



Date November 9, 2020

**APPROVING AGREEMENT WITH CENTRAL IOWA WATER TRAILS, LLC
REGARDING PROPOSED IMPACT TO CITY LEVEE AS PART OF THE CENTRAL
IOWA WATER TRAILS PROJECT**

WHEREAS, the Des Moines Area Metropolitan Planning Organization (DMAMPO) applied for and has been awarded a Better Utilizing Investments to Leverage Development (BUILD) Transportation Discretionary Grant for the Central Iowa Water Trail: Phase I Dam Mitigation and User Access Project; and

WHEREAS, the project is proceeding as a joint effort by the DMAMPO and Central Iowa Water Trails, LLC (CIWT) and includes mitigating the low-head dam at Scott Avenue to help facilitate a water recreational trail, and enhance three additional access points along the Des Moines River, including Prospect Park, Birdland Marina, and the Harriet Street Corridor; and

WHEREAS, CIWT has entered into a professional services agreement with Merrick & Company to design improvements at the low-head dam at Scott Avenue as part of BUILD Grant implementation (“CIWT Project”); and

WHEREAS, the City has entered into a professional services agreement with Barr Engineering Company to design improvements to the levee on the Des Moines River in the downtown corridor, which design is 95% complete (“City Levee Design”); and

WHEREAS, the CIWT Project, as proposed, would not achieve the required no-rise certification since the CIWT Project improvements would result in an increased water surface elevation of the Des Moines River for the 100-year event between Scott Avenue and SE 6th Street; and

WHEREAS, in addition, an increased water surface elevation of the Des Moines River for the 100-year event between Scott Avenue and SE 6th Street would not conform to the performance standards included in Chapter 50 Floodplain Development of the City of Des Moines Municipal Code; and

WHEREAS, the City Levee Design could be modified to raise the levee to mitigate the impact of the increased water surface elevation and preserve the City’s design requirements in accordance with the United States Army Corps of Engineers (“USACE”) and Federal Emergency Management Agency requirements; and

WHEREAS, the USACE requires a “Letter of No Objection” from the City as part of the Section 408 review for the CIWT Project; and



Date November 9, 2020

WHEREAS, City staff have negotiated an agreement with CIWT in which CIWT agrees to be solely responsible for the City’s increased costs associated with changing the City Levee Design, including costs for the professional services required to perform hydraulic modeling and re-design the levee, and increases to the real estate and construction costs, a copy of which is on file in the City Clerk’s Office; and

WHEREAS, the City Council and CIWT agree that it is of mutual benefit to the citizens of Des Moines that the CIWT Project be pursued.

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Des Moines, Iowa, that the above described Agreement Between the City of Des Moines and Central Iowa Trails, LLC For Proposed Impact to Levee is hereby approved and the Mayor is authorized and directed to sign on behalf of the City and the City Clerk is directed to attest to his signature.

BE IT FURTHER RESOLVED that the City Engineer, if deemed appropriate in his professional judgment, is authorized to submit a “Letter of No Objection” on behalf of the City of Des Moines to the United States Army Corps of Engineers for the above described Central Iowa Water Trails, LLC project.

(Council Communication Number 20-475)

Moved by _____ to adopt.

APPROVED AS TO FORM:

Ann DiDonato
Ann DiDonato
Assistant City Attorney

COUNCIL ACTION	YEAS	NAYS	PASS	ABSENT
COWNIE				
BOESEN				
GATTO				
GRAY				
MANDELBAUM				
VOSS				
WESTERGAARD				
TOTAL				

CERTIFICATE

I, P. Kay Cmelik, City Clerk of said City hereby certify that at a meeting of the City Council of said City of Des Moines, held on the above date, among other proceedings the above was adopted.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal the day and year first above written.

MOTION CARRIED APPROVED

Mayor

City Clerk

AGREEMENT
Between
The City of Des Moines
and
Central Iowa Water Trails, LLC
For Proposed Impact to Levee

THIS AGREEMENT made and entered into this ____ day of November 2020, by and between the City of Des Moines, Iowa, (the “**CITY**”), and Central Iowa Water Trails, LLC, an Iowa limited liability company, 6900 Westown Parkway, West Des Moines, Iowa 50266 (“**CIWT**”) (collectively, “the parties”).

