PARTICIPATION AGREEMENT
BETWEEN
THE PUBLIC ENTITY POOL FOR LIABILITY
AND
THE STATE OF SOUTH DAKOTA

This Agreement is made and entered into effective the first day of July 2016 by and between the Public Entity Pool for Liability (hereinafter referred to as "PEPL") and the State of South Dakota (hereinafter referred to as "State") and is made with reference to the following:

W I T N E S S E T H:

WHEREAS, SDCL ch. 3-22 establishes PEPL to provide a fund as the sole source for payment of valid tort claims against employees of the State; and

WHEREAS, PEPL has developed a program for funding such tort claims; and

WHEREAS, the State is authorized to obtain liability coverage for its employees from PEPL; and

WHEREAS, the State has duly authorized the execution, delivery and performance of this Agreement,

NOW THEREFORE, in consideration of the mutual covenants contained herein, under which immunity of such employees is waived pursuant to SDCL ch. 3-22, PEPL and the State hereby agree as follows:

ARTICLE I
INTRODUCTION

This Agreement sets forth the terms and conditions applicable to the tort liability coverage program offered by PEPL to employees of the State and the conditions under which immunity of such employees is waived in accordance with the provisions of SDCL ch. 3-22 and Article III, Section 27 of the South Dakota Constitution.

ARTICLE II
TERM

This Agreement commences July 1, 2016, and shall automatically continue for successive annual periods until termination or dissolution as set forth in Article X. Notwithstanding this section, if the Legislature fails to appropriate funds or to grant expenditure authority for this purpose, this Agreement shall terminate at the end of the then current coverage period.

ARTICLE III
COVERAGE

The scope and limits of coverage shall be as set forth in the Memorandum of Coverage attached hereto and incorporated herein as Appendix A.

ARTICLE IV
CONTRIBUTIONS

Contributions by the State to PEPL shall be calculated annually and shall consider:

1. The State's employees' exposure to liability loss;
2. The State's employees' historical loss experience;
3. The cost of providing claim administration, legal defense, loss prevention and related services to the State and its employees;
4. PEPL's general administration and overhead related to the program provided to the State;
5. The cost of any commercial insurance protecting the State's employees and purchased by PEPL;
6. The need for reserve funds and contingency contributions to ensure the solvency of PEPL;
7. Amounts needed to restore shortfalls of previous coverage periods;
8. Investment income earned by PEPL;
9. The limit and scope of coverage provided to the State's employees by PEPL.

The rating formula may be changed by PEPL, effective with the first day of any coverage period. The contribution amount and the rating formula selected by PEPL for

any coverage period shall be disclosed to the State no later than November 1 preceding the effective date of the next coverage period. Contributions shall be remitted to PEPL on or about July 1 each year.

ARTICLE V
RETURN OF SURPLUS

PEPL shall, from time to time, evaluate the financial results of each coverage period. If PEPL determines there is a surplus for any coverage period, it may distribute the surplus to the State or transfer it to the Contingency Reserve. The amount, timing and method of distribution or transfer of surplus, if any, shall be at the sole discretion of PEPL. No surplus shall be distributed to the State without an independent actuarial determination that the contingency reserve is adequate and outstanding liabilities are adequately provided for.

ARTICLE VI
CONTINGENCY RESERVE

PEPL shall establish a contingency reserve. The contingency reserve shall be used for contingencies, including temporary funding of contribution shortfalls. The contingency reserve shall be credited with interest earnings. An actuary shall periodically review the contingency reserve for adequacy. The contingency reserve may not be counted for triggering a surplus distribution.

ARTICLE VII
FUND

Prior to the inception of each coverage period hereafter, PEPL shall, by resolution, establish the amount of the fund for the coverage period. The amount so established shall be used to compute payouts for all structured settlements from occurrences during the coverage period.

