

DATE: May 13, 2009

SUBJECT: SOL on the Form of Indemnification

TO: District Executives

FROM: R. Scott Christie, P.E. /s/
Deputy Secretary for Highway Administration

The form of the indemnification used in the Department's Highway Occupancy Program (HOP) for driveways and local roads is being modified as part of a general review of this program. This strike-off letter is intended to change the form of the indemnification to be used and to make corresponding revisions to Department policy as reflected in the HOP Manual (Pub. 170) and the HOP Guidelines (Pub. 282). These modifications of Department policy should reduce the time for Department reviews and facilitate the execution of indemnifications by HOP applicants when appropriate and necessary.

Chapter 3.7 (Indemnification), page 70, and Chapter 8.1 (Indemnification Agreement; Form M-950 I and Covenant; Form M0950 IC), pages 236-237, of the HOP Manual and Chapter 3.6 (Indemnification), page 51, and Chapter 8.1 (Indemnification Agreement; Form M-950 I and Covenant; Form M0950 IC), pages 172-173 of the HOP Guidelines are being revised and replaced with the following as attached:

- Pub. 170, Chapter 3.7, Indemnification (Attachment A-1)
- Pub. 170, Chapter 8.1, Indemnifications; Forms M-950 IDW, M-950 IA and M-950 ID; and Covenant, Form M-950 IC (Attachment A-2)
- Pub. 282, Chapter 3.6, Indemnification (Attachment B-1)
- Pub. 282, Chapter 8.1, Indemnifications; Forms M-950 IDW, M-950 IA and M-950 ID; and Covenant, Form M-950 IC (Attachment B-2)

Also attached are the new forms which replace Form M-950 I. They are as follows:

- Form M-950 IDW (Attachment C-1)
- Form M-950 IA (Attachment C-2)
- Form M-950 ID (Attachment C-3)

The changes are effective immediately and will be incorporated into the next revisions to the manuals.

An indemnification provides that the indemnitor will save harmless (i.e. pay for), and defend if requested, the Department in connection with lawsuits filed by third parties against the Department. Currently there is one form of indemnification (Form M-950 I) even though indemnifications are required in three different situations. There will be three forms of

indemnification under the revised procedures, one for each of the three circumstances giving rise to the need for indemnification:

1. Form M-950 IDW (design waiver) for design waivers, including those relating to reductions in level of service (LOS)
2. Form M-950 IA (access) for situations where releases cannot be obtained from neighboring property owners whose access is being adversely impacted by permit work
3. Form M-950 ID (drainage) for situations where releases cannot be obtained from neighboring property owners where it can reasonably be anticipated that there will be an increase in the flow of water onto their property as a result of permit work

The following is a synopsis of the changes to the forms and policy:

1. The policy clarifies that there are prerequisites that must be met before the Department may accept indemnification as an option. It also suggests that the form of indemnification be provided to the permittee while a design waiver or other process is being considered to avoid any surprises on the nature of the indemnification that will be required.
2. The title of the forms has been changed from indemnification agreement to merely indemnification and the documents will no longer be signed by the Department. This will insure that the forms are not considered contracts requiring approval as to form and legality, which is a time-consuming process. The indemnification will be binding on the permittee as a condition to obtaining the permit.
3. The scope of the activity being indemnified has been narrowed through the use of three forms and limiting Section 1 to the reason indemnification is required. For example, M-950 IDW is limited to protecting the Department from liability for suits based in whole or in part upon the design waiver granted. The previous form required the permittee to indemnify the Department against any suit arising from actions taken under the permit. This broad indemnification sometimes made it difficult for developers to obtain financing. Section 4 of the indemnification forms still require broad insurance to cover any loss arising out of the permitted activity, construction or design.
4. The duration of the indemnification has been limited because the prior unlimited duration language made it difficult for developers to obtain financing. The access and drainage indemnifications are limited to six years from the date of final inspection and acknowledgement of completion by the Department of all work authorized by the permit. This is because the statute of limitations for suits by neighboring owners arising from access and drainage impacts will expire at that time. Access and drainage indemnifications may be released by the Department sooner under certain

circumstances where conditions change subsequent to issuance of the permit. Indemnifications arising from design waivers expire if the Department releases the permittee from its obligations because the subject of the permit has been removed or closed or the condition for which the waiver was granted is corrected to meet Department requirements.

5. Section 4 has been modified to require attachment of the actual special policy endorsement for the insurance rider. This will insure the Department has been added as an additional insured on the policy. The prior form, M-950 I, merely required attachment of the form of the endorsement required.
6. The deficiency and warrant of attorney to confess judgment clause (Section 8 of the prior form M-950 I) has been eliminated because it is an outdated remedy and extremely onerous. There are also no situations known that the Department has utilized its provisions appointing the Office of Chief Counsel to unilaterally confess judgment in the event the insurance coverage required by Section 4 is not sufficient to satisfy all claims. This clause was often deleted in the past when negotiations were held on the form of indemnification.
7. The decision whether a covenant running with the land imposing the obligations of the indemnification on subsequent owners (Section 9) and to excuse the personal guarantee of a corporate officer executing an indemnification (Section 11) has been transferred from the Office of Chief Counsel to the applicable District Executive. This appropriately places the decision with the Department rather than its attorneys. Excusing either requirement is legal; whether to do so is an administrative decision. Guidance on making the decision to excuse the covenant requirement or the personal guarantee is included in the HOP Manual and HOP Guidelines. Of course, the Office of Chief Counsel is available to provide advice on whether excusing either requirement would be prudent under the circumstances.
8. The indemnification forms are not to be modified without review and approval of the Office of Chief Counsel. Examples of when modification may be appropriate are addressed in the HOP Manual and HOP Guidelines. Special negotiation of the terms of an indemnification can be time-consuming.

If you have any questions in regard to the attached policy, please contact Glenn C. Rowe, P.E., PTOE, Acting Director, Bureau of Highway Safety and Traffic Engineering, at (717) 787-7350.

Attachments

SOL on the Form of Indemnification

Date:

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4700/MJD(3-6080)lap(7-3620)

CC: Daniele Spila, Director, Policy Office
William Cressler, Office of Chief Counsel
Tom Haist, Office of Chief Counsel
All Highway Administration Bureau Directors
All ADE, Maintenance
ADE, Construction, District 8-0
ADE, Services, District 6-0
All District Permit Managers
All District Traffic Engineers
Jeff Roback, Field Operations & Special Projects, Bureau of Municipal Services
Stephen Heil, Paperwork Management Unit, Bureau of Office Services
All BHSTE Division Chiefs
Mike Dzurko, BHSTE
Director's Correspondence File
HOP read file

Indemnification

- a. Utility Indemnification Agreement (Form M-945 I and M-950 IC) is required under:
1. Section 459.3(b)(2)(i)(A) relating to applicants not in the utility service business. In the case of applicants who are not in the business of providing utility service, the Indemnification Agreement (Form M-945 I and M-950 IC) will satisfy the indemnity requirement in Clause (A). Other requirements for insurance (Clause B), restoration security (Clause C), and facility maintenance (Clause D), shall be executed in an amount at least as high as may be required to cover PennDOT's exposure under the Permit.
 2. Section 459.12(b)(1) relating to modifications of Regulation 459 conditions. Whenever a modification is granted, the District Executive may, if requested, decide to excuse the applicant from executing an Indemnification Agreement (Form M-945 I and M-950 IC), submitting new or additional security (i.e., could the modification result in additional damage to the highway?), and providing a Certificate of Insurance (Form M-945 X) for the life of the facility.