WHEREAS, CITY is a municipal corporation of the State of Iowa and CIWT operates as a regional public-private partnership for the purpose of implementing a recreational and dam safety plan for 150 miles of water trails throughout Central Iowa; and

WHEREAS, the Des Moines Area Metropolitan Planning Organization (the “**DMAMPO**”) applied for and has been awarded a Better Utilizing Investments to Leverage Development (“**BUILD**”) Transportation Discretionary Grant for the Central Iowa Water Trail: Phase I Dam Mitigation and User Access Project (the “**CIWT Project Phase I**”); and

WHEREAS, the CIWT Project Phase I is proceeding as a joint effort by the DMAMPO and CIWT and includes the projects of mitigation of the low-head dam at Scott Avenue to help facilitate a water recreational trail, and enhancement of three additional access points along the Des Moines River, including Prospect Park, Birdland Marina, and the Harriet Street Corridor; and

WHEREAS, CIWT has entered into a professional services agreement with Merrick & Company to design improvements at the low-head dam at Scott Avenue as part of BUILD Grant implementation; and

WHEREAS, the current CIWT plans for the improvements at the Scott Avenue site are shown on **Exhibit A**, which is attached hereto and by this reference incorporated into this Agreement (“**PROJECT**”); and

WHEREAS, the CITY has entered into a professional services agreement with Barr Engineering Company to design improvements to the levee on the Des Moines River in the downtown corridor, which design is 95% complete (“**CITY Levee Design**”); and

WHEREAS, the PROJECT, as proposed, would not achieve the required no-rise certification since the PROJECT improvements would result in an increased water surface elevation of the Des Moines River for the 100-year event between Scott Avenue and SE 6th Street; and

WHEREAS, in addition, an increased water surface elevation of the Des Moines River for the 100-year event between Scott Avenue and SE 6th Street would not conform to the

performance standards included in Chapter 50 Floodplain Development of the City of Des Moines Municipal Code; and

WHEREAS, the CITY Levee Design could be modified to raise the levee to mitigate the impact of the increased water surface elevation and preserve the City’s design requirements in accordance with the United States Army Corps of Engineers (“USACE”) and Federal Emergency Management Agency requirements; and

WHEREAS, CIWT agrees to be solely responsible for the CITY’s increased costs associated with changing the CITY Levee Design, including costs for the professional services required to perform hydraulic modeling and re-design the levee, increases to the real estate and construction costs; and

WHEREAS, the CITY and CIWT agree that it is of mutual benefit to the citizens of Des Moines that such PROJECT be pursued; and

WHEREAS, the CITY, and CIWT are entering into this Agreement to formalize their responsibilities with respect to the impact proposed by CIWT as a result of the PROJECT that necessitates re-design of the CITY Levee Design and increases the cost of re-design, real estate and levee construction.

NOW, THEREFORE, the CITY and the CIWT do hereby agree as follows:

I. TERM

This Agreement shall be effective upon its approval and execution by both parties and shall terminate upon the CIWT’s payment of invoiced costs for re-design, real estate and construction related to the proposed impacts of the PROJECT to the CITY Levee Design, the levee, and base flood elevation, as determined by the City Engineer, as provided in Section III. The termination of this Agreement shall not relieve any party to this Agreement of any obligations or liability arising during the term of this Agreement.

II. FUNDING AND CIWT’S RESPONSIBILITIES

- A. CIWT is responsible for funding the development and design of the CIWT Project Phase I, including the PROJECT, including payment of all applicable fees and permits.
- B. CIWT agrees that it shall require Merrick and Company to be responsible for completing and submitting the PROJECT design to the CITY such that hydraulic modeling and CITY Levee Design re-design can be accomplished by the consultants under contract with the CITY. The CITY shall not be responsible for any corrections, additional information, or resubmittal of such Merrick and Company design work, if needed in the sole determination of the City Engineer, which CIWT shall require to be promptly provided by Merrick and Company.

