

**CALIFORNIA AFFILIATED RISK MANAGEMENT AUTHORITIES
(CARMA)**

MEMORANDUM OF COVERAGE

FOR THE 2011/2012 PROGRAM YEAR

EFFECTIVE JULY 1, 2011

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FOR THE
CALIFORNIA AFFILIATED RISK MANAGEMENT AUTHORITIES
(CARMA)**

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**MEMORANDUM OF COVERAGE
FOR THE
CALIFORNIA AFFILIATED RISK MANAGEMENT AUTHORITIES
(CARMA)**

In consideration of the payment of the deposit premium, the *Authority* agrees with the *Covered Parties* as follows:

SECTION I – COVERAGE

The *Authority* will pay up to the *Limit of Coverage* those sums for *Ultimate Net Loss* in excess of \$1,000,000 that the *Covered Parties* pay out of their own funds, unless otherwise provided herein, as *Damages* because of *Bodily Injury*, *Property Damage*, *Personal Injury*, or *Public Officials Errors and Omissions* as those terms are herein defined and to which this agreement applies, caused by an *Occurrence* during the *Coverage Period*, except as otherwise excluded.

This Memorandum of Coverage does not provide insurance, but instead provides for pooled risk sharing. This Memorandum is a negotiated agreement amongst the *Members* of the Authority and none of the parties to the Memorandum is entitled to rely on any contract interpretation principles that require interpretation of ambiguous language against the drafter of such Memorandum. This Memorandum shall be applied according to the principles of contract law, giving full effect to the intent of the *Members* of the Authority, acting through the Board of Directors in adopting this Memorandum of Coverage. As the Authority is not an insurer, it has no obligation to provide “Cumis” counsel to a *Covered Party* in disputed coverage situations under Civil Code §2860.

SECTION II - DEFINITIONS

1. "Aircraft" means a vehicle designed for the transport of persons or property principally in the air.
2. "Authority" means the California Affiliated Risk Management Authorities.
3. "Automobile" means a land motor vehicle, trailer, or semi-trailer.
4. "Bodily Injury" means bodily injury, sickness, disease, or emotional distress sustained by a person, including death resulting from any of these at any time. *Bodily Injury* includes *Damages* claimed by any person or organization for care, loss of services, or death resulting at any time from the *Bodily Injury*.
5. "Coverage Period" means that term prescribed for coverage by the *Authority* as set forth in the Declarations page.
6. "Covered Indemnity Contract" means that part of any contract or agreement pertaining to the *Covered Party's* routine governmental operations under which the *Covered Party* assumes the tort liability of another party to pay for *Bodily Injury* or *Property Damage* to a

third person or organization. This definition applies only to tort liability arising out of an *Occurrence* to which this agreement applies. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

7. "Covered Party" means:

- (a) A *Member* of the *Authority*. This includes all entities named in its Declarations page, including any and all commissions, agencies, districts, authorities, boards (including the governing board), or similar entities coming under the *Member's* direction or control, or for which the *Member's* board members sit as the governing body, except a hospital board or commission, regardless of how such body is denominated.
- (b) A member of a joint powers authority (JPA) which is a *Member* of the *Authority* herein, which participates in said JPA's liability program. This includes all entities named in its Declarations page, including any and all commissions, agencies, districts, authorities, boards (including the governing board), or similar entities coming under the *Member's* direction or control, or for which the *Member's* board member sits as the governing body, except a hospital board or commission, regardless of how such body is denominated.
- (c) Any person or *Member* identified as a *Covered Party* in a certificate of coverage to third parties duly issued by the *Authority* for *Occurrences* during the *Coverage Period* identified in the certificate of coverage, the person or *Member* is a *Covered Party* only for *Occurrences* arising out of the described activity.
- (d) Any person who is an official, employee, or volunteer of a person or *Member* covered by (a), (b), or (c) herein, whether or not compensated, while acting in an official capacity for or on behalf of such person or *Member*, including while acting on any outside board at the direction of such person or *Member*, except a hospital board or commission, regardless of how such a body is denominated.
- (e) The *Authority* itself and its Board of Directors individually.
- (f) With respect to any *Automobile* owned or leased by a *Member*, or loaned to or hired for use by or on behalf of the *Member*, any person while using such *Automobile* and any person or organization legally responsible for the use thereof, provided the actual use is with the permission of the *Member*, but this protection does not apply to:
 - i. Any person or organization, or any agent or employee thereof, operating an *Automobile* sales agency, repair shop, service station, storage garage, or public parking place, with respect to an *Occurrence* arising out of the operation thereof;
 - ii. The owner or any lessee, other than the *Member*, of any *Automobile* hired by or loaned to the *Member* or to any agent or employee of such owner or lessee.

