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2001-2002 MEMORANDUM
OF COVERAGE

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OF THE
CALIFORNIA JOINT POWERS
RISK MANAGEMENT AUTHORITY

CALIFORNIA JOINT POWERS RISK MANAGEMENT AUTHORITY

MEMORANDUM OF COVERAGE

PROGRAM YEAR: 2001-2002

This coverage document shall be in effect from July 1, 2001 through June 30, 2002.

In consideration of the payment of the deposit premium, the *Authority* agrees with the *covered parties* as follows:

SECTION I - COVERAGES

The *Authority* will pay up to the *limit of coverage* those sums for *ultimate net loss* in excess of the *retained limit* that the *covered parties* become legally obligated to pay as *damages* because of *bodily injury, property damage, personal injury, public officials errors and omissions* or *employment practices liability* 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 self-insurance. This Memorandum is a negotiated agreement among 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 agreement. 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. As the *Authority* is not an insurer, it has no obligation to issue reservation of rights letters, nor does it have an obligation to provide "Cumis" counsel to a *covered party* in disputed coverage situations under Civil Code section 2860. Finally, failure to provide notice to a *covered party* of any coverage dispute shall not operate to waive any of the provisions of this Memorandum.

SECTION II - DEFINITIONS

- 1) **Aircraft** means a vehicle designed for the transport of persons or property principally in the air.
- 2) **Airport** means an area of land or water used or intended to be used for the landing and taking off of *aircraft*; including an appurtenant area used or intended to be used for *airport* buildings or other *airport* facilities or right of way; and *airport* buildings and facilities located in any of these areas. "*Airport*" includes a heliport.

- 3) **Authority** shall mean the California Joint Powers Risk Management Authority created by the JPA Agreement.
- 4) **Automobile** means a land motor vehicle, trailer or semi-trailer.
- 5) **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*.
- 6) **Care, Custody or Control Hazard** includes all *property damage* to: (1) property that the *covered party* rents or occupies; (2) premises the *covered party* sells, gives away or abandons, if the *property damage* arises out of any part of those premises; (3) property loaned to the *covered party*; and (4) personal property in the care, custody or control of the *covered party*.
- 7) **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 liability that would be imposed by law in the absence of any contract or agreement, arising out of an *occurrence* to which this Agreement applies.
- 8) **Covered party** means:
 - (a) A *member entity* of the California Joint Powers Risk Management 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 entity's direction or control, or for which the entity'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 that is a *member entity* 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 entity's direction or control, or for which the entity's board members sit as the governing body, except a hospital board or commission, regardless of how such body is denominated.
 - (c) Any person or entity identified as a *covered party* holding a certificate of coverage duly issued by the *Authority*, for *occurrences* during the coverage period identified in the certificate of coverage; if a particular activity is identified in the certificate of coverage, the person or entity 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 entity 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 entity, including while acting on any outside board at the direction of such person or entity, except a hospital board or commission, regardless of how such body is denominated. *Covered party* shall not include any person whose conduct is not within the course and scope of his or her employment or office with the *covered party* at the time of the act or acts that give rise to liability.
- (e) With respect to any *automobile* owned or leased by a *covered party* (described in (a), (b) or (c) above), or loaned to or hired for use by or on behalf of the *covered party*, any person while using such *automobile*, and any person or organization legally responsible for the use thereof, provided the actual use is with the express permission of the *covered party*, but this protection does not apply to:
- 1) 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; or
 - 2) The owner or any lessee, other than the *covered party*, of any *automobile* hired by or loaned to the *covered party* or to any agent or *employee* of such owner or lessee.

This agreement does not provide uninsured or underinsured motorist coverage.

- (f) 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 entity* (described in (a) or (b) above) is not broader than the *member entity's* duty to defend and indemnify its official, *employee* or volunteer pursuant to California Government Code sections 815 to 815.3, 825 to 825.6, and 995 to 996.6, inclusive and any amendments thereof. If the *member entity* which employs the official, *employee* or volunteer is not obligated under the Government Code to provide a defense, or to provide indemnity, for a claim, or if said *member entity* refuses to provide such defense and/or indemnity to said official, *employee* or volunteer, then this agreement shall not provide for any such defense or indemnity coverage to said official, *employee* or volunteer. All immunities, defenses, rights and privileges afforded to a *member entity* under Government Code sections 815 to 815.3, 825 to 825.6, and 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 entity's* official, *employee* or volunteer.
- (g) No person or entity is a *covered party* with respect to the conduct of any current or past partnership, joint venture or joint powers authority unless all members are *covered parties* under (a) or (b) herein. However, for any person (1) who is an official, *employee*, or volunteer of an entity covered by (a) or (b) herein, (2) who

participates in the activities of any partnership, joint venture or joint powers authority (or any separate agency or entity created under any joint powers agreement by the named entity), and (3) who is acting for or on behalf of an entity 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 entity.