Thus, Form M-945 I Indemnification Agreement and M-950 IC Indemnification Covenant are to be used for Regulation 459 – Utilities. These forms may not be modified. Although the M-950 IC is used for Regulation 441 – Access, different indemnification forms are used as discussed below.

Section 4 of the agreement requires insurance that covers both property and personal injuries in an amount equal to the limits contained in the *Sovereign Immunity Act* (presently \$250,000 per individual and \$1,000,000 in the aggregate per occurrence). Evidence of required insurance must be submitted to the District Permit Manager initially and upon the future sale or transfer of any interest in the property.

Section 10 of the agreement requires a covenant to be added to the deed stating that the Indemnity Agreement's obligations attach to the land and pass with it on any transfer. If an application is made for a waiver/modification, the applicant must present a copy of a deed to the site showing the addition of the covenant. The applicant then has five working days to provide documentation from the Recorder of Deeds Office demonstrating such filing.

The use of these forms is explained in Chapter 8 (Indemnification Agreement; Form M-945 I and Covenant; Form M-945 IC) of this Manual.

- b. Access Indemnifications (Forms M-950 IDW, M-950 IA, M-950 ID, and M-950 IC) are required under:
1. Section 441.3(h) relating to inability to obtain a drainage release, where a drainage release or satisfactory drainage controls are not feasible - use Forms M-950 ID and M-950 IC.
 2. Section 441.5(e)(1)(v) relating to applicants requesting a waiver of design requirements - use Forms M-950 IDW and M-950 IC.
 3. Section 441.8(j)(5) relating to placing an auxiliary lane in front of another person's property - use Forms M-950 IA and M-950 IC.

The use of these forms is explained in Chapter 8 (Indemnifications; Forms M-950 IDW, M-950 IA and M-950 ID; and Covenant, Form M-950 IC) of this Manual.

Indemnifications; Forms M-950 IDW, M-950 IA and M-950 ID; and Covenant, Form M-950 ICPurpose

The appropriate indemnification and covenant, when executed together, provide standard, concise, and easy to use documentation when additional indemnification is required under the following Regulation sections:

1. 67 PA Code, Section 441.3(h), relating to drainage - use Forms M-950 ID and M-950 IC.
2. 67 PA Code, Section 441.5(e)(1)(v), relating to waiver - use Forms M-950 IDW and M-950 IC.
3. 67 PA Code, Section 441.8(j)(5), relating to lane in front of another property - use Forms M-950 IA and M-950 IC.

These forms are designed to be used for additional indemnification under these Regulation 441 sections only. (Use Form M-945 I and M-950 IC for additional indemnification under Regulation 459.)

General

Indemnification cannot be accepted by the Department unless the required prerequisites are met. See Chapter 3 of this Manual on design waiver requirements; Chapter 3 on obtaining releases from neighboring property owners whose access is impacted by auxiliary lanes and other features of an applicant's project; and Chapter 3 on obtaining permission from neighboring property owners impacted by drainage changes.

The applicant should be made aware of the form of indemnification that will be required while a design waiver or other process is being considered to avoid surprises at the end of the process.

Government entities may be legally prohibited from granting indemnification. Contact the Office of Chief Counsel for guidance in such situations.

The forms may not be modified except in special circumstances and only with review and approval of the Bureau of Highway Safety and Traffic Engineering (BHSTE) and the Office of Chief Counsel. Two situations where modification of the form may be appropriate would be where a housing development is involved and where security for the indemnification is appropriate. In the former situation it may not be appropriate to require the terms of the indemnification to pass to the purchaser of each lot through the indemnification covenant. Please note that special negotiations on the terms of an indemnification can be time-consuming and are strongly discouraged.

Preparation

The appropriate indemnification and covenant are to be prepared in duplicate and submitted to PennDOT for approval before the permit may be issued.

The pending permittee's name, address and application number need to be specified in the blank spaces on page 1.

Section 1; Liability, Loss or Damage. The three indemnifications are intended to protect the Department from liability relating to the specific matter under consideration. That is, M-950 IDW is intended to protect the Department from liability arising from the condition(s) for which a design waiver is being granted; M-950 IA is intended to protect the Department from liability for access impacts on other properties arising from the permit work; and M-950 ID is intended to protect the Department from liability for drainage impacts on other properties arising from the permit work.

When using the design waiver indemnification (M-950 IDW), the formal approval of the design waiver must be attached to the indemnification as Exhibit A. See Chapter 3 of this manual relating to the formal approval of design waivers.

When using the access and drainage indemnifications (M-950 IA and M-950 ID) there is no exhibit limiting the indemnification to specific impacted properties. The indemnification is for all access or drainage impacts of the permit work on other properties. If certain owners have granted permission for access or drainage impacts they are very unlikely to bring suit against the Department in that regard; however, the risk of any such suit is placed on the permittee. Not limiting the indemnification to specific properties also appropriately places the risk on the permittee for impacts to properties that may not have been identified as being affected during the permit review process.

Section 3; Duration. The duration of the indemnification is limited under M-950 IA and M-950 ID to the six-year statute of limitations period for lawsuits under the Eminent Domain Code. Additionally, access and drainage indemnifications may be released by the Department sooner than the six years if circumstances have changed since the permit was issued such that possible claims for interference with access or drainage impacts no longer exist. For example, releases may be obtained from other affected landowners or the impact on other affected property mitigated by subsequent events.

The indemnification provided under M-950 IDW can be released in writing by the Department if the subject for which the permit was issued (e.g. a driveway) has been removed, closed or otherwise extinguished, or if the condition for which a design waiver was granted is corrected to meet Department requirements (e.g. a future project corrects the deficiency for which the waiver was granted).

Section 4; Insurance. Section 4 requires the applicant to add the Commonwealth as an *additional insured* to its insurance in the amounts specified. Insurance is the backbone of the indemnification and must be provided before the indemnification is accepted.

The form of the special endorsement or policy rider to be added to all applicable insurance policies is included on page 3 of the indemnification. This endorsement or rider must indicate who is the insured, who is the additional insured and who the insurance company is and must reference a policy number.

The insurance exhibit (Exhibit A for forms M-950 IA and M-950 ID and Exhibit B for form M-950 IDW) must be a copy of the actual special endorsement or policy rider issued by the insurance company. It must incorporate the sample language included on page 3 of the indemnification and be properly executed by a representative of the insurance company with authority to do so. If the rider or endorsement is not executed by an officer of the corporation, evidence of authority to execute must be provided.

Section 9; Covenant Running with the Land. Section 9 requires the applicant to prepare a Covenant (see Form M-950 IC) containing the statement that the indemnification has been executed and that all subsequent purchasers, heirs, assigns or transferees of any legal or beneficial interest in the property take it subject to the obligations imposed herein as *covenants running with the land*. This section also requires the covenant to be recorded in the Recorder of Deeds Office. See section on recording below.

This section may be excused by the District Executive if the applicant can justify why the requirement should not apply. If the section is excused the indemnification will only be binding on the permittee and the Department will lose the protections provided by it if the permittee sells the property.

The Department should be cautious in excusing this requirement because the failure to have a covenant running with the land would limit the indemnification to the time during which the permittee owns the land for which the permit was issued. Excusing the requirement may be appropriate if the risk of having to exercise the indemnification is very small and/or the likelihood of the land being sold is low.

If the covenant requirement is excused the District Executive must sign a memorandum evidencing the excusal. That memorandum, which may also evidence other excusals, is then attached to the indemnification as an exhibit (Exhibit B for forms M-950 IA and M-950 ID and Exhibit C for form M-950 IDW).