- C. The parties agree that, as between the CITY and CIWT, CIWT is solely responsible for funding all costs of the PROJECT, and funding of the CITY's increased costs associated with the hydraulic modeling and levee re-design required to mitigate the impacts of the PROJECT, including additional professional services, increased real estate and construction of the revised design and CIWT shall reimburse the CITY for any such costs. The CITY's additional costs are initially estimated to be approximately \$400,000. However, actual costs may exceed the estimated amount. CIWT is responsible for the actual costs as provided in the CITY issued invoices.
- D. The CITY shall maintain complete and accurate records relating to the aforementioned costs incurred by the CITY for the revised levee design, including the manner in which such costs were based or calculated. CIWT may, upon reasonable notice to the CITY, audit and inspect such records at a time and place to be agreed upon by the parties.
- E. The parties agree that the CITY will not grant approval for PROJECT construction until a design has been mutually agreed to between the parties and approved by the USACE, including review by all applicable departments, boards and commissions of the CITY and neighborhood public presentations, and all ongoing maintenance, and operational responsibilities have been determined and amounts invoiced by the CITY have been paid in full by CIWT for the increased costs to date.
- F. Payments.
 - 1. CIWT shall reimburse the CITY for costs of additional professional services for hydraulic modeling and CITY Levee Design re-design by CITY consultants within thirty (30) calendar days of receipt of an undisputed invoice from the CITY for such fees.
 - 2. CIWT shall pay CITY issued invoices for the calculated increased real estate and construction associated with the revised City Levee Design within (30) calendar days of receipt of an undisputed invoice. The amount is anticipated to be calculated based on a unit cost for the increased area and increased construction quantities, as determined in the reasonable discretion of the CITY.
 - 3. CIWT agrees to pay an interest at a rate of 6% annually and to reimburse the CITY for all reasonable collection fees if undisputed payments are not received by the CITY within thirty (30) calendar days from CIWT's receipt of such invoice.

G. Flood Plain Variance.

1. The PROJECT design by the CIWT is subject to the granting of a variance by the City Council pursuant to Des Moines Municipal Code Chapter 50 Floodplain Development, for failure to meet the performance standards provided in Section 50-34. CIWT agrees that consideration of such appeal will require the CITY Levee Design re-design to fully mitigate the increase in 100-yr water surface elevation caused by the PROJECT design so that the increased levee height meets the required ACOE, FEMA, and Chapter 50 standards and established CITY design requirements.
2. CIWT shall be solely responsible for bringing an appeal to seek such variance as described in Section 50-35(c). CIWT agrees that CIWT will not file such appeal until the CITY has received full reimbursement of the CITY's costs for such CITY Levee Design re-design.
3. Nothing in this Agreement obligates the CITY or City Council to grant such appeal or variance.
4. The variance for the PROJECT will not include an increase in the 100-yr water surface elevation at the Harriet Street site. CIWT agrees that the final design of the Harriet Street improvements, as part of the CIWT Project Phase I, will not have an increase in the 100-yr water surface elevation and will meet the performance standards provided in Section 50-34.

III. CITY RESPONSIBILITIES

- A. The design of the CIWT Project Phase I, including the PROJECT, and the CITY levee improvements shall be subject to the approval of the City Council of the CITY.

CITY acknowledges that CIWT has secured the services of Merrick and Company to provide design services for the PROJECT, which includes providing the required design detail such that the CITY consultants can perform hydraulic modeling and re-design of the CITY Levee Design.

The CITY has previously entered into separate professional services agreements with Barr Engineering Company and Stantec Consulting Services Inc. The CITY is responsible for negotiating necessary supplemental agreements for the additional work of hydraulic modeling, re-design of the levee, and all tasks associated with preparing levee plans and obtaining USACE review and approval.

Levee re-design work is anticipated to include review of revised hydraulic modeling, rework of the geotechnical analysis, civil design, structural design, real estate impact determination, opinion of probable cost and construction drawings that are currently at or near a 95% level of completion.

