

Good Day, Mr. Zulkosky and Ms. Murphy,

On behalf of North Central Mitigation, LLC (NCM), please find attached the “**Purchase Agreement**” to purchase **4.061 FCU Depressional Credits** for wetland impacts at the Gateway Boulevard Phase-2 Project; permit number: **NWO-2015-01680-PIE**. Let us know if you have any questions on the contract. Below you will find details on the process to execute this document:

**1) Purchase Agreement**

Please review the attached Purchase Agreement. If it is acceptable, print, sign, scan and return the contract to us electronically. We will countersign and email it back to you. **IMPORTANT: This contract is between you, the Purchaser and NCM – DO NOT SEND THE PURCHASE CONTRACT TO THE CORPS OF ENGINEERS.**

**2) Letter of FCU Credit Availability**

Please note that the “**Letter of FCU Credit Availability**” (**Exhibit A**) was executed and delivered on 10-2-2020, but is included as an exhibit on the Purchase Agreement. (No further action required)

**3) Payment**

If you would prefer to pay from an invoice, rather than paying directly from the contract, let us know and we will draft an invoice. We will return to you, the signed “**Bill of Sale**” (**Exhibit B**) within 15 days of receipt of payment.

**4) Corps of Engineers Notification**

When the payment clears, NCM will notify the Corps of completion of the wetland mitigation transaction by submitting the signed “**Notification of Acceptance of Mitigation Requirement**” (**Exhibit C**). This will be emailed to the Corps and you will be included on that email.

**5) Transfer of Liability**

Upon notification to the Corps of Engineers, liability of the wetland impact immediately transfers from you, the Purchaser, to NCM and the credits will be debited from our wetland bank site, via the national federal wetland registry.

Do not hesitate to contact us with questions.

Thank you,  
Lanita Herbener, for North Central Mitigation, LLC

**Wetlands Functional Capacity Unit Credits Purchase Contract**  
**North Central Mitigation Statewide Umbrella Mitigation Banking Instrument for South Dakota**  
**Jandl Wetland Mitigation Bank Site**

This Purchase Contract is entered into effective this \_\_\_\_\_ day of \_\_\_\_\_, 2020 (the “Effective Date”), between North Central Mitigation, LLC (“North Central Mitigation”), a South Dakota limited liability company, with its principal offices in Sioux Falls, South Dakota and the City of Tea (“Permittee”), a South Dakota municipality, with its principal offices in Tea, South Dakota.

**Recitals:**

- A. Permittee proposes to impact wetlands on project known as and real property legally described as set forth below, pursuant to the terms and conditions of Permittee’s permit application:

**Sections 24 & 25, Township 100 North, Range 51 West  
in Lincoln County, South Dakota**

**Project: “Gateway Boulevard, Phase 2 Improvement”**

- B. Permittee is the applicant for a Department of the Army Section 404 permit, application number **NWO-2015-01680-PIE** to be issued pursuant to 33 C.F.R. Part 325, implemented under the Clean Water Act (the “Section 404 Permit”).
- C. The U.S. Army Corps of Engineers, Omaha District (the “Corps”) has required or will require Permittee to complete compensatory off-site wetland mitigation (the “Mitigation Requirement”) through the purchase of Functional Capacity Unit credits (the “FCU Credits”) from North Central Mitigation.
- D. North Central Mitigation is in the business of wetlands mitigation. North Central Mitigation is the sponsor of the Statewide Umbrella Mitigation Banking Instrument for South Dakota (the “Instrument”). The Corps has authorized North Central Mitigation to complete the Mitigation Requirement as contemplated herein by the Corps’ signature on the Instrument and North Central Mitigation’s development of Mitigation Bank Sites under the Instrument.
- E. Permittee desires to transfer to North Central Mitigation, and North Central Mitigation desires to accept from Permittee, legal responsibility for the Mitigation Requirement pursuant to the terms and conditions of this Agreement, the Instrument and the Section 404 Permit.

