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COMMUNITY DEVELOPMENT

**Planning,
Zoning,
Building Safety,
Construction Inspection Services,
Public Health,
Housing Inspections,
Code Enforcement**

MEMORANDUM

To: Mayor and City Council Members

Cc: Gregg Mandsager, City Administrator

From: Steven Boka, Director of Community Development

Date: July 7, 2011

Re: Master Agreement with CP Rail – Mad Creek Flood Protection

INTRODUCTION: The City has been working in cooperation with the Army Corps of Engineers (USACE) to design and build enhancements to the Mad Creek Flood Protection Levee, Flood Walls and Closure Structures. Phase I of the project was completed in 2010. Phase II is currently being advertised for construction.

BACKGROUND: Prior to opening bids for the construction of Phase II, the city must complete the acquisition of real estate as well as several permanent & temporary easements from CP Rail. As a part of the entire process, it is necessary for the city and CP Rail to enter into a "Master Agreement" related to the construction of the improvements. To that end, the enclosed Agreement serves as the Master Agreement that must be approved and signed by both parties. The Agreement has already been approved and signed by the appropriate CP Rail representative.

RECOMMENDATION/RATIONALE: The City Council is requested to approve the attached Agreement with CP Rail for access and construction of Mad Creek Flood Protection Improvements.

BACKUP INFORMATION:

1. Agreement

**"I remember Muscatine for its sunsets. I have never seen any
on either side of the ocean that equaled them" — Mark Twain**



**CANADIAN
PACIFIC**

Engineering Services
Structures & Projects
Suite 1510
501 Marquette Ave
Minneapolis MN 55402

AGREEMENT

Between

CITY OF MUSCATINE, IOWA

And

**DAKOTA MINNESOTA & EASTERN RAILROAD CORPORATION
d/b/a CANADIAN PACIFIC**

Covering

**Railroad Corporation Work Required for
Construction of New Railroad Closure Structure
And Raising of Existing System of Levees
As Part of the Mad Creek Local Floodwall Protection Project Phase II**

In

**Muscataine, Iowa
Muscataine County**

**Heinz Spur Line
New RR Gate Closure 550ft South of Washington Street
Raise Existing System of Levees along west side of Mad Creek**

EXHIBITS

Exhibit A-1:	Location Map
Exhibit A-2:	Vicinity and Site Maps
Exhibit B:	Easement Documents
Exhibit C-1 to C-5:	Project Plans
Exhibit C-6	Cost Estimate
Exhibit C-7:	Scope of Work
Exhibit D:	Project Specifications

AGREEMENT

THIS AGREEMENT made and entered into this _____ day of _____, 2011, by and between the City of Muscatine, Iowa, hereinafter referred to as the CITY, and the Dakota, Minnesota & Eastern Railroad Corporation d/b/a Canadian Pacific with principal offices located at 501 Marquette Ave S., Minneapolis, Minnesota 55402, hereinafter referred to as the COMPANY, for the Mad Creek Local Floodwall Protection Project, Phase II, hereinafter referred to as the PROJECT. The PROJECT is being done by the U.S. Army Corp of Engineers, hereinafter referred to as the USACE, in partnership with the CITY. It is understood that the USACE is not a signatory to this AGREEMENT.

The purpose of this AGREEMENT is to provide the COMPANY and USACE Contractor work requirements for the PROJECT work required to construct the railroad closure structure and raise existing system of levees along the west side of Mad Creek within COMPANY rights-of-way on the Heinz Spur Line. A location map indicating the locations of the future railroad closure structure and system of levees within COMPANY rights-of-way and PROJECT location, vicinity, and site maps are attached to this AGREEMENT as Exhibit A.

IN CONSIDERATION of the foregoing and the mutual promises contained herein, the parties agree as follows:

CITY, COMPANY AND USACE CONTRACTOR REQUIREMENTS

1. The COMPANY by separate agreement has granted the CITY acceptable permanent and temporary easement rights on COMPANY right-of-way, as shown on Exhibit B. The CITY's easement shall be subject to the continuing and compatible right of the COMPANY to use the railroad right-of-way to construct, operate, and maintain railroad facilities thereon, now and as reasonably required in the future, as contemplated and defined within this Agreement and permanent and temporary easement document. The CITY prepared the easement instrument, attached as Exhibit B, which has been fully executed and delivered by the COMPANY and payment in full has been made by the CITY.
2. **PROJECT CONSTRUCTION**
 - A. PROJECT Contract Documents

USACE has provided the CITY and the COMPANY a set of PROJECT Contract documents (plans and specifications) which both the CITY and the COMPANY have approved. Due to possible revisions during the solicitation for a PROJECT Contract, final Contract documents shall be provided to the COMPANY by the CITY no later than 30 calendar days after Contract award.

B. Company Work during PROJECT Construction

The COMPANY shall furnish all labor, track material, and equipment, or shall use a COMPANY approved contractor, to complete the required COMPANY work for the construction of the railroad closure structure and raising of the existing floodwall levees. Required COMPANY work is indicated within the PROJECT plans, attached as Exhibit C.