- (9) **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 flood water, no railroad fill or structure, and no road or highway fill or structure, no circular tank constructed of steel or concrete or of a combination thereof, no tank elevated above the ground, no water or wastewater 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 regulation and supervision by California Water Code section 6025.5 be considered a *dam*.

- 10) **Damages** means compensation in money recovered by a party for loss or detriment it has suffered through the acts of a *covered party*. *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. *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 *covered party* in a *covered indemnity contract* where such attorney fees or costs are attributable to a claim for *damages* covered by this Memorandum.

Damages with respect to *employment practices liability* shall not include those sums owed by a *covered party* as contract *damages*, prospective salary or wages, prospective benefits, any wage or salary resulting from promotion or reinstatement, or any *damages* owing under an express contract of employment or an express obligation to make severance payments in the event of termination of employment.

Damages with respect to *employment practices liability* also shall not include amounts awarded under a labor grievance or arbitration pursuant to a collective bargaining agreement, nor sums paid pursuant to any judgment or agreement, whether injunctive or otherwise, to undertake actions to correct past discriminatory or unlawful conduct or to establish practices or procedures designed to eliminate or prevent future discriminatory or other unlawful conduct, or any non-monetary relief.

- 11) **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 fees. *Defense costs* shall include adjusting expenses of a third party claims administrator which are specifically identifiable with a claim subject to this coverage.

Defense costs shall not include:

- (a) the office expenses, salaries of *employees* or officials, or expenses of the *covered party* or the *Authority*;
 - (b) any fee or expense relating to coverage issues or disputes between the *Authority* and any *covered party*; or
 - (c) attorney fees, interest on judgments, or costs awarded to a prevailing plaintiff against the *covered party*.
- 12) **Discrimination** means an act or failure to act with respect to any present or former *employee* or applicant for employment with regard to compensation, terms, conditions, privileges or opportunities of employment because of race, color, religion, age, sex, disability, pregnancy, national origin, sexual orientation, or other protected category or characteristic established pursuant to any applicable federal, state or local statute or ordinance.
- 13) **Employee** means a person whose labor or services is engaged and directed by a *covered party* described in definition 8 (a), (b) or (c) above. This includes part-time, seasonal, and temporary labor or services, as well as any person employed in a supervisory, managerial or confidential position. *Employee* shall not include an independent contractor, volunteer or agent, and shall not include any person performing work pursuant to a court order in lieu of a fine or jail sentence.

- 14) **Employment Practices Liability** means liability arising from *discrimination, sexual harassment, and/or wrongful termination* claimed by an *employee, former employee* or applicant for employment of a *covered party*.
- 15) **Limit of coverage** shall be the amount of coverage stated in the declaration page or certificate of coverage 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. If the *covered parties* have different limits of coverage, the highest limit for any party found liable by a final judgment will apply.
- 16) **Marina** means facilities which include floating docks, boat berthing spaces, marine fueling operations, marine repair facilities, storage facilities for boats and other related marine materials, and other related facilities in which berthing spaces are leased or rented to members of the public for berthing of their private boats. *Marina* includes all of such facilities beyond locking gates, fences or barriers barring access to non-lessees and within waterways enclosed by any breakwater or similar structure, and any repair and storage facilities wherever located.
- 17) **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 first aid administered by *employees*, nor does it include advice or services rendered by a 911 emergency dispatcher.
- 18) **Member Entity** means a signatory to the JPA Agreement creating the California Joint Powers Risk Management Authority.
- 19) **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.
- 20) **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*. *Property damage* that is 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*, *public officials errors and omissions liability* and *employment practices liability*, respectively: an offense described in the definitions of those terms in this coverage agreement.

