

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding ("MOU") is by and between the State of Florida Department of Environmental Protection ("FDEP") and the State of Florida Department of Transportation ("FDOT"). The purpose of this MOU is to memorialize the partnership between FDEP and FDOT for addressing discharges of petroleum pollutants from off-site source properties to state transportation facilities.

FDEP acknowledges that FDOT invests in world class transportation projects which enable Florida to be a global hub for trade and commerce and provide employment and economic benefits for the State of Florida. To this effect, and depending on the availability of funds in the Inland Petroleum Trust Fund or other approved trust fund authorized by law, FDEP has offered to prioritize for assessment and, where warranted, remediation, petroleum pollutants (defined in the MOU) emanating from a discharge located in a discharger's ("discharger") trust fund-eligible source property ("source property") into, onto or under transportation facilities, in advance of regionally economically significant transportation projects such as major future corridor expansions, Statewide Corridors, or Designated Strategic Intermodal System (SIS) Highway Corridor or other significant projects of mutual agreement.

Additionally, FDEP has determined there may be circumstances when a discharger's petroleum pollutants satisfy FDEP requirements for a risk based corrective action no further action (NFA) or a Site Rehabilitation Completion Order (SRCO) and are not a risk to the human health, public safety, the users or occupants of the transportation facility, or the environment and such discharges will naturally attenuate. FDEP has requested FDOT's assistance in establishing a procedure for the discharger who cannot readily access or remediate its petroleum pollutants that have spilled upon or migrated from the discharger's source property to FDOT's transportation facility. Such procedure would require a discharger to petition FDEP to request a note on the FDOT right of way map ("map note") showing the location of the petroleum pollutants in the transportation facility. Pursuant to section 376.305(4), Fla. Stat., the FDOT and any third party voluntarily containing or removing the discharger's petroleum pollutants from the transportation facility is immune from liability in rendering such assistance. FDEP has determined a map note would provide an additional reference and assist any party working in the transportation facility in performing its due diligence prior to commencing work. FDEP has determined that the map note and recordation as described in Section 6 satisfies the multi-layered approach for an alternative institutional control.

RECITALS

A. Section 403.061(21), Fla. Stat. (2013), authorizes FDEP and section 334.044(7), Fla. Stat. (2013), authorizes FDOT to enter into this MOU; and

B. FDEP and FDOT recognize that petroleum pollutants present in soil and groundwater are potentially detrimental to the public health and the environment; and

C. For the purpose of this MOU the phrase "petroleum pollutants" includes oil of any kind and in any form, natural gas, liquid fuel commodity made from petroleum, including all forms of fuel known or sold as diesel fuel, kerosene, all forms of fuel known or sold as gasoline, and fuels containing a mixture of gasoline and other products and derivatives thereof, excluding liquefied petroleum gas; and

D. For the purpose of this MOU, the term “discharge” includes but is not limited to, any spilling, leaking, seeping, misapplying, pouring, emitting, emptying, releasing or dumping of any petroleum pollutant which occurs and which affects the transportation facility; and “discharger” means the responsible party who has control, dominion, or responsibility over the petroleum or petroleum products at the time of the discharge into the environment; and

E. The “right-of-way” (“ROW”) is land in which FDOT owns the fee or has an easement devoted to or required for use as a transportation facility, section 334.03(21), Fla. Stat. (2013); and

F. A “transportation facility” is any means for the transportation of people or property from place to place which is constructed, operated, or maintained in whole or in part with public funds ...including property or property rights, real and personal, which have been or may be established by public bodies for the transportation of people or property from place to place, section 334.03(30), Fla. Stat. (2013);

G. A “road” is a way open to travel by the public, including, but not limited to, a street, highway, or alley including associated sidewalks, the roadbed, the right-of-way, and all culverts, drains, sluices, ditches, water storage areas, waterways, embankments, slopes, retaining walls, bridges, tunnels, and viaducts necessary for the maintenance of travel and all ferries used in connection therewith, section 334.03(22), Fla. Stat (2013); and

