



AGENDA

LEGEND : A – Action may be taken
I - Information
1 - Included
2 - Handout
3 - Separate
4 – Verbal

JPA: ACCEL SPECIAL BOARD OF DIRECTORS MEETING

DATE/TIME: Monday, March 4, 2024 at 3:00 PM

LOCATION: Teleconference

Link: <https://alliantinsurance.zoom.us/j/94347818915?pwd=M2x5VzVHVGVpPY2N2VzVydDQ5UUt2UT09>

Dial: (669) 900-6833

Meeting ID: 943 4781 8915

Passcode: 083932

In accordance with the requirements of the Brown Act, notice of this meeting must be posted in publicly accessible places, 24 hours in advance of the meeting, at the office of ACCEL's Secretary.

Per Government Code section 54954.2, persons requesting disability-related modifications or accommodations, including auxiliary aids or services in order to participate in the meeting, are requested to contact Alliant Insurance Services at (415) 403-1411, 24 hours in advance of the meeting. Access to some buildings may require routine provision of identification to building security. However, ACCEL does not require any member of the public to register his or her name, or to provide other information, as a condition to attendance at any public meeting and will not inquire of building security concerning information so provided. See Government Code section 54953.3.

- MEMBER LOCATIONS VIA TELE - CONFERENCE**
- City of Anaheim, 201 South Anaheim Blvd., Suite 503, Anaheim, CA 92805
 - City of Bakersfield, 1600 Truxtun Ave., 4th Floor, Bakersfield, CA 93301
 - City of Burbank, 275 E. Olive Ave., Burbank, CA 91510
 - City of Modesto, 1010 10th St., Modesto, CA 95353
 - City of Monterey, 735 Pacific St., Suite A, Monterey, CA 93940
 - City of Mountain View, 500 Castro St., 2nd Floor, Mountain View, CA 94041
 - City of Ontario, 200 North Cherry Ave., Ontario, CA 91764
 - City of Palo Alto, 250 Hamilton Ave., 1st Floor, Palo Alto, CA 94301
 - City of Salinas, 200 Lincoln Ave., Salinas, CA 93901
 - City of Santa Barbara, 735 Anacapa St., Santa Barbara, CA 93101
 - City of Santa Cruz, 1200 Pacific Ave, Suite 290, Santa Cruz, CA 95060
 - City of Santa Monica, 1685 Main St., Room 131, Santa Monica, CA 90401
 - City of Visalia, 220 N. Santa Fe St., Visalia, CA 93292

PAGE A. CALL TO ORDER

B. REPORTS

- 2-25 1 1. Proposed Changes to ACCEL's Memorandum of Coverage (MOC) – Exclusion J. Utilities (A)
The Underwriting Committee has made a recommendation to the Board to revise the utilities exclusion. Action may be taken to adopt the changes or direction given.

2. CLOSED SESSION – Pursuant to Gov't Code 54956.95

- 3 Members will review the following Closed Session Items: (A)
- i. Martinez de Garcia v. Modesto
 - ii. Scrivner v. Palo Alto
 - iii. Okamoto v. Bakersfield

C. PUBLIC COMMENTS

- 4 The public is invited at this point to address the Board of Directors on issues of interest to them.

ADJOURNMENT



Item No. B.1
Board of Directors
March 4th, 2024

PROPOSED CHANGES TO ACCEL'S MEMORANDUM OF COVERAGE (MOC):

EXCLUSION J. UTILITIES

ISSUE: ACCEL's Memorandum of Coverage (MOC) Exclusion J. Utilities eliminates coverage for failure to supply water, electricity, or gas.

The City of Ontario submitted a New Exposure Questionnaire regarding the "OntarioNet Boardband Network". The City is seeking to expand opportunities with a broadband fiber and wireless plan to cover the entire City with affordable, fast, and high-capacity internet service.

The Underwriting Committee held its meeting on January 31, 2024 and recommended that the Board amend the exclusion to include broadband/internet/wireless communication.

- J. To liability arising out of or contributed to by any complete or partial failure to supply utilities, including but not limited to water, electricity, ~~or gas,~~ or broadband/internet/wireless communication services.

Byrne Conley, ACCEL's Legal Counsel reviewed the proposed language and provided comments which are outlined in the background section below.

RECOMMENDATION: The Underwriting Committee reviewed this issue and recommends the Board take action to approve update the MOC language effective immediately or retroactively and not wait until the July 1, 2024 renewal. The Board may take action or provide direction.

Additional Consideration

In favor of updating the MOC: A vote in favor indicates the Board would further include broadband/internet/wireless communication services as part of its utility exclusion as it is considered a utility and unique exposure. The Committee recommends that the Board should not wait until the July 1, 2024 renewal to make this change to the MOC. Either the Board takes action to make this change retroactive or as of today's Board Meeting date. This would mean the 2023-24 policy year will have two separate MOCs. The effective date of the second MOC would be today's Board Meeting.

Against change to the MOC: Members may be against accepting the changes if they are in favor of the current language. All ACCEL Members may be providing these services in the future. ACCEL could move to include these types of new exposures.

FISCAL IMPACT: No financial impact is expected from this recommendation.



BACKGROUND: ACCEL's Coverage Counsel, Byrne Conley's comments are below:

The failure to supply exclusion is from an ISO form and I think it is in all JPA Memos of Coverage. The theory is that the pooled liability coverage should not act as a type of warranty for municipal services or contractual type promise to uninterrupted supply.

Historically, I do recall that there was some litigation relating to public entities in South Lake Tahoe being unable to supply sufficient sewer treatment services so that there was a lottery on building permits, and property owners tried to sue claiming inverse condemnation because their property lost all value if they could not build. I believe the litigation was unsuccessful, but it was a reason for pools adopting failure to supply exclusions right from the start (1986) and they likely were in commercial public entity forms before that.

The biggest claim more recently is one you are no doubt aware of a member district of ACWA JPA was sued when some water pumps were out of service during construction work and a large fire broke out, destroying many homes, and the fire hydrants lacked water pressure. The trial court overruled a demurrer on the inverse condemnation claim, the District sought a writ to the Court of Appeal and Supreme Court, but these were denied. ACWA JPA was left with a huge liability claim and subsequent disputes with reinsurers. To me, the irony was that at common law public utility suppliers could not be held liable for such failure to supply claims, based on many cases over the years, and the notion that such a failure could be deemed a taking for public use was novel and, in my view, completely unwarranted.