21) **Personal injury** means injury, other than *bodily injury*, arising out of one or more of the following offenses:

- (a) false arrest, detention or imprisonment, or malicious prosecution;
- (b) wrongful entry into, or eviction of a person from, a room, dwelling or premises that the person occupies;
- (c) publication or utterance of material 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.
- (d) *discrimination* or violation of civil rights.
- (e) injury resulting from the use of reasonable force for the purpose of protecting persons or property.

22) **Pollutants** means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, airborne particles or fibers, asbestos, lead and waste. Waste includes material 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.

23) **Property damage** means:

- (a) physical injury to 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.

24) **Public officials errors and omissions** means any 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*.

25) **Retained limit** means the amount, identified in the applicable declaration or certificate of coverage, of *ultimate net loss* which the *member entity* must incur or become liable for before the *Authority* is obligated to make any 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. If the *covered parties* have different *retained limits*, the lowest *retained limit* of any party found liable will apply. Payment of the *retained limit* shall be apportioned among the *covered parties* in accordance with their proportionate shares of liability.
- (b) 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 California Joint Powers Risk Management Authority in seeking such determination, including its attorney's fees in proportion to the court's determination of liability.
- (c) 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, only the present value of the agreed-upon payments (the present value cost of the structured settlement) shall be considered in satisfaction of the *covered party's retained limit*.
- (d) The amount which the *covered party* must "incur or become liable for" so that the *retained limit* is satisfied and this coverage attaches may include sums paid on behalf of the *covered party* by:
 - 1) A commercial insurance carrier because of a policy purchased by the *covered party*;
 - 2) A commercial insurance carrier because of an additional insured endorsement issued to the *covered party*;
 - 3) A self-insurance pooling joint powers authority which provides coverage to the *covered party*;or
 - 4) A party making payment because of a contractual indemnity agreement with the *covered party*.

In the event that one of the sources listed above provides indemnity coverage to the *covered party* and other defendant(s) in the claim or suit, only those sums paid on behalf of the *covered party* shall be used to satisfy the *retained limit*. If payment is for a settlement, payment will be allocated between the *covered party* and the other defendant(s) in accordance with their court-determined shares of liability, or in an allocation according to liability as agreed upon by the *covered party* and the *Authority*. In the event that the *covered party* and the *Authority* are unable to agree upon an allocation, the matter will be submitted binding arbitration for a determination of the respective shares of liability. This

determination will be according to the procedures set forth elsewhere in this Memorandum, each side to bear its own costs.

- 26) **Sexual harassment** means unwelcome sexual advances and/or requests for sexual favors and/or other verbal or physical conduct of a sexual nature that: (1) are made a condition of employment; and/or (2) are used as a basis for employment decisions; and/or (3) create a work environment that is intimidating, hostile or offensive, or interfere with performance.
- 27) **Ultimate net loss** means the total of all *defense costs* incurred by the *covered parties* and all *damages* for which the *covered parties* are liable either by adjudication or by compromise with the written consent of the *Authority*, arising from an *occurrence* to which this coverage applies. However, *ultimate net loss* does not include defense expenses incurred by the *Authority* after the *Authority* assumes control of the negotiation, investigation, defense, appeal or settlement of any claim or proceeding. *Ultimate net loss* also does not include attorneys fees or costs awarded to the prevailing party in a suit except where such attorneys fees or costs are attributable to a claim for *damages* covered by this Memorandum.
- 28) **Wrongful termination** means termination of an employment relationship in a manner which is against the law and wrongful or in breach of an implied agreement to continue employment.

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 which the *Authority* determines, in its sole discretion, to have a reasonable possibility 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 direction of the *Authority* any sum necessary for the 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 - THE AUTHORITY'S LIMIT OF COVERAGE

The *limit of coverage* is the most the *Authority* will pay for *ultimate net loss* arising out of any one *occurrence*, and the amount payable for *ultimate net loss* under this agreement shall be reduced by the amount of the *retained limit*. (For example, if the *covered party* has a \$15,000,000 *limit of coverage* and a \$500,000 *retained limit*, the *Authority* will pay not more than \$14,500,000 after exhaustion of the *retained limit*.) 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. The *limit of coverage* for an additional *covered party* (including its officials, *employees* and volunteers) shall be the limit stated in its additional *covered party* certificate, regardless of the limit that applies to the *member entity*.

