

Florida Department of Environmental Protection

Memorandum

TO: Herschel T. Vinyard Jr., Secretary
Department of Environmental Protection

THROUGH: Jennifer Fitzwater, Fitzwater, Chief of Staff
Department of Environmental Protection

FROM: Robert C. Brown, P.E., Chief *RS*
Bureau of Petroleum Storage Systems

DATE: October 29, 2012

SUBJECT: Memorandum of Understanding with DOT

The attached Memorandum of Understanding has been negotiated by the staff with our BPSS and OGC and staff with the Department of Transportation and has been reviewed and approved by your office. It was signed FDOT Secretary Prasad on October 16, 2012 and is ready for your signature. The MOU will streamline the permitting of monitor wells and remediation infrastructure to be installed in the Department of Transportation's right of way.

The MOU benefits both agencies. The DEP will be allowed to obtain permits for installations in the right-of-way through our Petroleum Cleanup Preapproval Program without the cost of obtaining a financial guarantee, e.g. a security bond, for work done at sites funded from the Inland Protection Trust Fund. The DOT will have assurance that all remediation infrastructure installed in the right-of way by the DEP will be maintained to ensure safety and removed when no longer needed.

Please contact me in you have any questions or would like more information.

MEMORANDUM OF UNDERSTANDING
between the
Florida Department of Environmental Protection
and the Florida Department of Transportation
regarding Petroleum Cleanup and Remediation in Right of Way

This Memorandum of Understanding ("MOU") is made between the Florida Department of Environmental Protection ("FDEP") and the Florida Department of Transportation ("FDOT").

The purpose of this MOU is to define the roles of FDEP and the FDOT regarding third party performance of cleanup activities, including the installation of environmental infrastructure in FDOT's right-of-way, when the third party has or will receive financial assistance from FDEP in connection with the cleanup effort.

Recitals

A. Section 334.044(7), Fla. Stat. (2012) authorizes the FDOT and Section 403.061(21), Fla. Stat. (2012) authorizes FDEP to enter into this MOU; and

B. The FDEP and the FDOT recognize that soil and groundwater contamination are potentially hazardous to the public health and the environment; and

C. Sections 376.021, 376.30, and 403.021, Fla. Stat. (2012) provide that the preservation of surface and groundwaters is a matter of the highest urgency and priority, as these waters provide the primary source for potable water in the state; and

D. FDEP is charged with protecting the State's natural resources, and assessing and recovering the costs of all damage to natural resources, Sections 376.121 and 403.121, Fla. Stat. (2012); and

E. The Florida Transportation Plan, pursuant to Section 339.155(2)(d), Fla. Stat. (2012), requires the FDOT to take into consideration the protection and enhancement of the environment; and

F. The right-of-way ("ROW") is land in which the FDOT owns the fee or has an easement devoted to or required for use as a transportation facility, Sections 334.03(22) and (31), Fla. Stat. (2012); and

G. The Florida Legislature in Sections 334.27(2) and 337.27(4), Fla. Stat. (2012) has exempted the FDOT from any liability imposed by Chapter 376 or 403 for pre-existing soil or groundwater contamination due solely to FDOT's ownership of the transportation facility or transportation corridor ROW; and

H. The Florida Legislature has authorized the FDOT to recover damages caused to FDOT property for actual damage to the highway or highway structure as a result of any illegal operating, driving, or moving of a vehicle, Section 316.560 Fla. Stat. (2012); and

I. The Florida Legislature has authorized FDEP to cleanup prohibited discharges, Section 376.305(1), 376.307(1)(a), Fla. Stat.; and keep a record of costs incurred and diligently pursue recovery of the sums so incurred; Section 376.3071(4)(f), Fla. Stat. (2012); and to bring an action on behalf of the state to enforce the liabilities; Section 376.303, and 376.3071(4)(f), Fla. Stat. (2012); and

J. The Florida Legislature has created a fund, under Section 376.3071, Fla. Stat. (2012), that authorizes the FDEP to pay for the assessment and cleanup of certain old petroleum discharges; however, absent an emergency or imminent threat to human health or the

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environment, pursuant to Section 376.30711, Fla. Stat. (2012), the FDEP cannot provide state funding for the clean-up of petroleum contamination sites eligible for state funded clean-up that are scored below the funding range; and

K. Section 376.30711, Fla. Stat. (2012), provides owners and other parties responsible for petroleum contamination and/or cleanup (collectively referred to as "responsible parties"), and who are eligible in whole or in part for state funded clean-up, the opportunity to select a contractor ("preapproval contractor"), to conduct the assessment and cleanup of the contamination regardless of where the contamination has migrated; and imposes some insurance requirements upon these preapproval contractors; and

L. The FDOT regulates the use of its ROW through permits or other approved authorization ("permits"), see Sections 334.044(2), (14), and (15), Fla. Stat. (2012); and may request a guarantee payment of any obligation due the FDOT or that may become due the FDOT, see Section 334.187 Fla. Stat. (2012); and