I am not aware of any pool extending the failure to supply exclusion to broadband/internet/wireless communication services. Partly this might be because most such service is supplied by private companies.

If the Board is inclined to expand the exclusion, I would have it say:

J. To liability arising out of or contributed to by any complete or partial failure to supply water, electricity ~~or gas~~, or broadband/internet/wireless communication services.

Some pools have made an exception for sudden and accidental failures based upon physical injury, or even software failure. Some limit it to failure of capacity claims rather than all failures. Some extend the exclusion to sewer, drainage, gas/fuel etc. Some exclude surge claims, particularly where public electric power is provided by some members. Here are samples of what other pools do with the failure to supply exclusion:

CJPIA:

H.

Any **Claim**, liability, alleged liability, loss, cost, or expense directly or indirectly caused by any complete or partial failure, interruption, or surge in the member's supply of water, electrical power, gas or fuel, unless such failure, interruption or surge results from sudden and accidental physical destruction of tangible property which is used in the generation or transmission of the supply.



PERMA:

12. Claims arising out of the failure to supply or provide an adequate or specific supply of gas, water, electricity, or sewage capacity. This exclusion shall not apply if such failure arises out of sudden and accidental physical damage to tangible property used in the generation or transmission of the supply, or sudden and accidental failure of computer software or programs used in the generation or transmission of supply, or a sudden interruption in the supply of electricity, gas,

or water to the **Covered Party** by a third-party utility supplier.

PLAN JPA:

L. Claims arising out of the failure to supply or provide an adequate supply of gas, water, electricity, storm drainage or sewage capacity when such failure is a result of the inadequacy of the Entity's facilities to supply or produce sufficient gas, water, electricity, storm drainage or sewage capacity to meet the demand. This exclusion does not apply if the failure to supply results from direct and immediate accidental damage to tangible property owned or used by any **Covered Party** to procure, produce, process, or transmit the gas, water, electricity, storm drainage or sewage.

CSRMA:

13. Arising out of failure or inability to supply or provide an adequate supply of electricity, gas or water. This exclusion, however, does not apply if: a) such failure arises out of sudden and accidental physical damage to tangible property used in the generation or transmission of the supply, or a sudden and accidental failure of computer software or programs used in the generation or transmission of the supply, and b) the combined capacity of your installed production facilities and contractual supply arrangements is equal to 110% of the electricity and/or gas demand or 100% of the water demand, whichever demand is applicable to your electric, gas or water system.



CARMA:

12.

Claims arising out of the failure to supply or provide an adequate supply of gas, water, electricity, or sewage capacity when such failure is a result of the inadequacy of the *Covered Party's* facilities to supply or produce sufficient gas, water, electricity, or sewage capacity to meet the demand.

CJPRMA:

16) Failure to Supply

Claims arising out of the failure to supply or provide an adequate supply of gas, water, electricity, storm drainage or sewage capacity when such failure is a result of the inadequacy of the covered party's facilities to supply or produce sufficient gas, water, electricity, storm drainage or sewage capacity to meet the demand. This exclusion does not apply if the failure to supply results from direct and immediate accidental damage to tangible property owned or used by any covered party to procure, produce, process or transmit the gas, water, electricity, storm drainage or sewage.

PRISM:

H. To liability arising out of the failure to provide an adequate supply of fuel, water or electricity; however, this exclusion applies only if such failure to provide results from any decision by the Member's governing body with respect to (1) obtaining such fuel, water or electricity, or (2) allocating such fuel, water or electricity among the users thereof;

The first three pools listed above are primary pools for cities, CSRMA is for sanitary districts (some supply water as well) and the last three are excess pools. I worked on all of these except PRISM's, and as you can see, each pool takes a slightly different view on what is excluded and what is excepted from the exclusion. The CSRMA Exclusion is the one I would personally prefer, but it is really an underwriting decision of the pool and all of the samples are acceptable.

Keep in mind that exclusions for breach of contract or inverse condemnation could also come into play depending on the pleadings; but a failure to supply exclusion does not depend on whether the plaintiff is suing for breach of contract, breach of warranty,

ACCEL

Authority for California Cities Excess Liability

c/o Alliant Insurance Services

Corporation Insurance License No. 0C36861

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dangerous condition, or inverse condemnation. The contract and inverse exclusions might apply to some causes of action but not others.

As for adding internet/broadband, there is no standard language, but the terms are common ones so additional definitions should not be necessary.

I am enclosing a letter I sent to the Supreme Court in the Yorba Linda Water District (ACWA) case mentioned above. I include it because it collects case law on common law immunity for failure to supply; Plaintiffs in that case were able to evade the immunity by suing under inverse condemnation rather than a tort theory, a result I think was terrible public policy.

Also enclosed is treatise material on the ISO form for a failure to supply exclusion.

ATTACHMENT:

1. ACCEL MOC proposed language – redlined

AUTHORITY FOR CALIFORNIA CITIES EXCESS LIABILITY

MEMORANDUM OF EXCESS LIABILITY COVERAGE

The **Authority** is an intergovernmental, risk-sharing, joint powers authority, duly formed pursuant to State of California Government Code Sections 6500 - 6512.

This Memorandum of Excess Liability Coverage is a contract between the **Authority** and a **Member Agency** which sets forth certain duties, responsibilities and obligations of each party. This Memorandum of Excess Liability Coverage is not an insurance policy or document, and is not necessarily subject to the particular rules of law, which apply to an insurance policy or document interpretation.

Throughout this Memorandum, words and phrases in boldface type have special meaning, which are defined in SECTION V. WORDS AND PHRASES WITH SPECIAL MEANING.

I. WHAT THE AUTHORITY PAYS ON MEMBER AGENCY'S BEHALF

A. COVERAGE OF MEMBER AGENCY

The **Authority** will reimburse the **covered party** for the **ultimate net loss** excess of the **retained limit** which the **covered party** shall become legally obligated to pay by reason of liability:

- (1) Imposed by law, or
- (2) Assumed by contract, for **damages** because of:

COVERAGE A - BODILY INJURY LIABILITY
COVERAGE B - PROPERTY DAMAGE LIABILITY
COVERAGE C - PUBLIC OFFICIALS ERRORS AND OMISSIONS LIABILITY
COVERAGE D - PERSONAL INJURY LIABILITY

to which the Memorandum applies, caused by or arising out of an **occurrence**.

