





**ABAG PLAN CORPORATION**  
**Executive Committee**  
**Special Meeting**  
**Summary of Minutes**

**Thursday, August 7, 2008**  
**101 8<sup>th</sup> Street**  
**Oakland, CA 94607**  
**Conference Room B**

**Presiding**

Emma Karlen, Chairman

**Jurisdiction**

Milpitas

**Committee Members Present**

Laura Allen  
Shawn Mason  
Jack Dilles  
Cecilia Quick  
Herb Lester

Colma  
San Mateo  
Morgan Hill  
Pacifica  
Suisun City

**Representatives:**

Mike Harrington, Bickmore Risk Services  
Peter Urhausen, Pacifica Attorney

**Staff Present – ABAG PLAN Corporation**

Henry Gardner, President  
Marcus Beverly, Risk Manager  
Ken Moy, Legal Counsel  
Gertruda Luermann, Risk Management Analyst  
Carol Taylor, Recording Secretary

**1. Call to Order:**

Meeting called to order by Emma Karlen at 9:00 a.m.

**2. Public Comments:**

None

**3. Approval of Minutes, Regular Meeting May 15, 2008**

Minutes were approved as presented: /M/Mason/S/Quick/C/approved

- Herb Lester arrived 9:10 a.m.

#### **4. Dispute Resolution**

Marcus Beverly provided an overview of the staff report and PLAN's current process for resolving coverage disputes, as outlined in the Claim Policy. The decision in the Pacifica litigation calls into question whether any weight would be given to the Board's decision. Staff has considered various alternatives and presented an option to grant the Board the final say on coverage decisions, subject to limited appeal via a procedure outlined in Civil Code section 1094.5. Beverly asked the committee to also consider expanding application of this procedure to other issues such as premium and loss allocation.

Ken Moy provided an overview of the writs of administrative mandamus under Civil Code Section 1094.5. He addressed questions from Shawn Mason regarding whether the procedure is available to a non-profit like PLAN. Traditionally, the procedure is available to governmental decisions. Moy stated case law makes it available to nongovernmental entities such as universities and trade unions.

PLAN would be breaking new ground in attempting to make it available to municipal risk pools. However, a municipal risk pool can fit within the precedents set by universities and trade unions: a self contained system in which the participants are in the best position to decide how the enterprise is run. In addition, the fact that municipal risk pools are explicitly authorized by statute to serve a public purpose makes them more akin to a governmental entity.

The committee members and staff discussed the issues at length, with Cecilia Quick stating she does not support the 1094.5 procedure. She advocated for maintaining an independent review of coverage through the court or arbitration. Mason also questioned whether or not giving the group the power to make the decision was the best option, stating in most contracts you would not give the other party the power to resolve disputes. The question is whether or not the uncertainty over how a court will treat the inverse exclusion, and the financial risk that poses to the members, is great enough to give up some individual control.

The group agreed the focus should be on the risk and coverage language and not on who makes the decision. Beverly stated the Board did address the issue by approving a revised inverse exclusion in the July 1, 2008, Memorandum of Coverage (MOC). However, drafting an exclusion, especially in an untested area like inverse, is inherently subject to a degree of risk in how a judge will interpret it.

There are also possible "tail" claims based on inverse that would fall under earlier MOCs, such as the Half Moon Bay claim. Moy stated that in his opinion, the exposure for this "tail" can be eliminated by agreement of the members only if each of them effectively waives the 'right' to have inverse exclusion resolved in the same manner as the Pacifica decision. Moy suggested that as part of the due diligence necessary before such a waiver can be sought or given, the PLAN survey the membership for such tail claims.

After further discussion the members agreed the goal is to remove as much uncertainty as possible regarding the application of the inverse exclusion, especially for the tail claims. Several ideas were considered. Moy agreed to provide a memorandum on the inverse exclusion and inverse tail claims for further discussion.

Staff was given direction to

- 1) Draft memorandum on the inverse exclusion and the inverse tail issue
- 2) Draft a survey to identify potential inverse tail claims.
- 3) Prepare members to make a decision at the Board meeting on October 22, 2008.

Members agreed to meet again on September 10.

## 5. Loss Allocation Formula

Marcus Beverly and Mike Harrington made a PowerPoint presentation summarizing an actuarial study by Bickmore Risk Services analyzing a number of methods for allocating losses among the members. The results are used for determining a member's share of net assets.

The presentation provided an overview of the PLAN's finances, including how money flows into and out of the pool, how much of each premium dollar has been paid in losses, and how much is expected to be left in net assets. Seven options for allocating paid losses were presented, with pro-rating by premium used as a starting point. Other options introduced a pooled retention to allocate a portion of the pooled loss to the member before sharing with the group by premium. The results were compared for stability using a variety of factors, including the standard deviation, spread, and degree of risk sharing.

The committee members reviewed and discussed the presentation material and a chart comparing the projected amount of each member's net assets per premium dollar for each option. Discussion included the pros and cons of using the pro-rata by premium method and whether that method must be used exclusively. Staff explained that while the government code allows use of the method, and therefore it's a safe choice, it is not mandated. The main benefit of using one of the other options is it will produce more stable results over time. In addition, making the allocation more loss sensitive by introducing the pooled retention supports the general risk management principle of discouraging frequency through retention while transferring larger losses.