M. The FDOT will accommodate requests to waive the guarantee payment when the project within the ROW is secured by federal, state, municipal or other governmental funds; and

N. Responsible parties and preapproval contractors who have been pre-approved for FDEP funded petroleum contamination clean-up are applying to FDOT for permits to construct and install monitoring wells, remediation wells, trenching and remediation systems ("environmental infrastructure") and perform remedial activities within the ROW; and

O. Because preapproval contractors are neither agents of FDEP nor authorized to represent FDEP, despite state funds being available for the construction and installation of the environmental infrastructure, there is no guarantee the environmental infrastructure will be properly operated, maintained, repaired, and removed; thus the FDOT may incur future obligations to remove the environmental infrastructure from the ROW; and

P. FDOT requests FDEP's assurance that the FDEP-funded environmental infrastructure and remedial activities conducted in the ROW will be timely and properly operated, maintained, repaired, and removed and not impose future liability or obligations on the FDOT; and

Q. To the limits authorized by statute, the FDEP will take all action necessary to properly operate, maintain, repair, and remove FDEP funded environmental infrastructure and perform remedial activities conducted in the ROW; and

R. FDEP and the FDOT recognize the benefits that accrue to each agency as a result of this MOU;

NOW THEREFORE, with full knowledge and understanding of the laws governing the subject matter of this MOU, and in consideration of the foregoing recitals and the mutual covenants and conditions contained in this MOU, the parties, intending to be legally bound hereby, acknowledge and agree as follows:

1. RECITALS AND EXHIBITS

The recitals set forth above and attached Exhibits are incorporated in and made part of this MOU.

2. EFFECTIVE DATE

The effective date of the MOU shall be the date the last of the parties to be charged executes the MOU ("Effective Date").

date:

3. PURPOSE OF THE MEMORANDUM OF UNDERSTANDING

A. The MOU does not modify or change Florida Statutes, FDOT rules, or FDEP rules and is limited to the scope outlined in this MOU.

B. This MOU supersedes and replaces the Memorandum of Understanding between the Florida Department of Environmental Regulation (FDEP's predecessor agency) and FDOT dated July 20, 1989, see attached Exhibit "A", only regarding the topics contained herein.

4. LIMITATIONS ON LIABILITY

A. Nothing in this MOU shall be deemed or otherwise interpreted as waiving the FDOT limit of liability set forth in Sections 334.27(2) and 337.27(4), Fla. Stat. (2012).

B. Nothing in this MOU shall be deemed or otherwise interpreted as waiving the parties' sovereign immunity protections, or as increasing the limits of liability set forth in Section 768.28, Fla. Stat. (2012).

5. PERMITTING PROCEDURE

A. The FDOT routinely receives permit applications from responsible parties for the use of the ROW for environmental cleanup and for the installation, operation, maintenance, repair, and removal of environmental infrastructure.

B. The FDOT may require the responsible party to execute a Maintenance Agreement; an example is attached to this MOU as Exhibit "B".

C. The FDOT will waive financial guarantee / bonding provisions of the Maintenance Agreement if the permit applicant demonstrates that FDEP has encumbered funds for the discharge in question under one of the applicable cleanup programs without a funding cap (Early Detection Incentive program –EDI, Abandoned Tank Restoration Program – ATRP, or the Innocent Victim Petroleum Storage System Program - IVP).

D. The FDOT may waive financial guarantee / bonding provisions of the Maintenance Agreement if the permit applicant demonstrates that FDEP has encumbered funds for the discharge in question under a program with a statutory funding cap (Florida Petroleum Liability & Restoration Improvement Program –FPLRIP or Petroleum Cleanup Participation Program- PCPP).

6. OPERATION, MAINTENANCE, REPAIR AND REMOVAL

A. Responsible parties will be required to perform cleanup activities and to operate, maintain, repair, and remove the environmental infrastructure, including restoration of the ROW, in accordance with all applicable federal, state, local, administrative, regulatory, safety and environmental laws, codes, rules, regulations, policies, procedures, guidelines, standards and permits, as the same may be constituted and amended from time to time.

B. Under certain circumstances the FDOT may require the responsible party to remove the environmental infrastructure from the ROW prior to responsible party's completion of its use of the ROW.

C. If the discharge in question is eligible for state funding without a statutory cap and the responsible party fails to comply with the operation, maintenance, repair or removal requirements of any permits/ Maintenance Agreement, after being notified by the FDOT of the deficiency, the FDEP will remedy any deficiency(s) with FDEP funded environmental infrastructure, including removal of the infrastructure and restoration of the ROW, at no cost or expense to the FDOT.

D. If the discharge in question is eligible for state funding with a statutory cap and the responsible party fails to comply with the operation, maintenance, repair or removal requirements of any

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permits / Maintenance Agreement, after being notified by the FDOT of the deficiency, the FDEP will remedy any deficiency(s) with FDEP-funded environmental infrastructure, including removal of the infrastructure and restoration of the ROW, at no cost or expense to the FDOT up to the limits of the statutory cap.