B. DEFENSE OF MEMBER AGENCY

The **Authority** shall not be called upon to assume charge of the investigation or defense of any claim. However, in the case of a claim or proceeding which, in the opinion of the **Authority**, may result in an **ultimate net loss** exceeding the **retained limit**, the **Authority** has certain rights as set forth below:

1. On any claim in which, in the opinion of the **Authority**, the **covered party** is acting reasonably in the handling, defense or settlement of a claim, the **Authority** may, at its own expense, associate in or participate with the **covered party** in the negotiation, investigation, defense, appeal or settlement of such claim; however, the **Authority** shall not have

the right to take over or control the negotiation, investigation, defense, appeal or settlement of such claim.

2. On any claim in which, in the opinion of the **Authority**, the **covered party** is acting unreasonably in the handling, defense or settlement of such claim, the **Authority** may, at its own expense, assume control of the negotiation, investigation, defense or appeal of such claim. However, nothing contained in this Section B.2. shall be construed as to allow the **Authority** to settle a claim, or to force a **covered party** to settle a claim, within the **retained limit**.
3. On any claim in which, in the opinion of the **Authority**, it is clear that the claim will result in an **ultimate net loss** exceeding the **retained limit**, the **Authority** may, at its own expense, assume control of the negotiation, investigation, defense, settlement or appeal. Such assumption of control may include requiring **covered party** to tender its **retained limit**, once it has been determined that there exists a reasonable, fair and realistic settlement opportunity in excess of the **retained limit**.
4. If a settlement demand is acceptable to the **Authority** and is not acceptable to the **covered party**, and the **Authority** tenders to the **covered party** an amount equal to the difference between the remainder of the **retained limit** and said settlement demand (or up to the applicable Limit of Coverage, whichever is less), then the **Authority's** agreement to indemnify or to pay on behalf of the **covered party** for the **ultimate net loss** hereunder shall be discharged and terminated, and the **Authority** shall have no further obligations with respect thereto.

The procedure for the **Authority** to invoke sections I.B.2, 3 and 4 above shall be as follows. The Liability Claims Administrators or Program Administrator may submit the issue of assuming control of a claim directly to the Board of Directors, for decision, by presenting a written recommendation to that effect. The staff and **covered party** will have the right to submit written materials and present oral arguments to the Board, subject to reasonable time constraints. The Board may determine to assume control of a claim by a two-thirds (2/3) vote of those present and voting. The affected Board member (i.e. whose member entity is the defendant in the claim) shall be disqualified from the final discussion and vote on the issue, but shall be counted as a “no” vote.

The **covered party** shall fully cooperate with the **Authority** in all matters pertaining to a claim or proceeding. No claim shall be settled for an amount in excess of the **retained limit** without the prior written consent of the **Authority**.

II. AUTHORITY'S LIMIT OF LIABILITY

Regardless of the number of (1) **covered parties** under this Memorandum, (2) persons or organizations who sustain injury or damage, or (3) claims made or suits brought, the **Authority's** liability is limited as follows:

- A. With respect to the Coverage provided, the **Authority's** liability for **Bodily Injury, Property Damage, Public Officials Errors and Omissions**, and **Personal Injury** or any combination thereof arising out of any one **occurrence** shall be limited to the **ultimate net loss**

which is in excess of the amount shown as the **Member Agency's** self-insured retention as specified in the Declarations, or for the **ultimate net loss** which is in excess of any scheduled underlying insurance under this Memorandum; but then only up to the sum set forth in the Declarations as the **Authority's** limit of liability for any one **occurrence**. In the event that a **structured settlement** is utilized in the resolution of a claim, only the present value of the agreed upon payments (the present value "cost" of the **structured settlement**) shall be considered in satisfaction of a **Member Agency's** self-insured retention. The total liability of the **Authority** for all **ultimate net loss** because of all **occurrences** during the period of time to which this Memorandum applies shall not exceed the limit of liability shown in the Declarations as "Aggregate".

- B. The **Authority** acknowledges that the **Member Agency**, from time to time, may directly purchase with its own funds (subject to the policies and procedures of the **Authority**) underlying insurance, or may participate in an underlying **risk retention pool**, with limits of liability less than, equal to, or greater than the amount of the **Member Agency's** retention for certain operations, events, and hazards for which this Memorandum provides coverage, however, these underlying insurance policies do not need to be scheduled.

It is agreed that this Memorandum of Coverage (subject to its exclusions, terms and conditions) shall provide coverage in excess of the per occurrence limits, but not the aggregate limits, of such insurance or **risk retention pool**, subject to the following conditions:

1. If the limits of liability of the underlying policy or **risk retention pool** are less than the **Member Agency's** retention, the **Member Agency** shall bear the risk of the difference. However, if such limits are greater than the **Member Agency's** retention, this Memorandum of Coverage will apply in excess of the greater limit.
2. All **defense costs** paid or payable, or obligations to provide defense or pay **defense costs**, under such underlying or other insurance shall be primary to and not contribute with the **Authority's** obligation to pay **defense costs** as required under this Memorandum.
3. If the **Member Agency** fails to meet its financial obligation for its **retained limit**, it is understood that the coverage provided under this Memorandum of Coverage will not drop down and provide coverage, and the limits of liability provided under this Memorandum of Coverage shall continue to apply as if the **Member Agency** had met its obligation and the limits of liability stated in the declarations are still in effect.
4. If the underlying insurance or **risk retention pool** coverage is canceled, or the limits reduced, then it is understood that the coverage provided under this Memorandum of Coverage will not drop down and provide coverage, and the limits of liability provided under this Memorandum of Coverage shall continue to apply as if the limits of liability stated in the declarations are still in effect.

5. If the limits of liability of such aggregate coverage limits are reduced, for whatever reason, this shall have no effect on the limits of liability afforded by this Memorandum of Coverage; coverage provided under this Memorandum of Coverage will not drop down and provide coverage; and this Memorandum of Coverage shall apply as if the limits of liability stated in the declarations are still in effect.