- (g) No person or *Member* is a *Covered Party* with respect to the conduct of any current or past partnership, joint venture, or joint powers authority that is not shown as a named *Covered Party* in the Declarations; however, for any person (1) who is an official, employee, or volunteer of a *Member* covered by (a) or (b) herein, (2) who participates in the activities of the partnership, joint venture, or joint powers authority (or any separate agency or *Member* created under any joint powers agreement by the named *Member*), and (3) who is acting for or on behalf of a *Member* covered by (a) or (b) herein at the time of the *Occurrence*, then coverage is afforded by this agreement. Such coverage will be in excess of and shall not contribute with any collectible insurance or other coverage provided to the other joint powers authority, agency, or *Member*.
- (h) Notwithstanding sections (d) and (e) above, the defense and indemnity coverage afforded by this agreement to a past or present official, employee, or volunteer of a *Member* (including a member entity of a *Member* joint powers authority) is not broader than the *Member's* duty to defend and indemnify its official, employee, or volunteer pursuant to California Government Code Section 815, 815.3, 825 to 825.6, 995 to 996.6, inclusive, and any amendments thereof. If the *Member* which employs the official, employee, or volunteer is not obligated under the California Government Code to provide a defense, or to provide indemnity for a claim, or if said *Member* refuses to provide such defense and/or indemnity to said official, employee, or volunteer, then this agreement shall not provide any such defense or indemnity coverage to said official, employee, or volunteer. All immunities, defenses, rights, and privileges afforded to a *Member* under California Government Code Section 815, 815.3, 825 to 825.6, 995 to 996.6, inclusive, and any amendments thereof, shall be afforded to the Authority to bar any defense or indemnity coverage under this agreement to that *Member's* official, employee, or volunteer.
8. "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 there from, 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, no road or highway fill or structure, no tank constructed of steel or concrete or of a combination thereof, no tank elevated above the ground, no water or waste water treatment facility, 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 or storm water detention or water recharging or use as a sewage sludge drying facility shall be considered a *Dam*. In addition, no obstruction in the channel of a stream or watercourse which is 15 feet or less in height from the lowest elevation of the obstruction and which has the single purpose of spreading water within the bed of the stream or watercourse upstream from the construction for percolation underground shall be considered a *Dam*. Nor shall any impoundment constructed and utilized to hold treated water from a sewage treatment plant be considered a *Dam*. Nor shall any wastewater treatment or storage pond exempted from State regulations and supervision by Water Code Section 6025.5 be considered a *Dam*.

9. "Damages" means compensation in money recovered by a third party for loss or detriment it has suffered through the acts of a *Covered Party* or for liability assumed by the *Covered Party* under a *Covered Indemnity Contract*. *Damages* include (1) attorney fees not based on contract awarded against the *Covered Party*, (2) interest on judgments, or (3) costs, for which the *Covered Party* is liable either by adjudication or by compromise with the written consent of the *Authority*, if the fees, interest, or costs arise from an *Occurrence* to which this coverage applies.
10. "Defense Costs" means all fees and expenses incurred by any *Covered Party*, caused by and relating to the adjustment, investigation, defense, or litigation of a claim to which this coverage applies, including attorney's fees, court costs, premiums for appeal bonds, and interest on judgments accruing after entry of judgment. *Defense Costs* shall include adjusting expenses of a third party claims administrator that are specifically identifiable with a claim subject to this coverage. *Defense Costs* shall include reasonable attorney fees and necessary litigation expenses incurred by or for a party other than the *Covered Party*, that are assumed by the *Covered Party* in a *Covered Indemnity Contract* where such attorney fees or costs are attributable to a claim for *Damages* covered by this Memorandum. *Defense Costs* shall include fees and expenses relating to coverage issues or disputes that arise after a written denial of coverage, between any *Covered Party* named in the Declarations and the *Authority*, if the *Covered Party* named in the Declarations prevails in such dispute. *Defense Costs* shall not include the office expenses, salaries of employees and officials, or expenses of the *Covered Party* or the *Authority*, or attorney fees or costs awarded to a prevailing plaintiff against the *Covered Party*.
11. "Limit of Coverage" shall be the amount of coverage stated in the declaration page or certificate of coverage, or sublimits as stated therein for each *Covered Party* per *Occurrence*, subject to any lower sublimit stated in this Memorandum. For each *Occurrence*, there shall be only one *Limit of Coverage* regardless of the number of claimants or *Covered Parties* against whom a claim is made. In the event that a structured settlement, whether purchased from or through a third-party, or paid directly by the *Covered Party* in installments, is utilized in the resolution of a claim or suit, the *Authority* will pay only up to the amount stated in the Declarations or certificate of coverage in present value of the claim, as determined on the date of settlement, regardless of whether the full value of the settlement exceeds the amount stated in the Declarations or certificate of coverage.
12. "Medical Malpractice" means the rendering of or failure to render any of the following

services:

- (a) Medical, surgical, dental, psychiatric, psychological counseling, x-ray, or nursing service or treatment or the furnishing of food or beverages in connection therewith; or any services provided by a health care provider as defined in Section 6146 (c), (2), (3), of the California Business and Professions Code.
- (b) Furnishing or dispensing of drugs or medical, dental, or surgical supplies or appliances.

Medical Malpractice does not include emergency medical services or first aid administered by employees, nor does it include advice or services rendered by a 911 emergency dispatcher.

- 13. "Member" shall mean any organization that is a party to the Agreement creating the California Affiliated Risk Management Authorities.
- 14. "Nuclear Material" means *Source Material*, *Special Nuclear Material*, or *Byproduct Material*. "Source Material", "Special Nuclear Material", and "Byproduct Material" have the meanings given to them by the Atomic Energy Act of 1954 or in any law amendatory thereof.
- 15. "Occurrence" means:
 - (a) With respect to *Bodily Injury* or *Property Damage*: an accident, including continuous or repeated exposure to substantially the same generally harmful conditions, which results in *Bodily Injury* or *Property Damage* neither expected nor intended from the standpoint of the *Covered Party*. Loss of use of tangible property that is not physically injured shall be deemed to occur at the time of the *Occurrence* that caused it.
 - (b) With respect to *Personal Injury*: an offense described in the definitions of those terms in this coverage agreement.
 - (c) With respect to *Public Officials Errors and Omissions*: any actual or alleged misstatement or misleading statement or act or omission as described in the definitions of the term in this coverage agreement.
- 16. "Personal Injury" means injury arising out of one or more of the following offenses:
 - (a) False arrest, detention or imprisonment, or malicious prosecution;
 - (b) Abuse of legal process;
 - (c) Wrongful entry into, or eviction of a person from, a room, dwelling, or premises that a person occupies;

- (d) Publication or utterance of material, including continuous or repeated, that slanders or libels a person or organization or disparages a person's or organization's goods, products or services, or oral or written publication of material that violates a person's right of privacy;
 - (e) Discrimination or violation of civil rights; and
 - (f) Injury resulting from the use of force for the purpose of protecting persons or property.
17. "Pollutants" means any solid, liquid, gaseous or thermal irritant or contaminant, including, but not limited to, smoke, vapor, soot, fumes, acids, alkalis, chemicals, airborne particles or fibers, mold, fungal pathogens, electromagnetic fields, and waste. Waste includes materials to be recycled, reconditioned, or reclaimed. The term *Pollutants* as used herein does not mean potable water, agricultural water, water furnished to commercial users, or water used for fire suppression.
18. "Property Damage" means:
- (a) Physical injury or destruction of tangible property, including all resulting loss of use of that property; or
 - (b) Loss of use of tangible property that is not physically injured or destroyed.
19. "Public Officials Errors and Omissions" means any (including continuous or repeated) actual or alleged misstatement or misleading statement or act or omission by any *Covered Party* (individually or collectively) arising in the course and scope of their duties with the *Covered Party* or claimed against them solely by reason of their being or having been public officials or employees, and which results in damage neither expected nor intended from the standpoint of the *Covered Party*. All claims involving the same misstatement or misleading statement or act or omission or a series of contiguous or interrelated misstatements or misleading statements or acts or omissions will be considered as arising out of one *Occurrence*.
20. "Retained Limit" means the amount, identified in the applicable Declaration or certificate, of *Ultimate Net Loss* for which the *Covered Party* pays out of its own funds, unless otherwise provided herein, before the *Authority* is obligated to make payment, subject to the following:
- (a) For each *Occurrence*, there shall be only one *Retained Limit* regardless of the number of claimants or *Covered Parties* against whom a claim is made.
 - (b) Payment of the *Retained Limit* shall be apportioned among the *Covered Parties* in accordance with their proportionate shares of liability. If the payment is for a settlement, the *Retained Limit* shall be apportioned among the *Covered Parties*, in accordance with the respective parties' agreed upon or court-determined share of

liability. In the event that the apportionment requires court determination, the *Covered Parties* will pay all costs of the *Authority* in seeking such determination, including its attorney's fees in proportion to the court's determination of liability.