Where this Agreement, or an endorsement or declaration, lists a "sublimit," that sublimit operates as the *limit of coverage*. (For example, if the *covered party* has a \$2 million sublimit and a \$1 million *retained limit*, the *Authority* will pay not more than \$1 million after exhaustion of the *retained limit*.)

A separate *limit of coverage* applies to *employment practices liability*. For any *claims* arising out of *employment practices liability*, the *limit of coverage* will be \$4,000,000 per *occurrence*. All allegations by an *employee* or former *employee* or applicant for employment in the same *claim* shall be considered as one *occurrence* for the purpose of the *limit of coverage*. All *claims* by all *employees* or former *employees* or applicants for employment arising from the same act, policy, or course of conduct by a *covered party* shall be considered as one *occurrence* for the purpose of the *limit of coverage*. All *claims* which allege *employment practices liability* for *occurrences* 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.

This limit for *employment practice liability* will further be subject to an annual aggregate limit, so that the *limit of coverage* is the most the *Authority* will pay for all *ultimate net loss* arising out of *employment practices liability* for any *covered party* (inclusive of its *employees*, commissions, agencies, districts, authorities or boards), as defined in Section II(8)(a) or (b) for any coverage year.

For *personal injury* claims arising from *discrimination*, the *limit of coverage* in any class action suit will be \$5 million per *occurrence*. For *bodily injury*, *property damage* or *personal injury* arising out of the subsidence of land or earth, the *limit of coverage* will be \$5 million per *occurrence*.

SECTION V - COVERAGE PERIOD AND TERRITORY

This agreement applies to *bodily injury, personal injury, property damage, public officials errors and omissions* and *employment practices liability* which occurs anywhere in the world during the coverage period identified in the applicable declaration or certificate of coverage.

SECTION VI - EXCLUSIONS

(Captions provided for the exclusions are descriptive only and do not serve to either expand or limit coverage.)

This agreement does not apply to:

1) **Aircraft**

Claims arising out of the ownership, operation, use, maintenance or entrustment to others of any *aircraft* by a *covered party*. "Ownership, operation, use or maintenance" as used herein does not include static displays of *aircraft* in a park or museum setting.

2) **Airports**

Claims arising out of ownership, maintenance, management, supervision or the condition of any *airport*. However, this exclusion does not apply to *public officials errors and omissions* or *employment practices liability* coverage arising from the ownership, maintenance, management, supervision or the condition of any *airport*. Notwithstanding what is stated in the applicable declarations, *public officials errors and omissions* coverage described in this exception will be subject to a sublimit of \$5 million.

3) **Airshows**

Claims arising out of any air show sponsored or controlled by the *covered party*.

4) **Bid Specifications**

Claims arising out of estimates of probable cost or cost estimates being exceeded or faulty preparation of bid specifications or plans including architectural plans.

5) **Contractual Obligations**

Claims arising out of:

- (a) a failure to perform or breach of a contractual obligation; or

(b) *bodily injury or property damage* for which the *covered party* is obligated to pay *damages* by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for *damages*:

- 1) 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; or
- 2) that the *covered party* would have in the absence of the contract or agreement.

Notwithstanding this exclusion, the General Manager (or Board President or Vice President, in the absence of the General Manager) is granted authority to approve settlements involving promises to indemnify a co-defendant as part of the settlement. Any funds recovered from a co-defendant under such an agreement must be applied to *ultimate net loss* in addition to the *retained limit* before CJPRMA coverage is triggered.

6) **Damages Other Than Money**

Ultimate net loss arising out of relief, or redress, in any form other than money *damages*.

7) **Dams**

Claims arising out of partial or complete structural failure of a *dam*.

8) **Defamation**

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.

9) **Date Related Computer Failure**

Any *bodily injury, property damage, personal injury or public official errors or omissions* arising directly or indirectly out of any actual or alleged failure, malfunction, or inadequacy of any computer hardware, including microprocessors, computer application software, computer operating systems and related software, computer networks, or other computerized or electronic equipment, or components, or any other products, services, data, or functions that directly or indirectly use or rely upon the foregoing due to inability to correctly recognize, process, distinguish, interpret, or accept the year 2000 and beyond.

This exclusion extends to any advice, consultation, design, installation, inspection, evaluation, maintenance, repair, replacement or supervision provided or done by any *covered party* to determine, rectify, or test for any potential or actual problem described in this exclusion.