The terms of this section (section 5) apply equally to any other pool operated by the **Authority**. Should a **Member Agency's** aggregate limits be reduced or exhausted in another **Authority** pool, the coverage provided under this Memorandum of Coverage shall not drop down and provide coverage; and this Memorandum of Coverage shall apply as if the limits of liability stated in the declarations are still in effect.

6. It is understood that the pool represented by this Memorandum of Coverage operates separately and distinctly from any other pools operated by the **Authority**.
7. It is understood that should **Member Agency's** underlying insurance, or coverage provided by any other **Authority** pool, fail to respond, or be financially unable to respond, to its obligations, the risk for this failure or inability to respond shall be borne by the **Member Agency** and not the **Authority**; but only up to the limit of the **Member Agency's** retained per **occurrence** limit (\$1,000,000 per **occurrence**) under this Memorandum of Coverage.

Nothing contained herein shall operate to increase the **Authority's** limit of liability under this Memorandum of Coverage.

III. WHO IS A COVERED PARTY

Each of the following is a **covered party** to the extent set forth below:

- A. The **Member Agency** as set forth in the Declarations, any and all commissions, agencies, districts, authorities, boards (including the governing board) or similar entity coming under the **Member Agency's** direction or control or for which the **Member Agency's** board members sit as the governing body. The **Member Agency** includes all departments and constituent agencies of the **Member Agency**.
- B. Any person who is an elected or appointed official, employee or authorized volunteer of the **Member Agency** whether or not compensated while acting for or on behalf of the **Member Agency** including while acting on outside boards at the direction of the **Member Agency**.
- C. Any person while using any **automobile** and any person legally responsible for the use thereof, provided the actual use of the **automobile** is with the permission of the **Member Agency**. The coverage extended by this Section C shall not apply:
 - (1) To any person or organization, other than the **Member Agency**, or to any agent or employee thereof, engaged in selling, repairing, servicing, delivering, testing, road

testing, parking or storing **automobiles**, with respect to any **occurrence** arising out of any such occupation; or

- (2) With respect to any **hired automobile**, to the owner, or lessee thereof other than the **Member Agency**, or to any agent or employee of such owner or lessee; or
 - (3) To liability arising from the ownership, maintenance, or use of any **automobile** assigned to an airport premises while such **automobile** is on the premises of an airport which is owned, maintained or operated by the **Member Agency**.
- D. Any person or organization to whom or to which the **Member Agency** is obligated by virtue of a written contract to provide coverage such as is afforded by this Memorandum of Coverage, but only with respect to **Bodily Injury** and **Property Damage** resulting from operations performed by or on behalf of the **Member Agency** or facilities owned or used by the **Member Agency**.
- E. As respects any person or organization to whom or to which the **Member Agency** is obligated by virtue of a written contract to name such person or organization as an additional covered party, coverage afforded by this Memorandum of Coverage shall be subject to all terms, exclusions and conditions of this MOC, as applicable, and shall apply only to the limit of liability coverage required by such contract.

IV. WHAT THE AUTHORITY WILL NOT COVER (EXCLUSIONS)

This Memorandum does not apply:

- A. To liability arising out of the partial or complete structural failure of any **dam**.
- B. To **Bodily Injury, Property Damage** or **Personal Injury** arising out of the ownership or maintenance or use or operation of any airfield or similar aviation facility.

This exclusion shall not apply, however, to liability arising out of the ownership, operation, rental, or loan of vehicles licensed for highway use while being operated away from the premises of any airfield owned, or operated by the **covered party**.

- C. To liability arising out of the ownership or maintenance or loading or unloading or use or operation of any **aircraft**.

This exclusion does not apply to claims arising out of the ownership, operation, use, maintenance or entrustment to others of any **Unmanned Aerial Vehicle (UAV)** that is an unmanned aircraft system owned by, or operated by, or rented to, or loaned to, or operated on behalf of, any Member of the Authority or Entity.

- D. To liability arising out of the ownership or maintenance or loading or unloading or use or operation of any watercraft over 35 feet in length, unless added by specific endorsement.

- E. To any obligation for which the **covered party**, or any carrier as insurer therefor, may be held liable under any workers' compensation, unemployment compensation or disability benefits law, or under any similar law.
- F. To liability for **Bodily Injury** to any employee of the **covered party** including the spouse, child, unborn child or fetus, parent, sibling or dependent of the employee, arising out of and in the course of his employment by the **covered party**, except with respect to liability of others assumed by the **covered party** under contract.
- G. To liability for **property damage** to:
 - (1) Property owned by the **covered party**;
 - (2) Property rented to or leased to the **covered party** where the **covered party** has assumed liability under contract for **damage** to or destruction of such property, unless the **covered party** would have been liable in the absence of such contract; and
 - (3) **Aircraft**, or watercraft, in the care, custody or control of the **covered party**.
- H. To liability arising out of the actual, alleged or threatened discharge, dispersal, release or escape of **pollutants**:
 - (1) At or from premises owned, leased or occupied by the **Member Agency**, except for public streets and roads when the discharge, dispersal, release or escape was not participated in by a **covered party**;
 - (2) At or from any site or location used by or for the **covered party** for the handling, storage, disposal, processing or treatment of **pollutants** or waste;
 - (3) Which are at any time transported, handled, stored, treated, disposed of or processed as **pollutants** or waste by or for the **Member Agency** or any person or organization for whom the **Member Agency** may be legally liable;
 - (4) At or from any site or location on which the **Member Agency** or any contractors or subcontractors working directly on the **Member Agency's** behalf are performing operations:
 - (a) If the **pollutants** are brought on or to the site or location in connection with such operations; or
 - (b) If the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize the **pollutants**.
- I. To liability arising out of any governmental direction or request that **pollutants** be tested for, monitored, cleaned up, removed, contained, treated, detoxified or neutralized.

J. To liability arising out of or contributed to by any complete or partial failure to supply utilities, including but not limited to water, electricity, ~~or~~ gas, or broadband/internet/wireless communication services.

K. To liability arising out of medical professional services provided by any doctor, nurse, or dentist employed by or contracted by the **Member Agency**, including:

(1) Rendering, or failure to render:

(a) Medical, surgical, dental, x-ray or nursing service or treatment or the furnishing of foods or beverages in connection therewith.

