer and used by the Developer to perform, in part, its obligations under the Project Agreement.
- (D) Pursuant to the Finance Documents, the provision by the Lenders of the Senior Debt to the Developer is conditioned upon the Authority providing the Lenders with certain assurances (as set out in this Lenders Direct Agreement).
- (E) Pursuant to the Master Indenture of Trust, the Authority, the Fiscal Agent and Trustee are authorized to enter into this Lenders Direct Agreement to provide the Collateral Agent with a lien on monies deposited in the Milestone Payment Account (as defined in the Master Indenture of Trust) by the Fiscal Agent and monies deposited in the P3 Payment Account (as defined in the Master Indenture of Trust) and P3 Availability Payment Account (as defined in the Master Indenture of Trust) by the Trustee in accordance with the terms and conditions of the Master Indenture of Trust.
- (F) This Lenders Direct Agreement is, for the purposes of the Project Agreement, the Lenders Direct Agreement referred to in the Project Agreement and the Master Indenture of Trust.

THE PARTIES AGREE as follows:

1. INTERPRETATION, PROJECT AGREEMENT AND ORDER OF PRECEDENCE

1.1 Definitions

Capitalized terms used but not otherwise defined in this Lenders Direct Agreement will have the respective meanings set out in Exhibit 1 (*Definitions*) to the Project Agreement. In addition, the following terms have the meanings specified below:

"**Authority Notice**" is defined in Section 3.1(b) (*Developer Default*);

"**Bankruptcy-Related Default**" means a Developer Default that arises pursuant to Section 42.1(e) (*Insolvency of Developer*) or Section 42.1(f) (*Insolvency of D&C Contractor, D&C Contractor Member or D&C Guarantor*) of the Project Agreement;

"**Collateral Agent Notice**" is defined in Section 3.2(a) (*Finance Document Defaults*);

"**Cure Period**" means the period commencing on the date that the Collateral Agent receives an Authority Notice pursuant to Section 3.1(b) (*Developer Default*) and ending on the earliest of:

- (a) the relevant Cure Period Completion Date;
- (b) any Step-out Date;
- (c) the Substitution Effective Date; or
- (d) the last day of the Term;

"**Cure Period Completion Date**" means, subject to Section 9.2 (*Extension of Cure Period Completion Date*):

- (a) with respect to any Payment Default, the date falling thirty (30) days after the later of (i) the date that the Collateral Agent receives the relevant Authority Notice and (ii) expiration of any applicable cure period granted to the Developer pursuant to Section 42.3 (*Notice and Cure Periods*) of the Project Agreement;
- (b) with respect to any Bankruptcy-Related Default, the date falling ninety (90) days after the later of (i) the date that the Collateral Agent receives the relevant Authority Notice and (ii) expiration of any applicable cure period granted to the Developer pursuant to Section 42.3 (*Notice and Cure Periods*) of the Project Agreement;
- (c) with respect to any Non-Completion Default, the date falling ninety (90) days after the date that the Collateral Agent receives the relevant Authority Notice; provided, that such period will be extended by such reasonable period of time as may be required to achieve Project Substantial Completion (subject to a maximum extension of two hundred seventy-five (275) days), but only to the extent that:
 - (i) there is a reasonable prospect of achieving Project Substantial Completion within three hundred sixty-five (365) days of the relevant Authority Notice; and
 - (ii) within the ninety (90) day period, the Collateral Agent and the Authority (each acting reasonably) agree to a plan in relation to achieving Project Substantial Completion; and

- (d) with respect to any Developer Default not referred to in clauses (a) through (c), the date falling ninety (90) days after the later of (i) the date that the Collateral Agent receives the relevant Authority Notice, and (ii) expiration of any applicable cure period granted to the Developer pursuant to Section 42.3 (*Notice and Cure Periods*) of the Project Agreement; provided that such period will, at the request of the Collateral Agent, be extended up to a maximum of sixty (60) additional days, but only to the extent that:
 - (i) within the ninety (90) day period provided for in this clause (d), the Collateral Agent and the Authority (each acting reasonably) agree to a plan specifying the remedial action to be taken with respect to the relevant Developer Default; and
 - (ii) the extension requested by the Collateral Agent represents (in the reasonable opinion of the Authority) a reasonable period of time to remedy the relevant Developer Default;

"Designated Account" means [●];

"Discharge Date" means the date on which all of the obligations of the Developer under the Finance Documents have been irrevocably discharged in full to the satisfaction of the Collateral Agent;

"Event of Default" has the meaning given to such term in the Finance Documents;

"Initial Equity Members" means the Equity Members as of the date of this Lenders Direct Agreement;

"Initial Period" means:

- (a) with respect to any Payment Default, the later of:
 - (i) the date falling thirty (30) days after the date that the Collateral Agent receives the relevant Authority Notice; and
 - (ii) expiration of any applicable cure period granted to the Developer pursuant to Section 42.3 (*Notice and Cure Periods*) of the Project Agreement; and
- (b) with respect to any other Developer Default not referred to in clause (a), the later of:
 - (i) the date falling ninety (90) days after the date that the Collateral Agent receives the relevant Authority Notice; and
 - (ii) expiration of any applicable cure period granted to the Developer pursuant to Section 41.3 (*Notice and Cure Periods*) of the Project Agreement,

in each case, as may be extended pursuant to Section 9.2 (*Extension of Cure Period Completion Date*);

"Key Ratios" means [●]⁴;

["Lenders D&C Direct Agreements"] means:

⁴ To be completed based on relevant ratios in the Finance Documents.

- (a) the agreement entered into on or about the date of this Lenders Direct Agreement between the D&C Contractor, the Collateral Agent and the Developer in connection with the D&C Contract; and
- (b) each parent company guarantee direct agreement to be entered into on or about the date of this Lenders Direct Agreement between the D&C Guarantors, the Collateral Agent and the Developer;]⁵

"Master Indenture of Trust" means the indenture of trust entered into by the Authority, Cass County Joint Water Resource District, a political subdivision of the State of North Dakota ("CCJWRD"), the Fiscal Agent, and the Trustee on June 10, 2021;

"Non-Completion Default" means a Developer Default that arises pursuant to Section 42.1(b) (*Failure to Achieve Project Substantial Completion*) of the Project Agreement;

"Payment Default" means a Developer Default that arises pursuant to Section 42.1(j) (*Non-Payment*) of the Project Agreement;

"Property" means any right or interest in or to property of any kind whatsoever, whether real, personal or mixed, and whether tangible or intangible;

"Qualified Substitute Developer" means a Person who:

- (a) has the legal capacity, power, and authority to become a party to, and perform the obligations of the Developer under, the Project Agreement;
- (b) has the resources available to it (including committed financial resources) to perform the obligations of the Developer under the Project Agreement;
- (c) employs or subcontracts with Persons having the appropriate qualifications, experience, and technical competence available to them that are sufficient to enable them to perform the obligations of the Developer under the Project Agreement; and
- (d) is not a Prohibited Person;

"Step-in Date" is defined in Section 5.1(c) (*Step-in Notice*);

"Step-in Entity" is defined in Section 5.1(b) (*Step-in Notice*);

"Step-in Entity Accession Agreement" means the agreement to be entered into by a Step-in Entity pursuant to Section 5.1(c) (*Step-in Notice*);

"Step-in Notice" is defined in Section 5.1(a) (*Step-in Notice*);

"Step-in Period" in relation to a Step-in Entity, means the period from and including the Step-in Date until the earliest of:

- (a) the last day of the Cure Period;
- (b) the Substitution Effective Date;
- (c) the Step-out Date;

⁵ To be conformed to structure of Lenders D&C Direct Agreements.

(d) the date of termination of the Project Agreement by the Authority in accordance with this Lenders Direct Agreement and the Project Agreement; and

(e) the last day of the term;

"Step-out Date" is defined in Section 5.3(a) (Step-out);

"Step-out Notice" is defined in Section 5.3(a) (Step-out);

"Substitute" is defined in Section 6.1 (Notice of Proposed Substitute);

"Substitute Accession Agreement" means the agreement to be entered into by a Substitute pursuant to Section 7.1 (Substitution Effective Date);

"Substitution Effective Date" is defined in Section 7.1 (Substitution Effective Date); and

"Substitution Notice" is defined in Section 6.1 (Notice of Proposed Substitute).

1.2 Interpretation

The rules of interpretation set out in Sections 1.2(a) through 1.2(c) (*Interpretation*) of the Project Agreement will apply to this Lenders Direct Agreement.

1.3 Order of Precedence

If there is any conflict, ambiguity, or inconsistency between the provisions of the Project Agreement and the provisions of this Lenders Direct Agreement, the provisions of this Lenders Direct Agreement will prevail.

1.4 No Effect on Project Agreement

Nothing in this Lenders Direct Agreement amends or modifies any of the Developer's obligations to the Authority under the Project Agreement.

2. CONSENT TO SECURITY, AUTHORITY PAYMENTS AND AUTHORITY ACKNOWLEDGEMENT

2.1 Consent to Security

Despite anything to the contrary in the Project Agreement:

(a) the Authority acknowledges and consents to:

- (i) the security interest granted by the Developer to the Collateral Agent with respect to the Developer's Interest pursuant to the Finance Documents;
- (ii) the security interest granted by each of the Initial Equity Members to the Collateral Agent in its respective equity interest(s) in the Developer, in each case pursuant to the Finance Documents; and
- (iii) the grant of security interests set out in the Security Documents;

(b) none of the security interests referred to in Section 2.1(a);

- (i) constitutes (or with the giving of notice or lapse of time, or both, could constitute) either a breach of the Project Agreement or a Developer Default; or
- (ii) requires any consent of the Authority that is either additional or supplemental to those granted pursuant to this Section 2.1;
- (c) the Collateral Agent will not, by virtue of the security interests referred to in Section 2.1(a), acquire any greater rights to the Developer's Interest than the Developer itself has at any particular time pursuant to the Project Agreement; and
- (d) for so long as any amount under the Finance Documents is outstanding, the Authority shall not, without the prior written consent of the Collateral Agent (to the extent such consent is required under the Finance Documents), consent to any assignment, transfer, pledge or hypothecation of the Project Agreement or any interest in the Project Agreement by the Developer, other than as specified in this Lenders Direct Agreement.

2.2 Authority Payments Under the Project Agreement

The Authority, through its Executive Director, shall instruct the Fiscal Agent and/or Trustee, unless directed otherwise by the Collateral Agent, to transfer monies held within the Milestone Payment Account, P3 Payment Account, and/or P3 Availability Account as applicable, and due under the Project Agreement, into the Designated Account and the Developer agrees that any payment made in accordance with this Section 2.2 will constitute a complete discharge of the Authority's relevant payment obligations under the Project Agreement.

2.3 Authority Acknowledgement Regarding Project Debt

The Authority acknowledges that the outstanding obligations of the Developer under the Finance Documents constitute Project Debt for the purposes of, and subject to the terms of, the Project Agreement.

3. NOTICES

3.1 Developer Default

- (a) The Authority shall provide the Collateral Agent, Fiscal Agent and Trustee with a copy of a Developer Default Notice that it issues under Section 42.3(a) of the Project Agreement at the same time as it delivers, or within 5 Business Days of delivering, that Developer Default Notice to the Developer.
- (b) Subject to Section 4.1 (No Termination During the Cure Period), the Authority shall not terminate the Project Agreement due to the occurrence of a Developer Default unless it has given the Collateral Agent, Fiscal Agent and Trustee written notice (an "**Authority Notice**") of the occurrence of such Developer Default, which must specify:
 - (i) the unperformed obligations of the Developer under the Project Agreement of which the Authority is aware (having made reasonable inquiry) and the grounds for termination of the Project Agreement in sufficient detail to enable the Collateral Agent to assess the nature of the Developer Default, the requirement to remedy the Developer Default and the scope and amount of any liability of the Developer resulting from such Developer Default;
 - (ii) all amounts due and payable by the Developer to the Authority under the Project Agreement, if any, on or before the date of the Authority Notice and which remain unpaid at such date and, by cross-reference to the applicable provision(s) of the

Project Agreement, the nature of the Developer's obligation to pay such amounts;
and

- (iii) the amount of any payments that the Authority reasonably foresees will become due from the Developer during the applicable Cure Period.
- (c) The Authority shall from time to time update any Authority Notice issued pursuant to Section 3.1(b) as and when it becomes aware of any unperformed obligations (including non-payment of amounts that are due) under the Project Agreement that were not specified in the relevant Authority Notice.
- (d) Nothing in this Lenders Direct Agreement will prevent the concurrent running of multiple Authority Notices.

3.2 Finance Document Defaults

The Collateral Agent shall:

- (a) promptly (and in any event within five (5) Business Days) after becoming aware of any Event of Default (whether or not an Authority Notice has been served in connection with the same event) give the Authority, Fiscal Agent and Trustee written notice (a "**Collateral Agent Notice**");
- (b) specify in any Collateral Agent Notice the circumstances and nature of the Event of Default to which the Collateral Agent Notice relates; and
- (c) notify the Authority, Fiscal Agent and Trustee of any decision to accelerate amounts outstanding under the Finance Documents or to exercise any enforcement remedies under the Finance Documents promptly (and in any event within five (5) Business Days) after the taking of such decision.

3.3 Updates to Notices

- (a) The Authority shall update any Authority Notice issued pursuant to Section 3.1(b) (*Developer Default*) or Section 3.1(c) (*Developer Default*) as and when it becomes aware of any unperformed obligations of the Developer (including non-payment of amounts that have become due) under the Project Agreement that were not specified in the relevant Authority Notice.

4. RIGHTS AND OBLIGATIONS DURING THE CURE PERIOD

4.1 No Termination During the Cure Period

At any time during a Cure Period, the Authority shall not, subject to the terms of this Lenders Direct Agreement:

- (a) terminate or give notice terminating the Project Agreement for Developer Default;
- (b) take, join in or support, whether directly or indirectly, any action for the liquidation, bankruptcy, administration, receivership, reorganization, dissolution or winding-up of the Developer or for the composition or readjustment of the Developer's debts, or any similar insolvency procedure in relation to the Developer, or for the appointment of a receiver, trustee, custodian, sequestrator, conservator, liquidator, administrator or similar official for the Developer or for any part of the Developer's Property, provided, that if and after any of the foregoing have been commenced with respect to the

Developer by a Person other than the Authority, this clause (b) will not otherwise restrict or impair the ability of the Authority to participate in any way in such liquidation, bankruptcy, administration, receivership, reorganization, dissolution or winding-up of the Developer or for the composition or readjustment of the Developer's debts, or any similar insolvency procedure in relation to the Developer, or for the appointment of a receiver, trustee, custodian, sequestrator, conservator, liquidator, administrator or similar official for the Developer or for any part of the Developer's Property;

- (c) suspend its performance under the Project Agreement; or
- (d) fail to pay any amount that becomes due and payable from the Authority to the Developer under the Project Agreement during such period into the Designated Account in accordance with Section 2.2 (Authority Payments under the Project Agreement).

4.2 Collateral Agent Rights

- (a) At any time during an Event of Default (but, in the case of a Developer Default, only for so long as the Initial Period has not expired), without giving a Step-in Notice, the Collateral Agent may (but shall have no obligation), in its sole discretion, perform or arrange for the performance of any act, duty or obligation required of the Developer under the Project Agreement, or remedy any breach of the Developer under the Project Agreement at any time, which performance or remedy by or on behalf of the Collateral Agent shall be accepted by the Authority in lieu of performance by the Developer and in satisfaction of the Developer's corresponding obligations under the Project Agreement. If any breach of the Developer under the Project Agreement is remedied or any payment liabilities or obligations of the Developer are performed by the Collateral Agent under this Section 4.2(a), such action will discharge the relevant liabilities or obligations of the Developer to the Authority. No such performance by or on behalf of the Collateral Agent under this Section 4.2(a) will be construed as an assumption by the Collateral Agent, or any person acting on the Collateral Agent's behalf, of any of the covenants, agreements, or other obligations of the Developer under the Project Agreement.
- (b) At any time during a Cure Period or an Event of Default, the Collateral Agent may:
 - (i) issue a Step-in Notice in accordance with the requirements of Section 5.1 (Step-in Notice); or
 - (ii) issue a Substitution Notice in accordance with the requirements of Section 6.1 (Notice of Proposed Substitute).

5. STEP-IN ARRANGEMENTS

5.1 Step-in Notice

- (a) Provided that all unperformed payment obligations of the Developer identified in an Authority Notice have been remedied in full or waived by the Authority on or before the Step-in Date, the Collateral Agent may provide the Authority, the Fiscal Agent, and the Trustee with a written notice ("**Step-in Notice**") under this Section 5.1 at any time during any Cure Period or Event of Default.
- (b) The Collateral Agent shall nominate, in any Step-in Notice, any one of:
 - (i) the Collateral Agent, a Lender or any of their respective Affiliates that is not a Prohibited Person; or

- (ii) any Person approved by the Authority in its reasonable discretion, such approval not to be unreasonably withheld, conditioned or delayed if such Person meets all the criteria to be a Qualified Substitute Developer and the Authority has been provided with the relevant information required under Section 6.3 (Provision of Information) with respect to such Person (if the Authority has failed to respond to the Collateral Agent within sixty (60) days of the date on which the Authority has received the information specified in Section 6.3 (Provision of Information) with respect to any such nominated Person, the approval of the Authority will be deemed to have been given),

(each a "**Step-in Entity**"), stating that the Step-in Entity is to become a joint and several obligor with the Developer under the Project Agreement and this Lenders Direct Agreement in accordance with the terms of this Lenders Direct Agreement.

- (c) The Step-in Entity named in the Step-in Notice will be deemed to become a party to the Project Agreement and this Lenders Direct Agreement on and from the date it executes a duly completed Step-in Entity Accession Agreement, substantially in the form attached to this Lenders Direct Agreement as Schedule 1 (Form of Step-in Entity Accession Agreement), and submits it to the Authority (the "**Step-in Date**").