E. If, for any reason, the FDEP does not remedy any deficiencies as required by this section, including removal of environmental infrastructure and restoration of the ROW, the FDOT may remedy any such deficiencies with no corresponding increase in the limits of liability set forth in Sections 334.27(2) and 337.27(4), Fla. Stat. (2012) as the same may be amended from time to time.

IN WITNESS WHEREOF, intending to be legally bound hereby, the parties hereby execute this MOU, consisting of four (4) pages.

FLORIDA DEPARTMENT OF
ENVIRONMENTAL PROTECTION


Secretary

10/31/12
Date

FLORIDA DEPARTMENT OF
TRANSPORTATION


Secretary

10.16.12
Date

electronic copies to:

Rebecca Robinette, Sr. Ass't General Counsel, rebecca.robinette@dep.state.fl.us
John Wright, PE, BPSS Team 2, DWM, FDEP, john.wright@dep.state.fl.us
Robert C. Brown, PE, Bureau Chief, BPSS FDEP, robert.c.brown@dep.state.fl.us

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MOU EXHIBIT "A"

MEMORANDUM OF UNDERSTANDING
between
The State of Florida Department of Environmental Regulation
and
The State of Florida Department of Transportation

This agreement was made and entered into this 20th day
of July, 1989 A.D. by and between the State of Florida
Department of Transportation (FDOT) and the State of Florida Department
of Environmental Regulation (FDER).

Purpose:

The purpose of this agreement is to define the role of the Florida
Department of Transportation in cleaning up contamination sites that
accrue to the FDOT through right-of-way acquisition and to describe
procedures for FDOT to seek reimbursement of the allowable costs of
cleanup from either the Water Quality Assurance Trust Fund or the Inland
Protection Trust Fund, as applicable, in accordance with Chapter
376.305(6), Florida Statutes.

For the purposes of this agreement, any contamination shall be
defined to mean any hazardous waste, hazardous substance, petroleum
product, petroleum, or any other substance which is or is suspected to
be carcinogenic, mutagenic, teratogenic, or toxic to human beings, or
acutely toxic to indigenous species of significance to the biological
community affected by the pollutant, or any substance which poses a
serious danger to the public health, safety, or welfare that is released
into the environment in quantities or concentrations sufficient to cause
harm to the public health or the environment.

WHEREAS, the Legislature, under Chapter 337.27(6), F.S., has seen fit to protect the Department of Transportation from liability which might be incurred from pre-existing soil or groundwater contamination of property acquired for transportation purposes through the exercise of eminent domain, and;

WHEREAS, the Legislature, under Chapter 376.307, and 376.3071, F.S., has created the Water Quality Assurance Trust Fund and the Inland Protection Trust Fund for the purpose of protecting Florida's surface and ground water by funding the costs of cleanup and restoration of contaminated sites, and;

WHEREAS, the Department of Transportation regularly acquires property throughout the state, through both eminent domain and fee simple purchase, and through this process often discovers heretofore unknown contaminated sites, and;

WHEREAS, this discovery of contamination sites may serve to enhance the Department of Environmental Regulation's role in protecting the ground and surface waters of the state, but at the same time the length of time it may take to resolve contamination issues may affect the Department of Transportation's project development process (right-of-way acquisition and/or the transportation construction schedule), and;

WHEREAS, in order to maintain these Transportation project schedules, it may be necessary for the Department of Transportation to act in behalf of the Department of Environmental Regulation to address and resolve contamination issues in a timely manner, and;

WHEREAS, the Legislature, under Chapter 376.305(6), F.S., has determined that any person, including a government entity, which renders assistance in containing or removing any pollutant may be eligible, with prior approval from FDER, for reimbursement of the cost of contaminant removal, except as provided in chapter 376.3071(9) and (12), F.S., and;

WHEREAS, the Department of Environmental Regulation, under the provisions of chapter 376.3071(7), F.S. and Chapter 376.307(5), F.S., has the authority to seek recovery and reimbursement from the person(s) having caused the pollutant discharge;

THEREFORE IT IS HEREBY AGREED

THAT, the Department of Environmental Regulation and the Department of Transportation recognize the benefits to accrue to each agency as a result of this Memorandum of Understanding, and;

THAT, subject to the conditions set forth herein and to any subsequent conditions mutually agreed upon between the two Departments,

THAT, the FDOT will, upon discovery of suspected contamination sites on, or adjacent to, property being acquired for right-of-way, notify the appropriate FDER personnel, and;

THAT, the FDER will make available to the FDOT all records, files and documents which are applicable to the contaminated parcel in question, and;

THAT, the FDOT will, as necessary, seek authority from FDER and will, using FDOT funds, proceed with the applicable steps of Initial Remedial Action, Contamination Assessment, and Remedial Action to the extent required to advance the project according to schedule and to the extent that the final environmental cleanup can be achieved in a timely and cost effective manner, and;

THAT, for any assessment or cleanup undertaken by FDOT pursuant to this Memorandum of Understanding, FDOT shall obtain FDER's written approval and shall undertake the assessment or cleanup in conformance with the applicable requirements of standard Department assessment and cleanup policies including, where appropriate, Chapter 17-70, F.A.C.