(b) Any service or treatment conducive to health or of a professional nature.

(c) Any cosmetic or tonsorial service or treatment.

(2) Furnishing of, or dispensing of, drugs or medical, dental, or surgical supplies or appliances.

This exclusion does not apply to the activities of paramedics, emergency medical dispatchers, technicians or similar personnel.

L. To liability arising out of the ownership or operation of any hospital or medical clinic.

M. To claims for loss or **damage** including consequential loss or any liability of any and all **covered parties** arising out of or in any way connected with the application of the principles of eminent domain, condemnation proceeding, retroactive condemnation, inverse condemnation or reverse condemnation, by whatever name called, regardless of whether such claims are made directly against the **covered party** or by virtue of any agreement entered into by or on behalf of the **covered party**.

This exclusion does not apply, however, to **Property Damage** for which the **covered party** may be legally responsible, and for which recovery is sought by claimant or plaintiff pursuant to a claim for inverse condemnation, by whatever name called; provided, however, that in any case in which a claim of inverse condemnation is made against the **covered party**, coverage shall exist for **Property Damage** only, and there shall be no coverage for reduced value of property (diminution of value), plaintiff's attorney fees and expert fees, severance **damages**, relocation costs, or any other form of relief, however denominated.

N. To liability, including, but not limited to, liability for civil rights violations, arising out of or in connection with land use planning, land use regulation, Code Enforcement, the adoption or administrative application of any ordinance, resolution or regulation, rent control, or zoning, by whatever names called, regardless of whether or not such liability accrues directly against the **Member Agency** or by virtue of any agreement entered into by or on behalf of the **Member Agency**.

O. Fines, assessments, penalties, restitution, disgorgement, exemplary or punitive damages, or injunctive relief, equitable relief or declaratory relief, writs of mandate or any other form of relief other than the payment of **damages**. This exclusion applies whether the fine, assessment, restitution, disgorgement, exemplary or punitive **damage** is awarded by a court or by an administrative or regulatory agency. Restitution and disgorgement as used herein refer to the order of a court or administrative agency for the return of a specified item of property or a specific sum of money, because such item or property or sum of money was not lawfully or rightfully acquired by the **covered party**

P. Under Coverage C, **Public Officials Errors and Omissions** to:

- (1) **Bodily Injury or Personal Injury;**
- (2) **Property damage;**
- (3) Refund of taxes, fees or assessments.
- (4) Liability of a **covered party** (a) arising in whole or in part out of a **covered party** obtaining remuneration or financial gain to which the **covered party** was not legally entitled or (b) arising out of the actual or alleged violation of the penal code, or a penal ordinance, committed by or with the knowledge or consent of any **covered party**, except that any act pertaining to any other **covered party** shall not be imputed to any other **covered party** for the purpose of determining application of these exclusions.
- (5) Liability arising out of estimates of probable cost or cost estimates being exceeded or faulty preparation of bid specifications or plans including architectural plans.
- (6) Failure to perform, or breach of, a contractual obligation.
- (7) Liability arising out of fiduciary activities as respects employee benefit plans, but however, this exclusion does not apply to administration of the Members employee benefits programs. Administration is defined as giving counsel to employees with respect the benefits; interpreting the benefits; handling of records in connection with benefits; and effecting enrollment, termination or cancellation of employees under the benefits, provided all such acts are authorized by the **Member Agency**.

Q. To liability:

- (1) With respect to which a **covered party** under the Memorandum is also a **covered party** under a nuclear energy liability policy issued by Mutual Atomic Energy Liability Underwriters, American Nuclear Insurers, or Nuclear Insurance Association of Canada, or any successor organizations, or would be a **covered party** under any such policy but for its termination upon exhaustion of its limit of liability; or,
- (2) Resulting from the “hazardous properties” of “nuclear material” and with respect to which (a) any person or organization is required to maintain financial protection

pursuant to the Atomic Energy Act of 1954, or any law amendatory thereof, or (b) the **covered party** is, or had this Memorandum not been issued would be, entitled to indemnity from the United States of America, or any agency thereof, with any person or organization, or,

- (3) Resulting from “hazardous properties” of “nuclear material,” if:
- (a) The “nuclear material” (i) is at any “nuclear facility” owned by, or operated by or on behalf of, a **covered party**, or (ii) has been discharged or dispersed therefrom;
 - (b) The “nuclear material” is contained in “spent fuel” or “waste” at any time possessed, handled, used, processed, stored, transported or disposed of by or on behalf of a **covered party**; or
 - (c) The liability arising out of the furnishing by a **covered party** of services, materials, parts of equipment in connection with the planning, construction, maintenance, operation or use of any “nuclear facility,” but if such facility is located within the United States of America, its territories or possessions, or Canada, this exclusion (c) applies only to “**Property Damage**” to such “nuclear facility” and any property threat;

As used in this exclusion:

- (a) “Hazardous properties” include radioactive, toxic, or explosive properties;
- (b) “Nuclear facility” means: (i) any nuclear reactor; (ii) any equipment or device designed or used for (aa) separating the isotopes of uranium or plutonium, (bb) processing or utilizing spent fuel, or (cc) handling, processing, or packaging “waste”; (iii) any equipment or device used for the processing, fabricating or alloying of “special nuclear material” if at any time the total amount of such material in the custody of the **covered party** at the premises where such equipment or device is located consists of or contains more than 25 grams of uranium m235; (iv) any structure, basin, excavation, premises or place prepared or used for the storage or disposal of waste; and (v) includes the site on which any of the foregoing is located, all operations conducted on such site, and all premises used for such operation;
- (c) “Nuclear material” means “source material,” “special nuclear material,” or “byproduct material”;
- (d) “Nuclear reactor” means any apparatus designed or used to sustain nuclear fission in a self-supporting chain reaction or to contain a critical mass of fissionable material;
- (e) “**Property Damage**” includes all forms of radioactive contamination of property.

