# Indemnification Agreement

**This Indemnification Agreement** ("Agreement") is made and entered into by and between the State of Florida Department of Transportation (“FDOT”) and \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (“Facility Owner”).

**Recitals:**

1. The FDOT owns State Road \_\_\_\_, also known as \_\_\_\_\_\_\_\_\_\_\_, in \_\_\_\_\_\_\_ Florida, as more particularly described in the attached Exhibit “A” (“FDOT Property”); and
2. The Facility Owner owns certain real property, the \_\_\_\_\_\_, FDEP BF \_\_\_\_\_\_\_ Facility Id. \_\_\_\_\_\_\_\_\_\_, located at \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, Folio # \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, as more particularly described in Exhibit “B” hereto \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_”), which is adjacent to the FDOT Property; and
3. A portion of the \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (“Site”) is contaminated with petroleum pollutants, including without limitation, \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ groundwater (and soil, if true) contamination (hereinafter collectively referred to as “contamination”), and such contamination has migrated from the Site into a portion of the FDOT Property (“Transportation Facility”); and
4. The State of Florida Department of Environmental Protection (“FDEP”) and the FDOT have entered into a Memorandum of Understanding (“MOU”), with an effective date of June 16, 2014, which addresses a procedure for a “No Further Action” or a “Site Rehabilitation Completion Order” (collectively, “closure”) on a property from which contamination has discharged onto a state transportation facility; the contamination arising from the Site discharged to and is located within the Transportation Facility is eligible for consideration under the provisions of the MOU; and
5. The FDEP has determined the party responsible for the contamination is the Facility Owner, and in accordance with the provisions of the MOU, the Facility Owner submitted a proposal to the FDEP for a determination that the Site qualifies for a Site Rehabilitation Closure Order (SRCO); and
6. FDEP has determined that the \_\_\_\_\_\_\_\_\_\_\_ Property qualifies for a SRCO, and has requested FDOT place a map note on its right of way map showing the location of the Site’s contamination within the Transportation Facility, see attached Exhibit C (“Map Note”); and
7. A condition of the MOU is that a request for a Map Note requires the Facility Owner to enter into an agreement with FDOT to indemnify and hold the FDOT harmless for any damage that may occur to the Transportation Facility; and
8. Section 337.27(4), Fla. Stat., exempts the FDOT from remediating soil and groundwater contamination unless the FDOT creates or exacerbates the pollution source; and
9. If the discharge occurred after the FDOT acquired the right of way, then the FDOT is not liable according to subsection 376.308(1)(c), Fla. Stat., as the FDOT is not a facility owner and did not cause or contribute to the discharge; See the Division of Administrative Hearings Case 97-4411 Parker v. D.E.P., 99 ER FALR 43 (1998); and
10. In order to comply with the Map Note requirements under the MOU, the Facility Owner has agreed to indemnify and hold the FDOT harmless for any damage that may occur to the Transportation Facility as a result of the contamination in exchange for the FDOT accepting the Map Note on its Right of Way Map.

**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, intending to be legally bound hereby, acknowledge and agree as follows:

* 1. **RECITALS & EXHIBITS**

The recitals set forth above and Exhibits attached hereto are specifically incorporated herein by reference and made part of this Agreement.

1. **SUFFICIENCY OF CONSIDERATION**

In exchange for the FDOT agreeing to submit the Acknowledgment Letter pursuant to FDEP’s request for the Map Note, the Facility Owner does hereby agree to indemnify the FDOT for any damage that may occur to the Transportation Facility as a result of the contamination as FURTHER set forth in this Agreement. By their signature below, the parties hereby acknowledge the receipt, adequacy and sufficiency of consideration provided in this Agreement and forever waive the right to object to or otherwise challenge the same.

1. **EFFECTIVE DATE**

The effective date of this Agreement shall be the date the last of the parties executes the Agreement (“Effective Date”).

1. **RESPONSIBLE PARTY**

The Facility Owner acknowledges and agrees that:

* 1. the Facility Owner is the party responsible for the contamination within the Map Note area; and
	2. the FDOT is not the discharger and did not cause or contribute to the contamination within the Transportation Facility.
1. **MAP NOTE AREA CONDITIONS**

Notwithstanding any other provision of this Agreement, the Facility Owner acknowledges and agrees that, in the event that, if the Facility Owner is required to undertake any task, work, or activity within the Map Note Area, the Facility Owner shall:

* + 1. perform any such activity or task 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, procedures, guidelines, standards and permits, as the same may be constituted and amended from time to time, including, without limitation, those of the FDOT, applicable Water Management District, Florida Department of Environmental Protection, Environmental Protection Agency, Army Corps of Engineers, United States Coast Guard and local governmental entities (“Federal, State, and Local Rules and Regulations”); and
		2. request access from the FDOT to the Map Note Area, which approval shall be at FDOT’s sole discretion and may require an FDOT permit, Construction Agreement or other authorization. It is understood and agreed that the issuance of any such permit or other approval for access to the Map Note Area is not in any way construed to waive or modify the indemnification provision of this Agreement.
1. **EMINENT DOMAIN AND DAMAGES**

Under no circumstances shall the FDOT’s exercise of any right provided in the Agreement, including, without limitation, termination of the Agreement create any right, title, interest or estate entitling the Facility Owner to full and just compensation from the FDOT either through inverse condemnation or eminent domain laws or any similar laws regarding the taking of property for public purposes (“Eminent Domain Law”). The Facility Owner 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 FDOT’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 Facility Owner, as a result of the FDOT’s exercise of any right provided in this Agreement.

1. **INDEMNIFICATION**
	* 1. The Facility Owner does hereby agree to defend, indemnify, and hold the FDOT harmless from, and pay for, all demands, claims, judgments, liabilities, damages, fines, fees, taxes, assessments, penalties, costs, expenses, attorneys’ fees and suits of any nature or kind whatsoever resulting from the contamination, and, and/or for any acts or omissions of the Facility Owner resulting in any damage to the Transportation Facility (“Liabilities”). The term “Liabilities” also specifically includes, without limitation, all civil and criminal environmental liability, including, without limitation, liability under any Federal, State, and Local Rules and Regulations. This indemnification provision is not limited to third party claims, but specifically includes reimbursement of any Liabilities incurred by the FDOT.
		2. The Facility Owner’s duty to defend, indemnify and hold the FDOT harmless from Liabilities specifically does not encompass indemnifying the FDOT for its negligence, intentional or wrongful acts, omissions or breach of contract.
		3. The Facility Owner shall notify the FDOT in writing immediately upon becoming aware of any Liabilities. The Facility Owner’s obligation to defend, indemnify and hold the FDOT harmless from any Liabilities, or at the FDOT's option to participate and associate with the FDOT in the defense and trial of any Liabilities, including any related settlement negotiations, shall be triggered by the FDOT's written notice of claim for indemnification to the Facility Owner. The Facility Owner’s inability to evaluate liability, or its evaluation of liability, shall not excuse performance of the provisions of this paragraph.
2. **SOVEREIGN IMMUNITY & LIMITATION OF LIABILITY**
	* 1. Nothing in this Agreement shall be deemed or otherwise interpreted as waiving the FDOT’s sovereign immunity protections, or as increasing the limits of liability set forth in §768.28, Fla. Stat. (2016). The FDOT’s liability for breach of this Agreement is specifically: (1) limited to actual damages incurred by the Facility Owner as a direct result of the FDOT’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. (2016).
		2. Nothing in this Agreement shall be deemed or otherwise interpreted as waiving the FDOT’s sovereign immunity protections, or increasing the limits of liability set forth in Florida Law §337.27(4) Florida Statutes (2016) as the same may be amended from time to time.
3. **COVENANT RUNNING WITH THE LAND**
	* 1. This Agreement shall constitute a covenant running with the land, in favor of FDOT, its successors and/or assigns, burdening the Tenneco Property, and shall remain in full force and effect and be binding on the Facility Owner, its assigns and successors in title, until such time as this Agreement has been modified, cancelled or terminated by instrument duly executed by FDOT, its successors and/or assigns, with the same formality as this Agreement, and recorded in the Miami-Dade County Public Records.
		2. Any request to modify, terminate or cancel this Agreement shall include the following: (1) analytical results demonstrating that the contamination has satisfied all applicable regulatory standards; (2) FDEP written determination that the Map Note may be removed from the FDOT right of way maps; and (3) any such other documentation as the FDOT may require. The FDOT shall review such request submittals and determine, in its sole discretion, whether FDOT shall cancel or terminate this Agreement.
		3. It is understood and agreed that the transfer or conveyance of all or any portion of the Tenneco Facility shall not relieve the transferor from any liability accruing during the transferor’s ownership thereof.
4. **NOTICE**

All notices, communications and determinations between the parties hereto and those required by this 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:

FDOT: Florida Department of Transportation

 Attention: District Secretary, District \_\_

 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 \_\_\_\_\_\_\_\_\_\_\_, FL \_\_\_\_\_\_\_\_\_\_\_\_

Copy to: Florida Department of Transportation

 Attention: Right of Way

 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 \_\_\_\_\_\_\_\_\_\_, FL \_\_\_\_\_\_\_\_\_\_

Copy to: Florida Department of Transportation

 Attention: Chief Counsel

 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 \_\_\_\_\_\_\_\_\_\_, FL \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Facility Owner: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 \_\_\_\_\_\_\_\_\_\_\_, FL \_\_\_\_\_\_\_\_\_\_\_\_\_

Copy to: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 \_\_\_\_\_\_\_\_\_\_, FL \_\_\_\_\_\_\_\_\_\_\_\_\_\_

1. **GOVERNING LAW**

This Agreement shall be governed by the laws of the State of Florida in terms of interpretation and performance.