10) **Employment Liability**

Bodily injury to:

- (a) an *employee* of the *covered party* arising out of and in the course of:
 - 1) employment by the *covered party*; or
 - 2) performing duties related to the conduct of the *covered party*'s business.
- (b) the spouse, child, unborn child or fetus, parent, brother or sister of the *employee* as a consequence of paragraph (a) above.

This exclusion applies to any obligation to share *damages* with or repay someone else who must pay *damages* because of the injury except under a *covered indemnity contract*.

This exclusion applies whether the *covered party* may be liable as an employer or in any other capacity.

11) **Employment Practices – Class Actions**

Under *employment practices liability*, to any potential or actual liability arising from a claim or claims which are filed or certified as class actions in which *employees* or other persons represent a class of *employees* who are alleging similar or related claims.

12) **Employment Practices – Labor Disputes**

Under *employment practices liability*, to any potential or actual liability arising out of a lockout, strike, picket line, replacement or other similar action in connection with labor disputes or labor negotiations.

13) **Employment Practices – Workers' Adjustment and Retraining**

Under *employment practices liability*, to any liability arising out of the Workers' Adjustment and Retraining Notification Act, Public Law 100-379 (1988), or any amendment thereto, or any similar federal, state or local law.

14) **Elected Officials – Employees - Restitution**

Claims by any *covered party* against its own past or present elected or appointed officials, *employees* or volunteers, where such claim seeks *damages* or restitution payable to the *covered party*.

15) **Employee Benefit Plans**

Benefits payable under any *employee* benefit plan (whether the plan is voluntarily established by the *covered party* or mandated by statute) because of unlawful *discrimination*.

This exclusion applies whether the *covered party* may be liable as an employer or in any other capacity.

16) **Employment Benefits**

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

This exclusion applies whether the *covered party* may be liable as an employer or in any other capacity.

17) **ERISA**

Claims arising out of the Employee Retirement Income Security Act of 1974 or any law amendatory thereof, or any similar law or liability arising out of fiduciary activities as respects *employee* benefits plans.

18) **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.

19) **Fines, Penalties, Punitive Damages**

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*.

20) **Firing Ranges**

Claims arising out of the private use of a firing range owned, operated or maintained by a *covered party* where such private use is sanctioned by the *covered party*, except where such use is by a covered individual as defined in definition (7) (d).

21) **Hospitals**

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

22) **Intentional Conduct**

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, where the *covered party* 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 the claim against the *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*.

23) **Jumping/Propelling Activities**

Claims arising out of bungee jumping or propelling activities sponsored, controlled or authorized by a *covered party*.

24) **Land Use**

Claims arising out of or in connection with land use regulation, land use planning, the principles of eminent domain, condemnation proceedings or inverse condemnation by whatever name called, and whether or not liability accrues directly against any *covered party* by virtue of any agreement entered into by or on behalf of any *covered party*.

25) **Marinas**

Claims arising out of:

- (a) or connected with *property damage* to private vessels or craft while present at or in a *marina* owned, operated or controlled by a *covered party* whether or not the vessel or craft is docked, moored or underway; or
- (b) *bodily injury* or *property damage* occurring on, in or about any boat owned or operated by the *covered party* (whether such vessel is being operated or has broken away from any dock or mooring) while present at or in a *marina* owned, operated or controlled by a *covered party*.

26) **Medical Malpractice**

Claims arising out of any professional *medical malpractice* (1) committed by a doctor, osteopath, chiropractor, dentist or veterinarian, or (2) 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.

27) **Multi Passenger Vehicles**

Claims arising out of the ownership, operation, maintenance or use of any vehicle (1) with over 30 passenger seats or carrying over 30 passengers and (2) which is owned, operated, maintained or used by any transit authority, transit system or public transportation system owned or operated by or on behalf of the *covered party*.

28) **Nuclear Material**

Claims arising out of the hazardous properties of *nuclear material*.

29) **Pollution**

Claims which would not have occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of *pollutants* at any time.