- (f) “Source material,” “special nuclear material,” and “byproduct material” have the meaning given them in the Atomic Energy Act of 1954 or in any law amendatory thereof;
 - (g) “Spent fuel” means any fuel element or fuel component, solid or liquid, which has been used or exposed to radiation in a nuclear reactor;
 - (h) “Waste” means any “waste” material (i) containing “byproduct material” and (ii) resulting from the operation by any person or organization of any “nuclear facility” included within the definition of “nuclear facility” under paragraph (b) (i) or (ii) thereof;
- R. To liability arising out of past and future salary, wages, benefits and/or retirement proceeds alleged or claimed because of any adverse employment action including, but not limited to, unlawful **discrimination**, harassment, and/or retaliation against, violation of civil rights of, or wrongful termination of any employee or official of the **covered party**.
- S. **ERISA, COBRA, UCERA, WARN Act, and FLSA Liability.** We do not cover any liability imposed on the **covered party** under:
- (A) the Employee Retirement Income Security Act of 1974;
 - (B) the Comprehensive Omnibus Budget Reconciliation Act;
 - (C) the Worker Adjustment and Retraining Notification Act;
 - (D) the Fair Labor Standards Act, including but not limited to any wage and hour or other claim arising under the FLSA or any California Wage Orders or any similar federal or state law;
 - (E) any similar federal, state or local laws;
 - (F) any amendments to such laws; or
 - (G) any regulations promulgated under any such laws.
- T. To **ultimate net loss** arising out of relief, or redress, in any form other than money **damages**.
- U. To any liability arising out of any investment decision, including, but not limited to, investing, re-investing, purchasing, acquiring, exchanging, selling and/or managing public funds.

V. WORDS AND PHRASES WITH SPECIAL MEANING

Aircraft means a vehicle designed for the transport of persons or property principally in the air. Aircraft does not mean **Unmanned Aerial Vehicles (UAVs)**, separately defined in Section V of this Memorandum.

Aggregate Limit means the total limit of coverage available for all occurrences during a program year.

Authority means the Authority for California Cities Excess Liability.

Automobile means a land motor vehicle or trailer licensed for highway use.

Bodily Injury means bodily injury, sickness, disease or emotional distress, including death resulting therefrom, and also includes care and loss of services by any person or persons.

Covered party means any person or entity set forth in Section III of this Memorandum.

Dam means any artificial barrier, together with appurtenant works, which does or may impound or divert water, and which either (a) is 25 feet or more in height from the natural bed of the stream or watercourse at the downstream toe of the barrier, or from the lowest elevation of the outside limit of the barrier, if it is not across a stream channel or watercourse, to the maximum possible water storage elevation; or (b) has an impounding capacity of 50 acre feet or more.

Any such barrier which is not in excess of 6 feet in height, regardless of storage capacity, or which has a storage capacity not in excess of 15 acre feet, regardless of height, shall not be considered a **dam**.

No obstruction in a canal used to raise or lower water therein or divert water therefrom, no levee, including but not limited to a levee on the bed of a natural lake the primary purpose of which levee is to control floodwaters, no railroad fill or structure, tank constructed of steel or concrete or of a combination thereof, no tank elevated above the ground, and no barrier which is not across a stream channel, watercourse, or natural drainage area and which has the principal purpose of impounding water for agricultural use shall be considered a **dam**. In addition, no obstruction in the channel of a stream or watercourse upstream from the construction for percolation underground shall be considered a **dam**, except that no structure specifically exempted from jurisdiction by the State of California Department of Water resources, Division of Safety of Dams shall be considered a Dam, unless such structure is under the jurisdiction of any agency or the federal government

Damages means compensation in money recovered by a party for loss or detriment it has suffered through the acts of a **covered party**. **Damages** includes attorney fees not based on contract awarded against the **covered party**, if the fees arise from an **occurrence** in which this coverage applies. **Damages** also include reasonable attorney fees and necessary litigation expenses incurred by or for a party other than the **covered party**, which are assumed by the **Member Agency** in a contract related to operations performed by or on behalf of the **Member Agency** or facilities owned or used by the **Member Agency**, where such attorney fees or costs attributed to a claim for **Bodily Injury** or **Property Damage** covered by this Memorandum.

Defense costs means all fees, costs and expenses caused by and relating to the adjustment, investigation, defense or litigation of a claim including attorney's fees, court costs and interest on judgments accruing after entry of judgment. **Defense costs** shall not include the salaries of employees or officials, or the office expenses of the **Authority**, the **covered party**, or any claims administration firm engaged by any **covered party**.

Discrimination - means action or inaction with respect to any present or former employee or applicant for employment with respect to their compensation, terms, conditions, rights, privileges or opportunities because of protected class category or characteristic established pursuant to any applicable federal, state or local statute or ordinance

Hired automobile means an **automobile** used under contract on behalf of or loaned to the **Member Agency** provided such **automobile** is not owned by or registered in the name of (1) the **Member Agency**, or (2) any other **covered party**.

Member Agency means the local public agency, designated in the declarations, which is a party signatory to the Joint Powers Agreement creating the **Authority** for California Cities Excess Liability. This coverage applies separately to each **covered party** against whom claim is made or suit is brought, except with respect to the limits of the **Authority's** liability.

Occurrence means: a) an accident or event which, during the coverage period, results in **Bodily Injury** or **Property Damage** neither expected nor intended from the standpoint of the **covered party** b) an act, accident or event, as defined under **Personal Injury** or **Public Officials Errors and Omissions**, during the coverage period which results in injury or **damage**; all injuries or **damages** arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one **occurrence**.

Owned automobile means an **automobile** owned by or under long term lease to the **Member Agency**.

Personal Injury means (a) false arrest, malicious prosecution, or willful detention; (b) libel, slander or defamation of character; (c) invasion of privacy; (d) wrongful entry or eviction, or other invasion of the right of private occupancy; (e) assault and battery; and (f) **discrimination** or civil rights violations.

Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed. The term **pollutant** as used herein is not defined to mean potable water or agricultural water or water furnished to commercial users or water used for fire suppression, and it is not defined to mean smoke from a hostile fire.

Property Damage means (1) physical injury to or destruction of tangible property, including the loss of use thereof, at any time resulting therefrom, or (2) loss of use of tangible property which has not been physically injured or destroyed, provided such loss of use is caused by an **occurrence** during the coverage period.

Public Officials Errors and Omissions means any and all breaches of duty by the **covered party** arising from negligent action or inaction, mistake, misstatement, error, neglect, inadvertence, or omission by the **covered party** in the discharge of duties with the **Member Agency**.