NOW, THEREFORE, for good and valuable consideration, the receipt of which is hereby acknowledged, the parties agree as follows:

1. Recitals Substantive. The above recitals are deemed substantive and incorporated herein by this reference.
2. Section 404 Permit Approval. Permittee agrees to diligently and in good faith endeavor to secure the Section 404 Permit, if not already received. A “Letter of FCU Credit Availability” (Exhibit A) was executed and provided by North Central Mitigation to the Permittee on October 2. In any event, if Permittee has not obtained the Section 404 Permit and made payment as provided below within a timely period, this Agreement will terminate, at which time neither party will have any liability to the other. If Permittee fails to make payment within a timely period, North Central Mitigation will deliver to the Corps a notice stating that this Agreement has terminated and the “Letter of FCU Credit Availability” has expired.
3. Sale of FCU Credits. Upon the Corps’s issuance and Permittee’s acceptance of the Section 404 Permit, to include the transfer to North Central Mitigation of the legal responsibility for the Mitigation Requirement, and the approval of the sale of **4.061 FCU Depressional Credits**, Permittee agrees to purchase from North Central Mitigation, and North Central Mitigation agrees to sell to Permittee, **4.061 FCU Depressional Credits**. The total purchase price will be **\$55,880.00** (Fifty-five thousand, eight hundred eighty and 00/100 dollars) (the “Purchase Price”).
4. Payment. Within a timely period of Permittee’s receipt of the Permit, Permittee will pay the Purchase Price. Upon timely receipt of the Purchase Price, North Central Mitigation will deliver to Permittee a “Bill of Sale” (Exhibit B) and will deliver to the Corps a “Notification of Acceptance of Mitigation Requirement” (Exhibit C).

Permittee is solely responsible for payment of all taxes and charges, now or hereafter imposed (whether by federal, state, municipal or other public authority), by reason of this Agreement or its performance, including but not limited to, sales or use taxes, but excluding any income tax imposed upon the net profits of North Central Mitigation. North Central Mitigation may pay the taxes required, in which event Permittee will reimburse North Central Mitigation for the amount of taxes paid within ten days of North Central Mitigation’s request for reimbursement.

5. Party Responsible for Mitigation Requirement; Indemnification. Legal responsibility for the Mitigation Requirement will be transferred from Permittee to North Central Mitigation upon the last to occur of the execution and signing by both Permittee and the Corps of the Section 404 Permit meeting the requirements of this Agreement and the timely payment of the Purchase Price. At such time as North Central Mitigation has assumed legal responsibility for the Mitigation Requirement, and at all times thereafter, the parties agree that the following indemnification provisions will be in full force and effect:

A. North Central Mitigation will indemnify, defend and hold harmless Permittee and its officers, directors, agents, employees, successors and assigns, including subsequent owners and mortgagees of the Project Site (the "Permittee Indemnitees"), against any liability, damage, loss or expense, including reasonable attorneys' fees, incurred by or imposed upon any of the Permittee Indemnitees in connection with any claims, administrative actions, legal actions or demands arising out of any theory of liability (including without limitation actions in the form of regulatory enforcement, tort, warranty or strict liability, and regardless of whether such action has any factual basis) with respect to North Central Mitigation's obligation to complete and maintain the Mitigation Requirement and with respect to North Central Mitigation's breach or violation of any laws for the protection of the environment as they apply to the Instrument; provided, however, that such indemnification will not apply to any liability, damage, loss or expense to the extent directly attributable to Permittee's breach of or default under the Section 404 Permit, exclusive of the Mitigation Requirement assumed by North Central Mitigation hereunder, and for any other breach or violation of any laws for the protection of the environment as they apply to the Project Site.