C. Company and USACE Contractor Coordination during PROJECT Construction

Subject to COMPANY operations, the COMPANY shall cooperate and coordinate with the USACE Contractor such that the PROJECT work for construction of the railroad closure structure and raising of existing levees may be handled and performed in an efficient manner. The USACE Contractor shall coordinate and provide space within the USACE Contractor staging areas for COMPANY material and equipment as necessary for construction of the railroad closure structure, as indicated in PROJECT specifications, attached as Exhibit D.

If work details for construction of the railroad closure structure and raising of the existing levees have been omitted in the PROJECT plans and specifications, or a PROJECT change order for construction of the railroad closure structure and levee work is required the USACE Contractor shall notify the USACE, as indicated in the PROJECT specifications, attached as Exhibit D. The review and approval period for this work shall not exceed 30 calendar days. This work shall not be undertaken until COMPANY approval is granted.

D. COMPANY Reimbursement for PROJECT Work

The CITY shall reimburse the COMPANY for 100 percent of the COMPANY costs incurred for the required COMPANY work, including any required COMPANY work as a result of any railroad closure structure and levee work structure omission in the PROJECT plans and specifications or as a result of a PROJECT change order, minus any salvage costs. The estimated cost for required COMPANY work shall be provided by the COMPANY as an attachment to this AGREEMENT. Estimated costs for COMPANY work are included to this AGREEMENT and are attached as Exhibit C-6

During construction of the PROJECT, the COMPANY may submit detailed monthly progressive billings (one (1) original and three (3) copies back-to-back) to the CITY attention Steven Boka, Director of Community Development, City of Muscatine, 215 Sycamore St., Muscatine, IA 52761 covering the work and costs incurred up to the date of the billing. Billings shall be submitted to the USACE by the CITY. The CITY shall reimburse the COMPANY for progressive billings in an amount not to exceed 95 percent of the estimated cost prior to the completion of the required COMPANY work.

Upon completion of the required COMPANY work, including any required COMPANY work as a result of any railroad closure structure or levee work structure omission in the PROJECT plans and specifications or as a result of a PROJECT change order, the COMPANY shall submit a detailed, final cost statement of the actual expenses incurred, minus any salvage costs, to the CITY. The final cost statement shall be submitted to the USACE by the CITY. The CITY shall reimburse the COMPANY 100 percent of the costs incurred 30

calendar days after receiving the COMPANY's final cost statement or within 14 days of payment to the City by USACE, whichever is later. The COMPANY will promptly, upon written request, reimburse the CITY in the amount of any exceptions taken by the CITY audit, which may exceed the amount withheld.

E. Salvage Items

Upon completion of the required COMPANY work, representatives of the USACE, CITY, and the COMPANY shall conduct a joint inspection of materials to be salvaged, if any, to determine the quantity and value of the salvaged items. Credit for salvaged items will be made pursuant to Federal regulations.

F. Operation and Maintenance of PROJECT Railroad Closure Structure

The CITY shall be responsible for the operation and maintenance (O&M) of the railroad closure structure, with said railroad closure structure not considered railroad COMPANY improvements or facilities. The COMPANY shall maintain all railroad facilities.

3. The COMPANY shall furnish, when requested by the USACE Contractor or as the COMPANY deems necessary, a watchman or flagman service to protect COMPANY traffic and property in connection with PROJECT work within COMPANY rights-of-way, as indicated in the PROJECT specifications, attached as Exhibit D. The USACE Contractor shall procure the watchman or flagman service for the PROJECT and shall bear the actual PROJECT costs of the watchman or flagman service. At PROJECT completion, the COMPANY shall forward to the USACE Contractor statements of actual watchman or flagman service costs incurred. The USACE Contractor shall be required to reimburse the COMPANY for costs incurred to provide the service, as indicated in the Project specifications, attached as Exhibit D.
4. PROJECT construction shall be completed under USACE Contract. The USACE shall provide supervision, administration, engineering support, and inspection of the PROJECT during construction. The USACE Contracting Officer shall administer the PROJECT.
5. The USACE Contractor shall be required to use all reasonable care to avoid accidents, damage to COMPANY's property, and delays to the COMPANY's normal operation. The USACE Contractor shall be required to, upon completion of the PROJECT work, remove from the COMPANY rights-of-way all materials, equipment, temporary structures and rubbish as a result of PROJECT construction, and shall leave the premises in a clean and neat, pre-work condition, acceptable to the COMPANY. All PROJECT work done by the USACE Contractor on COMPANY rights-of-way shall be done under the supervision of the USACE Contracting Officer or its authorized representatives. PROJECT work affecting COMPANY operations shall be subject to the approval of the COMPANY or its authorized representative. COMPANY approval shall not be unreasonably withheld.
6. Protection for the benefit of the COMPANY shall be provided as follows: The USACE Contractor shall be required to provide for and on behalf of the COMPANY, Railroad Protective Insurance as state in the Code of Federal Regulations, Title 23, part 646, and any revisions thereto issued by the Federal Highway Administration for damages because of bodily injury to or death of persons and injury to or destruction of property resulting from the operations of the USACE Contractor, its subcontractors, or their employees on the PROJECT. Documentation of said insurance shall be submitted to the USACE as indicated in the PROJECT specifications, attached as Exhibit D. Said insurance (written within the limits stated below) shall be approved by the COMPANY, with a copy of each required policy furnished to the COMPANY. The form of

insurance shall be in accordance with the Railroad Protective Liability Form shown in the Federal-Aid Highway Program Manual, and shall be executed by an insurance company qualified to write the same in the State of Iowa.