- (a) This exclusion does not apply to fire fighting activities, including training burns, or intentional demolition or burns for the purpose of limiting a fire, or the discharge of *pollutants* for the purpose of controlling a fire; or to police use of mace, oleoresin capsicum (O.C.), pepper gas or tear gas; or to weed abatement or tree spraying.
- (b) This exclusion does not apply to claims arising from sudden and accidental sewer backups. Notwithstanding what is stated in the applicable declarations, the *limit of coverage* for claims described in this exception will be subject to a sublimit of \$2,000,000.
- (c) This exclusion does not apply to claims arising from the sudden and accidental discharge, dispersal, release, or escape of chlorine and other chemicals (gas, liquid or solid) which are being used or being prepared for use in fresh or wastewater treatment or in water used in swimming pools, wading pools or decorative fountains. Notwithstanding what is stated in the applicable declarations, the *limit of coverage* for claims described in this exception will be subject to a sublimit of \$2,000,000.

- (d) This exclusion does not apply to claims arising from materials being collected as part of any drop-off or curbside recycling program implemented and operated by the *covered party*; if the materials have not been stored by the *covered party* or *parties* for a continuous period exceeding ninety (90) days. Notwithstanding what is stated in the applicable declarations, the *limit of coverage* for claims described in this exception will be subject to a sublimit of \$2,000,000.
- (e) This exclusion does not apply to sudden and accidental discharges of *pollutants* occurring during the transportation or deposit of materials as part of garbage collection activities. However, the exclusion does apply after *pollutants* have been deposited at a landfill or garbage dump.
- (f) This exclusion does not apply to *bodily injury* or *property damage* arising from activities of the *covered party* to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize *pollutants*, but this exception will not apply to *bodily injury* or *property damage* caused by *pollutants* on or arising from premises, equipment or locations under the control of the *covered party*.

As used in paragraphs (b), (c) and (e) above, “sudden” means abrupt or immediate, and occurring within a period not exceeding twenty-four (24) hours; “accidental” means causing harm neither expected nor intended by a *covered party*.

Notwithstanding what is stated in the applicable declarations, any liability arising out of the actual, alleged or threatened exposure to asbestos or lead, which is covered by an exception within this exclusion, shall be subject to a sublimit of \$5 million, or to any lower sublimit set forth in a specific exception involved.

30) **Pollution Clean Up**

Any loss, cost or expense, including *defense costs*, arising out of any:

- (a) request, demand or order that any *covered party* or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of *pollutants*; or
- (b) claim or suit by or on behalf of a governmental authority for *damages* because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of *pollutants*.

31) **Property of a Covered Party**

Property damage to:

- (a) property owned by the *covered party*;
- (b) property rented to or leased to 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; or
- (c) *aircraft* or watercraft in the *covered party's* care, custody or control.

Notwithstanding what is stated in the applicable declarations, the *limit of coverage* for any *property damage* not excluded by the language of this exclusion, but which is described in the *care, custody or control hazard*, shall be subject to a general aggregate limit within Pool D, only. The designated general aggregate limit of \$5 million is the most the *Authority* will pay from Pool D for all *ultimate net loss* described in the *care, custody or control hazard*. Should it appear to the Board of Directors that the total exposure for *ultimate net loss* for all such claims in a program year may exceed this \$5 million general aggregate limit, the aggregate limit will be prorated between the member entities, on the basis of the member entities' respective premium contributions for the program year at issue. For purposes of determining whether the aggregate limit has been exhausted, the Board retains full discretion regarding placement of reserves, and payment of claims in order to equitably allocate the general aggregate limit. Once the general aggregate limit for a program year has been exhausted, the *Authority* will have no further obligation to pay covered *ultimate net loss* for such claims within Pool D, but this will not limit coverage which may be available within Pools B or C.

32) **Public Officials Errors & Omissions – Fiduciary Liability**

Under *public officials errors and omissions* coverage, claims (including emotional distress claims) arising from the *covered party's* activities in a fiduciary capacity including but not limited to those with respect to: (a) property, including related operations, in which the *covered party* is acting in a fiduciary or representative capacity; (b) a pension, welfare, profit sharing, mutual or investment trust fund or trust, benefit plan or similar activity in a fiduciary capacity; (c) the issuance, management of proceeds or repayment of bonds, notes or other debt instruments by any insured or any agent acting on behalf of such insured; or (d) the purchase, transfer or sale of any securities by any insured or agent acting on behalf of such insured.

33) **Public Officials Errors & Omissions – Property Damage**

Under *public officials errors and omissions* coverage, *bodily injury, personal injury*, or physical injury to tangible property, including all resulting loss of use of that property.