THAT, FDOT may begin the resolution of the contamination issue by utilizing a qualified cleanup consultant under contract to FDOT and be entitled to seek reimbursement from the Inland Protection Trust Fund, or through Legislative budget request from the Water Quality Assurance Trust Fund, as appropriate, and;

THAT, FDOT is committed to follow any procedure for reimbursement that is mutually agreeable to both agencies, and;

THAT, FDER will support FDOT Legislative requests for funds from the Water Quality Assurance Trust Fund (WQATF) to the extent appropriations, trust fund balances, and other required commitments as provided in Chapter 376.307(4)(b), F.S. will allow, and;

THAT, FDOT annually will provide to DER estimates of FDOT requirements for reimbursements from the trust funds, and;

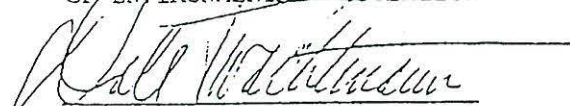
THAT, FDOT will assign staff with the technical skills and other qualifications necessary to independently oversee and manage contamination cleanup activities in order to assure timely and cost effective cleanups, and; .

THAT, the FDER will, to the extent possible, render assistance to the FDOT in evaluating the extent of contamination and providing guidance for additional required action by the FDOT, and;

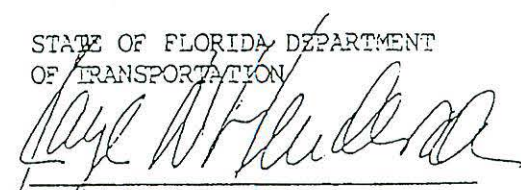
THAT, the FDER will respond in a timely fashion to requests from the FDOT for assistance, and;

THAT, the FDOT will respond in a timely fashion to requests from the FDER for information and assistance.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL REGULATION


Secretary

STATE OF FLORIDA DEPARTMENT
OF TRANSPORTATION


Secretary

Legal Review: 11/18/99

By 
Attorney - DOT

MOU EXHIBIT "B"

MONITORING WELL MAINTENANCE AGREEMENT

This Monitoring Well Maintenance Agreement ("Agreement") is made and entered into by and between the State of Florida Department of Transportation ("Department") and the _____ ("Applicant").

- Recitals -

A. The Department has the authority to enter this Agreement pursuant to Section 334.044, Florida Statutes (2012); and

B. The term "Department Property" shall refer to that certain real property located within the Department's right-of-way, more particularly described in Exhibit "1 " hereto; and

C. Applicant desires to install one or more monitoring wells ("Improvements") within the Department Property, at the location(s) described in Exhibit "2 " hereto, for the purpose of monitoring the presence / absence of certain environmental contaminates; and

D. The Department is amenable to Applicant's request given Applicant's willingness to execute and perform this Agreement; and

E. The Florida Department of Environmental Protection ("FDEP") has encumbered funds for the Applicant's installation of the Improvements, see Exhibit "3 " hereto; and

F. This Agreement is not intended to and shall not alter or amend Department rules, regulations, policies, processes or procedures, including, without limitation, those concerning the permitting, construction, installation and maintenance of improvements within Department right-of-way; and

G. Applicant's undersigned representative is vested with the authority to execute this Agreement on behalf of the Applicant by virtue of (check at least one): the undersigned's position with Applicant; or Applicant's Resolution, a copy of which is attached hereto as Exhibit "4 ".

NOW THEREFORE, with full knowledge and understanding of the laws governing the subject matter of this Agreement, and in consideration of the foregoing recitals and the mutual covenants and conditions contained in this Agreement, the parties acknowledge and agree as follows:

1. RECITALS & EXHIBITS

The recitals set forth above and attached exhibits are incorporated in and made part of this Agreement.

2. EFFECTIVE DATE

The effective date of the Agreement shall be the date the last of the parties to be charged executes the Agreement ("Effective Date").

3. TERM

The initial term of the Agreement shall be for a period of one (1) year from the Effective Date. The Agreement shall automatically renew for successive and continuing like one (1) year terms unless terminated by the Department.

4. E-VERIFY

Applicant shall utilize the U.S. Department of Homeland Security's E-Verify system to verify the employment eligibility of all new employees hired by the Applicant during the term of the Agreement. Applicant shall expressly require any subcontractors performing work or providing services pursuant to the Agreement to likewise utilize the U.S. Department of Homeland Security's E-Verify system to verify the employment eligibility of all new employees hired by the subcontractor during the term of the Agreement.