- B. Subject to the agreement of the City Engineer, the City Engineer will provide a letter of no objection to accompany the CIWT 408 submittal to the USACE. The letter of no objection shall be based on:
1. The information provided to date.
 2. The current design from a general perspective as it relates to levee impact.
 3. The understanding that anticipated impacts of the PROJECT will be mitigated by levee modifications that will be fully funded by CIWT.
 4. The understanding that final design of the Harriet Street site, as part of the CIWT Project Phase I, will not result in an increase to the 100-yr flood elevation.
 5. Satisfactory resolution of outstanding comments from the CITY related to hydraulic performance of the improvements.
- C. Hydraulic Modeling and Re-design of Levee
1. Upon receiving the required design detail from Merrick and Company, the CITY will direct Stantec Consulting Services Inc. to perform required hydraulic modeling. It is anticipated that the required design detail will be provided to the CITY by November 19, 2020. The work to be performed by Stantec Consulting Services Inc. is anticipated to be completed by approximately January 1, 2021.
 2. Upon receiving notice of the USACE review, acceptance or modification of the Merrick and Company design and 408 submittal, the CITY will direct additional hydraulic modeling by Stantec Consulting Services Inc., if required, and re-design of the levee by Barr Engineering Company using the appropriate hydraulic results. It is anticipated that the USACE review and response will be received by approximately January 31, 2021. The work to be performed by Barr Engineering Company is anticipated to be completed by approximately April 1, 2021.
- D. Subject to the City Council granting CIWT's appeal for a variance to the Chapter 50 Floodplain Development performance standards as provided in Section II.G, the City Engineer will issue a certificate of compliance.

IV. RESPONSIBILITY WITH RESPECT TO CONSTRUCTION, MAINTENANCE, REPAIR AND OPERATION OF PROJECT IMPROVEMENTS

Responsibility for funding, performing construction, maintenance, repair and operation of the CIWT Project Phase I project improvements, including the PROJECT, will be addressed in separate agreements. The CITY is under no obligation to consider actions or execute documents until those responsibilities have been determined and agreed to by all applicable parties.

V. MISCELLANEOUS

A. Mailing of Notices and Invoices

Except as otherwise specified, all Notices and invoices shall be deemed given on the day of mailing or sending via email. Except as otherwise specified, all notices, invoices, consents, approvals, requests and other communications (hereinafter referred to as “Notices”) required or permitted under this Agreement shall be given in writing and mailed by certified mail, return receipt requested, addressed or by sending via email as follows:

If to the CITY:

City of Des Moines
Engineering Department
400 Robert D. Ray Drive
Des Moines, IA 50309
Attention: Steve Naber, City Engineer
Email: SLNaber@dmgov.org

If to CIWT:

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

All Notices shall be deemed given on the day of mailing or emailing. Either party to this Agreement may change its address for the receipt of Notices at any time by giving notice thereof to the other as herein provided. Any Notice given by a party hereunder must be signed by an authorized representative of such party.

B. Assignment

The rights and liabilities of the parties under this Agreement may not be assigned without the prior written consent of the other party.

C. Amendment

This Agreement may not be amended, modified, or canceled except by a written agreement executed by each of the parties hereto.

D. Binding Nature of Agreement

This Agreement shall be binding upon the parties hereto and their respective successors and assigns.

E. Waiver of Compliance

No failure of either party to insist upon the strict performance of any covenant, agreement, term or condition of this Agreement or to exercise any right, term or remedy available upon a breach thereof shall constitute a waiver of any such breach or such covenant, agreement, term or condition. No waiver of any breach shall affect or alter this Agreement but each and every covenant, agreement, term or condition of this Agreement shall continue in full force and effect with respect to any other than existing or subsequent breach thereof.

F. Breach

In the event of a breach by any party of this Agreement, that breach shall not be considered to affect any remaining terms or conditions of this Agreement. If any terms or conditions of this Agreement are held to be invalid or illegal, those remaining terms or conditions shall not be construed to be affected.

G. Invalidity or Unenforceability

If any provision of this Agreement or the application thereof to any person or circumstance shall to any extent be determined to be invalid or unenforceable, the remainder of this Agreement or the application of such provision to persons or circumstances other than those as to which it is invalid or unenforceable shall not be affected thereby, and each provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

H. Entire Agreement

This instrument including all exhibits attached hereto and incorporated herein by reference, contains the entire agreement between the parties and all prior negotiations and agreements are merged herein. Neither party's agents have made any representations except those expressly set forth herein.