B. Permittee will indemnify, defend and hold harmless North Central Mitigation and its officers directors, agents, employees, successors and assigns including subsequent owners and mortgagees of the bank sites developed under the Instrument (the "North Central Mitigation Indemnitees"), against any liability, damage, loss or expense, including reasonable attorneys' fees, incurred by or imposed upon any of the North Central Mitigation Indemnitees in connection with any claims, suits, administrative actions, legal actions or demands arising out of any theory of liability (including without limitation actions in the form of regulatory enforcement, tort, warranty or strict liability, and regardless of whether such action has any factual basis) concerning the Mitigation Requirement, the Section 404 Permit and concerning the breach or violation of any laws for the protection of the environment as they apply to the Project Site; provided, however, that such indemnification will not apply to any liability, damage, loss or expense to the extent directly attributable to North Central Mitigation's breach of or default under the Mitigation Requirement and for any other breach or violation of any laws for the protection of the environment as they apply to any bank site developed under the Instrument.

C. The North Central Mitigation Indemnitees agree to provide to Permittee in the event subsection A above applies, and the Permittee Indemnitees agree to provide to North Central Mitigation in the event subsection B above applies (for purposes of this subsection C, each of Permittee and North Central Mitigation will be referred to as "Indemnitor", as is applicable under the circumstances) with prompt written notice of any claim, administrative action, legal action or demand for which indemnification is sought under this Agreement. Indemnitor agrees, at its own expense, to provide attorneys reasonably acceptable to the Indemnitees to defend against any such claim, administrative action, legal

action or demand. With respect to any claim, administrative action, legal action or demand that Indemnitor acknowledges to be covered by the indemnification contained in A above, Indemnitees must cooperate fully with Indemnitor in such defense and must permit Indemnitor to conduct and control such defense and the disposition of such claim, administrative action, legal action or demand, including all decisions relative to the defense, appeal and settlement thereof; provided, however, that any Indemnitee will have the right to retain its own attorneys, at the expense of Indemnitor, if representation of such Indemnitee by the attorneys retained by Indemnitor would be inappropriate because of actual or potential differences in the interests of any of the Indemnitees and Indemnitor represented by such attorneys. Indemnitor agrees to keep Indemnitees informed of the progress in the defense and disposition of such claim, administrative action, legal action or demand, and to consult with Indemnitees with regard to any proposed settlement.

6. Transfer of FCU Credits Prohibited. “Transfer” means a sale, assignment, transfer, gift, exchange or other disposition, including by operation of law, of all or any part of an FCU Credit to any person or entity. Permittee will not Transfer the FCU Credits. Any Transfer or attempted Transfer of the FCU Credits is void, and North Central Mitigation will not assume legal responsibility for the Mitigation Requirement upon any Transfer or attempted Transfer of the FCU Credits. This paragraph will survive the Closing of the transaction contemplated herein.

7. Permittee’s Representations, Warranties and Covenants. Permittee represents, warrants and covenants that:

A. Permittee is a duly organized municipality in good standing under the laws of South Dakota and has obtained all authority and action necessary to accomplish the transaction contemplated by this Agreement.

B. This Agreement has been duly executed and delivered by Permittee and constitutes the legal, valid and binding obligation of Permittee, enforceable against it in accordance with its terms.

C. Permittee will at all times comply with the terms of this Agreement, the Mitigation Requirement and the Section 404 Permit.

8. North Central Mitigation’s Representations, Warranties and Covenants. North Central Mitigation represents, warrants and covenants that:

A. North Central Mitigation is a duly organized South Dakota limited liability company in good standing under the laws of South Dakota and has obtained all company authority and actions necessary to accomplish the transaction contemplated by this Agreement.

B. This Agreement has been duly executed and delivered by North Central Mitigation and constitutes the legal, valid and binding obligation of North Central Mitigation, enforceable against it in accordance with its terms.

C. North Central Mitigation will at all times comply with the terms of this Agreement and the Instrument.

9. Survival of Representations, Warranties and Covenants. The representations, warranties and covenants set forth in this Agreement are continuing and will be made again by the parties as of the Closing and will survive the Closing of the transaction contemplated herein.

10. Permittee's Condition Precedent. Permittee's obligation to close the transaction contemplated by this Agreement is subject to fulfillment of or waiver by Permittee of the following condition:

A. The Corps must have issued the Section 404 Permit in accordance with the terms and conditions of this Agreement, including within the time as set forth in Section 2 above, and the Mitigation Requirement, including but not limited to, the Corps's authorization for Permittee to purchase the number of FCU Credits as set forth in Section 3 above.