H. The “roadway” is the portion of a highway improved, designed, or ordinarily used for vehicular travel, exclusive of the berm or shoulder. In the event a highway includes two or more separate roadways, the term “roadway” as used herein refers to any such roadway separately, but not to all such roadways collectively, section 316.003(42), Fla. Stat. (2013); and

I. The FDOT may not sell a property interest in land which the FDOT has determined it needs for the construction, operation, and maintenance of FDOT’s transportation facility, see 337.25(4), Fla. Stat. (2013);

J. FDOT has the duty to plan proposed transportation facilities and to construct, maintain, and operate such facilities, section 334.044(13), Fla. Stat. (2013); and FDOT permits third party work within the transportation facilities, sections 334.044(13), (14), and (15), and section 337.406, Fla. Stat. (2013);

K. FDEP’s rules and regulations govern the actions taken in response to the discovery of polluted soil and water, see sections 376.30701, 376.3071(5)(b), 376.3078(4), and 376.81, Fla. Stat. (2013); and FDEP is authorized to require the investigation, removal, disposal, and risk-based management of pollutants throughout Florida, see section 376.305(1), Fla. Stat. (2013); and

L. If any person discharging pollutants fails to immediately undertake to contain, remove, and abate the discharge then the FDEP may undertake the removal of the discharge; see section 376.09 Fla. Stat. (2013); FDEP is empowered to keep an accurate record of the costs and expenses incurred for the removal of prohibited discharges, diligently pursue the recovery of any sums from the person responsible, and bring an action to enforce the liabilities caused by a discharge, sections 376.30-376.317; and

M. FDOT is immune from any liability for rendering assistance in containing or removing any petroleum pollutant discharged or spilled on the transportation facility; see section 376.305(4),

Fla. Stat.; and FDOT is exempted from any liability imposed by Chapter 376 or 403, Fla. Stat., for pre-existing soil or groundwater petroleum pollutants due solely to FDOT's ownership of the transportation facility, see section 337.27(4), Fla. Stat. (2013); and

N. Section 335.10(3), Fla. Stat. (2013), imposes civil liability on any person by reason of his or her wrongful act who causes actual damage to FDOT roads; and section 376.205, Fla. Stat. (2013), authorizes the FDOT to bring a cause of action against a responsible party for damages resulting from spills and discharges; and

O. FDEP has determined that a discharge of petroleum pollutants within the transportation facility that meets the requirements of a risk based closure no further action (NFA) may present a minimal risk to FDOT, third parties working in the transportation facility, the traveling public, and adjacent property owners; and FDEP has determined a map note showing the location of the discharger's petroleum pollutants will provide an additional resource for any party performing its due diligence prior to working in the transportation facility; and

P. For the purpose of this MOU, the term "map note" shall mean a notation placed upon a ROW map showing the horizontal and vertical location of the discharger's petroleum pollutants and its quantity in applicable regulatory units; and

Q. For the purpose of this MOU, the term "governmental law" includes all applicable federal, state, local, administrative, regulatory, safety, and environmental laws, codes, rules, regulations, policies, procedures, guidelines, standards, specifications, 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, FDEP, Occupational Health and Safety Administration (OSHA), Environmental Protection Agency, Army Corps of Engineers, United States Coast Guard, and local governmental entities; and

R. This MOU shall not modify or change Florida Statutes, FDEP rules, or FDOT rules and is limited to the scope outlined in this MOU; and

S. FDEP and 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").

3. FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION FUNDS

A. FDEP acknowledges that FDOT transportation projects are important for Florida's employment and economic benefits. When a discharger discharges petroleum pollutants into, onto or under a transportation facility such discharges impact transportation facilities and future transportation projects. FDEP agrees such petroleum pollutant impacts to transportation facilities should be minimized; therefore, when the FDOT plans a project in the transportation facility where a

discharger's petroleum pollutants are located, the FDOT may request FDEP prioritize FDEP's remediation of the discharger's petroleum pollutants in the transportation facilities in advance of the FDOT work, regardless of the source property priority score. FDEP shall prioritize and remediate the discharger's petroleum pollutants within the transportation facilities subject to funding and statutory authority.