I. Remedies and Governing Law

The rights and remedies set forth herein are not exclusive and are in addition to any of the rights and remedies provided by law or equity. This Agreement and all actions arising hereunder shall be governed by, subject to and construed according to the laws of the State of Iowa. The parties agree, consent and submit to the personal jurisdiction of the Iowa District Court in and for Polk County, Iowa, for any action arising out of this Agreement. The parties agree that service of process at the address and in the manner specified above will be sufficient to put a party on notice and hereby waive any and all claims relative to such notice. The parties also agree that they will not commence any action because of any matter whatsoever arising out of or relating to the validity, construction, interpretation and enforcement of this Agreement in any court except the Iowa District Court in

and for Polk County, Iowa, unless original jurisdiction can be had in the United States District Court for the Southern District of Iowa.

J. Force Majeure

In the event of forced delay in the performance by either party or obligations under this Agreement due to Acts of God or of the public enemy, strikes, lockouts, unusual delay in transportation, unavailability of materials, fire, floods, epidemics, adverse weather conditions, riots, insurrection, war, unavoidable casualties, or judicial or governmental action, other than action by the CITY or CIWT, the time for performance of such obligations and for the satisfaction of the conditions precedent shall be extended for the period of the forced delays.

K. Captions

The headings of the Articles and Sections in this Agreement are for convenience only and shall not be used to construe or interpret the scope or intent of this Agreement or in any manner affect the same.

L. Contract Language

Words and phrases herein, including acknowledgment hereof, shall be construed as in the singular or plural number, and as masculine, feminine, or neuter gender according to the context.

M. Indemnification; Insurance; Waiver of Subrogation

Each party shall be solely authorized to supervise, direct and manage their own activities and the activities of their respective officers, officials, employee, volunteers and agents hereunder. No party shall be required to defend, indemnify, or hold harmless any other party to this Agreement.

CIWT shall be required to purchase and maintain Crime Insurance.

Each party shall retain sole responsibility and liability for its own acts and omissions hereunder and for the acts and omissions of their respective officers, officials, employees, volunteers, and agents hereunder, and each party waives subrogation against the other for all claims, suits, damages, and demands, which are covered by any insurance, including but not limited to property, casualty and worker's compensation.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their proper officers, duly authorized therefore.

CITY OF DES MOINES, IOWA

T.M. Franklin Cownie, Mayor

STATE OF IOWA)
) ss
COUNTY OF POLK)

On this ____ day of _____, 2020, before me, the undersigned, a Notary Public in and for the State of Iowa, personally appeared T. M. Franklin Cownie and P. Kay Cmelik, to me personally known, who being by me duly sworn, did say that they are the Mayor and City Clerk, respectively ,of the City of Des Moines, Iowa that the seal affixed signed on behalf of the corporation, by authority of its City Council as contained in the resolution adopted by the City Council, under Roll Call No.20- _____ and that T. M. Franklin Cownie and P. Kay Cmelik acknowledged the execution of the instrument to be the voluntary act and deed of the corporation by it voluntarily executed.

Notary Public for the State of Iowa

Form Approved:

ATTEST:

Ann DiDonato, Assistant City Attorney

P. Kay Cmelik, City Clerk

CENTRAL IOWA WATER TRAILS, LLC

Dan Houston, Chair, Central Iowa Water Trails LLC

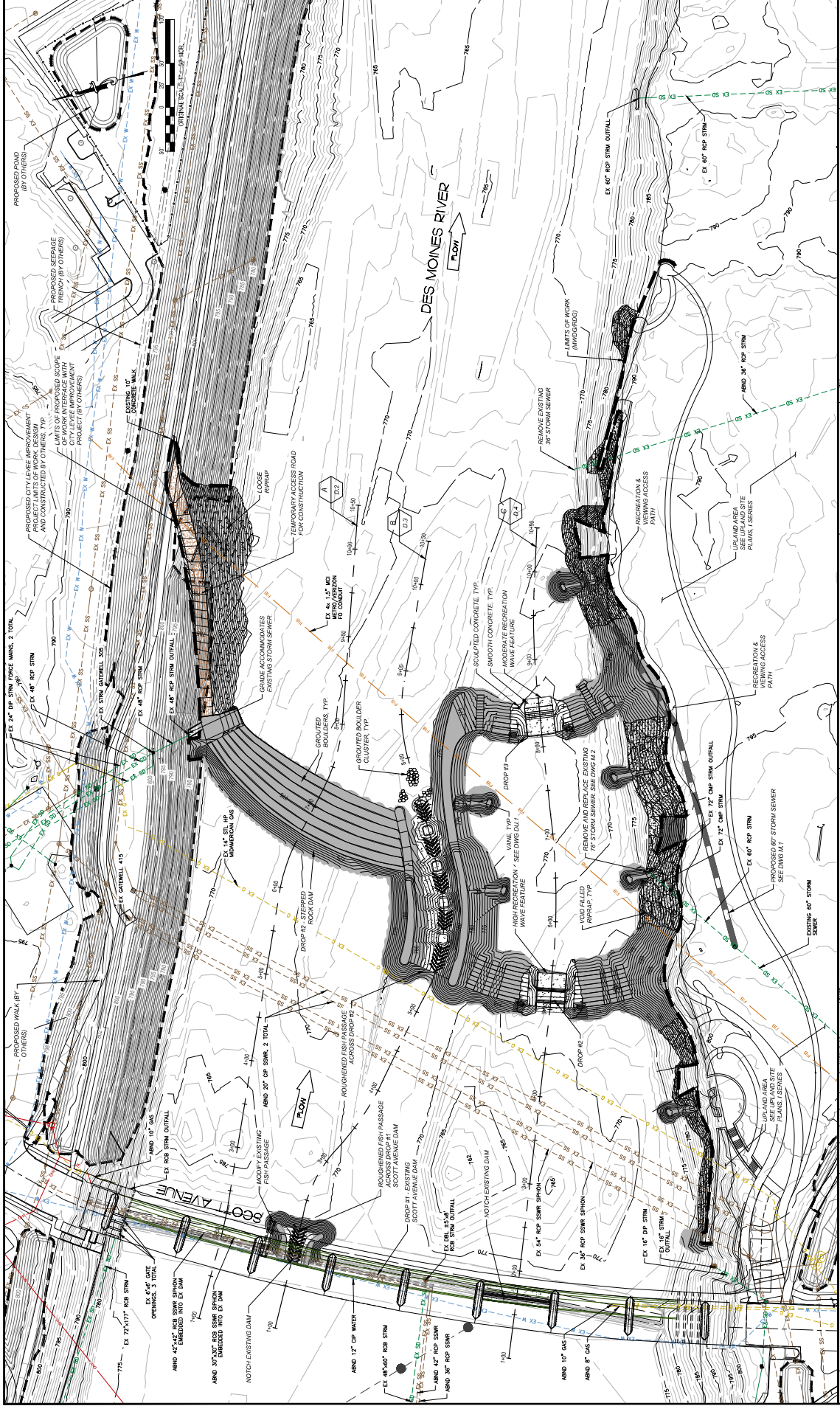
STATE OF IOWA)
) ss:
COUNTY OF POLK)

On this _____ day of _____, 2020, before me, the undersigned, a Notary Public in and for the State of Iowa, personally appeared Dan Houston, to me personally known, who being by me duly sworn, did say that he is the Chair of the CENTRAL IOWA WATER TRAILS, LLC, that such entity has no seal and that the instrument was signed on behalf of the Central Iowa Water Trails, LLC, by authority of its Board, on the ____ day of _____, 2020, and that Dan Houston acknowledged the execution of the instrument to be the voluntary act and deed of the Board, by it and by she voluntarily executed.

Notary Public in the State of Iowa

Exhibit A

Scott Avenue Overall Plan



 <p>Know what's below. Call before you dig.</p>	 <p>CAPITAL CROSSROADS CENTRAL IOWA WATER TRAILS INCUBATOR</p>	 <p>McLaughlin Whitewater A DIVISION OF MERRICK & COMPANY 1001 W. STATE ST., 4TH FLOOR, DES MOINES, IOWA 50319 TEL: 515-281-5271, FAX 515-281-5281 www.merrick.com</p>	<p>ISSUED FOR REVIEW</p> <p>60% DESIGN</p> <p>DESIGNED BY: MERRICK & COMPANY</p>	<p>SCOTT AVENUE DAM MODIFICATIONS POLK COUNTY, IOWA</p>	<p>65420522</p> <p>DATE: 10/16/2020</p> <p>SCALE: D.1</p> <p>REV: 11 of 54</p>
				<p>ODOT PROJ # EDP-PA26(01)-TY-77</p>	<p>OVERALL RIVER SITE PLAN</p>

REV	REVISION DESCRIPTION	DATE	DRWING NUMBER