If Permittee terminates this Agreement pursuant to this Section, neither party will have any liability to the other, except North Central Mitigation retains the Down Payment, if any.

11. North Central Mitigation's Condition Precedent. North Central Mitigation's obligation to close the transaction contemplated by this Agreement is subject to fulfillment of or waiver by North Central Mitigation of the following condition:

A. The Corps must have issued the Section 404 Permit in accordance with the terms and conditions of this Agreement, including within the time as set forth in Section 2 above, and the Mitigation Requirement, including but not limited to, the Corps's authorization for Permittee to purchase the number of FCU Credits as set forth in Section 3 above.

If North Central Mitigation terminates this Agreement pursuant to this Section, neither party shall have any liability to the other and North Central Mitigation will return the Down Payment, if any, to Permittee.

12. Deliveries by Permittee. Permittee must timely deliver to North Central Mitigation the Purchase Price, and in addition thereto, the following documents, reports, notices and information at such times as are set forth below:

A. Prior to or contemporaneous with Permittee's execution of this Agreement, Permittee's Mitigation Requirement.

B. Within a timely period of Permittee's receipt, in a form acceptable to Permittee, the unsigned Section 404 Permit proposed by the Corps.

C. Within a timely period of Permittee's receipt, the Section 404 Permit signed by the Corps.

D. Within seven days of Permittee's receipt, all amendments to Permittee's Mitigation Requirement and/or the Section 404 Permit approved by the Corps. If the Mitigation Requirement is amended and the FCU credit number changes, the contract will be modified to reflect the then current number of FCU credits to be purchased. An upward adjustment in the number of credits to be purchased may require an additional Down Payment, but the Down Payment, if any, will remain as originally stated in the event of a downward adjustment in the number of credits to be purchased.

E. Within seven days of Permittee's receipt, all notices of default, waivers of default and reinstatements following default issued by the Corps with respect to Permittee's Mitigation Requirement and/or the Section 404 Permit.

13. Deliveries by North Central Mitigation. North Central Mitigation must timely deliver to the parties designated below the following documents:

A. To Permittee and the Corps, a letter of credit availability in the form set forth on Exhibit A, attached hereto and incorporated herein by reference.

B. To Permittee, a Bill of Sale, in the form set forth on Exhibit B, attached hereto and incorporated herein by reference; and

C. To Permittee and the Corps, a notice of receipt of payment of the Purchase Price and acceptance of responsibility for the Mitigation Requirement, in the form set forth on Exhibit C, attached hereto and incorporated herein by reference.

14. Notice to Corps. If for any reason this Agreement is terminated or otherwise fails to close, as provided herein, or upon a Transfer or attempted Transfer, Permittee authorizes North Central Mitigation to notify the Corps of the termination and that North Central Mitigation will not be responsible for the Mitigation Requirement.

15. Default; Remedies. It is understood and agreed that if one or more of a party's warranties and representations is untrue or becomes untrue prior to or as of the Closing, or if a party defaults in the performance or compliance with any term or condition hereof, the other party may resort to any and all legal remedies or combination of legal remedies allowed by law. The party in default agrees to pay all attorneys' fees and other costs and expenses incurred by the other party in enforcing any of the defaulting party's obligations under this Agreement. Permittee must be given written

notice of any default in payment, and termination of this Agreement and the pursuit of other remedies will not result if within ten days of the giving of such notice, Permittee has corrected the default in payment. Upon any other default or breach other than failure to timely make payment of the Purchase Price, the party in default must be given written notice of default, and termination of this Agreement and the pursuit of other remedies will not result if the party in default has taken action reasonably likely to affect such correction within a reasonable time, but in any event, no longer than thirty days, all to the other party's satisfaction, in its sole and absolute discretion.