5.2 Rights and Obligations on Step-in

- (a) On and from the Step-in Date and during the Step-in Period, the Step-in Entity shall be:
 - (i) jointly and severally entitled to exercise and enjoy the rights and powers expressed to be assumed by or granted to the Developer under the Project Agreement and this Lenders Direct Agreement;
 - (ii) entitled to exercise and enjoy the rights and powers expressed to be assumed by or granted to a Step-in Entity under this Lenders Direct Agreement; and
 - (iii) jointly and severally liable with the Developer for the payment of all sums due from the Developer under or arising out of the Project Agreement at the Step-in Date and for the performance of all of the Developer's obligations under or arising out of the Project Agreement on or after the Step-in Date.
- (b) Without prejudice to Section 8 (Reinstatement of Remedies), during the Step-in Period:
 - (i) the Authority agrees:
 - (A) not to terminate or give notice terminating the Project Agreement for Developer Default, unless:
 - (aa) the grounds for termination or giving notice of termination arose during the Step-in Period; or
 - (bb) the Step-in Entity fails to comply with the requirements of any plan agreed between the Authority and the Collateral Agent in connection with the extension of the relevant Cure Period Completion Date; and
 - (B) not to take, join in or support, whether directly or indirectly, any action for the liquidation, bankruptcy, administration, receivership, reorganization, dissolution or winding-up of the Developer or for the composition or readjustment of the Developer's debts, or any similar insolvency procedure

in relation to the Developer, or for the appointment of a receiver, trustee, custodian, sequestrator, conservator, liquidator, administrator or similar official for the Developer or for any part of the Developer's Property; provided, that if and after any of the foregoing have been commenced with respect to the Developer by a Person other than the Authority, this clause (B) will not otherwise restrict or impair the ability of the Authority to participate in any way in such liquidation, bankruptcy, administration, receivership, reorganization, dissolution or winding-up of the Developer or for the composition or readjustment of the Developer's debts, or any similar insolvency procedure in relation to the Developer, or for the appointment of a receiver, trustee, custodian, sequestrator, conservator, liquidator, administrator or similar official for the Developer or for any part of the Developer's Property;

- (C) not to suspend its performance (including in connection with any insolvency or bankruptcy proceeding in relation to the Developer) under the Project Agreement, unless the grounds for suspension of performance arose during the Step-in Period; and
 - (D) to continue to make payments required to be made to the Developer under the Project Agreement to the Designated Account or to such other account as notified by the Collateral Agent to the Authority;
- (ii) the Authority will owe its obligations under the Project Agreement and this Lenders Direct Agreement to the Developer and such Step-in Entity jointly; provided, that:
 - (A) subject to clause (B), the performance of such obligations by the Authority in favor of either such Step-in Entity or the Developer shall be a good and effective discharge of such obligations under this Lenders Direct Agreement and the Project Agreement; and
 - (B) the Collateral Agent will be entitled at any time by notice in writing to the Authority to direct (such direction being binding on the Collateral Agent, the Authority and the Developer) that, at all times while such Step-in Entity is deemed to be a party to the Project Agreement and this Lenders Direct Agreement and subject to any further notice from the Collateral Agent, such Step-in Entity will be solely entitled to make any decisions, to give any directions, approvals or consents, to receive any payments or otherwise to deal with the Authority under the Project Agreement and this Lenders Direct Agreement.
- (c) The Developer will not be relieved from any of its obligations under the Project Agreement, whether arising before or after the Step-in Date, by reason of the Step-in Entity becoming a party to the Project Agreement pursuant to a Step-in Entity Accession Agreement, except to the extent provided in Section 4.2(a) (Collateral Agent Rights) and Section 7.2(a) (Effectiveness of Substitution).

5.3 Step-out

- (a) A Step-in Entity may, at any time, by giving not less than thirty (30) days' prior written notice to the Authority, the Fiscal Agent, and the Trustee ("**Step-out Notice**"), notify the Authority of the date that it wishes to terminate its obligations to the Authority under the Project Agreement and this Lenders Direct Agreement (the "**Step-out Date**").

- (b) On the Step-out Date the Step-in Entity will no longer be deemed to be a party to the Project Agreement and this Lenders Direct Agreement and will be released from all obligations under the Project Agreement and this Lenders Direct Agreement. The obligations of the Authority to the Step-in Entity in such capacity under the Project Agreement and this Lenders Direct Agreement will also terminate on the Step-out Date.
- (c) Nothing in this Section 5.3 will have the effect of releasing the Step-in Entity from any liability that relates to the performance or non-performance of the Project Agreement or this Lenders Direct Agreement by the Developer or the Step-in Entity during the Step-in Period.

6. SUBSTITUTION PROPOSALS

6.1 Notice of Proposed Substitute

If the Collateral Agent or the Lenders at any time propose to require the Developer to assign its rights and obligations under the Project Agreement or this Lenders Direct Agreement to a Person (a "**Substitute**") designated by the Collateral Agent or the Lenders (whether by mutual agreement or enforcement of rights under the Finance Documents), the effectiveness of such assignment will be conditional upon:

- (a) the Collateral Agent issuing a notice (a "**Substitution Notice**") to the Authority requesting the prior approval of the proposed Substitute;
- (b) the Authority approving the identity of the proposed Substitute pursuant to Section 6.2 (Grounds for Refusing Approval) or Section 6.4 (Deemed Approval); and
- (c) the proposed Substitute executing a Substitute Accession Agreement in accordance with Section 7.1 (Substitution Effective Date).

6.2 Grounds for Refusing Approval

The Authority will only be entitled to withhold its approval to any proposed Substitute that is the subject of a Substitution Notice if:

- (a) the proposed Substitute is not a Qualified Substitute Developer; or
- (b) subject to Section 7.4 (Settlement of Outstanding Obligations), there are outstanding breaches of the Project Agreement that have been previously notified by the Authority to the Collateral Agent and have not, to the reasonable satisfaction of the Authority, been remedied or waived prior to the date of the Substitution Notice; unless the Authority has approved (such approval not to be unreasonably withheld, conditioned or delayed) a plan specifying the remedial action that the Substitute will be required to take after the Substitution Effective Date in order to remedy each such breach.

6.3 Provision of Information

The Collateral Agent shall promptly provide to the Authority such information in relation to (i) the proposed Substitute and (ii) any Person who, it is proposed, will enter into a material subcontract with the proposed Substitute in relation to the Project, as the Authority reasonably requires to enable it to reasonably determine whether the proposed Substitute is a Qualified Substitute Developer, including:

- (a) the name and address of the proposed Substitute;

- (b) unless such proposed Substitute is a publicly traded entity, the names of the proposed Substitute's shareholders or members, and the share capital or partnership or membership interests, as the case may be, held by each of them;
- (c) the manner in which it is proposed to finance the proposed Substitute and the extent to which such financing is committed (to the extent relevant);
- (d) copies of the proposed Substitute's most recent financial statements (if available, for the last three (3) financial years and audited) or, in the case of a special purpose company, its opening balance sheet;
- (e) a copy of the proposed Substitute's organizational documents;
- (f) details of the resources available to the proposed Substitute and the proposed Substitute's appropriate qualifications, experience, and technical competence available to the proposed Substitute which enable it to perform the obligations of the Developer under the Project Agreement; and
- (g) the names of the proposed Substitute's directors and any key personnel who will have responsibility for the day-to-day management of its participation in the Project.

6.4 Deemed Approval

If the Authority has failed to respond to the Collateral Agent within sixty (60) days of the date on which the Authority has confirmed it has received the information specified in Section 6.3 (Provision of Information) with respect to any proposed Substitute, the approval of the Authority will be deemed to have been given.

7. SUBSTITUTION

7.1 Substitution Effective Date

If the Authority approves (or is deemed to have approved) the identity of a proposed Substitute pursuant to Section 6 (Substitution Proposals), the Substitute shall execute a duly completed Substitute Accession Agreement substantially in the form set out in Schedule 2 (Form of Substitute Accession Agreement) and submit it to the Authority (with a copy of it to the other parties to this Lenders Direct Agreement). Such assignment will become effective on and from (i) the date on which the Authority countersigns the Substitute Accession Agreement or (ii) the date that is seven (7) Business Days after the date the Authority receives the completed Substitute Accession Agreement if the Authority fails to countersign the Substitute Accession Agreement (the "**Substitution Effective Date**").

7.2 Effectiveness of Substitution

On and from the Substitution Effective Date:

- (a) the Substitute will become a party to the Project Agreement and this Lenders Direct Agreement in place of the Developer who will be immediately released from its obligations arising under, and cease to be a party to, the Project Agreement and this Lenders Direct Agreement from that Substitution Effective Date; and
- (b) the Substitute will exercise and enjoy the rights and perform the obligations of the Developer under the Project Agreement and this Lenders Direct Agreement, including any and all undischarged obligations of the Developer that were otherwise required to be performed by the Developer prior to the Substitution Effective Date; and

- (c) the Authority will owe its obligations (including any undischarged liability with respect to any loss or damage suffered or incurred by the Developer prior to the Substitution Effective Date) under the Project Agreement and this Lenders Direct Agreement to the Substitute in place of the Developer and any Step-in Entity.

7.3 Facilitation of Transfer

The Authority shall use its reasonable efforts to facilitate the transfer to the Substitute of the Developer's obligations under the Project Agreement and this Lenders Direct Agreement.

7.4 Settlement of Outstanding Obligations

- (a) The Substitute shall pay to the Authority within thirty (30) days after the Substitution Effective Date any amount due from the Developer to the Authority under the Project Agreement and this Lenders Direct Agreement as of the Substitution Effective Date (as notified by the Authority to the Substitute reasonably in advance of such Substitution Effective Date).
- (b) If the Substitute fails to satisfy its obligations pursuant to Section 7.4(a), the Authority will be entitled to exercise its rights under the Project Agreement with respect to the amount so due and unpaid.

7.5 Consequences of Substitution

On and from the Substitution Effective Date:

- (a) subject to Section 7.4 (Settlement of Outstanding Obligations), any right of termination or any other right suspended by virtue of Section 4.1 (No Termination During the Cure Period) will be of no further effect and the Authority shall not be entitled to terminate the Project Agreement and this Lenders Direct Agreement by virtue of any act, omission or circumstance that occurred prior to such Substitution Effective Date, and any Noncompliance Points arising from Noncompliance Events prior to the Substitution Effective Date will not be taken into account for the purposes of determining whether a Noncompliance Developer Default Trigger or a Noncompliance Increased Monitoring Trigger has occurred;
- (b) if any Step-in Entity is a party to or has any obligations under the Project Agreement and this Lenders Direct Agreement on the Substitution Effective Date, such Step-in Entity will cease to be a party to the Project Agreement and to this Lenders Direct Agreement and will be discharged from all obligations under the Project Agreement and under this Lenders Direct Agreement; and
- (c) the Authority shall enter into an equivalent direct agreement on substantially the same terms as this Lenders Direct Agreement, except that the Developer will be replaced as a party by the Substitute.

8. REINSTATEMENT OF REMEDIES

- (b) If an Authority Notice has been given, the grounds for that notice are continuing and have not been remedied or waived by the Authority and:
 - (a) no Step-in Entity or Substitute becomes a party to the Project Agreement and this Lenders Direct Agreement before the Cure Period Completion Date relating to the applicable Developer Default; or

- (b) a Step-in Entity becomes a party to the Project Agreement and this Lenders Direct Agreement, but the Step-in Period relating to such Step-in Entity ends without a Substitute becoming a party to the Project Agreement and this Lenders Direct Agreement,

then, on and from the Cure Period Completion Date or the date such Step-in Period expires, the Authority shall be entitled to:

- (i) act upon any and all grounds for termination available to it in relation to the Project Agreement with respect to Developer Defaults under the Project Agreement that have not been remedied or waived by the Authority;
- (ii) pursue any and all claims and exercise any and all remedies against the Developer; and
- (iii) if and to the extent that it is then entitled to do so under the Project Agreement, take or support any action of the type referred to in Section 4.1(b) (No Termination during the Cure Period).

9. IMPACT OF BANKRUPTCY OR INSOLVENCY PROCEEDINGS

9.1 Rejection of the Project Agreement

- (a) If:
 - (i) the Project Agreement is rejected by a trustee or debtor-in-possession in, or terminated as a result of, any bankruptcy or insolvency proceeding involving the Developer; and
 - (ii) within one hundred fifty (150) days after such rejection or termination, the Collateral Agent requests or certifies in writing to the Authority, the Fiscal Agent, and the Trustee that the Collateral Agent or the Collateral Agent's permitted designee or assignee (including a Qualified Substitute Developer) intends to perform the obligations of the Developer as and to the extent required under the Project Agreement,

the Authority will execute and deliver to the Collateral Agent (or any Substitute satisfying the requirements of this Lenders Direct Agreement if directed to do so by the Collateral Agent) a new Project Agreement. The new Project Agreement must contain terms, conditions and limitations which are the same as those of the Project Agreement, except for any obligations that have been fulfilled by the Developer, any party acting on behalf of or stepping-in for the Developer or the Collateral Agent prior to such rejection or termination. References in this Lenders Direct Agreement to the Project Agreement will be deemed also to refer to any such new Project Agreement.

- (b) The effectiveness of any new Project Agreement referred to in Section 9.1(a) will be conditional upon the Collateral Agent first reimbursing the Authority with respect to its costs incurred in connection with the execution and delivery of such new Project Agreement.

9.2 Extension of Cure Period Completion Date

If:

- (a) the Collateral Agent is prohibited by any court order, bankruptcy, or insolvency proceedings from remedying the Developer Default that is the subject of an Authority Notice; or
- (b) the Collateral Agent pursues with Good Faith, diligence and continuity lawful processes and steps to obtain the appointment of a court receiver for the Project and possession, custody, and control of the Project, but despite such efforts the Collateral Agent is unable to obtain such possession, custody, and control of the Project,

each of the relevant Cure Period Completion Date and Initial Period will be extended by a period of time equal to the shorter of (i) the period of such prohibition, and (ii) one hundred fifty (150) days.

10. TERMINATION OF THIS LENDERS DIRECT AGREEMENT

This Lenders Direct Agreement will remain in effect until the earliest to occur of:

- (a) the Discharge Date;
- (b) the time at which all of the parties' respective obligations and liabilities under the Project Agreement and this Lenders Direct Agreement have expired or have been satisfied in accordance with the terms of the Project Agreement and this Lenders Direct Agreement; and
- (c) any assignment to a Substitute has occurred under Section 7 (Substitution) and the Authority has entered into an equivalent direct agreement on substantially the same terms as this Lenders Direct Agreement, except that the Developer has been replaced as a party by the Substitute.

11. PRESERVATION OF FUNDS

Notwithstanding the other provisions of this Lenders Direct Agreement and the terms and conditions of the Finance Documents, the Collateral Agent agrees for itself and on behalf of the Lenders that it will not exercise any rights under the Finance Documents or take any other steps that would prejudice the operation of Section 19.2 (*Handback Reserve Account*) of the Project Agreement.

12. COMPETING STEP-IN RIGHTS

12.1 Subordination of Authority Rights

Notwithstanding any provision in the D&C Contractor Direct Agreement to the contrary, the Authority agrees that it will not exercise (a) any rights of step-in, novation or other similar rights it may have under the D&C Contractor Direct Agreement or (b) any of its rights as a beneficiary under the Performance Security until:

- (a) the Project Agreement has been terminated (other than pursuant to a transfer to a Substitute pursuant to Section 7 (Substitution)); or
- (b) the expiration of any relevant period under any of the Lenders D&C Direct Agreements in which the Collateral Agent is required or entitled to either exercise or procure the exercise of rights of step-in, novation, transfer or any similar right under such Lenders D&C Direct Agreements; or

- (c) if the Collateral Agent has exercised or procured the exercise of rights of step-in, novation, transfer or any similar right, the date of any step-out or similar event under any of the Lenders D&C Direct Agreements has occurred.

12.2 Expiration of Lender Rights

- (a) The Collateral Agent shall notify the Authority:
 - (i) promptly (and in any event within five (5) Business Days) after the date on which the Step-in Entity, the Collateral Agent (or any trustee or administrator acting on behalf of the Lenders) or the Developer has exhausted all of its direct or indirect legal rights and remedies against the D&C Contractor under the Finance Documents or has determined not to exercise (or to cease exercising) or is not entitled to exercise the same; and
 - (ii) of any decision by the Lenders whether or not to exercise any or all of their direct or indirect rights against the D&C Contractor under the Finance Documents or the D&C Contract (if they have not by then given notice under Section 12.2(a)(i)) by the date six (6) months after the date that the Authority pays to the Developer the whole of the termination compensation (if any) that is payable to the Developer following termination of the Project Agreement.
- (b) Following receipt by the Authority of any notice from the Collateral Agent pursuant to Section 12.2(a), all of the right, title and interest of the Collateral Agent or any other Lender against the D&C Contractor pursuant to the Finance Documents will be subject to and subordinated in all respects to all right, title and interest of the Authority pursuant to the D&C Contractor Direct Agreement.