As noted, special covenant language may be appropriate when the development for which the permit is being issued consists of residential units that will be resold as lots. BHSTE and the Office of Chief Counsel should be consulted in preparing alternate language.

Section 11; Corporate Officer Individual Guaranty. Section 11 requires a corporate officer who executes an indemnification on behalf of a corporation or other entity to personally guaranty the obligations contained in the indemnification. The reason for such an individual guaranty is to insure payment of obligations under the indemnification in the event the permittee may be judgment proof because it has no financial history and few or no assets.

This section has become a prominent issue because many permittees are single-purpose entities, often LLCs (limited liability corporations), created solely to construct and operate the development for which a permit is being sought. By their very nature these single-purpose entities have few if any assets. An indemnification from such an entity is of little value because there may be no assets from which the Department could recover in the event of liability under the indemnification.

Determining the viability of an entity providing indemnification requires a review of their financial statements, including balance sheet, income statement, profit and loss statement, and cash flow statement. This review is similar to that performed when assessing whether an entity is a responsible contractor under a proposed restricted receipt agreement. See SOL No. 470-07-2, dated March 20, 2007, entitled Restricted Receipt Private Sponsorship Agreements; Procedures for Contractor Responsibility Review.

The Department's Office of the Comptroller is available to assess the financial responsibility of an applicant and offer an opinion on whether indemnification should be accepted if the applicant provides independently audited financial statements. Any such assistance should be sought through the Permit Unit, BHSTE.

If an applicant is unable to substantiate its financial responsibility to support the obligations under the indemnification the Department can accept indemnification from another related entity with sufficient financial responsibility. If this occurs the Office of Chief Counsel should be consulted to review the indemnification for modification that may be required because the indemnifying party is not the landowner.

Another alternative to requiring the personal guaranty of a corporate officer of an applicant is the execution of security for the obligations under the indemnification. This may be especially appropriate if the applicant will have substantial assets after the development is constructed and in operation, in which case the security can be for the limited period of time until the development is completed and in operation. See Chapter 3 (Security) on the type of security that would be appropriate.

This section may be excused by the District Executive if the applicant can justify why the requirement should not apply. The most common justification is that the applicant has proven it has sufficient financial responsibility to support the obligations under the indemnification. Excusal would also be appropriate if security is provided for the obligations under the indemnification.

Excusing the personal guaranty requirement may also be appropriate if the Department determines the risk of having to exercise the indemnification is not substantial and/or the potential that the applicant will not be able to satisfy the obligations under the indemnification is not substantial. Factors to consider in making this assessment are the risk of a lawsuit arising from the waiver or impact on other properties for which the indemnification is required; the financial responsibility of the applicant; and whether the applicant has contractual liability insurance to cover its obligations under the indemnification.

In short, the Department must determine under all the circumstances whether to take the risk that it may not be able to rely upon the indemnification to protect it from liability because the permittee may not be able to defend or pay for any recovery against the Department if there is a lawsuit in the future. The Department should be very reluctant to place itself in this position where the indemnification concerns drainage because a lawsuit would normally be very likely. The Department should also be reluctant to do so where a design waiver for a geometric requirement is granted because of the clear connection that will likely be possible between the waiver and an accident. Whether to excuse the personal guaranty for access impacts should depend greatly on whether any landowners would have a significant chance of prevailing in a lawsuit against the Department. Excusing the requirement for design waivers relating to levels of service could often be appropriate because the likelihood of someone connecting an accident to the degradation in level of service is not great.

If the personal guaranty requirement is excused the District Executive must sign a memorandum evidencing the excusal. That memorandum, which may also evidence other excusals, is then attached to the indemnification as an exhibit (Exhibit B for forms M-950 IA and M-950 ID and Exhibit C for form M-950 IDW).

Signature

The signature page is to be prepared and executed by the applicant. The permittee's name must be entered on the permittee line exactly as it appears on the highway occupancy permit (HOP) application.

The indemnification must be signed by a person or persons with authority with respect to the site for which the permit is issued, for instance:

1. Regulation 441.1 defines persons that may qualify as owners. In the case where the tenant of a lease applies (a supermarket or convenience store, etc.), both the tenant and the landlord must sign the indemnification.
2. See Appendix F (Signature Authority Guide) of the Right of Way Manual for information on the appropriate person to execute the documents.
3. The indemnification covenant is to be attested and sealed by a notary public.

Recording

When the Covenant is required, the Indemnification and Covenant shall be recorded in the appropriate County Recorder of Deeds Office with the permit. See Chapter 8 (Recording Copy; Form M-945 RC) for generic recording procedures.

Indemnification

- a. Utility Indemnification Agreement (Form M-945 I & M-950 IC) is required under:
1. Section 459.3(b)(2)(i)(A) relating to applicants not in the utility service business. In the case of applicants who are not in the business of providing utility service, the Indemnification Agreement (Form M-945 I & M-950 IC) will satisfy the indemnity requirement in Clause (A). Other requirements for insurance (Clause B), restoration security (Clause C), and facility maintenance (Clause D), shall be executed in an amount at least as high as may be required to cover PennDOT's exposure under the permit.
 2. Section 459.12(b)(1) relating to modifications of Regulation 459 conditions. Whenever a modification is granted, the District Executive may, if requested, decide to excuse the applicant from executing an Indemnification Agreement (Form M-945 I and M-950 IC), submitting new or additional security (i.e., could the modification result in additional damage to the highway?), and providing a Certificate of Insurance (Form M-945 X) for the life of the facility.

Thus, Form M-945 I Indemnification Agreement and M-950 IC Indemnification Covenant are to be used for Regulation 459 – Utilities. These forms may not be modified. Although the M-950 IC is used for Regulation 441 – Access, different indemnification forms are used as discussed below.

Section 4 of the agreement requires insurance that covers both property and personal injuries in an amount equal to the limits contained in the *Sovereign Immunity Act* (presently \$250,000 per individual and \$1,000,000 in the aggregate per occurrence). Evidence of required insurance must be submitted to the District Permit Manager initially and upon the future sale or transfer of any interest in the property.

Section 10 of the agreement requires a covenant to be added to the deed stating that the Indemnity Agreement's obligations attach to the land and pass with it on any transfer. If application is made for a waiver/modification, the applicant must present a copy of a deed to the site showing the addition of the covenant. The applicant then has five working days to provide documentation from the Recorder of Deeds Office demonstrating such filing.

The use of these forms is explained in Chapter 8 (Indemnification Agreement; Form M-945 I and Covenant; Form M-945 IC) of this Manual.

- b. Access Indemnifications (Forms M-950 IDW, M-950 IA, M-950 ID and M-950 IC) are required under:
1. Section 441.3(h) relating to inability to obtain a drainage release, where a drainage release or satisfactory drainage controls are not feasible - use Forms M-950 ID and M-950 IC.
 2. Section 441.5(e)(1)(v) relating to applicants requesting a waiver of design requirements - use Forms M-950 IDW and M-950 IC.
 3. Section 441.8(j)(5) relating to placing an auxiliary lane in front of another person's property - use Forms M-950 IA and M-950 IC.

The use of these forms is explained in Chapter 8 (Indemnifications; M-950 IDW, M-950 IA and M-950ID; and Covenant, Form M-950 IC) of this Manual.