ARTICLE VIII
PEPL'S OBLIGATIONS

PEPL shall carry out the provisions of SDCL ch. 3-22 and this Agreement and shall provide:

1. Coverage in accordance with the Memorandum of Coverage, Appendix A;

2. Tort liability claim administration services for claims covered by the Memorandum of Coverage, Appendix A;

3. Legal defense for litigated claims covered by the Memorandum of Coverage, Appendix A;

4. Tort liability loss prevention services;

5. Monthly statements of claims reported and losses incurred, paid and reserved by accident year;

6. Detailed financial statements and budgets for each coverage period;

7. Independent audits of claim administration services;

8. Independent actuarial studies of loss and contingency reserves.

ARTICLE IX
STATE'S OBLIGATIONS

The State shall:

1. Remit to PEPL, in the manner and time requested, all contributions;

2. Comply with SDCL ch. 3-22;

3. Provide PEPL with prompt written notice of claims or events likely to give rise to claims covered by the Memorandum of Coverage;

4. Cooperate with PEPL and, upon its request, assist in the settlement and defense of claims and enforcement of any rights of contribution or indemnity that the State, its employees or PEPL may have against any person;

5. Not, except at its own expense, voluntarily make any payments, assume any obligations or incur any costs with regard to the settlement of any covered loss;

6. Subrogate PEPL to the extent of any and all rights that the State or its employees may have to the recovery or reimbursement of any payments made by PEPL on behalf of the State's employees. The State shall do nothing to prejudice such rights and shall cooperate with PEPL in the recovery or reimbursement of any sums.

ARTICLE X
TERMINATION OR DISSOLUTION

The State may withdraw from PEPL at the end of any coverage period by giving PEPL at least 180 days written notice of its desire to withdraw.

PEPL may decline renewal of the State's participation by giving the State at least 180 days written notice of its desire not to renew. Coverage may be terminated under this provision only at the end of a coverage period unless another date is mutually agreed upon.

Upon withdrawal, termination or dissolution for any reason, the State and PEPL shall reach an agreement on the disposition of all funds, reserves, surplus and claims.

THE PUBLIC ENTITY POOL FOR LIABILITY

By: _____
Craig Ambach, Director

THE STATE OF SOUTH DAKOTA

By: _____
Dennis Daugaard, Governor

Appendix A

THE PUBLIC ENTITY POOL FOR LIABILITY
Memorandum of Liability Coverage to the Employees of the State of South Dakota

Declarations

Coverage Amount:	$1,000,000 per *occurrence*, subject to limitations set forth in SDCL ch. 3-22 and this Memorandum.
Coverage Period:	From July 1, 2016 through June 30, 2017.

THE PUBLIC ENTITY POOL FOR LIABILITY

Memorandum of Liability Coverage to the Employees of the State of South Dakota

In consideration of the Contribution stated in the Declarations and incorporating the provisions of SDCL ch. 3-22, except as altered by the Participation Agreement, *PEPL* and the *State* agree as follows:

I. COVERAGE DESCRIPTION

A. SOVEREIGN IMMUNITY

Except to the extent that coverage is specifically provided under this Memorandum, the *State* reserves on behalf of itself and the *employees* all rights of sovereign or governmental immunity.

B. DAMAGES COVERAGE

PEPL will pay damages, not excluded hereunder, on behalf of the *employee* that the *employee* becomes legally obligated to pay because of an *occurrence*, not excluded hereunder.

C. DEFENSE COVERAGE

PEPL has the right and duty to defend any claim or suit for damages not excluded hereunder, but:

1. *PEPL* may, at its discretion, investigate any *occurrence* and settle any claim or suit that may result, and

2. *PEPL*'s right and duty to defend ends after the Coverage Limit is exhausted by payments made or obligations assumed by *PEPL* for occurrences not excluded hereunder.

Defense costs are payable in addition to the Coverage Limit.

D. APPROPRIATION AND EXPENDITURE AUTHORITY LIMITATION

All liability recognized or created under this agreement is void, unless the *State* Legislature appropriates funds and grants expenditure authority as required to discharge such liability.

E. EXCLUSIONS

This Memorandum does not extend coverage or apply to any liability:

1. Assumed under contract, except this exclusion shall not apply to rental car contracts entered into by *employees* or to contracts specifically added by endorsement hereto;

2. Arising out of the ownership, operation, use, maintenance or entrustment of any *aircraft* owned or operated by, rented or loaned by or to any employee, except this exclusion shall not apply to the extent *PEPL* purchases insurance for such purposes;

3. Due to declared or undeclared war, riot, a concerted act of civil disobedience and similar *occurrences* or acts or conditions incident thereto. However this exclusion does not apply to liability arising from actions taken to protect persons or property;