13. REPRESENTATIONS AND WARRANTIES

- (a) The undersigned signatory for the Collateral Agent represents and warrants that he or she has full and complete authority to enter into this Lenders Direct Agreement on behalf of the Collateral Agent.
- (b) The Collateral Agent represents and warrants that the Collateral Agent has full power and authority to execute and perform its obligations under this Lenders Direct Agreement.
- (c) The undersigned signatory for the Developer represents and warrants that he or she is an officer of the Developer and that he or she has full and complete authority to enter into this Lenders Direct Agreement on behalf of the Developer.
- (d) The Developer represents and warrants that the Developer has full power and authority to execute and perform its obligations under this Lenders Direct Agreement.
- (e) The Authority represents and warrants that:
 - (i) the Authority has the full power and authority to execute, deliver and perform this Lenders Direct Agreement and to carry out the transactions contemplated by this Lenders Direct Agreement;
 - (ii) the execution, delivery and performance of this Lenders Direct Agreement, and the performance of the transactions contemplated in this Lenders Direct Agreement, have been duly and validly authorized by all necessary action of the Authority; and

- (iii) this Lenders Direct Agreement has been duly and validly executed and delivered by the Authority, and constitutes a valid and binding obligation of the Authority, enforceable against the Authority in accordance with its terms, subject only to applicable bankruptcy, insolvency and similar laws affecting the enforceability of the rights of creditors generally and the general principles of equity.
- (f) The Authority represents and warrants to the Collateral Agent that:
 - (i) there is no Authority Default or, to its knowledge, Developer Default, there exists no event or condition that would, with the giving of notice or passage of time or both, constitute such an Authority Default or, to its knowledge, a Developer Default, and no Authority Default or, to its knowledge, Developer Default has occurred prior to the date of this Lenders Direct Agreement; and
 - (ii) each representation and warranty made by it under Section 3.2 (*Authority Representations and Warranties*) of the Project Agreement is true and correct as of the date of this Lenders Direct Agreement.
- (g) The Trustee represents and warrants that:
 - (i) the Trustee has the full power and authority to execute, deliver and perform this Lenders Direct Agreement and to carry out the transactions contemplated by this Lenders Direct Agreement; and
 - (ii) the execution, delivery and performance of this Lenders Direct Agreement, and the performance of the transactions contemplated in this Lenders Direct Agreement, have been duly and validly authorized by all necessary action of the Trustee.
- (h) The Fiscal Agent represents and warrants that:
 - (i) the Fiscal Agent has the full power and authority to execute, deliver and perform this Lenders Direct Agreement and to carry out the transactions contemplated by this Lenders Direct Agreement; and
 - (ii) the execution, delivery and performance of this Lenders Direct Agreement, and the performance of the transactions contemplated in this Lenders Direct Agreement, have been duly and validly authorized by all necessary action of the Fiscal Agent.

14. GOVERNING LAW AND JURISDICTION

14.1 Governing Law

This Lenders Direct Agreement will be governed by and construed in accordance with the laws of North Dakota.

14.2 Submission to Jurisdiction

The parties consent to the jurisdiction of any court of North Dakota, waiving any claim or defense that such forum is not convenient or proper. The parties agree that any such court will have *in personam* jurisdiction over it, and consents to service of process in any manner authorized by Applicable Law.

14.3 Waiver of Jury Trial

THE PARTIES HEREBY KNOWINGLY, IRREVOCABLY, VOLUNTARILY, AND INTENTIONALLY WAIVE ANY RIGHTS THAT ANY MAY HAVE TO A TRIAL BY JURY WITH RESPECT TO ANY ACTION, PROCEEDING, COUNTERCLAIM OR DEFENSE BASED ON THIS LENDERS DIRECT AGREEMENT, OR ARISING OUT OF, UNDER OR IN ANY CONNECTION WITH THIS LENDERS DIRECT AGREEMENT, OR WITH RESPECT TO ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER ORAL OR WRITTEN) OR ACTIONS OF ANY PARTY HERETO RELATING TO THIS LENDERS DIRECT AGREEMENT. THIS PROVISION IS A MATERIAL INDUCEMENT FOR ALL PARTIES ENTERING INTO THIS LENDERS DIRECT AGREEMENT. THIS PROVISION APPLIES ONLY TO SUITS BETWEEN THE PARTIES ARISING OUT OF OR RELATED TO THIS LENDERS DIRECT AGREEMENT AND DOES NOT APPLY TO THIRD PARTY CLAIMS OR SUITS BY OR ON BEHALF OF THE PARTIES FOR PROJECT PROPERTY ACQUISITION AND/OR CONSTRUCTION CONTRACT CLAIMS AND DEFENSES. Each of the Parties (a) certifies that no representative, agent, attorney or any other Person has represented, expressly or otherwise, that such other Person would not, in the event of any suit, action or proceedings relating to this Lenders Direct Agreement, seek to enforce the foregoing waiver and (b) acknowledges that it has been induced to enter into this Lenders Direct Agreement by, among other things, the mutual waivers and certifications in this Section 14.3.

15. GENERAL PROVISIONS

15.1 Public Information and Confidentiality

- (a) The Authority and the Collateral Agent will comply with the requirements of the Project Agreement with regard to the public disclosure of information as if any reference to the Developer in the Project Agreement was a reference to the Collateral Agent.
- (b) The Authority approves disclosure by the Developer to the Collateral Agent, the Lenders, and other agents of the Lenders, of the information, documents, reports, data, or records provided to, or prepared by, the Developer under the Project Agreement, or prepared by any Developer's Contractor under the relevant Contract.

15.2 Amendments and Waivers

- (a) No amendment of this Lenders Direct Agreement, and no waiver of any term, covenant, or condition of this Lenders Direct Agreement, will be effective unless in writing and signed by the parties to this Lenders Direct Agreement.
- (b) The exercise by a party of any right or remedy provided under this Lenders Direct Agreement or Applicable Law will not waive or preclude any other or further exercise thereof or the exercise of any other right or remedy. No waiver by any party of any right or remedy under this Lenders Direct Agreement or Applicable Law will be deemed to be a waiver of any other or subsequent right or remedy under this Lenders Direct Agreement or Applicable Law. The consent by one party to any act by the other party requiring such consent will not be deemed to render unnecessary the obtaining of consent to any subsequent act for which consent is required, regardless of whether similar to the act for which consent is given.

15.3 Non-Collusion

- (a) The Collateral Agent warrants that it has not employed or retained any company or person, other than a bona fide employee working solely for the Collateral Agent, to solicit or secure this Lenders Direct Agreement, and that it has not paid or agreed to pay any company or person any fee, commission, percentage, brokerage fee, gifts or any other

consideration contingent upon or resulting from the making of this Lenders Direct Agreement.

- (b) For breach or violation of this warranty, the Authority will have the right to terminate this Lenders Direct Agreement without liability.

15.4 Disputes

- (a) In the event of any dispute between the Authority and the Collateral Agent under this Lenders Direct Agreement, the parties shall resolve the dispute according to the dispute resolution procedures set out in the Project Agreement, with the Collateral Agent having the same rights and obligations as the Developer under the dispute resolution procedures set out in Article 54 (*Dispute Resolution*) of the Project Agreement.
- (b) Nothing in Section 15.4(a) affects the Collateral Agent's rights and remedies against the Developer and the Developer's Interest under the Finance Documents or the procedures available to the Collateral Agent under law to exercise its security interests under the Finance Documents.

15.5 Successors and Assigns

- (a) No party to this Lenders Direct Agreement may assign or transfer any part of its rights or obligations under this Lenders Direct Agreement without the prior written consent of the other parties; provided that the Collateral Agent may assign or transfer its rights and obligations under this Lenders Direct Agreement to a successor Collateral Agent in accordance with the Finance Documents. In connection with any such assignment or transfer, the Authority agrees to enter into a new direct agreement with the successor Collateral Agent on terms that are substantially the same as those of this Lenders Direct Agreement.
- (b) This Lenders Direct Agreement will be binding upon and inure to the benefit of the parties to this Lenders Direct Agreement and their respective successors and permitted assigns.

15.6 Severability

In the event any one or more of the provisions contained in this Lenders Direct Agreement will, for any reason, be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability will not affect any other provision of this Lenders Direct Agreement and this Lenders Direct Agreement will be construed as if such invalid, illegal, or unenforceable provision had never been contained in this Lenders Direct Agreement.

15.7 Prior Contracts Superseded

This Lenders Direct Agreement constitutes the sole agreement of the parties with respect to the subject matter set out in this Lenders Direct Agreement and supersedes any prior understandings or written or oral contracts between the parties respecting such subject matter.

15.8 Notices and Communications

- (a) Whenever under the provisions of this Lenders Direct Agreement it will be necessary or desirable for one party to serve any approval, notice, request, demand, report or other communication on another party, the same will be in writing and will not be effective for any purpose unless and until actually received by the addressee or unless served (i) personally, (ii) by independent, reputable, overnight commercial courier or (iii) by

deposit in the United States mail, postage and fees fully prepaid, registered or certified mail, with return receipt requested, addressed as follows:

If to the Authority:

Metro Flood Diversion Authority
207 4th Street North, Suite A
Fargo, ND 58102

Attention: Joel Paulsen, Executive Director
Email: PaulsenJ@FMDiversion.gov
Telephone: (701) 660-0900

If to the Developer:

Red River Valley Alliance, LLC
55 E. Monroe Street
Chicago, IL 60603

Attention: Esther Madrigal Díez, Developer Representative
Email: esther.madrigal.diez@acciona.com
Telephone: [●]

If to the Collateral Agent:

[●]
Address: [●]

Attention: [●]
Email: [●]
Telephone: [●]

If to the Trustee:

Bank of North Dakota
PO Box 5509
Bismarck, ND 58506-5509

Attention: Trust Department
Email: fmdiversiontrustee@nd.gov
Telephone: Cindy Doll (701) 328-5606; April Klingfus (701) 328-5703

If to the Fiscal Agent:

City of Fargo
225 4th Street North
Fargo, ND 58102

Attention: [●]
Email: [●]

Telephone: [●]

- (b) Any party may, from time to time, by notice in writing served upon the other parties, designate an additional or a different mailing address or an additional or a different person to whom all such notices, requests, demands, reports and communications are thereafter to be addressed. Any notice, request, demand, report or other communication served personally will be deemed delivered upon receipt, if served by mail or independent courier will be deemed delivered on the date of receipt as shown by the addressee's registry or certification receipt or on the date receipt at the appropriate address is refused, as shown on the records or manifest of the United States Postal Service or independent courier.

15.9 Effect of Breach

Without prejudice to any rights a party may otherwise have, a breach of this Lenders Direct Agreement will not of itself give rise to a right to terminate the Project Agreement.

15.10 Counterparts

This Lenders Direct Agreement may be executed in counterparts, each of which will be deemed an original, but all of which together will constitute one and the same instrument.

15.11 Electronic Signatures

The Parties agree that the electronic signature of a Party to this Lenders Direct Agreement shall be as valid as an original signature of such Party and shall be effective to bind such Party to this Lenders Direct Agreement. For purposes hereof: (i) "electronic signature" means a manually signed original signature that is then transmitted by electronic means; and (ii) "transmitted by electronic means" means sent in the form of a facsimile or sent via the internet as a portable document format ("pdf") or other replicating image attached to an electronic mail or internet message.

15.12 No Third-Party Beneficiaries

Nothing contained in this Lenders Direct Agreement is intended or will be construed as creating or conferring any rights, benefits, or remedies upon, or creating any obligations of the parties to this Lenders Direct Agreement toward, any person or entity not a party to this Lenders Direct Agreement.

15.13 No Partnership

Nothing contained in this Lenders Direct Agreement will be deemed to constitute a partnership between the parties to this Lenders Direct Agreement. None of the parties may hold itself out contrary to the terms of this Section 15.13.

15.14 No Interference

The Developer joins in this Lenders Direct Agreement to acknowledge and consent to the arrangements set out and agrees not to knowingly do or omit to do anything that may prevent any party from enforcing its rights under this Lenders Direct Agreement.

15.15 Collateral Agent Liability

- (a) Notwithstanding anything to the contrary in this Lenders Direct Agreement, but subject to Section 5 (Step-in Arrangements) (solely to the extent the Collateral Agent or any of

its Affiliates is the Step-in Entity), Section 13(a), Section 13(b) and Section 15.15(b), the Collateral Agent will not have any liability to the Authority under this Lenders Direct Agreement, unless the Collateral Agent expressly assumes such liability in writing.

- (b) The Authority acknowledges and agrees that the Collateral Agent will not be obligated or required to perform any of the Developer's obligations under the Project Agreement, except during any Step-in Period (solely to the extent the Collateral Agent or any of its Affiliates is the Step-in Entity).

15.16 Reliance by the Authority

The Authority may rely upon any notice purported to be signed and delivered by or for the Collateral Agent without any obligation to the Collateral Agent, any Lender, the Developer or any third party to ascertain or investigate its authenticity, truth, or accuracy.

15.17 Reliance by the Trustee

The Trustee may rely upon any notice purported to be signed and delivered by or for the Collateral Agent without any obligation to the Collateral Agent, any Lender, the Developer or any third party to ascertain or investigate its authenticity, truth, or accuracy.

15.18 Reliance by the Fiscal Agent

The Fiscal Agent may rely upon any notice purported to be signed and delivered by or for the Collateral Agent without any obligation to the Collateral Agent, any Lender, the Developer or any third party to ascertain or investigate its authenticity, truth, or accuracy.

The parties are signing this Lenders Direct Agreement on the date stated in the introductory clause.

[Signature Pages to Follow]

SIGNATORIES

Authority

Signed by METRO FLOOD DIVERSION AUTHORITY

Chair and Executive Director

BY: _____	BY: _____
NAME: SHELLY(MICHELLE) CARLSON	NAME: JOEL PAULSEN
TITLE: Chair	TITLE: Executive Director
Metro Flood Diversion Authority	Metro Flood Diversion Authority
DATE: _____	DATE: _____

Countersignature by Secretary

BY: _____

NAME: DAWN LINDBLOM

TITLE: Secretary

Metro Flood Diversion Authority

DATE: _____

Developer

Signed by RED RIVER VALLEY ALLIANCE, LLC

BY: _____

NAME: _____

TITLE: _____

Red River Valley Alliance, LLC

DATE: _____

BY: _____

NAME: _____

TITLE: _____

Red River Valley Alliance, LLC

DATE: _____

BY: _____

NAME: _____

TITLE: _____

Red River Valley Alliance, LLC

DATE: _____

Collateral Agent

Signed by [Company Name]

BY: _____
NAME: _____
TITLE: _____

DATE: _____

Trustee

Signed by BANK OF NORTH DAKOTA

BY: _____
NAME: _____
TITLE: _____

DATE: _____

Fiscal Agent

Signed by CITY OF FARGO, NORTH DAKOTA

BY: _____
NAME: _____
TITLE: _____

DATE: _____

SCHEDULE 1

Form of Step-in Entity Accession Agreement

To: Metro Flood Diversion Authority
[●]

Copied to: [●]
[Lenders and other parties to Finance Documents to be listed] [insert address]

For the attention of: [●]

From: [Step-in Entity]

**THE DIVERSION CHANNEL AND ASSOCIATED INFRASTRUCTURE WORK PACKAGE OF THE
FARGO-MOORHEAD METROPOLITAN AREA FLOOD RISK MANAGEMENT PROJECT
STEP-IN ENTITY ACCESSION AGREEMENT**

Ladies and Gentlemen:

Reference is made to (i) the Project Agreement for the Fargo-Moorhead Metropolitan Area Flood Risk Management Project – Diversion Channel and Associated Infrastructure, dated [●] (as amended, supplemented or otherwise modified from time to time, the "**Project Agreement**"), between the Metro Flood Diversion Authority (the "**Authority**") and [●] (the "**Developer**") and (ii) the Lenders Direct Agreement, dated [●] (as amended, supplemented or otherwise modified from time to time, the "**Lenders Direct Agreement**"), between the Authority, the Developer, [●], as the Collateral Agent, Bank of North Dakota, as Trustee, and the City of Fargo, as Fiscal Agent.

Terms used but not otherwise defined in this Step-in Entity Accession Agreement will have the meaning given to them in the Lenders Direct Agreement.

We confirm that we are a Step-in Entity pursuant to Section 5 (*Step-in Arrangements*) of the Lenders Direct Agreement.

1. We acknowledge and agree that, upon and by reason of our execution of this Step-in Entity Accession Agreement, we will become a party to the Project Agreement and the Lenders Direct Agreement jointly and severally with the Developer as a Step-in Entity and, accordingly, will have the rights and powers and assume the obligations of the Developer under the Project Agreement and the Lenders Direct Agreement in accordance with the terms of the Lenders Direct Agreement.
2. Our mailing address, telephone number and address for electronic mail for the purposes of receiving notices are as follows:

[contact details of Step-in Entity]
3. This Step-in Entity Accession Agreement will be governed by and construed in accordance with the law of North Dakota. Venue for any legal action arising out of this Step-in Entity Accession Agreement will lie in any North Dakota court or U.S. federal court venued in North Dakota.

The terms set out in this Step-in Entity Accession Agreement are agreed to: [Step-in Entity]

By
Name:
Title:

SCHEDULE 2

Form of Substitute Accession Agreement

To: Metro Flood Diversion Authority: [Date]
[●]

Copied to: [●]

From: [Substitute]

**THE DIVERSION CHANNEL AND ASSOCIATED INFRASTRUCTURE WORK PACKAGE OF THE
FARGO-MOORHEAD METROPOLITAN AREA FLOOD RISK MANAGEMENT PROJECT
SUBSTITUTE ACCESSION AGREEMENT**

Ladies and Gentlemen:

Reference is made to (i) the Project Agreement for the Fargo-Moorhead Metropolitan Area Flood Risk Management Project – Diversion Channel and Associated Infrastructure, dated [●] (as amended, supplemented or otherwise modified from time to time, the "**Project Agreement**"), between the Metro Flood Diversion Authority (the "**Authority**") and [●] (the "**Developer**") and (ii) the Lenders Direct Agreement, dated [●] (as amended, supplemented or otherwise modified from time to time, the "**Lenders Direct Agreement**"), between the Authority, the Developer, [●], as the Collateral Agent, Bank of North Dakota, as Trustee, and the City of Fargo, as Fiscal Agent.