16. Further Assurances. Subject to the terms and conditions of this Agreement, each of the parties agrees to use all reasonable efforts to take, or cause to be taken, all actions and to do, or cause to be done, all things necessary, proper or advisable under applicable laws and regulations to consummate and make effective the transactions contemplated by this Agreement.

17. Notices. Any notice or other communication required or permitted to be given to the parties hereto will be deemed to have been given if hand delivered, or mailed by certified or registered mail, return receipt requested, first class postage prepaid, addressed as follows:

If to Permittee: **City of Tea**  
P. O. Box 128  
Tea, SD 57064

If to North Central Mitigation: **North Central Mitigation, L.L.C.**  
401 East 8th Street, Suite 211  
Sioux Falls, South Dakota 57103

18. Assignment. Any assignment by Permittee requires the prior written consent of North Central Mitigation, which consent must not be unreasonably withheld. North Central Mitigation may assign its rights and obligations under this Agreement to any nonprofit, governmental entity or wetlands bank operator engaged in wetlands mitigation without notice to or the consent of Permittee; any other assignment by North Central Mitigation requires the prior written consent of Permittee, which consent must not be unreasonably withheld.

19. Successors and Assigns. All covenants and agreements set forth in this Agreement and made by or on behalf of any of the parties hereto will bind and inure to the benefit of the successors and assigns of such party, whether or not so expressed.

20. Severability. In the event that any one or more of the provisions contained herein is held invalid, illegal or unenforceable in any respect for any reason in any jurisdiction, the validity, legality and enforceability of any such provision in every other respect and of the remaining provisions hereof will not be in any way impaired or affected, it being intended that each parties' rights and privileges may be enforceable to the fullest extent permitted by applicable law, and any such invalidity, illegality and



unenforceability in any jurisdiction will not invalidate or render unenforceable such provision in any other jurisdiction.

21. Governing Law; Consent to Jurisdiction. This Agreement, including the validity hereof and the rights and obligations of the parties hereunder, must be construed in accordance with and governed by the laws of the State of South Dakota (without giving effect to the conflicts of laws provisions thereof). The parties consent to the jurisdiction of the courts of the State of South Dakota and agree that any action arising out of or to enforce this Agreement must be brought and maintained exclusively in the state or federal courts located in Minnehaha County, South Dakota.

22. Waiver. Any failure of a party to demand strict adherence by the other party to one or more of this Agreement's terms, on one or more occasions, must not be construed as a waiver nor deprive that party of the right to insist upon strict compliance with this Agreement. No waiver of any provision of this Agreement will be valid unless said waiver is provided in writing to the other party.

23. Entire Agreement. This Agreement, including the other agreements referred to herein, are complete, and all promises, representations, understandings, warranties and agreements with reference to the subject matter hereof, and all inducements to the making of this Agreement relied upon by all the parties hereto, have been expressed herein or in such other agreements.

24. Amendment. This Agreement may not be amended except by an instrument in writing signed by the parties hereto. Any written amendment, modification or waiver executed in accordance herewith will be binding upon each party.

25. Counterparts. This Agreement may be executed in any number of counterparts and by the different parties hereto on separate counterparts, each of which when so executed and delivered will be an original, but all of which together will constitute one and the same instrument. Signatures to this Agreement may be by facsimile, electronically or by any other similar means. Any such signature will be considered an original for all purpose of this Agreement.

26. Time is of the Essence. Time is of the essence with respect to this Agreement and the consummation of the transaction contemplated hereby.

[Signature Page Follows]

Executed as of the date above first written.

**NORTH CENTRAL MITIGATION, LLC:**

\_\_\_\_\_

By \_\_\_\_\_

Its \_\_\_\_\_

**CITY OF TEA, SOUTH DAKOTA:**

\_\_\_\_\_

By \_\_\_\_\_

Its \_\_\_\_\_

EXHIBIT A  
LETTER OF FCU CREDIT AVAILABILITY

## Letter of FCU Credit Availability

To the U.S. Army Corps of Engineers, Omaha District (the “Corps”):

The City of Tea, SD (“Permittee”) has applied for a Section 404 Permit under file number **NWO-2015-01680-PIE** (the “Permit Application”). The Corps may authorize Permittee to purchase Functional Capacity Unit Credits from North Central Mitigation, LLC to mitigate Permittee’s impacts to wetlands (the “Mitigation Requirement”) on real property legally described as:

**Sections 24, 25, 26, 19 & 30, Township 100N, Range 50 & 51W  
in Lincoln County SD**

The Applicant estimates that approximately **4.0 Pothole** Functional Capacity Unit Credits may be necessary to satisfy the Mitigation Requirement (the “Estimated Mitigation Requirement”).