Indemnifications; Forms M-950 IDW, M-950 IA and M-950 ID; and Covenant, Form M-950 ICPurpose

The appropriate indemnification and covenant, when executed together, provide standard, concise, and easy to use documentation when additional indemnification is required under the following Regulation sections:

1. 67 PA Code, Section 441.3(h), relating to drainage - use Forms M-950 ID and M-950 IC.
2. 67 PA Code, Section 441.5(e)(1)(v), relating to waiver - use Forms M-950 IDW and M-950 IC.
3. 67 PA Code, Section 441.8(j)(5), relating to lane in front of another property - use Forms M-950 IA and M-950 IC.

These forms are designed to be used for additional indemnification under these Regulation 441 sections only. (Use Form M-945 I & M-950 IC for additional indemnification under Regulation 459.)

General

Indemnification cannot be accepted by the Department unless the required prerequisites are met. See Chapter 3 of this Manual on design waiver requirements; Chapter 3 on obtaining releases from neighboring property owners whose access is impacted by auxiliary lanes and other features of an applicant's project; and Chapter 3 on obtaining permission from neighboring property owners impacted by drainage changes.

The applicant should be made aware of the form of indemnification that will be required while a design waiver or other process is being considered to avoid surprises at the end of the process.

Government entities may be legally prohibited from granting indemnification. Contact the Office of Chief Counsel for guidance in such situations.

The forms may not be modified except in special circumstances and only with review and approval of the Bureau of Highway Safety and Traffic Engineering (BHSTE) and the Office of Chief Counsel. Two situations where modification of the form may be appropriate would be where a housing development is involved and where security for the indemnification is appropriate. In the former situation it may not be appropriate to require the terms of the indemnification to pass to the purchaser of each lot through the indemnification covenant. Please note that special negotiations on the terms of an indemnification can be time-consuming and are strongly discouraged.

Preparation

The appropriate indemnification and covenant are to be prepared in duplicate and submitted to PennDOT for approval before the permit may be issued.

The pending permittee's name, address and application number need to be specified in the blank spaces on page 1.

Section 1; Liability, Loss or Damage. The three indemnifications are intended to protect the Department from liability relating to the specific matter under consideration. That is, M-950 IDW is intended to protect the Department from liability arising from the condition(s) for which a design waiver is being granted; M-950 IA is intended to protect the Department from liability for access impacts on other properties arising from the permit work; and M-950 ID is intended to protect the Department from liability for drainage impacts on other properties arising from the permit work.

When using the design waiver indemnification (M-950 IDW), the formal approval of the design waiver must be attached to the indemnification as Exhibit A. See Chapter 3 of this manual relating to the formal approval of design waivers.

When using the access and drainage indemnifications (M-950 IA and M-950 ID) there is no exhibit limiting the indemnification to specific impacted properties. The indemnification is for all access or drainage impacts of the permit work on other properties. If certain owners have granted permission for access or drainage impacts they are very unlikely to bring suit against the Department in that regard; however, the risk of any such suit is placed on the permittee. Not limiting the indemnification to specific properties also appropriately places the risk on the permittee for impacts to properties that may not have been identified as being affected during the permit review process.

Section 3; Duration. The duration of the indemnification is limited under M-950 IA and M-950 ID to the six-year statute of limitations period for lawsuits under the Eminent Domain Code. Additionally, access and drainage indemnifications may be released by the Department sooner than the six years if circumstances have changed since the permit was issued such that possible claims for interference with access or drainage impacts no longer exist. For example, releases may be obtained from other affected landowners or the impact on other affected property mitigated by subsequent events.

The indemnification provided under M-950 IDW can be released in writing by the Department if the subject for which the permit was issued (e.g. a driveway) has been removed, closed or otherwise extinguished, or if the condition for which a design waiver was granted is corrected to meet Department requirements (e.g. a future project corrects the deficiency in which the waiver was granted).

Section 4; Insurance. Section 4 requires the applicant to add the Commonwealth as an *additional insured* to its insurance in the amounts specified. Insurance is the backbone of the indemnification and must be provided before the indemnification is accepted.

The form of the special endorsement or policy rider to be added to all applicable insurance policies is included on page 3 of the indemnification. This endorsement or rider must indicate who is the insured, who is the additional insured and who the insurance company is and must reference a policy number.

The insurance exhibit (Exhibit A for forms M-950 IA and M-950 ID and Exhibit B for form M-950 IDW) must be a copy of the actual special endorsement or policy rider issued by the insurance company. It must incorporate the sample language included on page 3 of the indemnification and be properly executed by a representative of the insurance company with authority to do so. If the rider or endorsement is not executed by an officer of the corporation, evidence of authority to execute must be provided.

Section 9; Covenant Running with the Land. Section 9 requires the applicant to prepare a Covenant (See Form M-950 IC) containing the statement that the indemnification has been executed and that all subsequent purchasers, heirs, assigns or transferees of any legal or beneficial interest in the property take it subject to the obligations imposed herein as *covenants running with the land*. This section also requires the covenant to be recorded in the Recorder of Deeds Office. See section on recording below.

This section may be excused by the District Executive if the applicant can justify why the requirement should not apply. If the section is excused the indemnification will only be binding on the permittee and the Department will lose the protections provided by it if the permittee sells the property.

The Department should be cautious in excusing this requirement because the failure to have a covenant running with the land would limit the indemnification to the time during which the permittee owns the land for which the permit was issued. Excusing the requirement may be appropriate if the risk of having to exercise the indemnification is very small and/or the likelihood of the land being sold is low.

If the covenant requirement is excused the District Executive must sign a memorandum evidencing the excusal. That memorandum, which may also evidence other excusals, is then attached to the indemnification as an exhibit (Exhibit B for forms M-950 IA and M-950 ID and Exhibit C for form M-950 IDW).

As noted, special covenant language may be appropriate when the development for which the permit is being issued consists of residential units that will be resold as lots. BHSTE and the Office of Chief Counsel should be consulted in preparing alternate language.

Section 11; Corporate Officer Individual Guaranty. Section 11 requires a corporate officer who executes an indemnification on behalf of a corporation or other entity to personally guaranty the obligations contained in the indemnification. The reason for such an individual

guaranty is to insure payment of obligations under the indemnification in the event the permittee may be judgment proof because it has no financial history and few or no assets.

This section has become a prominent issue because many permittees are single-purpose entities, often LLCs (limited liability corporations), created solely to construct and operate the development for which a permit is being sought. By their very nature these single-purpose entities have few if any assets. An indemnification from such an entity is of little value because there may be no assets from which the Department could recover in the event of liability under the indemnification.

Determining the viability of an entity providing indemnification requires a review of their financial statements, including balance sheet, income statement, profit and loss statement, and cash flow statement. This review is similar to that performed when assessing whether an entity is a responsible contractor under a proposed restricted receipt agreement. See SOL No. 470-07-2, dated March 20, 2007, entitled Restricted Receipt Private Sponsorship Agreements; Procedures for Contractor Responsibility Review.

The Department's Office of the Comptroller is available to assess the financial responsibility of an applicant and offer an opinion on whether indemnification should be accepted if the applicant provides independently audited financial statements. Any such assistance should be sought through the Permit Unit, BHSTE.

If an applicant is unable to substantiate its financial responsibility to support the obligations under the indemnification the Department can accept indemnification from another related entity with sufficient financial responsibility. If this occurs the Office of Chief Counsel should be consulted to review the indemnification for modification that may be required because the indemnifying party is not the landowner.

Another alternative to requiring the personal guaranty of a corporate officer of an applicant is the execution of security for the obligations under the indemnification. This may be especially appropriate if the applicant will have substantial assets after the development is constructed and in operation, in which case the security can be for the limited period of time until the development is completed and in operation. See Chapter 3 (Security) on the type of security that would be appropriate.