Terms used but not otherwise defined in this Substitute Accession Agreement will have the meaning given to them in the Lenders Direct Agreement.

1. We confirm that we are a Substitute pursuant to Section 7 (*Substitution*) of the Lenders Direct Agreement.
2. We acknowledge and agree that, upon and by reason of our execution of this Substitute Accession Agreement, we will become a party to the Project Agreement and the Lenders Direct Agreement as a Substitute and, accordingly, will have the rights and powers and assume the obligations of the Developer under the Project Agreement and the Lenders Direct Agreement in accordance with the terms of the Lenders Direct Agreement.
3. Our mailing address, telephone number and address for electronic mail for the purposes of receiving notices are as follows:

[contact details of Substitute]
4. This Substitute Accession Agreement will be governed by and construed in accordance with the law of North Dakota. Venue for any legal action arising out of this Substitute Accession Agreement will lie in any North Dakota court or U.S. federal court venued in North Dakota.

The terms set out in this Substitute Accession Agreement are hereby agreed to: [Substitute]

By:

Name:

Title:

Agreed for and on behalf of:

Metro Flood Diversion Authority

By:
Name:
Title:

EXHIBIT 25

FORM OF D&C CONTRACTOR DIRECT AGREEMENT

D&C Contractor Direct Agreement

Metro Flood Diversion Authority
as Authority

and

[●]
as D&C Contractor

and

[●]
as D&C Guarantor

and

[●]
as Developer

THIS D&C CONTRACTOR DIRECT AGREEMENT (this "**D&C Direct Agreement**") is made on [●], 20[●]:

BETWEEN:

- (1) [●] [a [●]/an [unincorporated joint venture/other] (the "**D&C Contractor**"), between [●] and [●] (each a "**D&C Contractor Member**");
- (2) [●] an [●] corporation (the "**D&C Guarantor[s]**");
- (3) The **METRO FLOOD DIVERSION AUTHORITY**, a permanent North Dakota political subdivision and joint powers entity formed through the Joint Powers Agreement, dated June 13, 2016, by and among the City of Moorhead, the City of Fargo, Clay County, Cass County and the Cass County Joint Water Resource District (the "**Authority**"); and
- (4) [●], a [●] (the "**Developer**"),

collectively, the "**Parties**".

RECITALS:

- (A) By the Project Agreement for the Diversion Channel and Associated Infrastructure Work Package of the Fargo-Moorhead Metropolitan Area Flood Risk Management Project, dated [●], between the Authority and the Developer (the "**Project Agreement**"), the Authority has appointed the Developer to carry out the Work.
- (B) By a design and build contract between the Developer and the D&C Contractor dated [●] (the "**D&C Contract**"), the Developer has appointed the D&C Contractor to carry out the D&C Contractor Work in relation to the Project.
- (C) Each of the D&C Guarantor[s] has guaranteed the obligations of the D&C Contractor under the D&C Contract pursuant to guarantees in favor of the Developer dated [●] (the "**D&C Parent Guarantee**").
- (D) It is a condition precedent to the effectiveness of the Project Agreement that this D&C Direct Agreement be executed.

THE PARTIES AGREE as follows:

1. INTERPRETATION

1.1 Terms defined in the Project Agreement

Unless expressly defined otherwise in this D&C Direct Agreement, any defined term in this D&C Direct Agreement will have the same meaning given to such term in the D&C Contract. In addition:

"**D&C Contractor Work**" means all D&C Work and other obligations to be performed by the D&C Contractor under the D&C Contract.

1.2 Interpretation

The rules of interpretation set out in Sections 1.2(a) through 1.2(c) (*Interpretation*) of the Project Agreement will apply to this D&C Direct Agreement.

2. THE D&C CONTRACTOR'S WARRANTY AND LIABILITY

2.1 Warranty

The D&C Contractor warrants to the Authority that:

- (a) it has carried out and performed and will continue to carry out and perform its obligations under the D&C Contract in accordance with the D&C Contract; and
- (b) it has exercised and will continue to exercise in the performance of those obligations the reasonable skill, care and diligence to be expected of a properly qualified member of its profession experienced in carrying out obligations such as its duties under the D&C Contract in relation to works of similar scope, nature and complexity to the D&C Contractor Work.

2.2 Defense and Liability

In any action or proceedings by the Authority pursuant to Section 2.1 (Warranty):

- (a) the D&C Contractor may raise any defense (except for set off or counterclaim) as it would have against the Developer under the D&C Contract; and
- (b) the D&C Contractor's liability to the Authority will be no greater, and for no longer duration, than it would have been if the Authority had been a party to the D&C Contract as joint employer.

3. INTELLECTUAL PROPERTY AND DOCUMENTS

3.1 To the extent that any Project Data is in the ownership or possession of the D&C Contractor or any Intellectual Property is owned or licensable by the D&C Contractor, the D&C Contractor undertakes (for the benefit of the Authority) to comply with the terms of Article 50 (*Intellectual Property*) of the Project Agreement as if such terms were incorporated into this D&C Direct Agreement and the D&C Contractor was the Developer.

3.2 The D&C Contractor agrees on reasonable request at any time and following reasonable written prior notice to give the Authority or those authorized by it access to the Project Data relating to the D&C Work and to provide copies (including copy negatives and CAD disks) thereof at the Authority's expense.

3.3 The D&C Contractor warrants to the Authority that it has used the standard of skill, care and diligence as set out in Section 2.1 (Warranty) to see that the Project Data relating to the D&C Contractor Work (save to the extent duly appointed subcontractors have been used to prepare the same) is its own original work and that in any event their use in connection with the D&C Contractor Work will not infringe the rights of any third party.

4. CURE RIGHTS AND STEP-IN RIGHTS IN FAVOR OF THE AUTHORITY

4.1 Notice of Termination and Cure Period

Each of the D&C Contractor and the D&C Guarantors shall not exercise or seek to exercise any right which may be or become available to it to terminate or treat as terminated or repudiated (as relevant) the D&C Contract and the D&C Parent Guarantee, or its engagement under the D&C Contract and the D&C Parent Guarantee, or discontinue or suspend the performance of any duties or obligations under the D&C Contract and the D&C Parent Guarantee (including the D&C Contractor's obligations with respect to the Performance Security) without first giving to

the Authority not less than forty-five (45) days' prior written notice specifying the D&C Contractor's and the D&C Guarantors' grounds for terminating or treating as terminated or repudiated (as relevant) the D&C Contract and the D&C Parent Guarantee, or its engagement under the D&C Contract and the D&C Parent Guarantee or discontinuing or suspending its performance and stating the amount (if any) of monies outstanding under the D&C Contract and the D&C Parent Guarantee.

4.2 Cure Right

- (a) Within the period of notice stated in Section 4.1 (Notice of Termination and Cure Period):
 - (i) the Authority may give written notice to the D&C Contractor and D&C Guarantor that the Authority will become the Developer under the D&C Contract and the D&C Parent Guarantee to the exclusion of the Developer and each of the D&C Contractor and the D&C Guarantor will admit that the Authority is Developer under the D&C Contract and the D&C Parent Guarantee, respectively, and each of the D&C Contract and the D&C Parent Guarantee will be and remain in full force and effect despite any of the said grounds;
 - (ii) if the Authority has given notice under Section 4.2(a)(i) or Section 4.2(c), the Authority shall accept liability for the Developer's obligations under the D&C Contract and will promptly remedy any outstanding breach by the Developer which is capable of remedy by the Authority; and
 - (iii) if the Authority has given notice under Section 4.2(a)(i) or Section 4.2(c), the Authority will from the service of such notice become responsible for all sums properly payable to the D&C Contractor under the D&C Contract accruing due before and after the service of such notice but the Authority will in paying such sums be entitled to the same rights of set-off and deduction as would have applied to the Developer under the D&C Contract.
- (b) Despite anything contained in this D&C Direct Agreement and despite any payments which may be made by the Authority to the D&C Contractor, the Authority will not be under any obligation to the D&C Contractor or the D&C Guarantor nor will the D&C Contractor or the D&C Guarantor have any claim or cause of action against the Authority unless and until the Authority has given written notice to the D&C Contractor and the D&C Guarantor pursuant to Section 4.2(a)(i) or Section 4.2(c).
- (c) Each of the D&C Contractor and the D&C Guarantor further covenants with the Authority that if the Project Agreement is terminated by the Authority, it will, if requested by the Authority by notice in writing and subject to Section 4.2(a)(ii) and Section 4.2(a)(iii), accept the instructions of the Authority to the exclusion of the Developer with respect to its duties under the D&C Contract or the D&C Parent Guarantee, as the case may be, upon the terms and conditions of the D&C Contract or the D&C Parent Guarantee and will if so requested in writing enter into a novation agreement where the Authority is substituted for the Developer under the D&C Contract and the D&C Parent Guarantee.
- (d) The Developer acknowledges that each of the D&C Contractor and the D&C Guarantor will be entitled to rely on a notice given to it by the Authority under Section 4.2(c) as conclusive evidence that the Project Agreement has been terminated by the Authority.

5. LIABILITY OF D&C CONTRACTOR MEMBERS

References in this D&C Direct Agreement to the "D&C Contractor" will be deemed to include reference to each present and future D&C Contractor Member, and the liability of each D&C Contractor Member under this D&C Direct Agreement will be deemed to be joint and several.

6. REPRESENTATIONS AND WARRANTIES OF THE D&C CONTRACTOR MEMBERS

Each of the D&C Contractor Members (or, with respect to representations about a D&C Contractor Member, each D&C Contractor Member solely as to itself and not as to any other D&C Contractor Member) represents and warrants to the Authority as follows:

(a) Existence and Good Standing

Each D&C Contractor Member is an entity organized, validly existing and in good standing under the laws of its state of organization, and is duly qualified and authorized to conduct business in the State of North Dakota.

(b) Power and Authority

Each D&C Contractor Member has the power and authority to execute, deliver and perform its obligations under the D&C Contract and this D&C Direct Agreement.

(c) Authorization

(i) The execution, delivery and performance of this D&C Direct Agreement and the D&C Contract has been (or will be) duly authorized by all necessary corporate action of each D&C Contractor Member.

(ii) Each Person executing this D&C Direct Agreement and the D&C Contract on behalf of a D&C Contractor Member has been (or at the time of execution will be) duly authorized to execute and deliver each such document on behalf of such D&C Contractor Member.

(d) Execution

This D&C Direct Agreement and the D&C Contract has been (or will be) duly executed and delivered by each D&C Contractor Member.

(e) Enforceability

This D&C Direct Agreement and the D&C Contract constitutes (or at the time of execution and delivery will constitute) a legal, valid and binding obligation of each D&C Contractor Member, enforceable against each D&C Contractor Member, in accordance with its terms, subject to applicable bankruptcy, insolvency and similar laws affecting the enforceability of the rights of creditors generally and the general principles of equity.

(f) No Contravention

The execution, delivery and performance by each D&C Contractor Member of this D&C Direct Agreement and the D&C Contract does not (and at the time of execution will not), with respect to each such D&C Contractor Member, conflict with or result in a default under or a violation of:

(i) any organization documents of such D&C Contractor Member;

- (ii) any other material agreement or instrument to which the D&C Contractor or such D&C Contractor Member is a party or which is binding on the D&C Contractor or such D&C Contractor Member or any of its assets; or
- (iii) any Applicable Law in effect on the date on which this representation is made.

7. REPRESENTATIONS AND WARRANTIES OF THE D&C GUARANTORS

Each of the D&C Guarantors (or, with respect to representations about a D&C Guarantor, each D&C Guarantor solely as to itself and not as to any other D&C Guarantor) represents and warrants to the Authority as follows:

(a) Existence and Good Standing

- (i) Corporación Acciona Infraestructuras S.L. is a sociedad limitada duly organized, validly existing and in good standing under the laws of Spain.
- (ii) North American Construction Group Ltd. is a corporation duly organized, validly existing and in good standing under the laws of Canada.
- (iii) Shikun & Binui Ltd. is a corporation duly organized, validly existing and authorized to do business under the laws of Israel.

(b) Power and Authority

Each D&C Guarantor has (or at the time of execution and delivery will have) the power and authority to execute, deliver and perform its obligations under its D&C Parent Guarantee and this D&C Direct Agreement.

(c) Authorization

- (i) The execution, delivery and performance of its D&C Parent Guarantee and this D&C Direct Agreement has been (or will be) duly authorized by all necessary corporate action of each D&C Guarantor.
- (ii) Each Person executing its D&C Parent Guarantee and this D&C Direct Agreement on behalf of each D&C Guarantor has been (or at the time of execution will be) duly authorized to execute and deliver each such document on behalf of such D&C Guarantor.

(d) Execution

This D&C Direct Agreement and its D&C Guarantee has been (or will be) duly executed and delivered by each D&C Guarantor.

(e) Enforceability

This D&C Direct Agreement and its D&C Parent Guarantee constitutes (or at the time of execution and delivery will constitute) a legal, valid and binding obligation of each D&C Guarantor, enforceable against each D&C Guarantor, in accordance with its terms, subject to applicable bankruptcy, insolvency and similar laws affecting the enforceability of the rights of creditors generally and the general principles of equity.

(f) No Contravention

The execution, delivery and performance by each D&C Guarantor of this D&C Direct Agreement and its D&C Parent Guarantee does not (and at the time of execution will not), with respect to each such D&C Guarantor, conflict with or result in a default under or a violation of:

- (i) any of such D&C Guarantor's organizational documents;
- (ii) any other material agreement or instrument to which such D&C Guarantor is a party or which is binding on such D&C Guarantor or any of its assets; or
- (iii) any applicable law in effect on the date on which this representation is made.

8. NOTICES

8.1 Notices under this D&C Direct Agreement will be in writing and:

- (a) delivered personally;
 - (b) sent by certified mail, return receipt requested;
 - (c) sent by a recognized overnight mail or courier service, with delivery receipt requested; or
 - (d) sent by e-mail communication followed by a hard copy and with receipt confirmed by telephone, to the following addresses (or to such other address as may from time to time be specified in writing by such person):
- (i) All notices, correspondence and other communications to D&C Contractor will be delivered to the following address:

Address: Acciona Construction USA Corp.
#600-900 West Hastings
Vancouver, British Columbia, Canada
V6C 1E5
Attention: Carlos Planelles, President and CEO
Email: cplanelles@acciona.com, cc. lcaffaro@acciona.com

Address: NACG North Dakota, Inc.
27287 – 100 Avenue
Acheson, Alberta, Canada
T7X 6H8
Attention: Joe Lambert, President
Email: jlambert@nacg.ca
Telephone: (780) 960-7171

Address: Shikun & Binui – America Inc.
Nova Tower 1, Suite 300
One Allegheny Square
Pittsburgh, PA 15212
Attention: Michael Dishaw, CEO
Email: mdishaw@shikunusa.com

- (ii) All notices, correspondence and other communications to the Developer will be delivered to the following address or as otherwise directed by the Developer Representative (as defined in the Project Agreement):

Address: Red River Valley Alliance, LLC
55E. Monroe Street
Chicago, IL 60603
Attention: Esther Madrigal Díez, Developer Representative
Email: esther.madrigal.diez@acciona.com

- (iii) All notices, correspondence and other communications to the Authority will be marked as regarding the Project and will be delivered to the following address or as otherwise directed by the Authority Representative (as defined in the Project Agreement):

Metro Flood Diversion Authority
207 4th Street North, Suite A
Fargo, ND 58102

Attention: Joel Paulsen, Executive Director
Email: PaulsenJ@FMDiversion.gov
Telephone: 701-660-0900

- (iv) All notices, correspondence and other communications to [D&C Guarantor(s)] will be delivered to the following address:

[D&C Guarantor]

Address: [●]
[●]

Attention: [●]

Email: [●]

Telephone: [●]

- (v) All notices, correspondence and other communications to [D&C Guarantor(s)] will be delivered to the following address:

[D&C Guarantor]

Address: [●]
[●]

Attention: [●]

Email: [●]

Telephone: [●]

- 8.2 Notices will be deemed received when actually received in the office of the addressee (or by the addressee if personally delivered) or when delivery is refused, as shown on the receipt of the U.S. Postal Service, private carrier or other person making the delivery. Notwithstanding the foregoing notices received after 5:00 p.m. Central Time will be deemed received on the first business day following delivery.

9. **ASSIGNMENT**

No Party to this D&C Direct Agreement may assign or transfer any part of its rights or obligations under this D&C Direct Agreement without the prior written consent of the other Parties.

10. AUTHORITY'S REMEDIES

The rights and benefits conferred upon the Authority by this D&C Direct Agreement are in addition to any other rights and remedies it may have against the D&C Contractor, including any remedies in negligence.

11. INSPECTION OF DOCUMENTS

Each of the D&C Contractor's and the D&C Guarantors' liabilities under this D&C Direct Agreement will not be in any way reduced or extinguished by reason of any inspection or approval of the Project Data or attendance at Project meetings or other enquiry or inspection which the Authority may make or procure to be made for its benefit or on its behalf.

12. GOVERNING LAW AND JURISDICTION

12.1 Governing Law

This D&C Direct Agreement will be governed by and construed in accordance with the laws of North Dakota.

12.2 Submission to Jurisdiction

The Parties consent to the jurisdiction of any court of North Dakota and any federal courts in North Dakota, waiving any claim or defense that such forum is not convenient or proper. Each of the Developer, the D&C Contractor and the D&C Guarantors agrees that any such court will have *in personam* jurisdiction over it, and consents to service of process in any manner authorized by Applicable Law.