21. “Ultimate Net Loss” means the sums actually paid by the *Covered Parties* comprising the total of all *Defense Costs* and all *Damages*.

SECTION III - DEFENSE AND SETTLEMENT

The *Authority* shall have no duty to assume charge of investigation or defense of any claim. However, the *Authority*, at its own expense, shall have the right to assume the control of the negotiation, investigation, defense, appeal, or settlement of any claim the *Authority* determines, in its sole discretion, to have reasonable probability of resulting in an *Ultimate Net Loss* in excess of the applicable *Retained Limit*. The *Covered Party* shall fully cooperate in all matters pertaining to such claim or proceeding.

If the *Authority* assumes the control of the handling of a claim, the *Covered Parties* shall be obligated to pay at the discretion of the *Authority* any sum necessary for the defense and settlement of a claim, or to satisfy liability imposed by law, up to the applicable *Retained Limit*.

No claim shall be settled for an amount in excess of the *Retained Limit* without the prior written consent of the *Authority*, and the *Authority* shall not be required to contribute to any settlement to which it has not consented.

SECTION IV - CARMA'S LIMIT OF COVERAGE

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 coverage provided, the *Authority's* liability for any one *Occurrence* shall be limited to the *Ultimate Net Loss* that is in excess of \$1,000,000, which shall be the *Covered Party's Retained Limit*, 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, whether purchased from or through a third-party, or paid directly by the *Covered Party* in installments, is utilized in the resolution of a claim or suit, the *Authority* will pay only up to the amount stated in the Declarations or certificate of coverage in present value of the claim, as determined on the date of settlement, regardless of whether the full value of the settlement exceeds the amount stated in the Declarations or certificate of coverage.
- (b) The *Limit of Coverage* for any additional *Covered Party* as defined in Section 2, Paragraph 7, Subparagraph (c), subject to the per *Occurrence* limitation above, shall not exceed the limit stated in its additional *Covered Party* certificate regardless of

the limit which applies to the *Member*.

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

SECTION V - COVERAGE PERIOD AND TERRITORY

This agreement applies to *Bodily Injury, Property Damage, Personal Injury, or Public Officials Errors and Omissions* that occurs anywhere in the world during the *Coverage Period* identified in the applicable declaration or certificate of coverage.

SECTION VI - EXCLUSIONS

This agreement does not apply to:

1. With respect to Pollution:

- (a) Any liability arising out of the actual, alleged, or threatened discharge, dispersal, seepage, migration, release, or escape of *Pollutants* anywhere in the world.
- (b) Any loss, cost or expense arising out of any governmental direction or request that the *Authority, the Covered Party* or any other person or organization test for, monitor, clean-up, remove, contain, treat, detoxify, neutralize, or assess the effects of *Pollutants*; or
- (c) Any loss, cost, or expense, including but not limited to costs of investigation or attorneys' fees, incurred by a governmental unit or any other person or organization to test for, monitor, clean-up, remove, contain, treat, detoxify, or neutralize *Pollutants*.

However, this exclusion shall not apply to *Bodily Injury* or *Property Damage* caused by a *Covered Party's* response to contamination caused by a third party unrelated to a *Covered Party*. Response includes clean up, removal, containment, treatment, detoxification, and neutralization of *Pollutants*. In addition this exclusion does not apply to direct and immediate *Bodily Injury* or *Property Damage* arising out of operations involving the use, application, or spraying of any pesticide at or from any site or location not owned or controlled by the *Covered Party* on which the *Covered Party* or any contractors or subcontractors working directly or indirectly on behalf of the *Covered Party*, are performing operations if the operation(s) performed meet all standards of any statute, ordinance, regulation, or license requirement of any federal, state, or local government which apply to those operations.