Limits are as follows: Coverage A (Bodily Injury Liability); Coverage B (Property Damage Liability); and Coverage C, including amendment GL 00 30 03 83, (Physical Damage to Property) combined single limit of \$2,000,000 per occurrence with \$6,000,000 aggregate for the term of the policy.

The USACE Contractor shall also be required to have Liability Insurance in accordance with the Code of Federal Regulation requirements, in limits not less than \$1,000,000 per occurrence and \$2,000,000 general aggregate. The USACE Contractor shall provide certification of liability insurance to the COMPANY prior to commencement of any PROJECT work.

GENERAL PROVISIONS

7. It is understood that the improvements are being developed in compliance with Federal regulations; that all plans, specifications, estimates, awards of contracts, acceptance of the PROJECT work, and general procedures are subject to all Federal laws and regulations applying to it as a Federal project, and subject to applicable State and local laws and regulations.
8. Upon completion of the PROJECT, the CITY, at its own cost and expense, shall operate, maintain, repair, rehabilitate and/or reconstruct PROJECT features, except where PROJECT features are damaged as a result of the sole negligent operations of the COMPANY. The COMPANY, if found negligent shall be liable for the costs of the repairs or reconstruction of the PROJECT features to restore the PROJECT features substantially to their former condition or reconstruct in-kind. The COMPANY shall reimburse the CITY for the actual cost of such repairs or reconstruction. In the event that damage to the PROJECT features results from the negligence of the CITY and the COMPANY; then the costs of repairs or reconstruction shall be shared by the CITY and COMPANY, based upon joint CITY-COMPANY determination of relative liability at the time.

The CITY is fully aware of the dangers of working on and about COMPANY property and operations and knowingly and willingly assumes the risk of harm (e.g., injury to or death of persons and damage to or destruction of PROJECT features) that may occur while on and about COMPANY property.
9. Work covered in the AGREEMENT is subject to all Federal laws and regulations relating to equal employment and equal opportunity for all persons without regard to race, color, creed, sex, age, religion, handicap, and national origin relating to, but not limited to, nonsegregated facilities, minority business enterprise providing equal employment and equal opportunities to veterans including, without limitations, Executive Order 11246 as amended, 41 CFR Section 601-et seq., 41 CFR Section 1-1.1310.2, 41 CFR Section 60-741 et seq., Executive Order 11701, 41 CFR Section 60-250.1 et seq., 49 CFR Section 265.1 et seq. to the extent applicable.
10. Required notices and any other communication between CITY, USACE, and COMPANY, essential to the completion of the PROJECT, shall be made in writing to the CITY, USACE, and COMPANY contact person. The CITY contact person is: Mr. Steven Boka, Director of Community Development, City of Muscatine, 215 Sycamore St., Muscatine, IA 52761;

Telephone No. (563) 262-4141. The USACE contact person is: Ms. Joanne Traicoff, Acting Area Engineer, Central Area Office, U.S. Army Corps of Engineers, 5235 Grand Avenue, Davenport, Iowa 52807-1014, Telephone No. (563) 386-0572, Ext. 6701. The COMPANY contact person is: Mr. Jeff Johnson, Specialist Public Works, Canadian Pacific, 501 Marquette Ave S., Suite 1510, Minneapolis, MN 55402; Telephone No. (612) 904-5945.

11. This AGREEMENT with attachments constitutes the entire AGREEMENT between the CITY and the COMPANY concerning this PROJECT. Representations made before the signing of this AGREEMENT is not binding, and neither party has relied upon conflicting prior representations in entering into this AGREEMENT. Any significant change or alteration to the terms of this AGREEMENT as determined by the CITY or the COMPANY, must be made in the form of a written Addendum. Said Addendum shall become effective only upon the written approval of the CITY and COMPANY.
12. This AGREEMENT may be executed and delivered in two counterparts, each of which so executed and delivered, shall be deemed to be an original, and shall constitute but one and the same instrument.
13. This AGREEMENT shall be binding on the successors or assigns of either part.

IN WITNESS WHEREOF, the CITY and COMPANY have caused this AGREEMENT to be executed by their authorized officers as of the dates below indicated.

Executed by the COMPANY this

**DAKOTA, MINNESOTA & EASTERN
RAILROAD CORPORATION
d/b/a
CANADIAN PACIFIC**

7 Day of July, 2011

By: 
Specialist Public Works

Executed by the CITY this

CITY OF MUSCATINE, IOWA

____ Day of _____, 2011

By: _____

Its: _____