This section may be excused by the District Executive if the applicant can justify why the requirement should not apply. The most common justification is that the applicant has proven it has sufficient financial responsibility to support the obligations under the indemnification. Excusal would also be appropriate if security is provided for the obligations under the indemnification.

Excusing the personal guaranty requirement may also be appropriate if the Department determines the risk of having to exercise the indemnification is not substantial and/or the potential that the applicant will not be able to satisfy the obligations under the indemnification is not substantial. Factors to consider in making this assessment are the risk of a lawsuit arising from the waiver or impact on other properties for which the indemnification is required; the

financial responsibility of the applicant; and whether the applicant has contractual liability insurance to cover its obligations under the indemnification.

In short, the Department must determine under all the circumstances whether to take the risk that it may not be able to rely upon the indemnification to protect it from liability because the permittee may not be able to defend or pay for any recovery against the Department if there is a lawsuit in the future. The Department should be very reluctant to place itself in this position where the indemnification concerns drainage because a lawsuit would normally be very likely. The Department should also be reluctant to do so where a design waiver for a geometric requirement is granted because of the clear connection that will likely be possible between the waiver and an accident. Whether to excuse the personal guaranty for access impacts should depend greatly on whether any landowners would have a significant chance of prevailing in a lawsuit against the Department. Excusing the requirement for design waivers relating to levels of service could often be appropriate because the likelihood of someone connecting an accident to the degradation in level of service is not great.

If the personal guaranty requirement is excused the District Executive must sign a memorandum evidencing the excusal. That memorandum, which may also evidence other excusals, is then attached to the indemnification as an exhibit (Exhibit B for forms M-950 IA and M-950 ID and Exhibit C for form M-950 IDW).

Signature

The signature page is to be prepared and executed by the applicant. The permittee's name must be entered on the Permittee line exactly as it appears on the highway occupancy permit (HOP) application.

The indemnification must be signed by a person or persons with authority with respect to the site for which the permit is issued, for instance:

1. Regulation 441.1 defines persons that may qualify as owners. In the case where the tenant of a lease applies (a supermarket or convenience store, etc.), both the tenant and the landlord must sign the indemnification.
2. See Appendix F (Signature Authority Guide) of the Right of Way Manual for information on the appropriate person to execute the documents.
3. The indemnification covenant is to be attested and sealed by a notary public.

Recording

When the Covenant is required, the Indemnification and Covenant shall be recorded in the appropriate County Recorder of Deeds Office with the permit. See Chapter 8 (Recording Copy; Form M-945 RC) for generic recording procedures.



INDEMNIFICATION

67 PA Code, Section 441.5(e)(1)(v), relating to design waiver

THIS INDEMNIFICATION is by _____, with an address of _____ (the "Permittee") for the DEPARTMENT OF TRANSPORTATION, COMMONWEALTH OF PENNSYLVANIA (the "Commonwealth").

WHEREAS, the Permittee has applied to the Commonwealth for a permit (the "Permit") to occupy the Commonwealth's legal right-of-way with a driveway or structure at the location and for the purposes more fully described in Highway Occupancy Permit Application Number _____, and associated highway occupancy permit condition statement and supplements.

NOW, intending to be legally bound, as an express condition to issuance of the Permit hereunder, the Permittee enters into the following indemnification, which is to be binding upon the Permittee, its heirs, successors and assigns:

SECTION 1 - LIABILITY, LOSS OR DAMAGE

The Permittee hereby undertakes to indemnify fully the Commonwealth, its officers, agents and employees, of and from damages or injury to persons or property in a claim or suit seeking to impose liability on the Commonwealth, its officers, agents or employees, arising out of any and all claims, demands, costs, or judgments of any type and any act or omission of the Permittee or the Permittee's contractor, agent, servant, employee or other person engaged or employed in conjunction with the construction, design or use of the structure or facility that is the subject of the Permit based in whole or in part upon the design waiver(s) attached hereto as Exhibit "A," it being the intent of this provision to absolve and protect the Commonwealth, its officers, agents, and employees from any and all loss by reason of the design waiver(s). This Indemnification is in addition to that provided for under 67 Pa. Code §441.6(13).

SECTION 2 - EXPRESS CONDITION PRECEDENT

Full performance of all conditions and covenants of this Indemnification upon terms satisfactory to the Commonwealth is an express condition precedent to the issuance of the Permit. It is hereby acknowledged that the Commonwealth will not accept substantial compliance with the terms and conditions of this Indemnification by the Permittee. Inaction or lapse of time shall not constitute a bar to the pursuit of any legal or equitable remedy available to the Commonwealth in any court of competent jurisdiction.

SECTION 3 - DURATION

The obligations of the Permittee under this Indemnification shall commence upon the date of execution hereof and shall continue in full force and effect until the Commonwealth releases the Permittee in writing from the obligation of this Indemnification because the subject for which the permit has been issued has been removed, closed, or otherwise extinguished in accordance with the then existing regulations of the Commonwealth or the condition for which a design waiver was granted is corrected to meet Commonwealth requirements.

SECTION 4 - INSURANCE

The Permittee shall have the Commonwealth added as an additional insured to its and its contractor's policy in a form and amount satisfactory to the Commonwealth, to cover any loss that may be incurred for or on account of any matter, cause or thing arising out of the permitted activity, construction or design including the obligations under this Indemnification. The amount of insurance shall be at least \$250,000 per person and at least \$1,000,000 per occurrence. The obligation to maintain insurance with the Commonwealth as an additional insured shall remain in effect for so long as this Indemnification is in effect. A fully executed Form M-950X evidencing that the required insurance is in place and a copy of the required special policy endorsement are attached hereto as Exhibit "B" and made part hereof.

SECTION 5 - REQUIREMENT OF NOTICE TO COMMONWEALTH

The Permittee shall notify in writing, within ten days, by registered mail, return receipt requested, both the District Office Permit Manager and the Permit Section, Office of Chief Counsel, Pennsylvania Department of Transportation, P.O. Box 8212, Harrisburg, PA 17105-8212 of any and all claims made against the Permittee which pertain to the subject of the Permit.

SECTION 6 - OBLIGATION OF PERMITTEE TO DEFEND CLAIMS

The Permittee, upon request of the Commonwealth, shall defend, or pay and provide for the reasonable cost of such defense, including attorneys fees, the Commonwealth, its officers, agents and employees, against any and all claims brought or actions filed against the Commonwealth, either as an original or an additional defendant, with respect to the subject of the indemnity contained herein, whether such claims or actions are rightfully or wrongfully brought or filed. The Permittee hereby waives any and all rights to join the Commonwealth as an additional defendant in any actions arising as a result of the grant of the Permit or as a result of any construction, design or subsequent use that is the subject of the Permit.

Notwithstanding the foregoing provisions, the Commonwealth may employ or provide attorneys of its own selection to appear and defend any claims or actions on behalf of the Commonwealth, at the Permittee's sole cost and expense.

SECTION 7 - REIMBURSEMENT FOR EXPENSES AND ENFORCEMENT OF INDEMNIFICATION

The Permittee shall reimburse the Commonwealth for any necessary expenses, attorneys' fees or costs incurred in the enforcement of any part of this Indemnification within ninety (90) days after receiving written notice that the Commonwealth has incurred them.

SECTION 8 - SEVERABILITY

If any section of this Indemnification is found to be invalid by any court of competent jurisdiction, such finding shall not render the rest of this Indemnification invalid.