5. COMPLIANCE

Applicant shall perform this Agreement in a good and workmanlike manner, with reasonable care, in accordance with the terms and provisions hereof and all applicable federal, state, local, administrative,

regulatory, safety and environmental laws, codes, rules, regulations, policies, manuals, procedures, processes, guidelines, standards and permits, as the same may be constituted and amended from time to time, including, without limitation, those of the Department, applicable Water Management District (WMD), Florida Department of Environmental Protection (FDEP), Environmental Protection Agency, Army Corps of Engineers, United States Coast Guard and local governmental entities ("Governmental Law").

6. PERMITS

In the performance of this Agreement, Applicant and other third parties may be required to obtain one or more Department permits which may include copies of the Agreement as an exhibit. Notwithstanding the inclusion or incorporation of the Agreement as part of any such Department permits, the Agreement shall remain separate and apart from such permits and shall not be merged into the same absent the prior written express consent of the Department. Should any term or provision of the Agreement conflict with any term, provision or requirement of any Department permit, the terms and provisions of the Agreement shall control unless specifically noted otherwise in any such Department permit.

7. CONSTRUCTION

A. Applicant shall furnish the Department's _____ Maintenance Engineer ("ME") with four (4) signed and sealed copies of the construction plans and specifications for the Improvements ("Plans & Specifications") prepared by a Florida registered professional engineer, together with a construction schedule ("Construction Schedule") and such other documentation as the Department may require.

B. Applicant shall construct the Improvements in accordance with the terms and provisions of this Agreement, including, without limitation, applicable Governmental Law, Exhibit "5", and the most current edition of the FDEP's Monitoring Well Design and Construction Guidance Manual, as the same may be constituted and amended from time to time.

C. Applicant shall not commence construction of the Improvements until: (1) the ME issues final written approval of the Plans & Specifications and Construction Schedule via issuance of one or more appropriate Department permits; and (2) applicant complies with the "Security Deposit" and "Insurance" sections of this Agreement.

D. Applicant shall not make any changes to the approved Plans & Specifications without the prior written approval of the ME. Changes to the approved Plans & Specifications absent the prior written approval of the ME shall be deemed a material breach of this Agreement.

E. Applicant shall provide the Department with a minimum of seventy-two (72) hours prior written notice of its intent to commence construction of the Improvements.

F. Applicant shall complete construction of the Improvements in accordance with the Construction Schedule and shall provide the Department's ME with written notice of completion of construction of the Improvements, including, final as-built plans and an engineering certificate that construction was completed in accordance with the Plans & Specifications. Thereafter, the ME, or designee, shall perform a final inspection. If the construction is in compliance with the Plans & Specifications and applicable Governmental Law, the Department shall issue a final acceptance letter ("Final Acceptance"). In determining compliance with applicable Governmental Law, the Department may defer to the appropriate local, state, federal, administrative, regulatory or environmental entity. The Department shall notify Applicant in writing if the construction is deficient or not in compliance with the Plans & Specifications and applicable Governmental Law. The Department shall not issue its Final Acceptance until the deficiency / non-compliance is corrected. Applicant shall not utilize the Improvements until such time as the Department issues its Final Acceptance.

G. The approved Plans & Specifications, Construction Schedule, final as-built plans and engineering certificate are incorporated herein and made part of this Agreement by reference.

8. OPERATION, MAINTENANCE & REPAIR

A. The Applicant shall operate, maintain and repair the Improvements at its sole cost and expense, in a good and workmanlike manner, with reasonable care, in accordance with the terms and provisions of this Agreement, including applicable Governmental Law. No term or provision of this Agreement shall obligate the Department to operate, maintain or repair the Improvements, said obligations to remain the sole responsibility of the Applicant.

B. If the Department determines that the Applicant is not operating, maintaining and repairing the Improvements in accordance with the terms and provisions of this Agreement, the Department shall deliver written notification of such to the Applicant. The Applicant shall have thirty (30) days from the date of the Department's written notice, or such other time as the Department and the Applicant mutually agree in writing, to correct the deficiency and provide the Department with written notice of the same.

C. If the Department determines that the deficiency remains after receipt of the notice, the Department, within its sole discretion, may select one or more of the following remedies: (1) provide the Applicant with written authorization granting such additional time as the Department deems appropriate to correct the deficiency; (2) correct the deficiency at the Applicant's sole cost and expense; or (3) require removal of the Improvements in accordance with the "Removal" Section of this Agreement. Should the Department elect to correct the deficiency, the Department shall provide the Applicant with an invoice for the costs incurred by the Department to correct the deficiency and the Applicant shall pay the invoice in accordance with the "Payment" section of this Agreement.

D. If at any time in the sole determination of the Department, the integrity or safety of the Improvements requires immediate maintenance or repair of the Improvements for the benefit of public health, safety or welfare, the Department may perform such maintenance and repairs it deems appropriate under the circumstances. The Department shall provide the Applicant with an invoice for the emergency maintenance and repairs performed by the Department and the Applicant shall pay the invoice in accordance with the "Payment" section of this Agreement.