12.3 Waiver of Jury Trial

THE PARTIES HEREBY KNOWINGLY, IRREVOCABLY, VOLUNTARILY AND INTENTIONALLY WAIVE ANY RIGHTS THAT ANY MAY HAVE TO A TRIAL BY JURY WITH RESPECT TO ANY ACTION, PROCEEDING, COUNTERCLAIM OR DEFENSE BASED ON THIS D&C DIRECT AGREEMENT, OR ARISING OUT OF, UNDER OR IN ANY CONNECTION WITH THIS D&C DIRECT AGREEMENT, OR WITH RESPECT TO ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER ORAL OR WRITTEN) OR ACTIONS OF ANY PARTY HERETO RELATING TO THIS D&C DIRECT AGREEMENT. THIS PROVISION IS A MATERIAL INDUCEMENT FOR ALL PARTIES ENTERING INTO THIS D&C DIRECT AGREEMENT. THIS PROVISION APPLIES ONLY TO SUITS BETWEEN THE PARTIES ARISING OUT OF OR RELATED TO THIS D&C DIRECT AGREEMENT AND DOES NOT APPLY TO THIRD PARTY CLAIMS OR SUITS BY OR ON BEHALF OF THE PARTIES FOR PROJECT PROPERTY ACQUISITION AND/OR CONSTRUCTION CONTRACT CLAIMS AND DEFENSES. Each of the Parties hereby (a) certifies that no representative, agent, attorney or any other Person has represented, expressly or otherwise, that such other Person would not, in the event of any suit, action or proceedings relating to this D&C Direct Agreement, seek to enforce the foregoing waiver and (b) acknowledges that it has been induced to enter into this D&C Direct Agreement by, among other things, the mutual waivers and certifications in this Section 12.3.

13. GENERAL PROVISIONS

13.1 Third Party Rights

This D&C Direct Agreement is only enforceable by the original parties to it and by their successors in title and permitted assignees.

13.2 Severability

If any term or provision of this D&C Direct Agreement should be invalid, illegal, or unenforceable in any respect, the validity, legality, and enforceability of the remaining provisions will not in any way be affected or impaired thereby. In addition, the Parties shall endeavor in good-faith negotiations to replace any such invalid, illegal, or unenforceable provisions with valid, legal, and enforceable provisions with the same or comparable economic effect and benefit as such invalid, illegal, or unenforceable provisions.

13.3 Inconsistency with Other Documents

If this D&C Direct Agreement is inconsistent with the D&C Contract or D&C Parent Guarantee, this D&C Direct Agreement prevails.

13.4 Entire Agreement

This D&C Direct Agreement contains the entire understanding of the Parties with respect to the subject matter of this D&C Direct Agreement and supersedes all prior agreements, understandings, statements, representations and negotiations between the Parties with respect to their subject matter.

13.5 Amendments

This D&C Direct Agreement can only be amended or replaced by another document executed by the Parties.

13.6 Waivers

- (a) A waiver of any term, provision or condition of, or consent granted under, this D&C Direct Agreement will be effective only if given in writing and signed by the waiving or consenting Party and then only in the instance and for the purpose for which it is given.
- (b) No failure or delay on the part of any Party in exercising any right, power or privilege under this D&C Direct Agreement will operate as a waiver thereof, nor will any single or partial exercise of any such right, power or privilege preclude any other or further exercise thereof or the exercise of any other right, power or privilege.
- (c) No breach of any provision of this D&C Direct Agreement will be waived or discharged except with the express written consent of the other Party.

13.7 Counterparts

This D&C Direct Agreement may be executed in counterparts, each of which will be deemed an original, but all of which together will constitute one and the same instrument.

13.8 Electronic Signatures

The Parties agree that the electronic signature of a Party to this D&C Direct Agreement shall be as valid as an original signature of such Party and shall be effective to bind such Party to this D&C Direct Agreement. For purposes hereof: (i) "electronic signature" means a manually signed original signature that is then transmitted by electronic means; and (ii) "transmitted by electronic means" means sent in the form of a facsimile or sent via the internet as a portable

document format ("pdf") or other replicating image attached to an electronic mail or internet message.

The parties are signing this D&C Direct Agreement on the date stated in the introductory clause.

[Signature Pages to Follow]

SIGNATORIES

Authority

Signed by **METRO FLOOD DIVERSION**)
AUTHORITY)
)
)
)

D&C Contractor

Signed by [●])
for and on behalf of [])
)
)

D&C Guarantor[s]

Signed by [●])
for and on behalf of [●])
)
)

Developer

Signed by [●])
for and on behalf of [●])
)
)

EXHIBIT 26

FORM OF CLOSING SECURITY

PART 1 - IRREVOCABLE STANDBY LETTER OF CREDIT

ISSUER: [●]

[PLACE FOR PRESENTATION OF DRAFT IN PROGRESS: (Name and Address of Bank/Branch - MUST be NORTH DAKOTA, SOUTH DAKOTA, MINNESOTA, CHICAGO or NEW YORK Bank/Branch)]

APPLICANT: [●]

BENEFICIARY: Metro Flood Diversion Authority

[●]

LETTER OF CREDIT NUMBER: [●]

PLACE AND DATE OF ISSUE: [●]

AMOUNT: \$20,000,000

EXPIRATION DATE: ***[Must be no earlier than 30 days following the Financial Closing Deadline]***

The Issuer issues this Irrevocable Standby Letter of Credit (this "**Letter of Credit**") in favor of the Beneficiary for any sum or sums in the sum of up to **Twenty Million United States Dollars (\$20,000,000)** pursuant to the Project Agreement for the Fargo-Moorhead Metropolitan Area Flood Risk Management Project – Diversion Channel and Associated Infrastructure, dated [●] (the "**Project Agreement**"), between the Beneficiary and the Applicant, (such amount, the "**Stated Amount**"). Funds under this Letter of Credit are available by draft at sight drawn on the Issuer. Any draft under this Letter of Credit will identify this Letter of Credit by the name of the Issuer, and the Letter of Credit number, amount, and place and date of issue, and the Beneficiary will certify to the Issuer that the Beneficiary is entitled to draw on this Letter of Credit.

This Letter of Credit shall be honored by the Issuer if presented at [NORTH DAKOTA, SOUTH DAKOTA, MINNESOTA, CHICAGO or NEW YORK Bank/Branch—Name and Address] on or before [**30 days following the Financial Closing Deadline, or if such date is not a Business Day, the next succeeding Business Day**] (the "**Expiration Date**"). The obligations of the Issuer under this Letter of Credit are primary obligations to the Beneficiary and will not be affected by the performance or non-performance by [Name of Applicant] under any agreement with Beneficiary or by any bankruptcy, insolvency or other similar proceeding initiated by or against [Name of Applicant]. [Name of Applicant] is not the beneficiary under this Letter of Credit and possesses no interest whatsoever in proceeds of any draw on this Letter of Credit. This Letter of Credit will terminate on the earlier of (a) the close of business on the Expiration Date and (b) the date on which Issuer has honored one (1) or more draws in the full amount of the Stated Amount. This Letter of Credit may not be transferred by the Beneficiary to any other person. Drawings by facsimile to facsimile number [●] are acceptable (each such drawing, a "**Fax Drawing**"), provided, that a Fax Drawing will not be effectively presented until the Beneficiary confirms, by telephone, the Issuer's receipt of such Fax Drawing by calling the Issuer at telephone number [●]. The Issuer will acknowledge the Beneficiary's presentment by electronic mail to the electronic mail address provided to the Issuer in the Fax Drawing.

To the extent not inconsistent with the express provisions in this Letter of Credit, this Letter of Credit is subject to the rules of the International Standby Practices ISP98 (**ISP98**), as interpreted under the laws North Dakota, and will, as to matters not governed by the ISP98, be governed and construed in accordance with the laws North Dakota.

With respect to any suit, action or proceedings relating to this Letter of Credit ("**Proceedings**"), we irrevocably:

- (a) submit to the exclusive jurisdiction of any court of North Dakota and any federal courts in North Dakota; and
- (b) waive any objection which we may have at any time to the laying of venue of any Proceedings brought in any such court, waive any claim that such Proceedings have been brought in an inconvenient forum and further waive the right to object, with respect to such Proceedings, that such court does not have any jurisdiction over us.

Issuer:

By: _____

Name: [●]

Title: [●]

(Authorized Signatory of the Issuer)

*** Please instruct your bank to have the Letter of Credit issued in the above format in "Draft" form and emailed to the Authority (at the contact information provided in Section 56.9 (*Notices and Communications*) of the Project Agreement) for approval **PRIOR** to issuance in "Original" form. **If the draft is not reviewed in advance, the Letter of Credit can be rejected.** If you are in need of further assistance, please contact the Authority Representative. ****

Part 2 - DEMAND GUARANTEE

PLACE OF ISSUANCE: [Name and Address of Bank/Branch—MUST be Bank/Branch located in NORTH DAKOTA, SOUTH DAKOTA, MINNESOTA, CHICAGO or NEW YORK (the "**Place of Issuance**")].

NAME AND ADDRESS OF OBLIGEE: Metro Flood Diversion Authority, [●].

Reference is made to the Project Agreement for the Fargo-Moorhead Metropolitan Area Flood Risk Management Project – Diversion Channel and Associated Infrastructure, dated [●] (the "**Project Agreement**"), between the Obligee and [**NAME OF DEVELOPER**] (the "**Principal**"). All terms used but not defined in this Guarantee will have their respective meanings set out in the Project Agreement.

We have been informed that the Principal is entering into the Project Agreement with the Obligee, and the obligations of the Principal thereunder prior to the Financial Closing Date is required by such Project Agreement to be supported by Closing Security (which may be in the form of this demand guarantee (this "**Guarantee**")).

At the request of the Principal, we [**NAME OF GUARANTOR**] ("**Guarantor**") irrevocably undertake to pay you, as the Obligee, at the Place of Issuance any sum or sums not exceeding in total the amount of **Twenty Million United States Dollars (\$20,000,000)** upon receipt by us of your demand in writing and your written statement (in the demand) stating the Principal is in breach of one or more of its commitments made pursuant to the Project Agreement and the respect in which the Principal is in breach of such commitments.

Any demand of payment must contain your signature(s) which must be authenticated by your lawyers or by a notary public. The authenticated demand and statement must be received by us at this office on or before [***Must be no earlier than 30 days following the Financial Closing Deadline, or if such date is not a Business Day, the next succeeding Business Day***], when this Guarantee will expire and will be returned to us.

To the extent not inconsistent with the express provisions hereof, this Guarantee is subject to the [Uniform Rule for Demand Guarantees, published as number 758 by the International Chamber of Commerce (**URDG 758**)], as interpreted under the laws of North Dakota, and will, as to matters not governed by URDG 758, be governed and construed in accordance with the laws of North Dakota.

Dated:_____

Dated:_____

PRINCIPAL [Insert Name of Developer]

GUARANTOR [Insert Name of Guarantor]

By:
Title:_____

By:
Title:_____

EXHIBIT 27

FORM OF AUTHORITY LEGAL OPINION

*[An opinion in substantially the following form will be delivered by
Ohnstad Twichell, P.C., upon execution of the Project Agreement,
assuming no material change in facts or law.]*

_____, 20__

To the Parties Listed on Schedule A hereto

Re: Fargo-Moorhead Metropolitan Area Flood Risk Management Project – Project Agreement

Ladies and Gentleman:

As General Counsel, I am chief legal counsel for the Metro Flood Diversion Authority (the "Authority"), a political subdivision of the State of North Dakota, and in this capacity, I have examined the transactions contemplated by the Authority relating to the Project Agreement for the Fargo-Moorhead Metropolitan Area Flood Risk Management Project – Diversion Channel and Associated Infrastructure, dated _____, 20__, between the Metro Flood Diversion Authority, as the Authority, and _____, as Developer (the "Project Agreement"), with execution authorized pursuant to that certain resolution entitled "Resolution Authorizing the Execution and Delivery of the Project Agreement" adopted by the Authority on _____, 20__ (the "Authorizing Resolution"). For purposes of this opinion, capitalized terms used herein and not defined have the meanings assigned to them in the Project Agreement.

In connection with the opinions rendered herein, I have examined the laws, such certified proceedings, and other documents, opinions, materials, and papers as we deem necessary to this opinion. With regard to the various factual matters material to opinions herein, I have relied upon certificates and representations of the Authority and other public officials. I have assumed (i) the requisite power and authority of all parties to the documents other than the Authority to execute and deliver the documents and perform their respective obligations thereunder, (ii) the due execution, delivery, and due authorization of the documents by parties thereto other than the Authority, (iii) the validity and binding effect thereof as to such parties other than the Authority, (iv) the genuineness of all signatures on all documents seen or reviewed by me, (v) the authenticity of all documents submitted to me as originals, and (vi) the conformity with the original documents of all documents submitted to me as copies. For purposes of the opinion stated below, I have made such inquiries of such officers, officials, and representatives of the Authority as I have deemed relevant and necessary as a basis for the opinions set forth herein. I have also examined the documents referred to in the Project Agreement, including WRRDA, the Chief of Engineers Report, the PPA, the P3 MOU, the Joint Powers Agreement, and the Master Indenture of Trust, and the resolutions authorizing the execution of the same.

Whenever an opinion expressed herein is stated to be my knowledge, or known to me, it means that, during the course of my representation of the Authority, I have not acquired information giving me actual knowledge of the existence or absence of the facts forming the basis for such opinion, and that, except to the extent expressly set forth herein, I have not concluded an independent investigation to determine the existence or absence of such facts.

Based on the foregoing, and subject to the specific assumptions, qualifications, and reliance set forth herein, I am of the opinion that:

1. The Authority is a permanent North Dakota political subdivision and joint powers entity formed through the Joint Powers Agreement, dated June 1, 2016, by and among the City of Moorhead,

To the Parties Listed on Schedule A Hereto
Page 2 of 5

_____, 20____

the City of Fargo, Clay County, Cass County and the Cass County Joint Water Resource District (the "Member Entities"). The Authority is validly existing and in good standing under the constitution and laws of the State of North Dakota. The adoption of the Joint Powers Agreement to create the Authority was within each Member Entity's respective power, has been duly authorized and approved by all necessary action, and requires no action by or in respect of, or filing with, any governmental body, agency, or official that has not been accomplished.

2. The Authority has jurisdiction to undertake the Project.
3. The adoption of the Authorizing Resolution was within the Authority's powers, has been duly authorized by all necessary action, and requires no action by or in respect of, or filing with, any governmental body, agency, or official that has not be completed.
4. The Authorizing Resolution has been validly adopted by the Authority.
5. The Authority took all action necessary, and on the date executed has the full power, right and authority, to execute and deliver the Project Agreement and has all necessary power, right, and authority under its governing documents and applicable law and regulations to perform each and all of the obligations of the Authority provided for therein.
6. Payments due and owing by the Authority under the terms and conditions of the Project Agreement will be made pursuant to the Master Indenture of Trust. The Authority took all action necessary, and on the date executed, had the full power, right and authority, to execute and deliver the Master Indenture of Trust and has all necessary power, right, and authority under its governing documents and applicable law and regulations to perform each and all of the obligations of the Authority provided for therein in relation to payments required under the Project Agreement.
7. Neither the execution and delivery by the Authority of the Project Agreement, nor performance by the Authority of its obligations thereunder, nor the consummation of the transactions contemplated thereby, will or has at the time of execution (i) violate or contravene the statutory law of the State of North Dakota which, in my experience, is generally applicable to such transactions or, to the best of my knowledge, violate any federal statute; (ii) to the best of my knowledge require any consents, approvals, authorization, registration, or declaration under any agreement to which the Authority is a party, other than any such consents, approvals, authorizations, registrations, or declarations that have been previously obtained; or (iii) to the best of my knowledge result in any default under or violation of any agreement or instrument to which the Authority is a party or by which it is lawfully bound.
8. The Project Agreement has been duly and validly executed and delivered by the Authority.
9. The Project Agreement constitutes the legal, valid, and binding obligation of the Authority, enforceable against the Authority in accordance with its terms, except as enforceability may be limited or otherwise affected by (i) bankruptcy, insolvency, reorganization, moratorium, and other laws affecting the rights of creditors generally, (ii) principles of equity, whether considered at law or in equity, and (iii) the sovereign immunity of the State of North Dakota; provided, however, that sovereign immunity will not bar an action to enforce a claim based on a breach of a

contractual provision of the Project Agreement and presented in accordance with the laws of the State of North Dakota.

To the Parties Listed on Schedule A Hereto
Page 3 of 5

_____, 20____

10. To the best of my knowledge, there is no authorization, approval, consent, or other order or official action of any governmental authority or agency which is required for the valid authorization, execution, acceptance, and delivery by the Authority of the Project Agreement.
11. The Authority took all action necessary, and on the date executed has the full power, right and authority, to execute and deliver the Lenders Direct Agreement and has all necessary power, right, and authority under its governing documents and applicable law and regulations to perform each and all of the obligations of the Authority provided for therein.
12. Neither the execution and delivery by the Authority of the Lenders Direct Agreement, nor performance by the Authority of its obligations thereunder, nor the consummation of the transactions contemplated thereby, will or has at the time of execution (i) violate or contravene the statutory law of the State of North Dakota which, in my experience, is generally applicable to such transactions or, to the best of my knowledge, violate any federal statute; (ii) to the best of my knowledge require any consents, approvals, authorization, registration, or declaration under any agreement to which the Authority is a party, other than any such consents, approvals, authorizations, registrations, or declarations that have been previously obtained; or (iii) to the best of my knowledge result in any default under or violation of any agreement or instrument to which the Authority is a party or by which it is lawfully bound.
13. The Lenders Direct Agreement has been duly and validly executed and delivered by the Authority.
14. The Lenders Direct Agreement constitutes the legal, valid, and binding obligation of the Authority, enforceable against the Authority in accordance with its terms, except as enforceability may be limited or otherwise affected by (i) bankruptcy, insolvency, reorganization, moratorium, and other laws affecting the rights of creditors generally, (ii) principles of equity, whether considered at law or in equity, and (iii) the sovereign immunity of the State of North Dakota; provided, however, that sovereign immunity will not bar an action to enforce a claim based on a breach of a contractual provision of the Lenders Direct Agreement and presented in accordance with the laws of the State of North Dakota.
15. To the best of my knowledge, there is no authorization, approval, consent, or other order or official action of any governmental authority or agency which is required for the valid authorization, execution, acceptance, and delivery by the Authority of the Lenders Direct Agreement.
16. The Authority took all action necessary, and on the date executed has the full power, right and authority, to execute and deliver the D&C Contractor Direct Agreement and has all necessary power, right, and authority under its governing documents and applicable law and regulations to perform each and all of the obligations of the Authority provided for therein.
17. Neither the execution and delivery by the Authority of the D&C Contractor Direct Agreement, nor performance by the Authority of its obligations thereunder, nor the consummation of the transactions contemplated thereby, will or has at the time of execution (i) violate or contravene the statutory law of the State of North Dakota which, in my experience, is generally applicable to such transactions or, to the best of my knowledge, violate any federal statute; (ii) to the best of my knowledge require any consents, approvals, authorization, registration, or declaration under

any agreement to which the Authority is a party, other than any such consents, approvals, authorizations, registrations, or declarations that have been previously

To the Parties Listed on Schedule A Hereto
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_____, 20__

obtained; or (iii) to the best of my knowledge result in any default under or violation of any agreement or instrument to which the Authority is a party or by which it is lawfully bound.