34) **Racing Contests**

Claims arising out of *automobile* or motorcycle drag racing, speed racing, or similar speed contests sponsored, controlled or participated in by a *covered party*.

35) **Reasonable Accommodation**

Any expense or cost incurred by a *covered party* arising from reasonable accommodation of any disabled person, including any *employee*.

36) **Refunds/Restitution**

Refund or restitution of taxes, fees or assessments.

37) **Reimbursement of Money**

Claims for refund, reimbursement or repayment of any monies to which a *covered party* was not legally entitled.

38) **Transit Authorities**

Claims arising out of the operation of vehicles by or on behalf of any transit authority, transit system, or public transportation system owned or operated by a *covered party*, unless the vehicles are owned or leased by the *covered party* and driven, maintained, and supervised by *employees* of the *covered party*. However, this exclusion does not apply to *public officials errors and omissions* coverage arising from the operation of any transit authority, transit system, or public transportation system. Notwithstanding what is stated in the applicable declarations, the *limit of coverage* described in this exception will be subject to a sublimit of \$2,000,000.

39) **Tumbling Devices**

Claims arising out of the ownership, maintenance or use of any trampoline or any other rebound tumbling device.

40) **Uninsured/Underinsured Motorists**

Uninsured or underinsured motorist coverage.

41) **Watercraft**

For any motorized watercraft owned, operated, rented, or loaned to a *covered party*, to (1) *bodily injury* or *property damage* arising out of the use of watercraft unless such use is by an entity *employee* acting within the course and scope of employment; and (2) to watercraft being used to carry persons or property for a charge. Charge, as used herein, includes any payment or fee, including a donation. Use includes operation and loading or unloading. Use does not include static displays of watercraft.

42) **Willful Violation of Statute**

Claims arising out of the willful violation of a statute or ordinance committed by the *covered party* or with its consent.

SECTION VII - CONDITIONS

1) **Covered party's Duties in the Event of Occurrence, Claim or Suit**

(a) The *covered party* shall notify the *Authority* within 30 days upon receipt of notice of a claim, or the setting of a reserve on any claim or suit including multiple claims or suits arising out of one *occurrence*, such claim or reserve amounting to fifty percent or more of the *retained limit*; Title 42 USC 1983 cases in which a complaint has been served and the plaintiff is represented by legal counsel or with reserves of twenty-five percent or more of the *retained limit*; or regardless of reserve, any claim involving:

- 1) one or more fatalities;
- 2) loss of a limb;
- 3) loss of use of any sensory organ;
- 4) quadriplegia or paraplegia;
- 5) third degree burns involving ten percent or more of the body;
- 6) serious facial disfigurement;
- 7) paralysis; or
- 8) closed head injuries.

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 by or for the *covered party* to the *Authority* or any of its authorized agents as soon as possible.

- (b) If claim is made or suit is brought against the *covered party* and such claim or suit falls within the description 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.
- (d) The *Authority* shall be entitled to complete access to 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) **Action Against Authority/Subrogation**

- (a) No action shall lie against the *Authority* with respect to the coverages and related provisions defined in the Memorandum of Coverage (Memorandum) for the *Automobile/General Liability Program* unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of the 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*. Any person or organization or the representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under said Memorandum to the extent of the coverage afforded by said Memorandum. No person or entity shall have any right under said 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 its legal representative.
- (b) The *Authority* shall be subrogated to the extent of any payment hereunder to all the *covered party's* rights of recovery thereof, and the *covered party* shall do nothing after loss to prejudice such right and shall do everything necessary to secure such right. Any amount so recovered shall be apportioned as follows:
 - 1) The *Authority* shall be reimbursed first to the extent of its actual payment thereunder. If any balance then remains unpaid, it shall be applied to reimburse the *covered party*.

- 2) The expenses of all such recovery proceedings shall be apportioned in the ratio of respective recoveries. If there is no recovery in proceedings conducted by the *Authority*, it shall bear the expenses thereof.

3) **Bankruptcy or Insolvency**

Bankruptcy or insolvency of the *covered party* shall not relieve the *Authority* of any of its obligations hereunder.

4) **Other Coverage**

If insurance or any other coverage with any insurer, joint powers authority or other source respectively is available to the *covered party* covering a loss also covered hereunder (whether on 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 designed to cover the operator of an *automobile* or watercraft. 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.