9. UTILITIES

The Department shall not be responsible for locating, removing or relocating utilities. The Applicant shall bear the sole cost, expense and responsibility of locating, removing and relocating utilities, both aerial and underground, that lie within the Department Property, if required for the Applicant to perform this Agreement. The Applicant shall ensure all utility locations are accurately documented on the Plans & Specifications. All utility conflicts shall be resolved by the Applicant directly with the applicable utility.

10. MAINTENANCE OF TRAFFIC

A. The Applicant shall be responsible for the maintenance of traffic ("MOT") at all times during its performance of this Agreement. MOT shall be performed in accordance with applicable Governmental Law and the most current edition of each of the following, as the same may be constituted and amended from time to time, all of which are incorporated herein and made part of the Agreement by reference: (1) Section 102 of the Department's Standard Specifications for Road and Bridge Construction; (2) the MUTCD; and (3) the Department's Roadway Design Standards Index 600 Series.

B. If the Applicant fails to perform MOT as required herein, the Department, within its discretion, may elect to perform MOT at the Applicant's sole cost and expense. Should the Department perform MOT, the Department shall provide the Applicant with an invoice for the costs incurred by the Department and the Applicant shall pay the invoice in accordance with the "Payment" section of this Agreement.

11. REMOVAL & TERMINATION

A. The Department may require the removal of the Improvements, or any portion of the Improvements, and restoration of the Department Property without liability to the Department if: (1) the Improvements are not constructed or maintained in accordance with the terms and provisions of this Agreement; (2) removal of the Improvements is required by applicable Governmental Law; (3) the Department notifies Applicant that it intends to terminate the Agreement; (4) the Applicant no longer utilizes the Improvements; or (5) if in the Department's determination removal of the Improvements is necessary for the conduct of the Department's business.

B. Applicant shall remove the Improvements, or portions thereof designated by the Department for removal, and shall restore the Department Property to a condition: (1) that existed immediately prior to the Effective Date of this Agreement as reasonably determined by the Department; and (2) that satisfies the requirements of applicable Governmental Law. Removal and restoration shall be completed within forty-five (45) days of the Department's written notice requiring removal.

C. Should the Applicant fail to complete the removal and restorative work as required herein, the Department may: (1) provide the Applicant with written authorization granting such additional time as the Department deems appropriate to complete the removal and restoration; or (2) complete the removal and restoration at the Applicant's sole cost and expense. Should the Department elect to complete the removal and restoration, the Department shall provide the Applicant with an invoice for the costs incurred

by the Department and the Applicant shall pay the invoice in accordance with the "Payment" section of this Agreement.

D. In the event of any default by Applicant under this Agreement which is not cured within any applicable cure period in this Agreement, the Department may apply all or part of the Security Deposit to cure such default.

12. ACCESS / PERMISSIVE USE

A. This Agreement creates a permissive use only. The granting of the permission to use the Department Property to construct, operate and maintain the Improvements shall not operate to create or vest any property right in or to the Applicant. The Applicant shall not acquire any right, title, interest or estate in the Department Property by virtue of the execution, operation, effect, performance or breach of this Agreement.

B. Applicant shall have the limited right to enter only those portions of the Department Property necessary for Applicant to perform this Agreement.

C. This Agreement is not intended to, and shall not, prohibit, limit or interfere with the Department's right to access or use the Department Property in any manner not inconsistent with the provisions of this Agreement.

13. PAYMENT

All Department invoices submitted to Applicant for payment pursuant to the terms and provisions of this Agreement are due and payable within thirty (30) days of the date of the invoice ("Due Date"). Any portion of an invoice not received by the Department by the Due Date shall immediately thereafter begin accruing interest at a rate of interest established pursuant to §55.03, Florida Statutes, until paid in full.

14. INSURANCE

A. Prior to the commencement of construction of the Improvements, Applicant shall procure and maintain a commercial general liability insurance policy, specifically naming the Department as an additional insured and insuring the Department and Applicant against any and all claims for injury or damage to persons and property, and for the loss of life or property, that may occur (directly or indirectly) by reason of the performance or breach of this Agreement. Such insurance shall be carried in a minimum amount of not less than Five Hundred Thousand and No/100 Dollars (\$500,000.00) for bodily injury or death to any one person or any number of persons in any one occurrence, and not less than Five Hundred Thousand and No/100 Dollars (\$500,000.00) for property damage, or a combined coverage of not less than one million dollars (\$1,000,000.00).

B. Applicant shall continuously maintain each policy of insurance required by this Agreement in full force and effect during each term of this Agreement. Each policy of insurance required by this Agreement shall be issued by a company licensed to do business in the State of Florida. If during any term of this Agreement any insurance carrier provides notice to either party of its intent to cancel any of the required insurance policies, or not renew any of the required insurance policies, Applicant shall, prior to the earlier of expiration of the existing term or the effective date of cancellation, secure replacement insurance satisfying the requirements of this Agreement.