18. The D&C Contractor Direct Agreement has been duly and validly executed and delivered by the Authority.
19. The D&C Contractor Direct Agreement constitutes the legal, valid, and binding obligation of the Authority, enforceable against the Authority in accordance with its terms, except as enforceability may be limited or otherwise affected by (i) bankruptcy, insolvency, reorganization, moratorium, and other laws affecting the rights of creditors generally, (ii) principles of equity, whether considered at law or in equity, and (iii) the sovereign immunity of the State of North Dakota; provided, however, that sovereign immunity will not bar an action to enforce a claim based on a breach of a contractual provision of the D&C Contractor Direct Agreement and presented in accordance with the laws of the State of North Dakota.
20. To the best of my knowledge, there is no authorization, approval, consent, or other order or official action of any governmental authority or agency which is required for the valid authorization, execution, acceptance, and delivery by the Authority of the D&C Contractor Direct Agreement.
21. There is, to the best of my knowledge, after due and reasonable inquiry among relevant Authority personnel, no actions, suits, proceedings, investigations, or litigation pending and served on the Authority which challenges the Project or the Authority's authority to execute, deliver, or perform all of its obligations under, or the validity or enforceability of, the Project Agreement, or which challenges the authority of the Authority officials who executed the Project Agreement.

I express no opinions regarding compliance with or the effect of (i) antitrust and unfair competition laws, (ii) securities laws and regulations, (iii) environmental laws, (iv) real estate zoning or land use laws or regulations, (v) fiduciary duties, (vi) pension and employee benefit laws and regulations, (vii) tax laws and regulations, or (viii) labor laws and regulations. Further, I express no opinion as to whether a federal or state court outside of the State of North Dakota would give effect to a choice of the law of the State of North Dakota.

I express no opinion with respect to any indemnification, contribution, penalty, choice of law, choice of forum, choice of venue, severability, or waiver provisions contained in the Project Agreement.

I express no opinion as to the nature or extent of the Authority's rights in, or title to, any property, or to the existence or priority of any lien or security interest applicable to any property.

A court may refuse to enforce a provision of the Project Agreement if it deems that such provision is in violation of public policy. No opinion is being rendered as to the availability of any particular remedy.

This opinion is given in my official capacity as General Counsel and not personally, and no personal liability shall derive therefrom. The opinions expressed herein are matters of professional judgment and are not a guarantee of result.

The opinions expressed in this letter (i) are strictly limited to the matters expressed in this letter, and without limiting the foregoing, no other opinions or confirmations of fact are to be implied or inferred and (ii) speak only as of the date hereof and are based on the laws of the State of North

To the Parties Listed on Schedule A Hereto

Page 5 of 5

_____, 20__

Dakota and the interpretations thereof as of the date hereof, and I am under no obligation, and do not undertake any obligation, to advise you or any other person or entity of changes of law or fact that occur after the date of this letter, even though the change may affect the legal analysis, a legal conclusion, or an informational confirmation of this letter.

This letter may be relied on by you in connection with the matters set forth herein and, without any express written consent, may not be furnished to, quoted to, or relied upon by any other person or entity for any purpose.

This letter may not be published or reproduced in any manner or distributed or circulated to any other person or entity without my express written consent.

Very truly yours,

OHNSTAD TWICHELL, P.C.

John T. Shockley
A Shareholder

Schedule A

EXHIBIT 28

BASE CASE FINANCIAL MODEL

This Exhibit 28 (*Base Case Financial Model*) consists of the Exhibit 28 (*Base Case Financial Model*) transmitted by the Authority to the Developer via Aconex (Mail Number FMDA-TRN-000335) at 10:52:07 AM CDT on August 18, 2021 and assigned Aconex Document No. MFDA-GN-AGR-0004 evidenced by the below screenshot.

FARGO-MOORHEAD AREA DIVERSION PROJECT

8/18/2021

Aconex

Kris Bakkegard
DIVERSION AUTHORITY

Transmittal of execution version of Exhibit 28 (Base Case Financial ...
TRANSMITTAL 10:52 AM
FMDA-TRN-000335

Esther Madrigal Diez
RED RIVER VALLEY ALLIANCE

Re: Transmittal of execution version of Exhibit 28 (Base Case Financ...
GENERAL CORRESPONDENCE 11:06 AM
RRVA_LLC-GNC-000002



MAIL TYPE
Transmittal

MAIL NUMBER
FMDA-TRN-000335

REFERENCE NUMBER
FMDA-TRN-000335

Transmittal of execution version of Exhibit 28 (Base Case Financial Model) to the Project Agreement

From Kris Bakkegard - Diversion Authority

To Ms Esther Madrigal Diez - Red River Valley Alliance

Cc (11) Mr Julio Marcos - Acciona / Infrared (+10 more...)

Sent Wednesday, August 18, 2021 10:52:07 AM CDT (GMT -05:00)

Reason Issued for Information

Acknowledge by 8/18/21

Status **Responded**

DOCUMENT ATTACHMENTS (1)

(0 selected)					
File	Document No	Revision	Revision Date	Title	Status
	MFDA-GN-AGR-0004	1	8/17/21	Exhibit 28 - Base Case Financial Model	Final

MESSAGE

This transmittal encloses the execution version of Exhibit 28 (Base Case Financial Model) to the Project Agreement for the Fargo-Moorhead Metropolitan Area Flood Risk Management Project - Diversion Channel And Associated Infrastructure between the Metro Flood Diversion Authority and Red River Valley Alliance, LLC.

Please confirm receipt and that it is the agreed form.

https://us1.aconex.com/Login?mainTarget=%2FViewCorrespondence%3FCorrespondence_ID%3D1228094453%26CORRESPONDENCE_MAILBO... 1/1

EXHIBIT 29

FORM OF CCJWRD LEGAL OPINION

*[An opinion in substantially the following form will be delivered by
Ohnstad Twichell, P.C., upon execution of the Project Agreement,
assuming no material change in facts or law.]*

_____, 20__

(CCJWRD Opinion)

To the Parties Listed on Schedule A hereto

Re: Fargo-Moorhead Metropolitan Area Flood Risk Management Project – Project Agreement

Ladies and Gentlemen:

We have acted as legal counsel for the Cass County Joint Water Resource District ("CCJWRD"), a political subdivision of the State of North Dakota, and in this capacity we have examined the transactions contemplated by CCJWRD relating to the Project Agreement for the Fargo-Moorhead Metropolitan Area Flood Risk Management Project – Diversion Channel and Associated Infrastructure, dated _____, 20__, between the Metro Flood Diversion Authority, as the Authority, and _____, as the Developer (the "Project Agreement"), with execution authorized pursuant to that certain resolution entitled "Resolution Authorizing the Execution and Delivery of the Project Agreement" adopted by the Authority on _____, 20__. For purposes of this opinion, capitalized terms used herein and not defined have the meanings assigned to them in the Project Agreement.

In connection with the opinions rendered herein, we have examined the laws, such certified proceedings, and other documents, opinions, materials, and papers as we deem necessary to this opinion. With regard to the various factual matters material to opinions herein, we have relied upon certificates and representations of CCJWRD and other public officials. We have assumed (i) the requisite power and authority of all parties to the documents other than CCJWRD to execute and deliver the documents and perform their respective obligations thereunder, (ii) the due execution, delivery, and due authorization of the documents by parties thereto other than CCJWRD, (iii) the validity and binding effect thereof as to such parties other than CCJWRD, (iv) the genuineness of all signatures on all documents seen or reviewed by us, (v) the authenticity of all documents submitted to us as originals, and (vi) the conformity with the original documents of all documents submitted to us as copies. For purposes of the opinion stated below, we have made such inquiries of such officers, officials, and representatives of CCJWRD as we have deemed relevant and necessary as a basis for the opinions set forth herein. We have also examined the documents referred to in the Project Agreement, including WRRDA, the Chief of Engineers Report, the PPA, the P3 MOU, the Joint Powers Agreement, and the Master Indenture of Trust, and the resolutions authorizing the execution of the same.

Whenever an opinion expressed herein is stated to be our knowledge, or known to us, it means that, during the course of our representation of CCJWRD, we have not acquired information giving us actual knowledge of the existence or absence of the facts forming the basis for such opinion, and that, except to the extent expressly set forth herein, we have not concluded an independent investigation to determine the existence or absence of such facts.

Based on the foregoing, and subject to the specific assumptions, qualifications, and reliance set forth herein, we are of the opinion that:

- (i) CCJWRD is a permanent North Dakota political subdivision, which is validly existing and in good standing under the constitution and laws of the State of North Dakota.
- (ii) The resolution of CCJWRD authorizing the issuance of the Temporary P3 Improvement Warrants (the "Temporary P3 Improvement Warrant Resolution") to the Trustee and execution of the Master Indenture of Trust was within the CCJWRD's powers, has been duly authorized by all necessary action, and requires no action by or in respect of, or filing with, any governmental body, agency, or official that has not been completed.
- (iii) CCJWRD took all action necessary, and on the date executed has the full power, right, and authority to execute and deliver the Master Indenture of Trust and the Temporary P3 Improvement Warrant Resolution to the Trustee.
- (iv) CCJWRD took all action necessary, and on the date executed has the full power, right, and authority to execute and deliver the Temporary P3 Improvement Warrants to the Trustee, in accordance with the Master Indenture of Trust and the Temporary P3 Improvement Resolution.
- (v) The terms and conditions of the Master Indenture of Trust as they relate to the Temporary P3 Improvement Warrants and CCJWRD constitute a legal, valid, and binding obligation of CCJWRD enforceable against CCJWRD.
- (vi) Neither the execution and delivery by CCJWRD of the Temporary P3 Improvement Warrants, the Temporary P3 Improvement Warrant Resolution, or the Master Indenture of Trust, nor performance by CCJWRD of its obligations thereunder, will or has at the time of execution violate or contravene the statutory law of the State of North Dakota or, to the best of our knowledge, violate any federal statute.
- (vii) There is, to the best of our knowledge, after due and reasonable inquiry among relevant CCJWRD personnel, no actions, suits, proceedings, investigations, or litigation affecting the ability of CCJWRD to execute and deliver, or to perform its obligations under, the Master Indenture of Trust or the Temporary P3 Improvement Warrants.

We express no opinions regarding compliance with or the effect of (i) antitrust and unfair competition laws, (ii) securities laws and regulations, (iii) environmental laws, (iv) real estate zoning or land use laws or regulations, (v) fiduciary duties, (vi) pension and employee benefit laws and regulations, (vii) tax laws and regulations, or (viii) labor laws and regulations. Further, we express no opinion as to whether a federal or state court outside of the State of North Dakota would give effect to a choice of the law of the State of North Dakota.

We express no opinion with respect to any indemnification, contribution, penalty, choice of law, choice of forum, choice of venue, severability, or waiver provisions contained in the Project Agreement.

We express no opinion as to the nature or extent of CCJWRD's rights in, or title to, any property, or to the existence or priority of any lien or security interest applicable to any property.

A court may refuse to enforce a provision of the Project Agreement if it deems that such provision is in violation of public policy. No opinion is being rendered as to the availability of any particular remedy.

This opinion is given in our official capacity as Counsel to CCJWRD and not personally, and no personal liability shall derive therefrom. The opinions expressed herein are matters of professional judgment and are not a guarantee of result.

The opinions expressed in this letter (i) are strictly limited to the matters expressed in this letter, and without limiting the foregoing, no other opinions or confirmations of fact are to be implied or

inferred and (ii) speak only as of the date hereof and are based on the laws of the State of North Dakota and the interpretations thereof as of the date hereof, and we are under no obligation, and do not undertake any obligation, to advise you or any other person or entity of changes of law or fact that occur after the date of this letter, even though the change may affect the legal analysis, a legal conclusion, or an informational confirmation of this letter.

This letter may be relied on by you in connection with the matters set forth herein and, without any express written consent, may not be furnished to, quoted to, or relied upon by any other person or entity for any purpose.

This letter may not be published or reproduced in any manner or distributed or circulated to any other person or entity without our express written consent.

Very truly yours,

OHNSTAD TWICHELL, P.C.

Schedule A

EXHIBIT 30 [NOT USED]

EXHIBIT 31 – FEDERAL REQUIREMENTS

1. AMERICAN IRON AND STEEL REQUIRED

The Developer acknowledges to and for the benefit of the Authority and the United States Environmental Protection Agency ("EPA") that it understands the goods and services under this Agreement are being funded with monies made available by the Water Infrastructure Finance and Innovation Act ("WIFIA") program of the EPA that has statutory requirements commonly known as "American Iron and Steel" that requires all of the iron and steel products used in the Project to be produced in the United States ("American Iron and Steel Requirement") including iron and steel products provided by the Developer pursuant to this Agreement. The Developer hereby represents, warrants and covenants to and for the benefit of the Authority and the EPA that (a) the Developer has reviewed and understands the American Iron and Steel Requirement, (b) all of the iron and steel products used in the Project will be and/or have been produced in the United States in a manner that complies with the American Iron and Steel Requirement, unless a waiver of the requirement is approved, and (c) the Developer will provide any further verified information, certification or assurance of compliance with this paragraph, or information necessary to support a waiver of the American Iron and Steel Requirement, as may be requested by the Developer or the EPA. Notwithstanding any other provision of this Agreement, any failure to comply with this paragraph by the Developer shall permit the Authority or the EPA to recover as damages against the Developer any loss, expense, or cost (including without limitation attorney's fees) incurred by the Authority or the EPA resulting from any such failure (including without limitation any impairment or loss of funding, whether in whole or in part, from the EPA or any damages owed to the EPA by the Authority). While the Developer has no direct contractual privity with the EPA, as a lender to the Authority for the funding of its project, the Authority and the Developer agree that the EPA is a third-party beneficiary and neither this paragraph (nor any other provision of this Agreement necessary to give this paragraph force or effect) shall be amended or waived without the prior written consent of the EPA.

2. CIVIL RIGHTS AND NON-DISCRIMINATION CERTIFICATION

Developer shall provide the Authority with a certification providing assurance that it will comply with the following federal non-discrimination requirements:

- (a) Title VI of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, and national origin, including limited English proficiency (LEP).
- (b) Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination against persons with disabilities.
- (c) The Age Discrimination Act of 1975, which prohibits age discrimination.
- (d) Section 13 of the Federal Water Pollution Control Act Amendments of 1972, which prohibits discrimination on the basis of sex.
- (e) 40 CFR Part 7, as it relates to the foregoing.
- (f) Executive Order No. 11246.

3. EQUAL EMPLOYMENT OPPORTUNITY REQUIREMENTS

The Developer shall comply with Executive Order No. 11246, entitled "Equal Employment Opportunity," as amended by Executive Order No. 11375, and as supplemented in Department of Labor regulations (41 CFR Part 60). Developer's compliance with Executive Order No. 11246 shall be based on implementation of the Equal Opportunity Clause, and specific affirmative active obligations required by the Standard Federal Equal Employment Opportunity Construction Contract Specifications, as set forth in 41 CFR Part 60-4.