SECTION 9 - COVENANT RUNNING WITH THE LAND

Unless excused in writing by the applicable Commonwealth District Executive or his/her designee, the Permittee shall cause a covenant to be executed concerning the property which is the subject of this Indemnification, reciting that this Indemnification has been executed and that all subsequent purchasers, heirs, assigns or transferees of any legal or beneficial interest in the property take it subject to the obligations imposed herein as covenants running with the land. The covenant shall be recorded in the Office of the Recorder of Deeds of the appropriate county or counties. A copy of the executed covenant, Form M-950 IC, shall be presented to the District Permit Manager prior to the granting of the Permit, together with evidence that the covenant will be submitted to the Office of the Recorder of Deeds for recording in the Grantor/Grantee Index. If excused, memorandum of District Executive attached as Exhibit "C."

SECTION 10 - INDEMNIFICATION DOES NOT CREATE RIGHTS IN THIRD PARTIES

Nothing contained in this Indemnification shall confer a third party beneficiary right of action upon any person whatsoever and nothing set forth in this entire Indemnification shall be construed so as to confer upon any person or entity other than the Commonwealth, its officers, agents and employees, any right of action either under this Indemnification or in any manner whatsoever.

SECTION 11 - CORPORATE OFFICER INDIVIDUAL GUARANTY

Unless excused in writing by the applicable Commonwealth District Executive or his/her designee, execution of this Indemnification by a corporate officer on behalf of a corporation or other entity shall constitute an individual guaranty of all obligations herein. If excused, memorandum of District Executive attached as Exhibit "C."

IN WITNESS WHEREOF, the undersigned have set their hands this _____ day of _____, 20__.

PERMITTEE

BY: _____

Applicant: do not write below this line -- for Department of Transportation use only

- Exhibit "A" Design Waiver Approval attached.
- Exhibit "B" Certificate of Insurance M-950 X and a copy of the Insurance Policy Rider endorsement attached. See form of special endorsement below. Exhibit to be fully executed M-950 X and a copy of the actual special endorsement.
- Covenant Form M-950 IC received (unless excused by Commonwealth).
- Recording Copy Form M-945 RC verifying covenant (Form M-950 IC) will be recorded in appropriate County Courthouse Grantor/ Grantee Index supplied.
- Financial responsibility of Permittee determined to decide whether personal guaranty should be excused for corporations or other entities.
- Exhibit "C" memorandum from District Executive attached if Section 9 covenant requirement, and/or Section 11 personal guaranty requirement are excused.
- Indemnification properly executed. See Appendix F (Signature Authority Guide) to Right of Way Manual.

Form of special endorsement to be added to all insurance policies required as a condition precedent to the issuance of a Highway Occupancy Permit:

It is hereby agreed and understood that the Commonwealth of Pennsylvania, Department of Transportation, is added to this policy as an additional insured for public liability insurance (including personal injury liability) for at least \$250,000.00 per individual and at least \$1,000,000.00 per occurrence. The Commonwealth of Pennsylvania, Department of Transportation, is added to this policy as an additional insured specifically for all claims, suits and damages arising out of the design, construction or use of the driveway or other structure that is the subject of Application No. _____, submitted to the Department for issuance of a Highway Occupancy Permit.

This policy is conditioned such that the insurance company issuing this policy shall give notice to the Commonwealth of Pennsylvania, Department of Transportation, at least 30 days prior to any change in the amount of insurance or in the designation of the insured(s) under this policy, or upon the lapsing or canceling of coverage on behalf of the Commonwealth for any reason whatever. Such notice shall be in writing by registered mail, return receipt requested, to both the District Office Permit Manager and the Permit Section of the Office of Chief Counsel, Pennsylvania Department of Transportation, P.O. Box 8212, Harrisburg, PA 17105-8212, and shall state the nature of any such change or lapse in coverage.

Design Waivers

**[This exhibit is to be the fully executed Design Waivers
which are the subject of the Indemnification.]**

EXHIBIT "A"

Form M-950 X and INSURANCE POLICY RIDER

**[This exhibit is to be the fully executed Certificate of Insurance M-950 X
and a copy of the actual insurance policy rider.]**

EXHIBIT "B"

Memorandum Excusing Requirements

[This exhibit is to be a memorandum signed by the applicable District Executive or her/his designee; use only if Sections 9 and/or 11 are excused.]

EXHIBIT "C"



INDEMNIFICATION

67 PA Code, Section 441.8(j)(5), relating to lane in front of another property, and/or
67 PA Code, Section 441.6(4)(i), relating to costs and expenses of highway improvements

THIS INDEMNIFICATION is by _____, with an address of _____ (the "Permittee") for the DEPARTMENT OF TRANSPORTATION, COMMONWEALTH OF PENNSYLVANIA (the "Commonwealth").

WHEREAS, the Permittee has applied to the Commonwealth for a permit (the "Permit") to occupy the Commonwealth's legal right-of-way with a driveway or structure at the location and for the purposes more fully described in Highway Occupancy Permit Application Number _____, and associated highway occupancy permit condition statement and supplements.

NOW, intending to be legally bound, as an express condition to issuance of the Permit hereunder, the Permittee enters into the following indemnification, which is to be binding upon the Permittee, its heirs, successors and assigns:

SECTION 1 - LIABILITY, LOSS OR DAMAGE

The Permittee hereby undertakes to indemnify fully the Commonwealth, its officers, agents and employees, of and from damages or injury to persons or property in a claim or suit seeking to impose liability on the Commonwealth, its officers, agents or employees, arising out of any and all claims, demands, costs, or judgments of any type and any act or omission of the Permittee or the Permittee's contractor, agent, servant, employee or other person engaged or employed in conjunction with the construction, design or use of the structure or facility that is the subject of the Permit based in whole or in part upon interference with access to any property due to the construction and operation of auxiliary lanes and/or other features, including without limitation any action brought pursuant to the provisions of the Eminent Domain Code, 26 Pa.C.S. § 101 et seq., it being the intent of this provision to absolve and protect the Commonwealth, its officers, agents, and employees from any and all loss by reason of interference with access. This Indemnification is in addition to that provided for under 67 Pa. Code §441.6(13).

SECTION 2 - EXPRESS CONDITION PRECEDENT

Full performance of all conditions and covenants of this Indemnification upon terms satisfactory to the Commonwealth is an express condition precedent to the issuance of the Permit. It is hereby acknowledged that the Commonwealth will not accept substantial compliance with the terms and conditions of this Indemnification by the Permittee. Inaction or lapse of time shall not constitute a bar to the pursuit of any legal or equitable remedy available to the Commonwealth in any court of competent jurisdiction.

SECTION 3 - DURATION

The obligations of the Permittee under this Indemnification to the Commonwealth shall commence upon the date of execution hereof and shall continue in full force and effect until the expiration of six years from the date of final inspection and acknowledgement of completion by the Commonwealth of all work authorized by the Permit or sooner if, due to changed circumstances since the Permit was issued, the Commonwealth releases the Permittee in writing from the obligations of this Indemnification because possible claims for interference with access due to the construction and operation of auxiliary lanes and/or other features of the Permit no longer exist.

SECTION 4 - INSURANCE

The Permittee shall have the Commonwealth added as an additional insured to its and its contractor's policy in a form and amount satisfactory to the Commonwealth, to cover any loss that may be incurred for or on account of any matter, cause or thing arising out of the permitted activity, construction or design including the obligations under this Indemnification. The amount of insurance shall be at least \$250,000 per person and at least \$1,000,000 per occurrence. The obligation to maintain insurance with the Commonwealth as an additional insured shall remain in effect for so long as this Indemnification

is in effect. A fully executed Form M-950X evidencing that the required insurance is in place and a copy of the required special policy endorsement are attached hereto as Exhibit "A" and made part hereof.