C. On such occasions as the Department reasonably requests, Applicant shall provide the Department with certificates and other documents requested by the Department evidencing that the required insurance is in place and effective.

15. EMINENT DOMAIN AND DAMAGES

Under no circumstances shall the Department's exercise of any right provided in the Agreement, including, without limitation, termination of the Agreement or removal the Improvements, or any portion of the Improvements, create any right, title, interest or estate entitling the Applicant to full and just compensation from the Department either through inverse condemnation or eminent domain laws or any similar laws regarding the taking of property for public purposes ("Eminent Domain Law"). The Applicant forever waives and relinquishes all legal rights and monetary claims which it has, or which may arise in the future, for compensation or damages, including, without limitation, special damages, severance damages, removal costs, and loss of business profits resulting in any manner from the Department's exercise of any right provided in this Agreement. This waiver and relinquishment specifically includes all damages flowing from adjacent properties owned, leased or otherwise controlled by the Applicant, as a result of the Department's exercise of any right provided in this Agreement.

16. INDEMNIFICATION

A. The Applicant shall promptly defend, indemnify, hold the Department harmless from and pay all demands, claims, judgments, liabilities, damages, fines, fees, taxes, assessments, costs, losses, penalties, construction delay costs / penalties, expenses, attorneys' fees and suits of any nature or kind whatsoever caused by or resulting from Applicant's performance or breach of this Agreement ("Liabilities"). The term "Liabilities" shall also specifically include all civil and criminal environmental liability arising, directly or indirectly under any Governmental Law, including, without limitation, liability under the Resource Conservation and Recovery Act ("RCRA"), the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), the Clean Air Act ("CAA") and the Clean Water Act ("CWA"). Applicant's obligations under this section include, at the Department's option, to participate and associate with the Department in settlement negotiations, mediation and the defense and trial of any Liabilities. The Applicant's duties under this section of the Agreement specifically do not encompass indemnifying the Department for its negligence, intentional or wrongful acts, omissions or breach of contract.

B. The Applicant shall notify the Department in writing immediately upon becoming aware of any Liabilities. Applicant's obligations under this section shall be triggered by the Department's written notice of claim for indemnification to Applicant. Applicant's inability to evaluate liability, or its evaluation of liability, shall not excuse performance of the provisions of this section of the Agreement.

17. SOVEREIGN IMMUNITY & LIMITATION OF LIABILITY

Nothing in this Agreement shall be deemed or otherwise interpreted as waiving the Department's sovereign immunity protections, or as increasing the limits of liability set forth in §768.28, Florida Statutes, as the same may be amended from time to time. The Department's liability for breach of this Agreement is specifically: (1) limited to actual damages incurred by Applicant as a direct result of the Department's breach; and (2) further limited in amount and shall not, under any circumstances, exceed the limitations of liability for tort actions set forth in §768.28(5), Fla. Stat. (2012).

18. DUE DILIGENCE & WARRANTIES

A. Any and all due diligence requirements related to the Applicant's negotiation, execution and performance of this Agreement are the sole responsibility of the Applicant.

B. The Department makes no representations or warranties of any kind, express or implied, concerning the Department Property, including, without limitation, representations and warranties concerning: (1) the physical condition of the property; (2) compliance with local ordinances and zoning laws; (3) compliance with Governmental Law; or (4) merchantability or fitness for a particular purpose.

19. NOTICE

All notices, communications and determinations between the parties hereto and those required by the Agreement, including, without limitation, changes to the notification addresses set forth below, shall be in writing and shall be sufficient if mailed by regular United States Mail, postage prepaid, to the parties at the following addresses:

Department: Florida Department of Transportation
Attention: _____ Maintenance Engineer

Applicant: _____

20. GOVERNING LAW

This Agreement shall be governed in all respect by the laws of the State of Florida.

21. INITIAL DETERMINATION OF DISPUTES

The Department's District Two Secretary ("District Secretary") shall act as the initial arbiter of all questions, difficulties, and disputes concerning the interpretation, validity, performance or breach of the Agreement.

22. VENUE AND JURISDICTION

A. Venue for any and all actions arising out of or in any way related to the interpretation, validity, performance or breach of the Agreement that are not resolved to the mutual satisfaction of the parties by the Department's District Secretary shall lie exclusively in a state court of appropriate jurisdiction in Leon County, Florida.

B. Applicant and all persons and entities accepting an assignment or assumption of this Agreement, in whole or in part, shall be deemed as having consented to personal jurisdiction in the State of Florida and as having forever waived and relinquished all personal jurisdiction defenses with respect to any proceeding related to the interpretation, validity, performance or breach of this Agreement.