4. Under workers' compensation, disability benefits, unemployment compensation or similar laws;

5. For *bodily injury* to an *employee* arising out of and in the course of employment by the *State*;

6. For injury to the spouse, child, parent, brother or sister of the *employee* in 5, above, as a consequence of the *bodily injury* to that *employee*;

7. Arising out of the actual, alleged, or threatened discharge, release or escape of *pollutants*;

8. Resulting from or contributed to in any manner by the hazardous properties of *nuclear material*;

9. For injuries resulting from or contributed to in any manner by the presence of asbestos;

10. Arising from or contributed to in any manner by acts, errors or omissions in the engineering or design of any public roadway or public transportation project;

11. For any costs relating to reinstatement or promotion of an employee, or any other equitable relief, arising from employee grievances, administrative claims, or legal actions, including but not limited to, claims asserted by an employee under any federal law or as a result of an employee's rights as guaranteed by the United States Constitution;

12. For back pay, front pay, benefits, emotional injuries, penalties, attorney fee awards, punitive damages, or any other form of damages, arising from employee grievances, administrative claims, or legal actions, including but not limited to, claims asserted by an employee under any federal law or as a result of an employee's rights as guaranteed by the United States Constitution;

13. For fines, penalties, punitive damages or exemplary damages;

14. For failure to perform, or breach of, a contractual obligation;

15. Arising out of the providing or the failure to provide *medical professional services* by *employees*, except this exclusion shall not apply to *employees* of the University of South Dakota Sanford School of Medicine to the extent they are performing medical research during the course of their employment and as approved by the University of South Dakota Sanford School of Medicine. This exclusion also does not apply to employees of the School of Health Sciences to the extent they are performing approved medical research during the course of their employment;

16. For damages that are a result of a discretionary act or task. This exclusion does not apply if the damages are the result of a *ministerial act or task;*

17. To the extent the *occurrence* is covered by any valid and collectible liability insurance, except this exclusion shall not apply to liability insurance of the *employee* that protects the *employee* while driving a *State* owned or leased vehicle;

18. For damages measured by contract, as set forth in SDCL ch. 21-2;

19. For damage to property owned by the *State*;

20. Arising out of the ownership, operation, engineering or design of any airport, landing strip or similar facility. However, this exclusion shall not apply to state-owned hangars in the cities of Brookings, Vermillion, and Pierre, South Dakota;

21. For refund of taxes, fees and assessments;

22. For claims where notice was not given by the claimant within 180 days after the injury or as required by SDCL, ch. 3-21;

23. Arising out of the *employee* obtaining remuneration or financial gain to which the *employee* was not legally entitled;

24. Arising from collecting or attempting to collect taxes;

25. Arising from providing or attempting to provide emergency disaster relief services pursuant to SDCL ch. 33-15;

26. Arising from activities or facilities of the South Dakota Building Authority or its *employees*;

27. Arising from activities or facilities of the South Dakota Health and Educational Facilities Authority or its *employees*;

28. Arising from activities or facilities of the South Dakota Housing Development Authority or its *employees* except this exclusion shall not apply to the South Dakota Housing Development Authority, its commissioners, officers and employees, with respect to liability arising from the construction of residential and other structures under the Governor's House and Daycare Building Project at Mike Durfee State Prison in Springfield, South Dakota;

29. Arising from activities or facilities of the South Dakota Science and Technology Authority or its *employees*;

30. Arising out of the employee's willful and wanton misconduct.

31. Arising in any manner from activities of South Dakota State University 4-H volunteers. No South Dakota 4-H volunteer is considered an *employee* under this Memorandum.

II. COVERAGE AMOUNT

The Coverage Amount shown in the Declarations is the most *PEPL* will pay for damages for each occurrence, regardless of the number of:

A. *Employees* involved;

B. Claims made or suits brought for damages; or

C. Persons or organizations who sustain damages.

The Coverage Amount shown in the Declarations shall be reduced by any insurance that applies to an *occurrence* not excluded hereunder, and the coverage afforded by

this Memorandum shall be excess of and not contribute with any such insurance. Notwithstanding the preceding sentence, this Memorandum shall be primary with respect to liability insurance of the *employee* that protects the *employee* while driving a *State* owned or leased vehicle.