SECTION 5 - REQUIREMENT OF NOTICE TO COMMONWEALTH

The Permittee shall notify in writing, within ten days, by registered mail, return receipt requested, both the District Office Permit Manager and the Permit Section, Office of Chief Counsel, Pennsylvania Department of Transportation, P.O. Box 8212, Harrisburg, PA 17105-8212 of any and all claims made against the Permittee which pertain to the subject of the Permit.

SECTION 6 - OBLIGATION OF PERMITTEE TO DEFEND CLAIMS

The Permittee, upon request of the Commonwealth, shall defend, or pay and provide for the reasonable cost of such defense, including attorneys fees, the Commonwealth, its officers, agents and employees, against any and all claims brought or actions filed against the Commonwealth, either as an original or an additional defendant, with respect to the subject of the indemnity contained herein, whether such claims or actions are rightfully or wrongfully brought or filed. The Permittee hereby waives any and all rights to join the Commonwealth as an additional defendant in any actions arising as a result of the grant of the Permit or as a result of any construction, design or subsequent use that is the subject of the Permit.

Notwithstanding the foregoing provisions, the Commonwealth may employ or provide attorneys of its own selection to appear and defend any claims or actions on behalf of the Commonwealth, at the Permittee's sole cost and expense.

SECTION 7 - REIMBURSEMENT FOR EXPENSES AND ENFORCEMENT OF INDEMNIFICATION

The Permittee shall reimburse the Commonwealth for any necessary expenses, attorneys' fees or costs incurred in the enforcement of any part of this Indemnification within ninety (90) days after receiving written notice that the Commonwealth has incurred them.

SECTION 8 - SEVERABILITY

If any section of this Indemnification is found to be invalid by any court of competent jurisdiction, such finding shall not render the rest of this Indemnification invalid.

SECTION 9 - COVENANT RUNNING WITH THE LAND

Unless excused in writing by the applicable Commonwealth District Executive or his/her designee, the Permittee shall cause a covenant to be executed concerning the property which is the subject of this Indemnification, reciting that this Indemnification has been executed and that all subsequent purchasers, heirs, assigns or transferees of any legal or beneficial interest in the property take it subject to the obligations imposed herein as covenants running with the land. The covenant shall be recorded in the Office of the Recorder of Deeds of the appropriate county or counties. A copy of the executed covenant, Form M-950 IC, shall be presented to the District Permit Manager prior to the granting of the Permit, together with evidence that the covenant will be submitted to the Office of the Recorder of Deeds for recording in the Grantor/Grantee Index. If excused, memorandum of District Executive attached as Exhibit "B."

SECTION 10 - INDEMNIFICATION DOES NOT CREATE RIGHTS IN THIRD PARTIES

Nothing contained in this Indemnification shall confer a third party beneficiary right of action upon any person whatsoever and nothing set forth in this entire Indemnification shall be construed so as to confer upon any person or entity other than the Commonwealth, its officers, agents and employees, any right of action either under this Indemnification or in any manner whatsoever.

SECTION 11 - CORPORATE OFFICER INDIVIDUAL GUARANTY

Unless excused in writing by the applicable Commonwealth District Executive or her/his designee, execution of this agreement by a corporate officer on behalf of a corporation or other entity shall constitute an individual guaranty of all obligations herein. If excused, memorandum of District Executive attached as Exhibit "B."

IN WITNESS WHEREOF, the undersigned have set their hands this _____ day of _____, 20__.

PERMITTEE

BY: _____

Applicant: do not write below this line -- for Department of Transportation use only

- Exhibit "A" Certificate of Insurance M-950 X and a copy of the Insurance Policy Rider endorsement attached. See form of special endorsement below. Exhibit to be fully executed (M-950 X and a copy of the actual special endorsement).
- Covenant Form M-950 IC received (unless excused by Commonwealth).
- Recording Copy Form M-945 RC verifying covenant (Form M-950 IC) will be recorded in appropriate County Courthouse Grantor/ Grantee Index supplied.
- Financial responsibility of Permittee determined to decide whether personal guaranty should be excused for corporations or other entities.
- Exhibit "B" memorandum from District Executive attached if Section 9 covenant requirement, and/or Section 11 personal guaranty requirement are excused.
- Indemnification properly executed. See Appendix F (Signature Authority Guide) to Right of Way Manual.

Form of special endorsement to be added to all insurance policies required as a condition precedent to the issuance of a Highway Occupancy Permit:

It is hereby agreed and understood that the Commonwealth of Pennsylvania, Department of Transportation, is added to this policy as an additional insured for public liability insurance (including personal injury liability) for at least \$250,000.00 per individual and at least \$1,000,000.00 per occurrence. The Commonwealth of Pennsylvania, Department of Transportation, is added to this policy as an additional insured specifically for all claims, suits and damages arising out of the design, construction or use of the driveway or other structure that is the subject of Application No. _____, submitted to the Department for issuance of a Highway Occupancy Permit.

This policy is conditioned such that the insurance company issuing this policy shall give notice to the Commonwealth of Pennsylvania, Department of Transportation, at least 30 days prior to any change in the amount of insurance or in the designation of the insured(s) under this policy, or upon the lapsing or canceling of coverage on behalf of the Commonwealth for any reason whatever. Such notice shall be in writing by registered mail, return receipt requested, to both the District Office Permit Manager and the Permit Section of the Office of Chief Counsel, Pennsylvania Department of Transportation, P.O. Box 8212, Harrisburg, PA 17105-8212, and shall state the nature of any such change or lapse in coverage.

Form M-950 X and INSURANCE POLICY RIDER

**[This exhibit is to be the fully executed Certificate of Insurance M-950 X
and a copy of the actual insurance policy rider.]**

EXHIBIT "A"

Memorandum Excusing Requirements

[This exhibit is to be a memorandum signed by the applicable District Executive or her/his designee; use only if Sections 9 and/or 11 are excused.]

EXHIBIT "B"



INDEMNIFICATION

67 PA Code, Section 441.3(h), relating to flow of water onto another property

THIS INDEMNIFICATION is by _____, with an address of _____ (the "Permittee") for the DEPARTMENT OF TRANSPORTATION, COMMONWEALTH OF PENNSYLVANIA (the "Commonwealth").

WHEREAS, the Permittee has applied to the Commonwealth for a permit (the "Permit") to occupy the Commonwealth's legal right-of-way with a driveway or structure at the location and for the purposes more fully described in Highway Occupancy Permit Application Number _____, and associated highway occupancy permit condition statement and supplements.

NOW, intending to be legally bound, as an express condition to issuance of the Permit hereunder, the Permittee enters into the following indemnification, which is to be binding upon the Permittee, its heirs, successors and assigns:

SECTION 1 - LIABILITY, LOSS OR DAMAGE

The Permittee hereby undertakes to indemnify fully the Commonwealth, its officers, agents and employees, of and from damages or injury to persons or property in a claim or suit seeking to impose liability on the Commonwealth, its officers, agents or employees, arising out of any and all claims, demands, costs, or judgments of any type and any act or omission of the Permittee or the Permittee's contractor, agent, servant, employee or other person engaged or employed in conjunction with the construction, design or use of the structure or facility that is the subject of the Permit based in whole or in part upon an increase in the flow of water onto any property, including without limitation any action brought pursuant to the provisions of the Eminent Domain Code, 26 Pa.C.S. § 101 et seq., it being the intent of this provision to absolve and protect the Commonwealth, its officers, agents, and employees from any and all loss by reason of an increase in the flow of water onto other properties. This Indemnification is in addition to that provided for under 67 Pa. Code §441.6(13).