B. If FDEP, for reasons that may impede it from doing so such as trust fund availability, does not assess or, where warranted, remediate the petroleum pollutants in advance of FDOT transportation projects described in the introduction, the FDOT may assess and remediate such petroleum pollutants within the transportation facility. In these cases, the FDOT may request FDEP provide funding and/or reimbursement for the remediation of the trust-fund eligible discharger's petroleum pollutants in the transportation facility, regardless of source property priority score, from the Inland Protection Trust or Water Quality Assurance Trust Fund or other funding source as may become available. Upon FDOT's request the FDEP shall provide funding and/or reimbursement to FDOT for the FDOT's remediation of the discharger's petroleum pollutants within the transportation facilities to the extent authorized by law.

4. DISCHARGER PETITION TO THE FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION FOR A NO FURTHER ACTION FOR PETROLEUM POLLUTANTS

A. A discharger may remediate the petroleum pollutants in its source property but may be unable to remediate some or all of its petroleum pollutants that have migrated from its source property to the transportation facility. If the discharger's access to the petroleum pollutants within the transportation facility causes an inconvenience to the traveling public, or when the discharger's remediation of the petroleum pollutants is not feasible or technically impractical, then the discharger may submit a proposal to FDEP for a determination that the petroleum pollutants within the transportation facility are not a threat to human health, public safety, or the environment, will naturally attenuate, and source property qualifies for a No Further Action or a Site Rehabilitation Completion Order ("closure").

B. Upon FDEP's review of the discharger's proposal and FDEP's written determination that the proposal qualifies for closure, the FDEP may submit to FDOT a request for FDOT to put a map note on FDOT's ROW map. Upon receipt of such request, FDOT may add a map note to its ROW maps identifying the location of discharger's petroleum pollutants in the transportation facility

C. FDOT and any third party voluntarily containing or removing a discharger's petroleum pollutants are immune from liability; FDEP has determined a map note is a reference to assist any party with its due diligence prior to working in the transportation facility; and a map note may be included in a multi-layered approach and qualify as an alternative institutional control.

5. FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION REQUEST FOR A MAP NOTE ON THE TRANSPORTATION FACILITY RIGHT OF WAY MAP

A. FDEP's request to FDOT for a map note shall include, at minimum:

- (i) A Letter from FDEP to FDOT requesting the map note, see attached exhibit "A";
- (ii) FDEP written determination that the petroleum pollutants within the transportation facility are not a threat to human health, public safety, the users or occupants of the transportation facility, or the environment; and source property qualifies for a closure;
- (iii) FDEP's written determination the proposed map note on the FDOT ROW map qualifies as an alternative institutional control;
- (iv) A summary of the soil data and groundwater data, in the applicable regulatory units;
- (v) A legal description for the location of the map note; and

- (vi) A Specific Purpose Survey, Boundary Survey or Sketch and Description as defined under Chapter 5J-17, F.A.C. tied to the FDOT bearing base, and GPS coordinate information showing the map note; and
- (vii) The transportation facility ROW map ("ROW map"), prepared according to all FDOT laws, rules, regulations, and procedures, showing the map note; and
- (viii) Draft language for future property interest transfer agreement and draft deed of conveyance language referencing the map note on the ROW Map; and
- (ix) An agreement between the discharger and FDOT to indemnify and hold the FDOT harmless for any damage that may occur to the transportation facility; and
- (x) Any other document the FDOT may require.

D. The FDEP request will be sent to appropriate FDOT District Secretary, with a courtesy copy to the District Right of Way Administrator, the District Contamination Impact Coordinator, and the District Chief Counsel. The FDOT shall timely consider and may acknowledge FDEP request in writing by Acknowledgement Letter; see attached exhibit "B."

6. RECORDING

Upon receipt of FDOT's Acknowledgment Letter, the FDEP shall file this MOU, the FDEP Request Letter, the FDOT Acknowledgment Letter, and the ROW map with map note with the discharger's facility documents in the FDEP's OCULUS database. FDOT shall record this MOU, the FDEP Request Letter, the FDOT Acknowledgment Letter, and the transportation facility ROW map with the map note in the FDOT District Mapping office. FDEP shall require the discharger to record a reference to the ROW map note with the source property in the County Clerk's office.