During the performance of this Agreement, the Developer agrees as follows:

- (a) The Developer will not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin. The Developer will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Developer agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.
- (b) The Developer will, in all solicitations or advancements for employees placed by or on behalf of the Developer, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin.
- (c) The Developer will not discharge or in any other manner discriminate against any employee or applicant for employment because such employee or applicant has inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant. This provision shall not apply to instances in which an employee who has access to the compensation information of other employees or applicants as a part of such employee's essential job functions discloses the compensation of such other employees or applicants to individuals who do not otherwise have access to such information, unless such disclosure is in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the employer, or is consistent with the Developer's legal duty to furnish information.
- (d) The Developer will send to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the Developer's commitments under Section 202 of Executive Order No. 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.
- (e) The Developer will comply with all provisions of Executive Order No. 11246 of Sept. 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.
- (f) The Developer will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.
- (g) In the event of the Developer's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be cancelled, terminated, or suspended in whole or in part and the Developer may be declared ineligible for further government contracts in accordance with procedures authorized in Executive Order No. 11246 of Sept. 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.
- (h) The Developer will include the provisions of paragraphs (a) through (g) as set forth above in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of September

24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The Developer will take such action with respect to any subcontract or purchase order as may be directed by the Secretary of Labor as a means of enforcing such provisions including sanctions for noncompliance; provided, however, that in the event the Developer becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction, the Developer may request the United States to enter into such litigation to protect the interests of the United States. [Sec. 202 amended by EO 11375 of Oct. 13, 1967, 32 FR 14303, 3 CFR, 1966-1970 Comp., p. 684, EO 12086 of Oct. 5, 1978, 43 FR 46501, 3 CFR, 1978 Comp., p. 230, EO 13665 of April 8, 2014, 79 FR 20749, EO 13672 of July 21, 2014, 79 FR 42971]

4. EQUAL OPPORTUNITY CONTRACT CLAUSES REQUIRED IN ALL DEVELOPER CONSTRUCTION CONTRACTS FOR WORK ON THE PROJECT

- (a) As used in these specifications:
 - (i) "Covered area" means Clay County, MN, Cass County, ND, and Richland County, ND;
 - (ii) "Director" means Director, Office of Federal Contract Compliance Programs, United States Department of Labor, or any person to whom the Director delegates authority;
 - (iii) "Employer identification number" means the federal Social Security number used on the Employer's Quarterly Federal Tax Return, U.S. Treasury Department Form 941;
 - (iv) "Minority" includes:
 - (A) Black (all persons having origins in any of the Black African racial groups not of Hispanic origin);
 - (B) Hispanic (all persons of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish Culture or origin, regardless of race);
 - (C) Asian and Pacific Islander (all persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands); and
 - (D) American Indian or Alaskan Native (all persons having origins in any of the original peoples of North America and maintaining identifiable tribal affiliations through membership and participation or community identification).
- (b) Whenever the Developer or any subcontractor at any tier, subcontracts a portion of the work involving any construction trade, it shall physically include in each subcontract in excess of \$10,000 the provisions of these specifications and the Notice which contains the applicable goals for minority and female participation and which is set forth in the solicitations from which this contract resulted,
- (c) If the contractor is participating (pursuant to 41 CFR 60-4.5) in a Hometown Plan approved by the U.S. Department of Labor in the covered area either individually or through an association, its affirmative action obligations on all work in the Plan area (including goals and timetables) shall be in accordance with that Plan for those trades which have unions participating in the Plan. Contractors must be able to demonstrate their participation in and compliance with the provisions of any such Hometown Plan. Each contractor or subcontractor participating in an approved Plan is individually required to comply with its obligations under the EEO clause, and to make a good faith effort to achieve each goal under the Plan in each trade in which it has employees. The overall good faith performance by other contractors or subcontractors toward a goal in an approved Plan does not excuse any covered Developer's or subcontractor's failure to take good faith efforts to achieve the Plan goals and timetables.
- (d) The contractor shall implement the specific affirmative action standards provided in paragraphs (g) (i) through (xvi) of these specifications. The goals set forth in the solicitation

from which this contract resulted are expressed as percentages of the total hours of employment and training of minority and female utilization the contractor should reasonably be able to achieve in each construction trade in which it has employees in the covered area. Covered Construction contractors performing construction work in geographical areas where they do not have a federal or federally assisted construction contract shall apply the minority and female goals established for the geographical area where the work is being performed. Goals are published periodically in the Federal Register in notice form, and such notices may be obtained from any Office of Federal Contract Compliance Programs office or from federal procurement contracting officers. The Developer is expected to make substantially uniform progress in meeting its goals in each craft during the period specified.

- (e) Neither the provisions of any collective bargaining agreement, nor the failure by a union with whom the contractor has a collective bargaining agreement, to refer either minorities or women, shall excuse the contractor's obligations under these specifications, Executive Order No. 11246, or the regulations promulgated pursuant thereto.
- (f) In order for the nonworking training hours of apprentices and trainees to be counted in meeting the goals, such apprentices and trainees must be employed by the contractor during the training period, and the contractor must have made a commitment to employ the apprentices and trainees at the completion of their training, subject to the availability of employment opportunities. Trainees must be trained pursuant to training programs approved by the U.S. Department of Labor.
- (g) The contractor shall take specific affirmative actions to ensure equal employment opportunity. The evaluation of the contractor's compliance with these specifications shall be based upon its effort to achieve maximum results from its actions. The contractor shall document these efforts fully, and shall implement affirmative action steps at least as extensive as the following:
 - (i) Ensure and maintain a working environment free of harassment, intimidation, and coercion at all sites, and in all facilities at which the contractor's employees are assigned to work. The contractor, where possible, will assign two or more women to each construction project. The contractor shall specifically ensure that all foremen, superintendents, and other on-site supervisory personnel are aware of and carry out the contractor's obligation to maintain such a working environment, with specific attention to minority or female individuals working at such sites or in such facilities.
 - (ii) Establish and maintain a current list of minority and female recruitment sources, provide written notification to minority and female recruitment sources and to community organizations when the contractor or its unions have employment opportunities available, and maintain a record of the organizations' responses.
 - (iii) Maintain a current file of the names, addresses and telephone numbers of each minority and female off-the-street applicant and minority or female referral from a union, a recruitment source or community organization and of what action was taken with respect to each such individual. If such individual was sent to the union hiring hall for referral and was not referred back to the contractor by the union or, if referred, not employed by the contractor, this shall be documented in the file with the reason therefor, along with whatever additional actions the contractor may have taken.
 - (iv) Provide immediate written notification to the Director when the union or unions with which the contractor has a collective bargaining agreement has not referred to the contractor a minority person or woman sent by the contractor, or when the contractor has other information that the union referral process has impeded the contractor's efforts to meet its obligations.

- (v) Develop on-the-job training opportunities and/or participate in training programs for the area which expressly include minorities and women, including upgrading programs and apprenticeship and trainee programs relevant to the contractor's employment needs, especially those programs funded or approved by the Department of Labor. The contractor shall provide notice of these programs to the sources compiled under g, ii. above.
- (vi) Disseminate the contractor's EEO policy by providing notice of the policy to unions and training programs and requesting their cooperation in assisting the contractor in meeting its EEO obligations; by including it in any policy manual and collective bargaining agreement; by publicizing it in the company newspaper, annual report, etc.; by specific review of the policy with all management personnel and with all minority and female employees at least once a year; and by posting the company EEO policy on bulletin boards accessible to all employees at each location where construction work is performed.
- (vii) Review, at least annually, the company's EEO policy and affirmative action obligations under these specifications with all employees having any responsibility for hiring, assignment, layoff, termination or other employment decisions including specific review of these items with onsite supervisory personnel such as Superintendents, General Foremen, etc., prior to the initiation of construction work at any job site. A written record shall be made and maintained identifying the time and place of these meetings, persons attending, subject matter discussed, and disposition of the subject matter.
- (viii) Disseminate the contractor's EEO policy externally by including it in any advertising in the news media, specifically including minority and female news media, and providing written notification to and discussing the contractor's EEO policy with other contractors and subcontractors with whom the contractor does or anticipates doing business.
- (ix) Direct its recruitment efforts, both oral and written, to minority, female and community organizations, to schools with minority and female students and to minority and female recruitment and training organizations serving the contractor's recruitment area and employment needs. Not later than one month prior to the date for the acceptance of applications for apprenticeship or other training by any recruitment source, the contractor shall send written notification to organizations such as the above, describing the openings, screening procedures, and tests to be used in the selection process.
- (x) Encourage present minority and female employees to recruit other minority persons and women and, where reasonable, provide after school, summer and vacation employment to minority and female youth both on the site and in other areas of a contractor's work force.
- (xi) Validate all tests and other selection requirements where there is an obligation to do so under 41 CFR part 60-3.
- (xii) Conduct, at least annually, an inventory and evaluation at least of all minority and female personnel for promotional opportunities and encourage these employees to seek or to prepare for, through appropriate training, etc., such opportunities.
- (xiii) Ensure that seniority practices, job classifications, work assignments and other personnel practices, do not have a discriminatory effect by continually monitoring all personnel and employment related activities to ensure that the EEO policy and the contractor's obligations under these specifications are being carried out.

- (xiv) Ensure that all facilities and company activities are non-segregated except that separate or single-user toilet and necessary changing facilities shall be provided to assure privacy between the sexes.
- (xv) Document and maintain a record of all solicitations of offers for subcontracts from minority and female construction contractors and suppliers, including circulation of solicitations to minority and female Developer associations and other business associations.
- (xvi) Conduct a review, at least annually, of all supervisors' adherence to and performance under the Developer's EEO policies and affirmative action obligations.
- (h) Contractors are encouraged to participate in voluntary associations which assist in fulfilling one or more of their affirmative action obligations (7a through p). The efforts of a contractor association, joint contractor-union, contractor-community, or other similar group of which the contractor is a member and participant, may be asserted as fulfilling any one or more of its obligations under (g) (i) through (xvi) of these Specifications provided that the contractor actively participates in the group, makes every effort to assure that the group has a positive impact on the employment of minorities and women in the industry, ensures that the concrete benefits of the program are reflected in the contractor's minority and female workforce participation, makes a good faith effort to meet its individual goals and timetables, and can provide access to documentation which demonstrates the effectiveness of actions taken on behalf of the contractor. The obligation to comply, however, is the contractor's and failure of such a group to fulfill an obligation shall not be a defense for the contractor's noncompliance.
- (i) A single goal for minorities and a separate single goal for women have been established. The contractor, however, is required to provide equal employment opportunity and to take affirmative action for all minority groups, both male and female, and all women, both minority and non-minority. Consequently, the contractor may be in violation of the Executive Order if a particular group is employed in a substantially disparate manner (for example, even though the contractor has achieved its goals for women generally, the contractor may be in violation of the Executive Order if a specific minority group of women is underutilized).
- (j) The contractor shall not use the goals and timetables or affirmative action standards to discriminate against any person because of race, color, religion, sex, sexual orientation, gender identity, or national origin.
- (k) The contractor shall not enter into any subcontract with any person or firm debarred from Government contracts pursuant to Executive Order No. 11246.
- (l) The contractor shall carry out such sanctions and penalties for violation of these specifications and of the Equal Opportunity Clause, including suspension, termination and cancellation of existing subcontracts as may be imposed or ordered pursuant to Executive Order No. 11246, as amended, and its implementing regulations, by the Office of Federal Contract Compliance Programs. Any contractor who fails to carry out such sanctions and penalties shall be in violation of these specifications and Executive Order No. 11246, as amended.
- (m) The contractor, in fulfilling its obligations under these specifications, shall implement specific affirmative action steps, at least as extensive as those standards prescribed in paragraph g of these specifications, so as to achieve maximum results from its efforts to ensure equal employment opportunity. If the contractor fails to comply with the requirements of the Executive Order, the implementing regulations, or these specifications, the Director shall proceed in accordance with 41 CFR 60-4.8.

- (n) The contractor shall designate a responsible official to monitor all employment related activity to ensure that the company EEO policy is being carried out, to submit reports relating to the provisions hereof as may be required by the Government and to keep records. Records shall at least include for each employee the name, address, telephone numbers, construction trade, union affiliation if any, employee identification number when assigned, social security number, race, sex, status (e.g., mechanic, apprentice trainee, helper, or laborer), dates of changes in status, hours worked per week in the indicated trade, rate of pay, and locations at which the work was performed. Records shall be maintained in an easily understandable and retrievable form; however, to the degree that existing records satisfy this requirement, Developers shall not be required to maintain separate records.
- (o) Nothing herein provided shall be construed as a limitation upon the application of other laws which establish different standards of compliance or upon the application of requirements for the hiring of local or other area residents (e.g., those under the Public Works Employment Act of 1977 and the Community Development Block Grant Program).

5. DEVELOPER REQUIREMENTS TO COMPLY WITH EQUAL OPPORTUNITY REQUIREMENTS

- (a) Provision of Segregated Facilities.

The Developer must ensure that facilities provided for its and all related entity employees engaged on the Project are provided in such a manner that segregation on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin cannot result. The Developer and its related entities may neither require such segregated use by written or oral policies nor tolerate such use by employee custom. The Developer's and its related entities obligation extends further to ensuring that its employees are not assigned to perform their services at any location, under the Developer's or its related entities control, where the facilities are segregated. This obligation extends to all contracts containing the equal opportunity clause regardless of the amount of the contract. The term "facilities," as used in this section, means waiting rooms, work areas, restaurants and other eating areas, time clocks, restrooms, wash rooms, locker rooms, and other storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas, transportation, and housing provided for employees; Provided, That separate or single-user restrooms and necessary dressing or sleeping areas shall be provided to assure privacy between the sexes.

- (b) Notice of Requirement for Affirmative Action to Ensure Equal Employment Opportunity.
 - (i) The Developer's attention is called to the "Equal Opportunity Clause" and the "Standard Federal Equal Employment Specifications" set forth herein.
 - (ii) The goals and timetables for minority and female participation, expressed in percentage terms for the Developer's aggregate workforce in each trade on all construction work in the covered area, are as follows:

Time- tables	Goals for minority participation for each trade	Goals for female participation in each trade
	0.7%	6.9%

These goals are applicable to all the Developer's construction work (whether or not it is federal or federally assisted) performed in the covered area. If the Developer performs construction work in a geographical area located outside of the covered area, it shall apply the goals established for such geographical area where the work is actually performed. With regard to this second area, the Developer also is subject to the goals for both its federally involved and non-federally involved construction.

The Developer's compliance with the Executive Order and the regulations in 41 CFR part 60-4 shall be based on its implementation of the Equal Opportunity Clause, specific affirmative action obligations required by the specifications set forth in 41 CFR 60-4.3(a), and its efforts to meet the goals. The hours of minority and female employment and training must be substantially uniform throughout the length of the contract, and in each trade, and the Developer shall make a good faith effort to employ minorities and women evenly on each of its projects. The transfer of minority or female employees or trainees from Developer and its related entities to Developer and its related entities or from project to project for the sole purpose of meeting the Developer's goals shall be a violation of the Project Agreement, the Executive Order, and the regulations in 41 CFR part 60-4. Compliance with the goals will be measured against the total work hours performed.

- (iii) The Developer shall provide written notification to the Director of the Office of Federal Contract Compliance Programs within 10 working days of award of any construction subcontract in excess of \$10,000 at any tier for construction work under the contract resulting from this solicitation. The notification shall list the name, address, and telephone number of the subcontractor; employer identification number of the subcontractor estimated dollar amount of the subcontract; estimated starting and completion dates of the subcontract; and the geographical area in which the subcontract is to be performed.
 - (iv) As used in this Notice, and in the contract resulting from this solicitation, the "covered area" is Clay County, MN, Cass County, ND, and Richland County, ND.
- (c) Required Participation by Disadvantaged Business Enterprises in Procurement under EPA Financial Assistance Agreements, 73 FR 15904.
- (i) The Developer's attention is called to the minimal requirement of the WIFIA program, which incorporates six (6) good faith efforts during contract and subcontract procurement and maintaining documentation of efforts.
 - (ii) Developer shall comply with 40 CFR Section 33.301, and retain all records documenting compliance with the six good faith efforts. The Developer shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The Developer shall carry out applicable requirements of 40 CFR part 33 in the award and administration of contracts awarded under EPA financial assistance agreements. Failure by the Developer to carry out these requirements is a material breach of this contract which may result in the termination of this contract or other legally available remedies.

6. DEVELOPER REQUIREMENTS TO COMPLY WITH DAVIS BACON ACT

- (a) In any contract in excess of \$2,000 which is entered into for the actual construction, alteration and/or repair, including painting and decorating, of a public building or public work, or building or work financed in whole or in part from federal funds or in accordance with guarantees of a federal agency or financed from funds obtained by pledge of any contract of a federal agency to make a loan, grant or annual contribution (except where a different meaning is expressly indicated), and which is subject to the labor standards provisions of any of the acts listed in 29 C.F.R. § 5.1, the following clauses (or any modifications thereof to meet the particular needs of the agency, provided that such modifications are first approved by the Department of Labor):

(i) Minimum wages.

All laborers and mechanics employed or working upon the site of the work (or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the project), will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 CFR part 3)), the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than those contained in the wage determination of the Secretary of Labor, regardless of any contractual relationship which may be alleged to exist between the Developer and such laborers and mechanics. The wage determination of the Secretary of Labor can be found at: <https://beta.sam.gov/search>. Contributions made or costs reasonably anticipated for bona fide fringe benefits under section 1(b)(2) of the Davis-Bacon Act on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of paragraph (a)(1)(iv) of this section; also, regular contributions made or costs incurred for more than a weekly period (but not less often than quarterly) under plans, funds, or programs which cover the particular weekly period, are deemed to be constructively made or incurred during such weekly period. Such laborers and mechanics shall be paid the appropriate wage rate and fringe benefits on the wage determination for the classification of work actually performed, without regard to skill, except as provided in § 5.5(a)(4). Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein: Provided that the employer's payroll records accurately set forth the time spent in each classification in which work is performed. The wage determination (including any additional classification and wage rates conformed under paragraph (a)(1)(ii) of this section) and the Davis-Bacon poster (WH-1321) shall be posted at all times by the Developer and its affiliated entities at the site of the work in a prominent and accessible place where it can be easily seen by the workers.

(ii)

(A) The WIFIA assistance recipient, the Authority, on behalf of the U.S. Environmental Protection Agency (EPA), requires that any class of laborers or mechanics, including helpers, which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination. The Authority shall approve an additional classification and wage rate and fringe benefits therefore only when the following criteria have been met:

- (1) The work to be performed by the classification requested is not performed by a classification in the wage determination; and
- (2) The classification is utilized in the area by the construction industry; and
- (3) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.

(B) If the Developer, its affiliated entities, and the laborers and mechanics to be employed in the classification (if known), or their representatives, and the WIFIA assistance recipient agree on the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the action taken shall be sent to the Administrator of the Wage and Hour Division (WHD Administrator), U.S. Department of Labor, Washington, DC 20210. The WHD Administrator, or an authorized representative, will approve, modify, or disapprove every additional classification action within 30 days of receipt and so advise the WIFIA assistance recipient or will notify the WIFIA assistance recipient within the 30-day period that additional time is necessary.