23. JURY TRIAL

The parties hereby waive the right to trial by jury of any dispute concerning the interpretation, validity, performance or breach of the Agreement, including, without limitation, damages allegedly flowing therefrom.

24. ASSIGNMENT

Applicant shall not assign, pledge or transfer any of the rights, duties and obligations provided in this Agreement without the prior written consent of the Department's District Secretary or his/her designee. The Department has the sole discretion and authority to grant or deny proposed assignments of this Agreement, with or without cause. Nothing herein shall prevent the Applicant from delegating its duties hereunder, but such delegation shall not release the Applicant from its obligation to perform the Agreement.

25. THIRD PARTY BENEFICIARIES

This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns. Nothing in this Agreement is intended to confer any rights, privileges, benefits, obligations or remedies upon any other person or entity except as expressly provided for herein.

26. VOLUNTARY EXECUTION OF AGREEMENT

Each party warrants and represents to the other: (i) that it understands all of the rights and obligations set forth in the Agreement and the Agreement accurately reflects the desires of said party; (ii) each provision of the Agreement has been negotiated fairly at arm's length; (iii) it fully understands the advantages and disadvantages of the Agreement and executes the Agreement freely and voluntarily of its own accord and not as a result of any duress, coercion, or undue influence; and (iv) it had the opportunity to have independent legal advice by counsel of its own choosing in the negotiation and execution of the Agreement.

27. ENTIRE AGREEMENT

This instrument, together with any exhibits and documents made part hereof by reference, contains the entire agreement of the parties and no representations or promises have been made except those that are specifically set out in the Agreement. All prior and contemporaneous conversations, negotiations, possible and alleged agreements and representations, covenants, and warranties with respect to the subject matter of the Agreement, and any part hereof, are waived, merged herein and superseded hereby.

28. EXECUTION OF DOCUMENTS

The parties agree that they shall promptly execute and deliver to the other all documents necessary to accomplish the intent and purpose of the Agreement and shall do all other acts to effectuate the Agreement.

29. SUFFICIENCY OF CONSIDERATION

By their signature below, the parties hereby acknowledge the receipt, adequacy and sufficiency of consideration provided in the Agreement and forever waive the right to object to or otherwise challenge the same.

30. WAIVER

The failure of either party to insist on the strict performance or compliance with any term or provision of the Agreement on one or more occasions shall not constitute a waiver or relinquishment thereof and all such terms and provisions shall remain in full force and effect unless waived or relinquished in writing.

31. INTERPRETATION

No term or provision of the Agreement shall be interpreted for or against any party because that party or that party's legal representative drafted the provision.

32. CAPTIONS

Paragraph title or captions contained herein are inserted as a matter of convenience and reference and in no way define, limit, extend or describe the scope of the Agreement, or any provision hereof.

33. SEVERANCE

If any section, paragraph, clause or provision of the Agreement is adjudged by a court, agency or authority of competent jurisdiction to be invalid, illegal or otherwise unenforceable, all remaining parts of the Agreement shall remain in full force and effect and the parties shall be bound thereby so long as principle purposes of the Agreement remain enforceable.

34. COMPUTATION OF TIME

In computing any period of time prescribed in the Agreement, the day of the act, event or default from which the designated period of time begins to run, shall not be included. The last day of the period shall be included unless it is a Saturday, Sunday or legal holiday, in which event the period shall run until the end of the next day which is not a Saturday, Sunday or legal holiday.

35. MODIFICATION OF AGREEMENT

A modification or waiver of any of the provisions of the Agreement shall be effective only if made in writing and executed with the same formality as the Agreement.

IN WITNESS WHEREOF, intending to be legally bound hereby, the parties hereby execute this Agreement, consisting of seven (7) pages, excluding content of the attached exhibits.

-Signatures to Follow-

Florida Department of Transportation

Attest:

By: _____

By: _____

Printed Name: _____

Printed Name: _____

Title: _____

Title: _____

Date: _____

Date: _____

Legal Review:

By: _____

Office of the General Counsel
Florida Department of Transportation

Applicant

Attest:

By: _____

By: _____

Printed Name: _____

Printed Name: _____

Title: _____

Title: _____

Date: _____

Date: _____

Exhibit "5"

(Right of Way Safety- Monitoring Well Construction Requirements)

Applicant shall construct the monitoring well(s) in compliance with the most current addition of Florida Department of Environmental Protection Monitoring Well Design and Construction Guidance Manual and the Department's safety requirements below:

- (1) All construction shall comply with the Department's NPDES permit requirements, specifically during construction the Applicant shall not discharge into the Department's stormwater system or the Department Property; and
- (2) All concrete wellheads shall be at least three (3) square feet in surface area and a minimum of six (6) inches in depth thickness; and
- (3) the top of wellhead and the surrounding concrete shall not extend above surrounding ground surface and shall not interfere with pedestrians or the Department's operation of maintenance equipment; and
- (4) The well location(s) shall be provided to the Department as GPS coordinates.