This “other coverage” paragraph shall not operate to increase the *covered party’s retained limit* or the *Authority’s limit of coverage* under this Memorandum because of any coverage afforded to the *covered party* by the Employment Risk Management Authority.

5) **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*.

6) **Accumulation of Limits**

An *occurrence* which extends 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.

7) **Termination**

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

8) **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.

9) **Reduction of Limits**

In the event of reduction or exhaustion of the *retained limit* applicable to the *covered party* by reason of losses paid thereunder, this coverage shall (a) in the event of reduction pay the excess of the reduced underlying *retained limit*, or (b) in the event of exhaustion continue in force as underlying coverage. In no event shall the coverage apply until the *retained limit* is exhausted through the payment of *defense costs*, judgments and/or settlements to which the agreed.

10) **Arbitration of Coverage Disputes**

(a) **Coverage Determinations**

The General Manager shall make the initial determination whether to deny coverage on all or part of a claim, or to reserve the *Authority's* right to deny coverage on all or part of a claim, if a loss subsequently exceeds the *retained limit*.

A decision by the General Manager to deny coverage can be appealed to the Board of Directors. Notice of such appeal shall be submitted in writing within thirty (30) calendar days of the date of the General Manager's written notice of decision.

The appeal shall be considered by the Board of Directors at the next regular or special meeting following receipt of the written appeal; if the appeal is received too late for inclusion in the agenda packet, it can be postponed to the next following Board meeting. The General Manger and the *covered party* will have the right to submit written materials and present oral argument to the Board, subject to reasonable time constraints. Any dispute concerning a decision by the Board to deny coverage for all or part of a claim shall not be subject to any court action, but may instead be submitted to binding arbitration in accordance with the procedures set forth below. Notice of a request for binding arbitration by the *covered party* must be submitted within thirty (30) calendar days from the date of the noticed decision by the Board of Directors.

(b) **Arbitration Procedures for Resolving Disputes**

1) **Selection of Arbitrators**

If an appeal of a Board decision is submitted to arbitration, each side shall, within ten (10) calendar days, select one (1) arbitrator and submit his or her name in writing to the other side. Within ten (10) calendar days after their

selection, these two arbitrators shall select a third independent arbitrator. If the two sides cannot agree on the selection of the third arbitrator within ten (10) calendar days, either side may petition the Alameda 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 third arbitrator shall be an attorney and preside as the Chairperson of the arbitration panel. No arbitrator shall be employed or affiliated with the *Authority* or the *covered party* or *parties*.

The arbitration hearing shall commence within forty-five (45) calendar days from the date of the selection of the Chairperson, unless both sides agree to an extension.

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

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

2) **Discovery**

The procedures set forth in Code of Civil Procedure section 1283.05 relating to depositions and discovery shall apply to any arbitration pursuant to this paragraph (b).

3) **Testimony Under Oath**

The testimony of witnesses shall be given under oath.

4) **Length of Hearing**

The panel will endeavor to confine the length of the hearing to two (2) days. A decision of the panel shall be reported in writing. The written decision of the panel shall be given to both sides within thirty (30) calendar days of the close of the hearing.

5) **Certified Shorthand Reporter**

Either side wishing a certified shorthand reporter record shall make arrangements directly with a certified shorthand reporter and notify the other side of such arrangements in advance of the hearing. The requesting side shall pay the cost of recording the hearing if no transcript is ordered. If a transcript is ordered, the cost of the transcript and of recording the hearing shall be prorated equally among the parties ordering copies.

(c) **Funding of Defense and Payment of Claims Pending Resolution of Dispute**

During the course of the arbitration proceedings provided herein, the *covered party* will be responsible for all fees and expenses for investigation, defense or litigation of a claim or lawsuit. In the event the arbitration panel determines that coverage applies for such *defense costs*, the *Authority* will reimburse the *covered party* as directed by the panel.

(d) **Effects of Arbitration Decisions**

All decisions on appeals, whether by the Board of Directors (after the time to request arbitration has expired) or by the arbitration panel, shall be final and binding upon the parties and shall not be subject to any further appeal or court action, except as provided in Code of Civil Procedures sections 1286.2 and 1286.4 (relating to fraud or corruption, etc.).

(e) **General Law**

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