7. MODIFICATION OF THE MAP NOTE

Modification of the map note is authorized if the discharger, a third party, FDEP, or FDOT demonstrate the transportation facility has achieved cleanup target levels established pursuant to governmental law and the map note is modified.

8. LIMITATIONS

A. This MOU creates a procedure for the FDEP's request for a map note to manage and to notify, of petroleum pollutants that are not feasible or technically impractical to remediate and which under current circumstances of exposure and/or land use, does not pose a potential or real threat to human health or the environment. The management of work, from assessment to closure, at a funding eligible discharge is performed by FDEP's Petroleum Restoration Program in accordance with section 376.305(1), Fla. Stat. (2013). Health and safety considerations for intrusive work in petroleum contaminated areas or discharges such as monitor well installations, contaminated soil excavation, etc., is regulated by the Occupational Health and Safety Administration (OSHA) and existing governmental law. This MOU, any FDEP Request Letter, any FDOT Acknowledgement letter, and any map note are only an additional reference showing the location of petroleum pollutants in the transportation facility for any party to rely on during its due diligence prior to working within the transportation facility;

B. This MOU, any FDEP Request Letter, any FDOT Acknowledgement letter, and any map note shall not operate to create or vest any property right in or to FDEP, the discharger, or to third parties. The FDEP, the discharger, and third parties shall not acquire any right, title, interest or estate in the transportation facility by virtue of the execution, operation, effect, performance or

breach of this MOU, any FDEP Request Letter, any FDOT Acknowledgement letter, or any map note.

C. This MOU, any FDEP Request Letter, any FDOT Acknowledgment letter, and any map note shall not create or impose any additional compliance requirements, other than those already imposed by existing governmental law. The FDEP, the discharger, and third parties shall not acquire any right to monitor or enforce any environmental or safety requirements under this MOU, any FDEP Request Letter, any FDOT Acknowledgement letter, or any map note.

D. This MOU, any FDEP Request Letter, any FDOT Acknowledgement letter, and any map note shall not impose any requirement on FDOT to monitor or enforce the map note, or any additional compliance requirements, other than those already imposed by existing governmental law, on FDOT for any acquisition, use, design, construction, operation, maintenance, utility work, or issuance of any permit to use or do work within the transportation facility.

E. Under no circumstances shall this MOU, any FDEP Request Letter, any FDOT acknowledgment letter, any map note, or FDEP prioritization and remediation of a discharger's petroleum pollutants in the transportation facility, obligate the FDOT to remediate the discharger's petroleum pollutants in the transportation facility.

F. Under no circumstances shall this MOU, any FDEP Request Letter, any FDOT acknowledgment letter, any map note, or FDEP prioritization and remediation of a discharger's petroleum pollutants in the transportation facility, obligate the FDOT to remediate the discharger's petroleum pollutants in the source property.

G. Nothing in this MOU, any FDEP Request Letter, any FDOT Acknowledgement letter, or in any map note shall be interpreted as waiving any rights available to FDEP or FDOT under sections 376.305 or 335.10(3), Fla. Stat. (2013).

H. 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. (2013). Nothing in this MOU shall be deemed or otherwise interpreted as waiving FDOT limits of liability set forth in sections 768.28, 376.305, and 337.27(4), Fla. Stat. (2013).

9. RIGHT OF ENTRY

Subject to requirements of Florida Law, FDOT agrees to allow FDEP access to the transportation facility at reasonable times for the purpose of performing those tasks contemplated by this MOU. FDEP acknowledges and agrees that FDOT permit requirements, or safety considerations limit the times, areas, and activities which may be conducted. FDEP will contact FDOT and schedule time(s) to access the transportation facility by coordinating through the appropriate FDOT District Office.