SECTION 2 - EXPRESS CONDITION PRECEDENT

Full performance of all conditions and covenants of this Indemnification upon terms satisfactory to the Commonwealth is an express condition precedent to the issuance of the Permit. It is hereby acknowledged that the Commonwealth will not accept substantial compliance with the terms and conditions of this Indemnification by the Permittee. Inaction or lapse of time shall not constitute a bar to the pursuit of any legal or equitable remedy available to the Commonwealth in any court of competent jurisdiction.

SECTION 3 - DURATION

The obligations of the Permittee under this Indemnification to the Commonwealth shall commence upon the date of execution hereof and shall continue in full force and effect until the expiration of six years from the date of final inspection and acknowledgement of completion by the Commonwealth of all work authorized by the Permit or sooner if, due to changed circumstances since the Permit was issued, the Commonwealth releases the Permittee in writing from the obligations of this Indemnification because possible claims due to an increase in the flow of water onto any property no longer exist.

SECTION 4 - INSURANCE

The Permittee shall have the Commonwealth added as an additional insured to its and its contractor's policy in a form and amount satisfactory to the Commonwealth, to cover any loss that may be incurred for or on account of any matter, cause or thing arising out of the permitted activity, construction or design including the obligations under this Indemnification. The amount of insurance shall be at least \$250,000 per person and at least \$1,000,000 per occurrence. The obligation to maintain insurance with the Commonwealth as an additional insured shall remain in effect for so long as this Indemnification is in effect. A fully executed Form M-950X evidencing that the required insurance is in place and a copy of the required special policy endorsement are attached hereto as Exhibit "A" and made part hereof.

SECTION 5 - REQUIREMENT OF NOTICE TO COMMONWEALTH

The Permittee shall notify in writing, within ten days, by registered mail, return receipt requested, both the District Office Permit Manager and the Permit Section, Office of Chief Counsel, Pennsylvania Department of Transportation, P.O. Box 8212, Harrisburg, PA 17105-8212 of any and all claims made against the Permittee which pertain to the subject of the Permit.

SECTION 6 - OBLIGATION OF PERMITTEE TO DEFEND CLAIMS

The Permittee, upon request of the Commonwealth, shall defend, or pay and provide for the reasonable cost of such defense, including attorneys fees, the Commonwealth, its officers, agents and employees, against any and all claims brought or actions filed against the Commonwealth, either as an original or an additional defendant, with respect to the subject of the indemnity contained herein, whether such claims or actions are rightfully or wrongfully brought or filed. The Permittee hereby waives any and all rights to join the Commonwealth as an additional defendant in any actions arising as a result of the grant of the Permit or as a result of any construction, design or subsequent use that is the subject of the Permit.

Notwithstanding the foregoing provisions, the Commonwealth may employ or provide attorneys of its own selection to appear and defend any claims or actions on behalf of the Commonwealth, at the Permittee's sole cost and expense.

SECTION 7 - REIMBURSEMENT FOR EXPENSES AND ENFORCEMENT OF INDEMNIFICATION

The Permittee shall reimburse the Commonwealth for any necessary expenses, attorneys' fees or costs incurred in the enforcement of any part of this Indemnification within ninety (90) days after receiving written notice that the Commonwealth has incurred them.

SECTION 8 - SEVERABILITY

If any section of this Indemnification is found to be invalid by any court of competent jurisdiction, such finding shall not render the rest of this Indemnification invalid.

SECTION 9 - COVENANT RUNNING WITH THE LAND

Unless excused in writing by the applicable Commonwealth District Executive or his/her designee, the Permittee shall cause a covenant to be executed concerning the property which is the subject of this Indemnification, reciting that this Indemnification has been executed and that all subsequent purchasers, heirs, assigns or transferees of any legal or beneficial interest in the property take it subject to the obligations imposed herein as covenants running with the land. The covenant shall be recorded in the Office of the Recorder of Deeds of the appropriate county or counties. A copy of the executed covenant, Form M-950 IC, shall be presented to the District Permit Manager prior to the granting of the Permit, together with evidence that the covenant will be submitted to the Office of the Recorder of Deeds for recording in the Grantor/Grantee Index. If excused, memorandum of District Executive attached as Exhibit "B."

SECTION 10 - INDEMNIFICATION DOES NOT CREATE RIGHTS IN THIRD PARTIES

Nothing contained in this Indemnification shall confer a third party beneficiary right of action upon any person whatsoever and nothing set forth in this entire Indemnification shall be construed so as to confer upon any person or entity other than the Commonwealth, its officers, agents and employees, any right of action either under this Indemnification or in any manner whatsoever.

SECTION 11 - CORPORATE OFFICER INDIVIDUAL GUARANTY

Unless excused in writing by the applicable Commonwealth District Executive or her/his designee, execution of this agreement by a corporate officer on behalf of a corporation or other entity shall constitute an individual guaranty of all obligations herein. If excused, memorandum of District Executive attached as Exhibit "B."

IN WITNESS WHEREOF, the undersigned have set their hands this _____ day of _____, 20__.

PERMITTEE

BY: _____

Applicant: do not write below this line -- for Department of Transportation use only

- Exhibit "A" Certificate of Insurance M-950 X and a copy of Insurance Policy Rider endorsement attached. See form of special endorsement below. Exhibit to be fully executed M-950 X and a copy of the actual special endorsement.
- Covenant Form M-950 IC received (unless excused by Commonwealth).
- Recording Copy Form M-945 RC verifying covenant (Form M-950 IC) will be recorded in appropriate County Courthouse Grantor/ Grantee Index supplied.
- Financial responsibility of Permittee determined to decide whether personal guaranty should be excused for corporations or other entities.
- Exhibit "B" memorandum from District Executive attached if Section 9 covenant requirement, and/or Section 11 personal guaranty requirement are excused.
- Indemnification properly executed. See Appendix F (Signature Authority Guide) to Right of Way Manual.

Form of special endorsement to be added to all insurance policies required as a condition precedent to the issuance of a Highway Occupancy Permit:

It is hereby agreed and understood that the Commonwealth of Pennsylvania, Department of Transportation, is added to this policy as an additional insured for public liability insurance (including personal injury liability) for at least \$250,000.00 per individual and at least \$1,000,000.00 per occurrence. The Commonwealth of Pennsylvania, Department of Transportation, is added to this policy as an additional insured specifically for all claims, suits and damages arising out of the design, construction or use of the driveway or other structure that is the subject of Application No. _____, submitted to the Department for issuance of a Highway Occupancy Permit.

This policy is conditioned such that the insurance company issuing this policy shall give notice to the Commonwealth of Pennsylvania, Department of Transportation, at least 30 days prior to any change in the amount of insurance or in the designation of the insured(s) under this policy, or upon the lapsing or canceling of coverage on behalf of the Commonwealth for any reason whatever. Such notice shall be in writing by registered mail, return receipt requested, to both the District Office Permit Manager and the Permit Section of the Office of Chief Counsel, Pennsylvania Department of Transportation, P.O. Box 8212, Harrisburg, PA 17105-8212, and shall state the nature of any such change or lapse in coverage.

Form M-950 X and INSURANCE POLICY RIDER

**[This exhibit is to be the fully executed Certificate of Insurance M-950 X
and a copy of the actual insurance policy rider.]**

EXHIBIT "A"

Memorandum Excusing Requirements

[This exhibit is to be a memorandum signed by the applicable District Executive or her/his designee; use only if Sections 9 and/or 11 are excused.]

EXHIBIT "B"