- (d) The exclusions set forth in (a), (b), or (c) above do not apply if said discharge, dispersal, release, or escape of *Pollutants* meets all of the following conditions:

- i. It was accidental and neither expected nor intended by the *Covered Party*; and
 - ii. It was demonstrable as having commenced on a specific date during the term of this memorandum; and
 - iii. Its commencement became known to the *Member* within seven (7) calendar days; and
 - iv. Its commencement was reported in writing to the *Authority* within forty (40) calendar days of becoming known to the *Member*; and
 - v. Reasonable effort was expended by the *Member* to terminate the discharge, dispersal, release, or escape of *Pollutants* as soon as conditions permitted.
 - (e) The exclusions set forth in (a), (b), or (c) above do not apply if said discharge, dispersal, release, or escape arises from materials being collected as part of any drop off or curbside recycling program implemented and operated by the *Covered Party*, unless the materials have been stored by the *Covered Party* or parties for a continuous period exceeding ninety (90) days.
 - (f) Nothing contained in this agreement shall operate to provide any coverage with respect to:
 - i. Any site or location principally used by the *Covered Party*, or by others in the *Covered Party's* behalf, for the handling, storage, disposal, dumping, processing, or treatment of waste material; except as provided in Section VI, paragraph 1, subparagraph (e)
 - ii. Any fines or penalties;
 - iii. Any clean-up costs ordered by the Superfund Program, or any federal, state, or local governmental authority. However, this specific exclusion (c) shall not serve to deny coverage for third party clean-up costs otherwise covered by this endorsement simply because of the involvement of a governmental authority;
 - iv. Acid rain; or
 - v. Clean-up, removal, containment, treatment, detoxification, or neutralization of *Pollutants* situated on premises the *Covered Party* owns, rents, or occupies at the time of the actual discharge, dispersal, seepage, migration, release, or escape of said *Pollutants*.
2. Claims, including attorney's fees or salary or wage loss claims, by any potential, present, or

former employee or official of the *Covered Party*, arising out of, but not limited to, a violation of civil rights or employment-related practices, policies, acts, or omissions, including termination, coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, or discrimination directed at that person. This exclusion extends to claims of the spouse, child, unborn child or fetus, parent, brother, or sister of that person as a consequence of injury to the person at whom any of the employment-related practices, policies, acts, or omissions described above are directed.

3. *Bodily Injury* to:

- (a) An employee of the *Covered Party* arising out of and in the course of:
 - i. Employment by the *Covered Party*; or
 - ii. Performing duties related to the conduct of the *Covered Party's* business; or
- (b) The spouse, child, unborn child or fetus, parent, brother, or sister of the employee as a consequence of paragraph (1) above.

This exclusion applies to any obligation to share *Damages* with or repay someone else who must pay *Damages* because of the injury. However, this exclusion does not apply to liability assumed under contract.

4. Any obligation under any workers' compensation, unemployment compensation, or disability benefits law or any similar law.

These exclusions 2, 3, and 4 apply whether the *Covered Party* may be liable as an employer or in any other capacity.

5. Claims arising out of ownership, maintenance, management, supervision, or the condition of any hospital.

6. Claims because of *Bodily Injury, Personal Injury, or Property Damage* arising out of ownership, maintenance, management, supervision, or the condition of any airport, including but not limited to liability arising out of ownership, operation, maintenance, or entrustment of *Automobiles* while used in airport operations.

7. Claims arising out of any professional *Medical Malpractice*:

- (a) Committed by a doctor, osteopath, chiropractor, dentist, or veterinarian; or
- (b) Committed by any health care provider, as defined in Business & Professions Code Section 6146(c)(2), working for any hospital or hospital operated out-patient, in-patient, or other clinic at the time of the occurrence giving rise to the loss.

8. Claims arising out of the hazardous properties of *Nuclear Material*.

9. Claims arising out of:

- (a) Land use regulations or planning policies, annexation, eminent domain by whatever name called, no matter how or under what theory such claims are alleged.

Notwithstanding this exclusion, coverage under this Memorandum is provided, in excess of the \$1,000,000 Covered Parties Retained Limit first paid, for Damages and Defense Costs of up to \$2,000,000 per Occurrence and subject to an aggregate limit of \$4,000,000 per Member for inverse condemnation claims due to Property Damage resulting from any of the following: weather acting upon or with the Covered Party's property or equipment, accidental failure of the Covered Party's property or equipment, negligent design or maintenance of or inadequate design of a public work or public improvement.

Notwithstanding the above, this Memorandum shall not afford inverse condemnation coverage for any claim arising out of the design, construction, ownership, maintenance, operation, or use of any water treatment plant or waste water treatment plant, no matter how or under what theory such claim is alleged, except a claim based upon the accidental failure of the equipment utilized or contained within the water treatment plant or waste water treatment plant.

- (b) The initiative process, whether or not liability accrues directly against any Covered Party by reason of any agreement which a Covered Party has entered.