1. **INITIAL DETERMINATION OF DISPUTES**

The FDOT’s District \_\_\_\_\_\_\_\_\_ Secretary (“District Secretary”) or designee shall decide all questions, difficulties, and disputes concerning the interpretation, validity, performance or breach that may arise under or by reason of this Agreement.

1. **VENUE AND JURISDICTION**
	* 1. Venue for any and all actions arising out of or in any way related to the interpretation, validity, performance or breach of this Agreement shall lie exclusively in a state court of appropriate jurisdiction in Leon County, Florida.
		2. The Facility Owner and all persons and entities claiming by or through the Facility Owner, including the Facility Owner’ successors in title in whole or in part, to the \_\_\_\_\_\_\_\_\_\_\_\_\_ Property, 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 and the subject matter thereof.
2. **JURY TRIAL**

The parties hereby waive the right to trial by jury of any dispute concerning the validity, interpretation, performance or breach of this Agreement.

1. **ASSIGNMENT**

The Facility Owner, its successors and/or assigns in title (collectively, “Property Owner”), may not assign or transfer any duties and obligations provided in this Agreement absent the prior written consent of the FDOT’s District Secretary or his/her designee. FDOT has the sole discretion and authority to grant or deny proposed assignments, with or without cause.

1. **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.

1. **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 this Agreement and the Agreement accurately reflects the desires of said party; (ii) each provision of this Agreement has been negotiated fairly at arm’s length; (iii) it fully understands the advantages and disadvantages of this Agreement and executes this 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 this Agreement.

1. **ENTIRE AGREEMENT**

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

1. **WAIVER**

The failure of either party to insist on the strict performance or compliance with any term or provision of this 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.

1. **INTERPRETATION**

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

1. **CAPTIONS**

Paragraph titles 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 this Agreement or any provision hereof.

1. **SEVERANCE**

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

1. **RECORDATION**

This Agreement shall be recorded in the Public Records of Miami-Dade County, Florida.

1. **PUBLIC RECORDS**
	* 1. The Facility Owner shall allow public access to all documents, papers, letters, or other material subject to the provisions of Chapter 119, Florida Statutes, and made or received by the Facility Owner in conjunction with this Agreement.
		2. Specifically, the Facility Owner shall:
			1. keep and maintain public records that ordinarily and necessarily would be required by the Department in order to perform the services being performed by the Facility Owner; and
			2. upon request from the Department, provide the Department with a copy of the requested records or allow the records to be inspected or copied within a reasonable time at a cost that does not exceed the cost provided in chapter 119, Florida Statutes, or as otherwise provided by law; and
			3. ensure that public records that are exempt or confidential and exempt from public records disclosure requirements are not disclosed except as authorized by law for the duration of this agreements term and following completion of this agreement if the Facility Owner does not transfer the records to the Department; and
			4. upon completion of this Agreement, transfer, at no cost, to the Department all public records in possession of the Facility Owner upon termination of this Agreement and destroy any duplicate public records that are exempt or confidential and exempt from public records disclosure requirements.
		3. All records stored electronically must be provided to the Department in a format that is compatible with the information technology systems of the Department.

Signatures on following pages

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**By\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

 **Witnesses:**

By: By:

Printed Name: Printed Name:

Title: By:

Date: Printed Name:

By:

Printed Name:

Title:

Date:

**Legal Review:**

By:

Name:

STATE OF FLORIDA

COUNTY OF

The foregoing instrument was acknowledged before me this day of , 2016, by , □ who is personally known to me, or □ who produced as identification, who took an oath.

Signatures continue on following page

**Florida Department of Transportation Witness:**

By: By:

Printed Name: Printed Name:

Title: District Secretary District

Date: **Witness:**

By:

Printed Name:

**Legal Review:**

By:

Office of the General Counsel

Florida Department of Transportation

STATE OF FLORIDA

COUNTY OF COUNTY

The foregoing instrument was acknowledged before me this day of , 2016, by , District Secretary District , who is personally known to me.