(C) In the event the Developer, its affiliated entities, the laborers or mechanics to be employed in the classification or their representatives, and the WIFIA assistance

recipient do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the WIFIA assistance recipient shall refer the questions, including the views of all interested parties and the recommendation of the WIFIA assistance recipient, to the WHD Administrator for determination. The WHD Administrator, or an authorized representative, will issue a determination within 30 days of receipt and so advise the WIFIA assistance recipient or will notify the WIFIA assistance recipient within the 30-day period that additional time is necessary.

- (D) The wage rate (including fringe benefits where appropriate) determined pursuant to paragraphs (a)(ii)(B) or (C) of this section, shall be paid to all workers performing work in the classification under this contract from the first day on which work is performed in the classification.

Whenever the minimum wage rate prescribed in the contract for a class of laborers or mechanics includes a fringe benefit which is not expressed as an hourly rate, the Developer shall either pay the benefit as stated in the wage determination or shall pay another bona fide fringe benefit or an hourly cash equivalent thereof.

If the Developer does not make payments to a trustee or other third person, the Developer may consider as part of the wages of any laborer or mechanic the amount of any costs reasonably anticipated in providing bona fide fringe benefits under a plan or program, provided that the Secretary of Labor has found, upon the written request of the Developer, that the applicable standards of the Davis-Bacon Act have been met. The Secretary of Labor may require the Developer to set aside in a separate account assets for the meeting of obligations under the plan or program.

- (iii) Withholding. The Authority, shall upon written request of the WIFIA Director or an authorized representative of the Department of Labor withhold or cause to be withheld from the Developer under this contract or any other federal contract with the same Developer, or any other federally-assisted contract subject to Davis-Bacon prevailing wage requirements, which is held by the same Developer, so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics, including apprentices, trainees, and helpers, employed by the Developer or any related entity the full amount of wages required by the contract. In the event of failure to pay any laborer or mechanic, including any apprentice, trainee, or helper, employed or working on the site of the work (or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the project), all or part of the wages required by the contract, the WIFIA Director may, after written notice to the Developer, sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

- (iv) Payrolls and basic records.

- (A) Payrolls and basic records relating thereto shall be maintained by the Developer during the course of the work and preserved for a period of three years thereafter for all laborers and mechanics working at the site of the work (or under the United States Housing Act of 1937, or under the Housing Act of 1949, in the construction or development of the project). Such records shall contain the name, address, and social security number of each such worker, his or her correct classification, hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in section 1(b)(2)(B) of the Davis-Bacon Act), daily and weekly number of hours worked, deductions made and actual wages paid. Whenever the Secretary of Labor has found under 29 CFR 5.5(a)(1)(iv) that the wages of any laborer or mechanic include the

amount of any costs reasonably anticipated in providing benefits under a plan or program described in section 1(b)(2)(B) of the Davis-Bacon Act, the Developer shall maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and records which show the costs anticipated or the actual cost incurred in providing such benefits. Developers employing apprentices or trainees under approved programs shall maintain written evidence of the registration of apprenticeship programs and certification of trainee programs, the registration of the apprentices and trainees, and the ratios and wage rates prescribed in the applicable programs.

- (B) The Developer shall submit weekly for each week in which any contract work is performed a copy of all payrolls to the Authority. The payrolls submitted shall set out accurately and completely all of the information required to be maintained under 29 CFR 5.5(a)(3)(i), except that full social security numbers and home addresses shall not be included on weekly transmittals. Instead the payrolls shall only need to include an individually identifying number for each employee (e.g., the last four digits of the employee's social security number). The required weekly payroll information may be submitted in any form desired. Optional Form WH-347 is available for this purpose from the Wage and Hour Division Web site at <https://www.dol.gov/agencies/whd/forms> or its successor site. The prime Developer is responsible for the submission of copies of payrolls by all related entities. Developer and related entity shall maintain the full social security number and current address of each covered worker, and shall provide them upon request to the Authority, for transmission to the EPA, the Developer, or the Wage and Hour Division of the Department of Labor for purposes of an investigation or audit of compliance with prevailing wage requirements. It is not a violation of this section for the Developer to require a related entity to provide addresses and social security numbers to the Developer for its own records, without weekly submission to the Authority.
- (C) Each payroll submitted shall be accompanied by a "Statement of Compliance," signed by the Developer or related entity or his or her agent who pays or supervises the payment of the persons employed under the contract and shall certify the following:
 - (1) That the payroll for the payroll period contains the information required to be provided under § 5.5 (a)(3)(ii) of Regulations, 29 CFR part 5, the appropriate information is being maintained under § 5.5 (a)(3)(i) of Regulations, 29 CFR part 5, and that such information is correct and complete;
 - (2) That each laborer or mechanic (including each helper, apprentice, and trainee) employed on the contract during the payroll period has been paid the full weekly wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deductions as set forth in Regulations, 29 CFR part 3;
 - (3) That each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification of work performed, as specified in the applicable wage determination incorporated into the contract.
- (D) The weekly submission of a properly executed certification set forth on the reverse side of Optional Form WH-347 shall satisfy the requirement for submission of the "Statement of Compliance" required by paragraph (a)(3)(ii)(B) of this section.
- (E) The falsification of any of the above certifications may subject the Developer or a related entity to civil or criminal prosecution under section 1001 of title 18 and section 231 of title 31 of the United States Code.

- (v) The Developer or its related entities shall make the records required under paragraph (a)(iv) of this section available for inspection, copying, or transcription by authorized representatives of the Authority, EPA, or the Department of Labor, and shall permit such representatives to interview employees during working hours on the job. If the Developer or its related entities fails to submit the required records or to make them available, the EPA may, after written notice to the Authority, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds. Furthermore, failure to submit the required records upon request or to make such records available may be grounds for debarment action pursuant to 29 CFR 5.12.
- (vi) Apprentices and Trainees.
 - (A) Apprentices. Apprentices will be permitted to work at less than the predetermined rate for the work they performed when they are employed pursuant to and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Office of Apprenticeship Training, Employer and Labor Services, or with a State Apprenticeship Agency recognized by the Office, or if a person is employed in his or her first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Office of Apprenticeship Training, Employer and Labor Services or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice. The allowable ratio of apprentices to journeymen on the job site in any craft classification shall not be greater than the ratio permitted to the Developer as to the entire work force under the registered program. Any worker listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated above, shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any apprentice performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. Where a Developer is performing construction on a project in a locality other than that in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyman's hourly rate) specified in the Developer's or a related entity's registered program shall be observed. Every apprentice must be paid at not less than the rate specified in the registered program for the apprentice's level of progress, expressed as a percentage of the journeymen hourly rate specified in the applicable wage determination. Apprentices shall be paid fringe benefits in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the full amount of fringe benefits listed on the wage determination for the applicable classification. If the WHD Administrator determines that a different practice prevails for the applicable apprentice classification, fringes shall be paid in accordance with that determination. In the event the Office of Apprenticeship Training, Employer and Labor Services, or a State Apprenticeship Agency recognized by the Office, withdraws approval of an apprenticeship program, the Developer will no longer be permitted to utilize apprentices at less than the applicable predetermined rate for the work performed until an acceptable program is approved.
 - (B) Trainees. Except as provided in 29 CFR 5.16, trainees will not be permitted to work at less than the predetermined rate for the work performed unless they are employed pursuant to and individually registered in a program which has received prior approval, evidenced by formal certification by the U.S. Department of Labor, Employment and Training Administration. The ratio of trainees to journeymen on the job site shall not be greater than permitted under the plan approved by the Employment and Training Administration. Every trainee must be paid at not less than the rate specified in the approved program for the trainee's level of progress, expressed as a percentage of the journeyman hourly rate specified in the applicable

wage determination. Trainees shall be paid fringe benefits in accordance with the provisions of the trainee program. If the trainee program does not mention fringe benefits, trainees shall be paid the full amount of fringe benefits listed on the wage determination unless the WHD Administrator determines that there is an apprenticeship program associated with the corresponding journeyman wage rate on the wage determination which provides for less than full fringe benefits for apprentices. Any employee listed on the payroll at a trainee rate who is not registered and participating in a training plan approved by the Employment and Training Administration shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any trainee performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. In the event the Employment and Training Administration withdraws approval of a training program, the Developer will no longer be permitted to utilize trainees at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

- (C) Equal Employment Opportunity. The utilization of apprentices, trainees and journeymen under this part shall be in conformity with the equal employment opportunity requirements of Executive Order No. 11246, as amended, and 29 CFR part 30.
- (vii) Compliance with Copeland Act requirements. The Developer shall comply with the requirements of 29 CFR part 3, which are incorporated by reference in this contract.
- (viii) Subcontracts. The Developer or its related entities shall insert in any subcontracts the clauses contained in 29 CFR 5.5(a)(1) through (10) and such other clauses as the EPA may by appropriate instructions require, and also a clause requiring the related entities to include these clauses in any lower tier subcontracts. The prime Developer shall be responsible for the compliance by any related entity or lower tier related entity with all the contract clauses in 29 CFR 5.5.
- (ix) Contract termination: debarment. A breach of the contract clauses in 29 CFR 5.5 may be grounds for termination of the contract, and for debarment as a Developer and a related entity as provided in 29 CFR 5.12.
- (x) Compliance with Davis-Bacon and Related Act requirements. All rulings and interpretations of the Davis-Bacon and Related Acts contained in 29 CFR parts 1, 3, and 5 are herein incorporated by reference in this contract.
- (xi) Disputes concerning labor standards. Disputes arising out of the labor standards provisions of these requirements shall not be subject to the general disputes clause of the Project Agreement. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR parts 5, 6, and 7. Disputes within the meaning of this clause include disputes between the Developer (or any of its related entities) and the Authority, EPA, the U.S. Department of Labor, or the employees or their representatives.
- (xii) Certification of eligibility.
- (A) By entering into this contract, the Developer certifies that neither it (nor he or she) nor any person or firm who has an interest in the Developer's firm is a person or firm ineligible to be awarded Government contracts by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).
- (B) No part of this contract shall be subcontracted to any person or firm ineligible for award of a Government contract by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

- (C) The penalty for making false statements is prescribed in the U.S. Criminal Code, 18 U.S.C. 1001.
- (b) Contract Work Hours and Safety Standards Act. The following clauses set forth in paragraphs (b)(i), (ii), (iii), and (iv) of this section shall be inserted in full in any contract in an amount in excess of \$100,000 and subject to the overtime provisions of the Contract Work Hours and Safety Standards Act. These clauses shall be inserted in addition to the clauses required by §5.5(a) or §4.6 of part 4 of this title. As used in this paragraph, the terms laborers and mechanics include watchmen and guards.
- (i) Overtime requirements. No Developer or related entity contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any such laborer or mechanic in any workweek in which he or she is employed on such work to work in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of forty hours in such workweek.
- (ii) Violation; liability for unpaid wages; liquidated damages. In the event of any violation of the clause set forth in paragraph (b)(i) of this section the Developer and any related entity responsible therefor shall be liable for the unpaid wages. In addition, such Developer and any related entity shall be liable to the United States (in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory), for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchmen and guards, employed in violation of the clause set forth in paragraph (b)(i) of this section, in the sum of \$25 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of forty hours without payment of the overtime wages required by the clause set forth in paragraph (b)(i) of this section.
- (iii) Withholding for unpaid wages and liquidated damages. The Authority shall upon its own action or upon written request of an authorized representative of the Department of Labor, or the EPA, withhold or cause to be withheld, from any moneys payable on account of work performed by the Developer or related entity under any such contract or any other federal contract with the same Developer, or any other federally-assisted contract subject to the Contract Work Hours and Safety Standards Act, which is held by the same prime Developer, such sums as may be determined to be necessary to satisfy any liabilities of such Developer or any related entity for unpaid wages and liquidated damages as provided in the clause set forth in paragraph (b)(ii) of this section.
- (iv) Subcontracts. The Developer or its related entities shall insert in any subcontracts the clauses set forth in paragraph (b)(i) through (iv) of this section and also a clause requiring the related entities to include these clauses in any lower tier subcontracts. The Developer shall be responsible for compliance by any related entity or lower tier related entity with the clauses set forth in paragraphs (b)(1) through (4) of this section.
- (c) In addition to the clauses contained in paragraph (b), in any contract subject only to the Contract Work Hours and Safety Standards Act, the Developer or related entity shall maintain payrolls and basic payroll records during the course of the work and shall preserve them for a period of three years from the completion of the contract for all laborers and mechanics, including guards and watchmen, working on the contract. Such records shall contain the name and address of each such employee, social security number, correct classifications, hourly rates of wages paid, daily and weekly number of hours worked, deductions made, and actual wages paid. Further, the EPA shall cause or require the Metro Flood Diversion Authority to

insert in any such contract a clause providing that the records to be maintained under this paragraph shall be made available by the Developer or related entity for inspection, copying, or transcription by authorized representatives of the Metro Flood Diversion Authority, EPA and the Department of Labor, and the Developer or related entity will permit such representatives to interview employees during working hours on the job.

7. DEVELOPER CERTIFICATION REGARDING DEBARMENT AND SUSPENSION

On the Commercial Closing date, Developer must provide the Authority with a certificate certifying that it will not knowingly enter into a contract with anyone who is ineligible under the 40 CFR Part 32 to participate in the Project. Developer represents and warrants that it has or will include a term or condition requiring compliance with this provision in all of its subcontracts under the Project Agreement.

8. DEVELOPER CERTIFICATION REGARDING RESTRICTIONS ON LOBBYING

The Developer shall not pay any person for influencing or attempting to influence any officer or employee of a federal agency, a member of Congress, an officer or employee of Congress, or an employee of a member of Congress with respect to the award, continuation, renewal, amendment, or modification of a federal grant, loan, or contract. These requirements are implemented for US EPA in 40 CFR Part 34, which also describes types of activities, such as legislative liaison activities and professional and technical services, which are not subject to this prohibition. Upon award of this contract, Developer shall complete and submit to the Metro Flood Diversion Authority the certification and disclosure forms in Appendix A and Appendix B to 40 CFR Part 34. Developer shall also require all related entities and suppliers of any tier awarded a subcontract over \$100,000 to similarly complete and submit the certification and disclosure forms pursuant to the process set forth in 40 CFR 34.110.

EXHIBIT 32

PERMITTED REVENUE-GENERATING ACTIVITY

1. Permitted Revenue Generating Activities

"Permitted Revenue-Generating Activity" means:

- (a) (a) any public or private agricultural or farming activity consistent with local practices (excluding any row-cropping after the Project Substantial Completion Date); or
- (b) (b) any other commercial or industrial activity that has been approved in writing by the Authority in its absolute discretion,

which, in each case, is compliant with all Applicable Laws and the terms of this Agreement.

2. General Requirements for Permitted Revenue Generating Activities

2.1 Permitted Revenue Generating Activities

If the Developer proposes to use any portion of the Project or the Project Site that has not been acquired via last resort eminent domain (as noted in Exhibit 4-2a (Project ROW Diversion Authority Parcels) of Exhibit 4 (Project Land)) for a Permitted Revenue-Generating Activity, the Developer shall comply with each of the following requirements:

- (a) the Developer shall obtain all Governmental Approvals required to conduct such Permitted Revenue-Generating Activity;
- (b) the Developer shall pay, or cause to be paid, any loss, damage, injury, liability, obligation, tax, cost, expense, fee, charge, judgement, penalty or fine arising from or related to such Permitted Revenue-Generating Activity;
- (c) the Developer shall ensure that any Permitted Revenue-Generating Activities are undertaken in compliance with Applicable Laws, Governmental Approvals, Third Party MOUs, Utility MOUs and this Agreement; and
- (d) in the case of any Permitted Revenue Generating Activities under clause (b) of that definition, the Developer shall comply with any conditions that are attached to the Authority's approval.

2.2 Annual Reporting

On or before October 15 of each year, the Developer must provide an annual report containing a description of the Permitted Revenue-Generating Activities undertaken in the previous 12 month period together with a complete accounting of any revenues generated from all such Permitted Revenue-Generating Activities.

2.3 No Modification to Work

Unless otherwise agreed in writing by the Authority, in its absolute discretion, nothing in Section 8.2 or this Exhibit 32 modifies or otherwise relieves the Developer from any of its obligations with respect to the Work.

3. Obligations Relating to the End of the Term

- (a) Five (5) years prior to the end of the Term, the Developer shall provide the Authority with a detailed description of all on-going Permitted Revenue-Generating Activities (a "**Permitted Revenue-Generating Activity Description**").
- (b) Within sixty (60) Business Days of receiving the Permitted Revenue-Generating Activity Description, the Authority will notify the Developer:
 - (i) the extent to which the Authority intends to continue any of the activities detailed in the Permitted Revenue-Generating Activity Description after the Termination Date; or
 - (ii) whether the Authority requires additional information on one or more Permitted Revenue-Generating Activities necessary for it to make its determination under clause (i).
- (c) If the Authority notifies the Developer that it intends to continue all or part of the activities in the Permitted Revenue-Generating Activity Description, the Developer and the Authority will meet periodically throughout the remainder of the Term to determine whether any modifications to the Handback Requirements are necessary to accommodate the continuance of such activity after the Termination Date.
- (d) Unless otherwise agreed in writing by the Authority, in its absolute discretion, nothing in Section 8.2 or this Exhibit 32 modifies or otherwise relieves the Developer from any of its obligations with respect to the Handback Requirements and the Developer shall hand back the Project, including the area on which the Permitted Revenue-Generating Activity was conducted, in accordance with the Handback Requirements and in the same condition it would have been in had the Developer or its licensee not conducted such Permitted Revenue Generating Activity.