10. *Property Damage* to:

- (a) Property owned by the *Covered Party*;
- (b) Property rented to or leased by the *Covered Party* where it has assumed liability for damage to or destruction of such property, unless the *Covered Party* would have been liable in the absence of such assumption of liability; and
- (c) *Aircraft* or watercraft in the *Covered Party's* care, custody, or control.

11. Claims arising out of the ownership, operation, use, maintenance, or entrustment to others of: (a) any *Aircraft* or (b) any watercraft being used for commercial purposes. Ownership, operation, use, or maintenance as used herein does not include static displays of aircraft in a park or museum setting.

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.

This exclusion does not apply if the failure to supply results from direct and immediate

accidental injury to tangible property owned or used by any *Covered Party* to procure, produce, process, or transmit the gas, water, electricity, or sewage.

13. Claims arising out of the ownership, maintenance, or use of any trampoline or any other rebound tumbling device.
14. Claims arising out of a *Covered Party's* sponsored or controlled skateboard activities or facilities unless those activities or facilities are covered by the *Member* joint powers authority.
15. Claims arising out of bungee jumping or propelling activities sponsored or controlled by the *Covered Party*.
16. Claims arising out of a failure to perform or breach of a contractual obligation.
17. Claims arising out of liability assumed under any contract or agreement, except liability that would be imposed by law in the absence of the contract or agreement, or when such assumption is the subject of a duly issued Certificate of Additional *Covered Party*; but such assumption is covered only up to the *Limit of Coverage* stated in the certificate. This exclusion does not apply to liability assumed in a contract or agreement that is a *Covered Indemnity Contract*, provided the *Bodily Injury* or *Property Damage* occurs subsequent to the execution of the contract or agreement.
18. Fines, assessments, penalties, restitution, disgorgement, exemplary or punitive *Damages*. This exclusion applies whether the fine, assessment, penalty, 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 specific item of property or a specific sum of money, because such item of property or sum of money was not lawfully or rightfully acquired by the *Covered Party*.
19. *Ultimate Net Loss* arising out of relief, or redress, in any form other than money *Damages*.
20. Claims arising out of the manufacture of, mining of, use of, sale of, installation of, removal of, distribution of or exposure to radon, asbestos, asbestos products, asbestos fibers, asbestos dust, or other asbestos containing materials, or:
 - (a) Any obligation of the *Covered Party* to indemnify any party because of such claims, or
 - (b) Any obligation to defend any suit or claims against the *Covered Party* because of such claims.
21. Claims for injury or *Damages* caused by intentional conduct done by the *Covered Party* with willful and conscious disregard of the rights or safety of others, or with malice. However, as to any other *Covered Party* that did not authorize, ratify, participate in, consent

to, or have knowledge of such conduct by its past or present employee, elected or appointed official, or volunteer, and where the claim against that *Covered Party* is based solely on its vicarious liability arising from its relationship with such employee, official, or volunteer, this exclusion does not apply to said *Covered Party*.

22. Claims arising out of partial or complete structural failure of a *Dam*.
23. Claims by any *Covered Party* against its own past or present elected or appointed officials, employees, volunteers, or additional covered parties where such claim seeks *Damages* payable to the *Covered Party*.
24. Claims arising out of oral or written publication of material, if done by or at the direction of the *Covered Party* with knowledge of its falsity.
25. Claims arising out of liability imposed on any *Covered Party* under any uninsured/underinsured motorist law or *Automobile* no-fault law.
26. The cost of providing reasonable accommodation pursuant to the Americans with Disabilities Act, Fair Employment and Housing Act, or similar law.
27. Refund or restitution of taxes, fees, or assessments.
28. Claims for refund, reimbursement, or repayment of any monies to which a *Covered Party* was not legally entitled.
29. Claims arising in whole or in part out of the violation of a statute, ordinance, order, or decree of any court or other judicial or administrative body, or rule of law, committed by or with the knowledge or consent of the *Covered Party*.
30. Claims arising out of estimates of probable cost or cost estimates being exceeded or faulty preparation of bid specifications or plans including architectural plans unless prepared by a qualified, licensed and/or registered engineer or architect who is the appointed City Engineer or an employee of the *Covered Party*.
31. Under *Public Officials Errors and Omissions Coverage*:
 - (a) *Bodily Injury, Personal Injury*, or physical injury to tangible property, including all resulting loss of use of that property.
 - (b) Benefits payable under any employee benefit plan.