Retained limit means the amount of paid claim liability for which the **covered party** is responsible on a per **occurrence** basis, and which the **covered party** actually pays in cash, after making proper deduction for all recoveries, offsets, and salvages collectible, including, but not limited to, payments by or recoveries from other insurance which may be available to the **Member Agency**; provided, however, that recoveries and payments, as used herein, shall not include recoveries from or payments by an “underlying” insurer or pool as contemplated under Section II B. Further, a **Member Agency’s retained limit** includes **defense costs** expended by the **Member Agency** or on the **Member Agency’s** behalf by an underlying insurer or pool as contemplated under Section IIB.

Risk retention pool means any legally formed group of public entities joining together to share risk or joint-purchase insurance, or other insurance.

Structured settlement shall mean any agreement which provides for a program of future payments in the settlement of a claim, but in no event shall the present value be in excess of the judgment.

Unmanned Aerial Vehicle (UAV) means an aircraft (with its aerial system or control device) that is not controlled directly by a person from within or on the aircraft and is authorized to be operated by the Federal Aviation Authority (FAA) Small Unmanned Aircraft Regulations (14 Code of Federal Regulations Part 107), or that is authorized to be operated under a Certificate of Waiver or Certificate of Authorization pursuant to 49 U.S. Code sections 40102(a)(41)(D) and 40125(a)(2), and 44806, relating to agreements to operate “public aircraft” for “governmental functions” including but not limited to firefighting, search and rescue, and law enforcement. In the event any of these provisions are amended, any successor statutes or regulations will apply.

Ultimate net loss means the sum actually paid or payable in cash in the settlement or satisfaction of losses for which a **Member Agency** is liable either by adjudication or compromise (with the written consent of the **Authority**) after making proper deductions for all recoveries and salvages collectible, and includes **defense costs** and interest on any judgment or award, whether such sums paid or payable, costs, or interest are incurred by the **Member Agency**, a **covered party** or the **Authority**.

VI. CONDITIONS

- A. **Deposit/Adjustment.** All deposits and retroactive adjustments for this Memorandum shall be computed and paid in accordance with the Joint Powers Agreement, By-Laws and the cost allocation plan adopted by the Board of Directors. The deposit is an estimate to be credited to the amount of retrospective adjustment determined under the cost allocation plan.
- B. **Inspection and Audit.** The **Authority** shall be permitted but not obligated to inspect the **Member Agency’s** property and operations at any time. The **Authority** may examine and audit the **Member Agency’s** books and records at any time prior to cessation of the **Member Agency’s** financial obligations under the Joint Powers Agreement.

C. **Covered Party's Duties in the Event of Occurrence, Claim or Suit.**

In the event of:

(1) **Member Agencies** will report to the Authority's Claims Administrator as soon as possible all events meeting any of the criteria identified below, without regard to liability:

- a. Claims in which the **ultimate net loss** is estimated to exceed twenty-five percent (25%) of the **covered party's retained limit**.
- b. Claims falling within any of the following classifications:
 - i. Class action suits.
 - ii. Law enforcement actions alleging excess use of force or wrongful conviction.
 - iii. Claims involving allegations of harassment, including but not limited to sexual, employment-based or third-party.
 - iv. Sexual misconduct or molestation – including allegations of assault, misconduct, rape and related offenses.
 - v. Fatalities.
 - vi. Spinal cord injuries resulting in any degree of paraplegia or quadriplegia.
 - vii. Nerve damage injuries resulting in paralysis or loss of sensation.
 - viii. Brain damage claims including; but not limited to, closed head injuries, permanent disorientation, behavior disorder, personality change, seizure, motor deficit or other cognitive disorders.
 - ix. Burns – Third degree burns involving 10% of the body, or second degree burns involving 30% of the body.
 - x. Amputation – complete or partial.
 - xi. Impairment of vision or hearing – 50% or greater.
 - xii. Multiple injuries arising out of one occurrence, including but not limited to; massive internal injuries or multiple fractures involving more than one claimant.
 - xiii. Severe disfigurement
 - xiv. Long term hospitalization (30 days or more)
 - xv. Multiple claims arising out of the same occurrence in which the aggregate ultimate net loss is estimated to exceed 25% of the Member Agency's retained limit.
 - xvi. Any claim with an assigned trial date in the next 60 days that has not been otherwise reported.
- c. Lawsuits or writs involving employment practices liability.
- d. Demands in excess of \$250,000 arising out of any of the following settings:

- i. Statutory demand;
- ii. Post closed discovery (not expert) demand;
- iii. Mandatory Settlement Conference demand;
- iv. Mediation demand; or
- v. Arbitration demand.

Written notice containing particulars sufficient to identify the **covered party** and also reasonable obtainable information with respect to the date, time, place and circumstances thereof, and the names and addresses of the **covered party** and of available witnesses, shall be given by or for the **covered party** to the **Authority** or any of its authorized agents as soon as practicable.

With respect to any claim required to be reported in accordance with Section VI. C.(1), the **covered party** shall immediately forward to the **Authority** every demand, notice, summons or process received.

The **covered party** shall cooperate with the **Authority** and, upon the **Authority's** request, assist in making settlements in the conduct of suits and in enforcing any right of contribution or indemnity against any person who, or organization which, may be liable to the **covered party** because of injury or **damage** with respect to which coverage is afforded under this Memorandum; and the **covered party** shall attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses. The **covered party** shall not, except at the **covered party's** cost, voluntarily make any payment, assume any obligation or incur any expense other than for first aid or **damage** mitigation.

The **Authority** may not be liable for **occurrences**, suits or claims in which the **Member Agency** fails to comply with this Subsection C.

- D. Action against Authority. No action shall lie against the **Authority** unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this Memorandum, nor until the amount of the **covered party's** obligation to pay shall have been finally determined either by judgment against the **covered party** after actual trial or by written agreement of the **covered party**, the claimant and the **Authority**.

No person or organization shall have any right under this Memorandum to join the **Authority** as a party to any action against the **covered party** to determine the **covered party's** liability, nor shall the **Authority** be impleaded by the **covered party** or the **covered party's** legal representative. Bankruptcy or insolvency of the **covered party** or of the **covered party's** estate shall not relieve the **Authority** of any of its obligations hereunder.