This serves as notice that North Central Mitigation has sufficient FCU credits within its Jandl Wetland Mitigation Bank Site under its Statewide Umbrella Mitigation Banking Instrument in South Dakota to satisfy the Estimated Mitigation Requirement if the Permit is issued and the Permittee satisfies the terms and conditions of its Wetlands Functional Capacity Unit Credits Purchase Contract with North Central Mitigation.

This Letter of Credit Availability will expire 180 days from the date presented below but may be extended at the sole discretion of North Central Mitigation, LLC.

Dated this 2<sup>nd</sup> day of October 2020.

North Central Mitigation, LLC

By  its Member

EXHIBIT B  
BILL OF SALE

**Bill of Sale**

In consideration of **\$55,880**, receipt of which is hereby acknowledged, North Central Mitigation, LLC does hereby bargain, sell, and transfer to the City of Tea, South Dakota (“Buyer”), **4.061 FCU Depressional Credits** in the North Central Mitigation Statewide Umbrella Mitigation Banking Instrument for South Dakota; in the Jandl Wetland Mitigation Bank Site in Minnehaha County, South Dakota, pursuant to the terms and conditions of a Wetlands Functional Capacity Unit Credits Purchase Contract. These credits are being sold and transferred in order to satisfy Buyer’s Mitigation Requirement incurred under Section 404 Permit number **NWO-2015-01680-PIE**, for project known as and on real property legally described, as set forth below:

**Sections 24 & 25, Township 100 North, Range 51 West  
in Lincoln County, South Dakota**

**Project: “Gateway Boulevard, Phase 2 Improvement”**

North Central Mitigation, LLC warrants that it has marketable title to the credits. The credits are being sold without any warranty whatsoever except marketable title.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2020.

North Central Mitigation, LLC

By \_\_\_\_\_, its Member

EXHIBIT C

NOTIFICATION OF ACCEPTANCE OF MITIGATION REQUIREMENT

## Notification of Acceptance of Mitigation Requirement

To the U.S. Army Corps of Engineers, Omaha District (the “Corps”):

The City of Tea, South Dakota (“Permittee”) has been issued a Section 404 Permit number **NWO-2015-01680-PIE** (the “Permit”). The Permit authorizes Permittee to purchase Functional Capacity Unit Credits from North Central Mitigation, LLC to mitigate Permittee’s impacts to wetlands (the “Mitigation Requirement”) for project known as and on real property legally described, as set forth below:

**Sections 24 & 25, Township 100 North, Range 51 West  
in Lincoln County, South Dakota**

**Project: “Gateway Boulevard, Phase 2 Improvement”**

Pursuant to the terms and conditions of a Wetlands Functional Capacity Unit Credits Purchase Contract, North Central Mitigation, LLC agreed to accept responsibility for the Mitigation Requirement upon payment from Permittee for Functional Capacity Unit Credits.

North Central Mitigation, LLC, by acceptance of the Mitigation Payment, acknowledges that North Central Mitigation, LLC is responsible for the off-site compensatory mitigation requirements of the Permit and agrees to complete the off-site compensatory mitigation as specified in the Permit. **4.061 Functional Capacity Unit Depressional Credits** have been debited from the North Central Mitigation Statewide Umbrella Mitigation Banking Instrument for South Dakota; Jandl Wetland Mitigation Bank Site to satisfy the Mitigation Requirement.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2020.

North Central Mitigation, LLC

By \_\_\_\_\_, its Member