SECTION VII - CONDITIONS

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

The following provisions are conditions precedent to being afforded coverage under this Memorandum. The *Covered Party's* failure to comply with any of these provisions shall void the coverage provided herein, unless otherwise specifically stated.

(a) Notice Conditions

From the time when any of the following occurs the *Covered Party* shall notify the *Authority* within 30 days:

1. Establishment of a reserve on any claim or suit (including multiple claims or suits arising out of one *Occurrence*), amounting to at least fifty percent of the *Retained Limit*;
2. For a Title 42 USC 1983 matter alleging a violation of civil rights:
 - i. Any claim or case where a Complaint has not yet been served and the combined total of paid and reserved amounts reaches twenty-five percent of the *Retained Limit*; or
 - ii. Any claim or case in which a Complaint has been filed and served on a *Covered Party*.
3. Regardless of service or reserve, any claim involving any:
 - i. Fatality,
 - ii. Amputation,
 - iii. Loss of use of any sensory organ,
 - iv. Spinal cord injuries (quadriplegia or paraplegia),
 - v. Third degree burns involving ten percent or more of the body,
 - vi. Facial disfigurement,
 - vii. Paralysis,
 - viii. Closed head injuries,
 - x. Loss of use of any body function, or
 - xi. Hospitalization for at least 30 consecutive days when known by the Member entity.

If the *Covered Party* fails to comply with any of these notice conditions and the *Authority's* Board of Directors find by a majority vote that the delay was unreasonable, the *Authority* shall limit the coverage provided herein, as follows:

- i. If notice is given to the *Authority* within 180 days after the date on which it should have been given, any *Ultimate Net Loss* that would have been owing to the *Covered Party*, if notice had been timely given to the *Authority*, shall be reduced by twenty-five percent (25%).
- ii. If notice is given to the *Authority* between 181 days and 365 days after the

date on which it should have been given, any *Ultimate Net Loss* that would have been owing to the *Covered Party*, if notice had been timely given to the Authority, shall be reduced by fifty percent (50%).

- iii. If notice is given to the *Authority* between 366 days and 730 days after the date on which it should have been given, any *Ultimate Net Loss* that would have been owing to the *Covered Party*, if notice had been timely given to the *Authority*, shall be reduced by seventy-five percent (75%).
- iv. If notice is given to the *Authority* over 730 days after the date on which is should have been given, the *Authority* shall deny any coverage and shall pay no *Ultimate Net Loss*.

In determining whether or not the delay was unreasonable, the *Authority's* Board of Directors shall consider all facts and circumstances that caused the delay. Prejudice to the *Authority* is a factor but is neither conclusive nor required.

Written notice containing particulars sufficient to identify the *Covered Party* and also reasonably obtainable information with respect to the time, place, and circumstances thereof, and the names and addresses of the *Covered Party* and of available witnesses, shall be given to the *Authority* or any of its authorized agents as soon as possible.

- (b) If a claim is made or suit is brought against the *Covered Party* and such claim or suit falls within the descriptions in paragraph (a) above, the *Covered Party* shall be obligated to forward to the *Authority* every demand, notice, summons, or other process received by it or its representative.
- (c) The *Covered Party* shall cooperate with the *Authority* and upon its request assist in making settlements, in the conduct of suits and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the *Covered Party* because of *Bodily Injury, Personal Injury, Property Damage, or Public Officials Errors and Omissions* with respect to which coverage is afforded under this agreement; 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 its own cost, voluntarily make any payment, assume any obligation, or incur any expense toward the settlement of any claim for which the Authority has accepted responsibility and has so notified the *Covered Party*.
- (d) As to any claim for which the Authority has accepted responsibility and has so notified the *Covered Party*, if the *Covered Party* prevents settlement of the claim for a reasonable amount, defined as the amount the Authority is willing to pay and the claimant is willing to accept, and increases the *Covered Party's* potential liability for *Damages* and continued *Defense Costs*, the *Covered Party* shall pay or shall reimburse the Authority for those *Defense Costs* incurred after the claim could have

been settled, and for any *Damages* awarded or settlement agreed upon in excess of the amount for which the claim could have been settled.

- (e) The *Authority* shall be entitled to complete access of the *Covered Party's* claim file, the defense attorney's complete file, and all investigation material and reports, including all evaluations and information on negotiations. The *Covered Party* shall be responsible to report on the progress of the litigation and any significant developments at least quarterly to the *Authority*, and to provide the *Authority* with simultaneous copies of all correspondence provided to the *Covered Party* by its defense attorneys and/or agents.