10. MODIFICATION OF MOU

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

11. DISPUTE RESOLUTION AND VENUE

A. If a dispute arises concerning the interpretation, validity, performance or alleged breach of this MOU which cannot be resolved at the staff level, such dispute shall be elevated to the attention of FDEP's Director for the Division of Waste Management (DWM) and FDOT's Manager of the State Environmental Management Office (SEMO). If the DWM Director and SEMO Manager are unable to resolve any such dispute, then the matter will be elevated to each agency's Secretary or their designee for resolution.

B. Venue for any and all actions arising out of or in any way related to the interpretation, validity, performance or breach of the MOU that are not resolved to the mutual satisfaction of the parties shall lie exclusively in a state court of appropriate jurisdiction in Leon County, Florida.

12. SPILLS AND DISCHARGES, AND ABANDONED LIQUID WASTE

A. The public's right to use the transportation facility can result in third party spills and discharges of petroleum pollutants and contamination and the abandonment of liquid waste in containers and drums (abandoned liquid waste). The third party responsible (responsible party) for the spills, discharges, and abandonment may be unknown or known. Such spills, discharges, and abandoned waste may be discovered by the FDOT, FDEP, or the traveling public.

B. Upon discovery of any spill or discharge of petroleum pollutants or contamination by an unknown third party to a transportation facility, the FDEP shall:

- (i) notify the FDOT in writing within forty-eight (48) hours of the spill or discharge; and
- (ii) determine whether the spill or discharge is a de-minimus discharge and provide a copy of such determination to FDOT; and
- (iii) if not a de-minimus discharge then task its Office of Emergency Response headquarters office in Tallahassee or any of the Office's emergency response specialists located in one of its six districts to investigate and, where warranted, ensure the spill or discharge does not pose a threat to human health or the environment by authorizing one of its approved discharge cleanup organizations to remove/remediate and dispose of the spill or discharge; and
- (iv) require the local discharge clean-up organizations to acquire the appropriate FDOT permit and submit a copy of that permit to FDEP; and

C. Upon discovery of a spill or discharge of petroleum pollutants or contamination by a known third party into a transportation facility, the FDEP shall:

- (i) if a spill, require the Division of Emergency Management State Watch Office to notify FDOT in writing within forty eight (48) hours of the spill; and
- (ii) if a discharge, require the responsible party to notify FDOT in writing by certified mail; and
- (iii) determine whether the spill or discharge is a de-minimus discharge and provide a copy of such determination to FDOT; and
- (iv) if not a de-minimus discharge then require any and all parties, including without limitation local discharge clean-up organizations, who are remediating spills or discharges in the transportation facility, to acquire a FDOT permit and submit a copy of that permit to FDEP; and

D. Upon discovery and notice of unknown abandoned liquid waste in the transportation facility, the FDEP shall authorize a local discharge cleanup organization to, where warranted, contain, remove, and dispose of the abandoned waste.

E. Good Samaritan

If an unknown third party abandons waste, or spill or discharges petroleum pollutants or contamination within the transportation facility, the FDOT may voluntarily elect to collect, contain, remove or abate, and dispose of such without liability for its actions; section 376.305(3), (4), and (5), Fla. Stat. (2013).

IN WITNESS WHEREOF, intending to be legally bound hereby, the parties hereby execute this MOU, consisting of eight pages.


- Signatures to follow -

FLORIDA DEPARTMENT OF
ENVIRONMENTAL PROTECTION


Secretary

June 12, 2014
Date

FLORIDA DEPARTMENT OF
TRANSPORTATION


Secretary

June 16, 2014
Date

Electronic copies to:

Jorge Caspary, Director Division of Waste Management, FDEP,
Jorge.caspary@dep.state.fl.us

Marjorie Bixby, Manager State Environmental Management Office

Valerie K. Huegel, Program Administrator, Petroleum Restoration Program FDEP

Douglas A. Jones, Program Administrator, Waste Cleanup Program, FDEP

FDOT District 1 Secretary

FDOT District 2 Secretary

FDOT District 3 Secretary

FDOT District 4 Secretary

FDOT District 5 Secretary

FDOT District 6 Secretary

FDOT District 7 Secretary