An *occurrence* taking place over more than one Coverage Period shall be deemed to have taken place during the Coverage Period in which the *occurrence* first took place, and only that Coverage Period's Coverage Amount applies.

III. DEFINITIONS

1. *Aircraft* – any machine designed to travel through the air, including but not limited to airplanes, dirigibles, hot air balloons, helicopters, hang gliders, and drones.

2. *Bodily injury* - injury, sickness or disease sustained by a person, including death resulting therefrom.

3. *Defense costs* - fees and expenses generated by and related to the adjustment, investigation, defense or litigation of a claim, including attorney's fees, court costs, and interest on judgments before they are paid. *Defense costs* shall not include the salaries and overhead of employees of the *State*, except as may be provided for under contract with the Attorney General.

4. *Employee* - all current and former employees and elected and appointed officials of the *State* whether classified, unclassified, licensed or certified, permanent or temporary, whether compensated or not. The term includes employees of all branches of government including the judicial and legislative branches and employees of constitutional, statutory and executive order boards, commissions, and offices. The term does not include independent contractors.

5. *Medical professional services* - the furnishing of:

   a. Medical, surgical, psychiatric, dental, nursing or other health care services, including the furnishing of food or beverages in connection therewith; or

   b. Drugs or medical, dental or surgical supplies or appliances.

6. *Ministerial act or task* - an act or task that involves obedience to instructions, but demands no special discretion, judgment or skill.

7. *Nuclear material* - Source material, special nuclear material or byproduct material, all as defined in the Atomic Energy Act of 1954 or any law amendatory thereto.

8. *Occurrence* - an accident, act, error, omission or event, during the Coverage Period, which results in damages and arises within the scope of the *employee's* duties for the *State*.

9. *PEPL* - the Public Entity Pool for Liability established by SDCL ch. 3-22.

10. *Pollutants* - any solid, liquid, gaseous or thermal irritant or contaminant.

11. *State* - the State of South Dakota.

IV. SPECIAL COVERAGE EXTENSION

This Memorandum shall cover students at *State* educational institutions and consultants to the *State* when operating *State* owned or leased vehicles on official *State* business. This Memorandum shall be primary with respect to liability insurance available to such consultants. However, with respect to liability, the student's own insurance shall be primary and any coverage provided by this special coverage extension shall be secondary and available only after all other available coverages are exhausted.

This extension shall only apply to students if the following conditions have been met:

1. That at the time the student makes application to use a vehicle the student presents a valid drivers license and current proof of compliance with the financial responsibility laws of the State of South Dakota.

2. That the educational institution photocopy the information required in paragraph 1 and attach the photocopies to the application and keep the same for a minimum of three years.

3. That if any of the information required in paragraph 1 is false or if the educational institution fails to perform the requirements in paragraph 2, then no coverage shall be provide

THE PUBLIC ENTITY POOL FOR LIABILITY
MEMORANDUM OF LIABILITY COVERAGE
TO THE EMPLOYEES OF SOUTH DAKOTA

Endorsement No. 1

Privately-Owned Vehicles Operated by Employees of the State of South while on Official Duty During Periods of State Disaster Declarations by the Governor

Effective Date of Endorsement: July 1, 2015

Issue Date of Endorsement: July 1, 2015

Section IV, Special Coverage Extension, is amended as follows:

With respect to employees of the State of South Dakota who must use their privately-owned vehicles to travel on official business to conduct disaster relief-related work during periods of time when there has been a State Disaster Declaration by the Governor, coverage is provided by this Memorandum and shall be a combined single limit of liability of $1,000,000 to include coverage for bodily injury and property damage. This shall include damage to the employee's vehicle (collision and comprehensive coverage) when in use under the conditions set forth in this endorsement.

This extension shall only apply to employees of the State of South Dakota if all of the following conditions have been met:

1. The employee must drive to a workstation that is located in a city, town or rural location that is not their normal place of work.

2. The director of Fleet and Travel or the director's designated agent has certified that a state-owned fleet vehicle is not available during the period of time of required use.

3. The employee is on official business conducting work associated with a State Disaster Declaration by the Governor.

THE PUBLIC ENTITY POOL FOR LIABILITY

By: _____
Grafo Ambach, Director

THE STATE OF SOUTH DAKOTA

By: _____
Dennis Daugaard, Governor