2. Bankruptcy or Insolvency

Bankruptcy or insolvency of the *Covered Party* shall not relieve the *Authority* of any of its obligations hereunder.

3. Other Coverage

- (a) Except as provided in 3(b), in order for coverage herein to apply, the *Covered Party* must pay the full amount of its *Retained Limit*. Payment of the *Retained Limit* by the *Covered Party* is required in addition to, and regardless of, any payment or payments from any other source for or on behalf of that *Covered Party*. If insurance or any other coverage with any insurer, joint powers authority or other source is available to the *Covered Party* covering a loss also covered hereunder (whether on a primary, excess or contingent basis), the coverage hereunder shall be in excess of, and shall not contribute with, such other insurance or coverage. This coverage shall be in excess of, and shall not contribute with, any insurance or coverage which names a *Covered Party* herein as an additional *Covered Party* or additional insured party, where coverage is extended to a loss also covered hereunder.
- (b) Commercial coverage purchased directly by a *Covered Party* for the sole purpose of insuring all or a portion of its *Retained Limit* may be utilized to pay all, or a portion of, a *Covered Party's Retained Limit*.

4. Severability of Interests

The term *Covered Party* is used severally and not collectively, but the inclusion herein of more than one *Covered Party* shall not operate to increase the limits of the *Authority's* liability or the *Retained Limit* applicable per *Occurrence*.

5. Accumulation of Limits

A claim which contains allegations extending to a duration of more than one *Coverage Period* shall be treated as a single *Occurrence* arising during the first *Coverage Period* when the *Occurrence* begins.

6. Termination

This agreement may be terminated at any time in accordance with the Bylaws of the *Authority*.

7. Changes

Notice to any agent or knowledge possessed by any agent of the *Authority* or by any other person shall not effect a waiver or a change in any part of this Memorandum of Coverage, nor shall the terms of this Memorandum of Coverage be waived or changed, except by endorsement issued to form a part of this Memorandum of Coverage.

8. Subrogation

The *Authority* shall be subrogated to the extent of any payment hereunder to all the *Covered Parties'* rights of recovery thereof and the *Covered Parties* shall do nothing after loss to prejudice such right and shall do everything necessary to secure such right. Any amounts so recovered shall be apportioned as follows:

- (a) The highest layer of coverage shall be reimbursed first and if there are sufficient recoveries then the next highest layer shall be reimbursed until all recoveries are used up.
- (b) The expenses of all such recovery proceedings shall be paid before any reimbursements are made. If there is no recovery in the proceedings conducted by the *Authority*, it shall bear the expenses thereof.

9. Arbitration

Decisions by the *Authority* whether to assume control of the negotiation, investigation, defense, appeal, or settlement of a claim, or whether or not coverage exists for a particular claim or part of a claim shall be made by the Board of Directors of the *Authority*.

Any dispute concerning a decision of the *Authority* to deny coverage for all or part of a claim shall not be subject to any court action, but shall instead be submitted to binding arbitration. The *Covered Party* must exhaust the right to appeal to the Board of Directors before requesting arbitration of a dispute.

Arbitration shall be conducted pursuant to the California Code of Civil Procedure. Arbitration shall be conducted by a single neutral arbitrator. The *Covered Party* or parties and the Authority shall select the arbitrator by mutual agreement. No arbitrator shall be employed or affiliated with the *Authority* or the *Covered Party* or parties.

The selection of the arbitrator shall take place within twenty (20) calendar days from the receipt of the request for arbitration; if not agreed to within twenty (20) days, an immediate petition to a court of law for appointment of a neutral arbitrator shall be filed by the

Authority. The arbitration hearing shall commence within forty-five (45) calendar days from the date of the selection or court appointment of the arbitrator.

Each party shall bear equally the cost of the selected or appointed arbitrator. In addition, each party shall be responsible for its own costs and expenses of arbitration.

Except for notification of appointment and as provided in the California Code of Civil Procedure, there shall be no communication between the "parties" and the arbitrator relating to the subject of the arbitration other than at oral hearings.

The procedures set forth in California Code of Civil Procedure Section 1283.05 relating to depositions and discovery shall apply to any arbitration pursuant to this paragraph 9.

Except as provided otherwise above, arbitration shall be conducted as provided in Title 9 of the Code of Civil Procedure (commencing with Section 1280).

The decision of the neutral arbitrator shall be final and binding, and shall not be subject to appeal except as provided for in California Code of Civil Procedure sections 1286.2 and 1286.6.