- E. Multiple Coverage Periods. An **occurrence** with a duration of more than one coverage period shall be treated as a single **occurrence** arising during the coverage period to which Excess Insurance, if any, applies. If no Excess Insurance applies, then the **occurrence** shall be treated as arising when the **occurrence** begins.

- F. Other Coverage. The coverage afforded in this Memorandum shall be excess of and shall not contribute with any valid and collectible insurance, coverage provided by a **risk retention pool**, or coverage provided through a risk-purchasing group that is available to the **covered party**, other than any excess or umbrella insurance or coverage procured by the **Authority** or the **Member Agency** which is specifically meant to apply in excess of the coverage afforded by this Memorandum.
- G. Subrogation. In the event of any payment under this Memorandum, the **Authority** shall be subrogated to all the **covered party's** rights of recovery therefor against any person or organization and the **covered party** shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The **covered party** shall do nothing after loss to prejudice such rights.
- H. Withdrawal/Cancellation. The **Member Agency** may withdraw from the **Authority** and cancel this coverage only pursuant to Section XIX of the **Authority's** JPA Agreement.
- I. Changes. This Memorandum shall not be changed except by written endorsement hereto.

VII. ARBITRATION

It is the intent of this Section VII: (1) to provide an alternative, and confidential, alternative to litigation for the resolution of coverage disputes between a **Member Agency** and the **Authority**, and (2) that this Section shall apply to those disputes arising out of or in connection with claims or actions filed against the **Authority** by a **Member Agency**. The purpose of such confidentiality is to protect the interests of parties, particularly in a circumstance in which there is a pending, or the potential of an underlying case.

Arbitration shall be final and binding, and shall apply only in instances in which the **Member Agency** and the **Authority** agree to arbitration. Agreement by the **Authority** to arbitrate shall require a majority vote of the Board.

The Parties in the proceedings shall be the **Authority** and a **Member Agency** (hereinafter referred to in this Section VII as "Party" or "Parties").

A. Requesting arbitration:

Either a **Member Agency** or the **Authority** may request arbitration of disputes under this Section. To proceed with arbitration, the **Member Agency** and the **Authority** must have prior approval from their respective governing bodies. Such arbitration proceeding becomes non-cancelable once an arbitration agreement is executed by both the **Authority** and the **Member Agency**.

Upon receipt of a request for arbitration from a **Member Agency**, the Board decides whether or not the **Authority** shall agree to arbitration, and the time to make such decision shall not extend past the next two regularly scheduled Board meetings after receipt of such request, provided that such request is received no later than 14 days prior to the first of such two Board meetings.

Upon receipt of a request for arbitration from the **Authority**, the **Member Agency** decides whether or not it will agree to arbitration, and the time to make such decision shall not extend past the next two regularly scheduled **Authority** Board meetings after receipt of such request, provided that such request is received no later than 14 days prior to the first of such two **Authority** Board meetings.

B. Arbitration procedures:

If a dispute is submitted to arbitration, each Party shall, within thirty (30) calendar days, select one (1) arbitrator and submit their name in writing to the other Party. Within thirty (30) calendar days after their selection, these two arbitrators shall select a third, independent arbitrator. No arbitrator shall be employed by or in any way affiliated with the **Authority** or with any **covered party**. One of the three arbitrators must be an attorney with knowledge, expertise, and experience in the area of California insurance or memorandum-of-coverage law.

If the two selected arbitrators cannot agree on the selection of the third arbitrator within thirty (30) calendar days, either Party may petition the Contra Costa County Superior Court for the appointment of the third arbitrator pursuant to the provisions of Section 1281.6 of the California Code of Civil Procedure.

The arbitration panel shall choose a Chairperson from the three panelists; however, each arbitrator shall have an equal vote. The arbitration hearing shall commence within one hundred eighty (180) calendar days from the date of the selection of the complete panel.

Each Party shall pay the cost of its selected arbitrator and one-half the cost of the third, independent arbitrator. In addition, each Party shall be responsible for its own cost and expense of arbitration.

Except for notification of appointment, and as otherwise provided for in the California Code of Civil Procedure, there shall be no communication between the Parties and the arbitrator(s) relating to the subject of the arbitration, other than at scheduled hearings.

C. Discovery:

The procedures set forth in California Code of Civil Procedure 1283.05 relating to discovery (including, but not limited to, depositions) shall apply to any arbitration pursuant to this Section. The arbitration panel shall have the authority to designate any discovery under this arbitration as confidential.

D. Testimony under oath:

The testimony of witnesses shall be given under oath, as administered by a qualified individual, or shall be given under a declaration under penalty of perjury.

E. Hearing decision:

The decision of the panel shall be reported in writing. The written decision of the panel shall be given to both Parties within thirty (30) calendar days of the close of the hearing.

F. Certified court reporter:

Either Party electing to utilize a certified court reporter shall make arrangements directly with such certified court reporter and shall notify the other Party of such arrangements in advance of the hearing. Such Party shall pay the cost of recording the hearing if no transcript is ordered by the other Party. If such a transcript is ordered, the cost of the transcript and of recording the hearing shall be divided equally among the Parties ordering copies.

G. Funding of defense and payment of claims pending resolution of dispute:

The commencement of an arbitration process hereunder shall have no effect on the Parties' responsibilities for payment of fees or expenses related to investigation, defense, or litigation of a claim or lawsuit, until such time as a final decision has been rendered by the arbitration panel. The initiation of an arbitration process shall have no effect on the Parties' obligation, rights, or responsibilities under this Memorandum.

H. Effect of arbitration decisions:

All decisions made by the arbitration panel shall be final and binding upon the Parties.

I. Costs of arbitration:

Unless otherwise provided for herein, each Party shall bear its own costs associated with arbitration.

J. Interpretation and application of rules:

With respect to any procedure not herein expressly provided for, the arbitration shall be governed by the California Code of Civil Procedure provisions relating to arbitration (Section 1280 et seq.). The arbitrator(s) shall interpret and apply these rules in so far as they relate to the arbitrator(s)' power and duties. All decisions of the arbitration panel shall be decided by a majority vote.

K. Not applicable to excess carriers:

These arbitration provisions are intended to bind only the **Authority** and its **Member Agencies**. They are not intended to be binding upon any of the **Authority's** excess carriers.

Issued by the Authority for California Cities Excess Liability.

By: _____
Secretary