After further review and discussion the members were asked their preference. Four members preferred option number five, the credibility loss cap. Two members, Cecilia Quick and Jack Dilles, preferred option seven but stated they could also support option five. Members agreed to move options three, five and seven to the full Board. Members and staff also discussed and agreed to revisions in the presentation, including eliminating the most volatile options, providing a glossary of terms, and sending an advance copy of the material before presentation.

Members approved a recommendation for option five, with two votes for option seven and presentation of options three, five and seven to the full Board.  
/M/Karlen/S/Mason/C/approved

## 6. Benchmarking and Coverage Review

The report from ARMTECH benchmarking the PLAN against other pools was provided to the members and discussed briefly in the context of the loss sharing formula. However, due to time spent discussing the previous agenda items the review was tabled for the next meeting.

## 7. Other Business

None

## 8. Adjournment

Emma Karlen adjourned the meeting at 12:35 p.m.

Respectfully Submitted,



Marcus Beverly  
Risk Manager and Secretary



**To:** Executive Committee  
ABAG PLAN Corporation

**Fr:** Kenneth K. Moy, Legal Counsel  
Marcus Beverly, Risk Manager

**Re:** Regulatory Inverse Claims – Exclusion

**Dt:** August 28, 2008

## **A. Managing exposure to ‘tail’ claims for regulatory inverse claims**

### **1. Description of “Inverse Tail” Exposure**

Based on the strategy described in section B of this memorandum, staff expects to reduce the exposure for defense costs incurred by a member in defending itself against a claim that includes a cause of action for inverse condemnation. The strategy was initiated for the 2008-09 coverage year and is scheduled to be completed at the beginning of the 2009-10 coverage year.

The PLAN program still has exposure for inverse defense costs for claims with dates of loss prior to July 1, 2008 and possibly for those with dates of loss in the 2008-09 coverage year (“inverse tail exposure”). The balance of this section describes possible approaches to managing the exposure.

### **2. Magnitude of “Inverse Tail” Exposure**

The staff recommends that PLAN first identify the risk by conducting a due diligence examination of the extent and magnitude of the inverse tail claim exposure. The results of the survey will be used in two contexts:

- a) PLAN’s decision on how to manage the tail exposure of the group
- b) individual member decisions on waiver (see below)

A draft survey instrument marked Appendix A is attached for your review.

Please discuss whether the instrument captures all exposures for the inverse tail and the likelihood that the membership will comply with the request.

### **3. Management of “Inverse Tail” Exposure**

The following is an outline of the risk management techniques available to manage the inverse tail exposure. Options are limited in that the exposure involves activities, processes and/or decisions that have already been made and coverage that is already in place. Therefore, the options involve limiting members’ current ability to use coverage language, pooled funds, and/or past practices for resolving

MetroCenter, 101 Eighth Street, Oakland, CA 94607-4756

Mail: P.O. Box 2050, Oakland, CA 94604-2050

[www.abag.ca.gov/services/plan](http://www.abag.ca.gov/services/plan)

Phone: (510) 464-7900

Fax: (510) 464-7989

disputes. The baseline assumption is all PLAN members must agree to implement the strategy. Suggestions include:

- Limit the time frame for coverage
  - “Claims Made” approach to limit the time for claims or potential claims from prior acts to be reported to PLAN. This also usually involves setting a “retroactive date” to eliminate coverage for claims arising from acts prior to the retro date.
- Limit the pool funds available for recovery
  - Sublimit for inverse claims
  - Share loss in a special manner
  - Share loss only among members who want coverage
  - Loss not shared, but member may borrow v. pooled funds
- Limit the coverage decision process
  - **Special process in lieu of binding arbitration or litigation**
  - Members agree not to appeal Board or ADR decision
  - Members agree to give weight to Board’s rationale and coverage intent

Options for risk transfer to a third party are limited and likely cost prohibitive but will be explored once the survey is complete.

Options for risk control to prevent and reduce the severity of inverse claims are limited due to the reasons outlined in Section B below. This is especially true for tail claims. However, staff will work with members to identify training, best practices, and resources for members to use in addressing this exposure. Mission meetings would likely not be effective for the tail claims but should be considered in developing best practices for the future

## **B. Changes to Coverage and Coverage Determinations**

### **1. Eliminate liability for cost of defending claims based on or arising out of a member’s exercise of any of its powers over land or the use of land**

The PLAN Program has been pursuing this goal since 1997. Staff recommended modifying the strategy in light of the trial court decision in the Pacifica matter. The first step occurred at the beginning of the 2008-09 coverage year with the adoption of changes to the Memorandum of Coverage (MOC).

The inverse condemnation exclusion was divided into two parts. One is a narrow exclusion for ‘traditional’ physical inverse claims: those arising out of the non-negligent operation of a public improvement. The other expansively defines regulatory inverse to include bogus and premature inverse claims. In addition, the changes added a separate exclusion for causes of action included in a claim that falls within the ‘traditional’ physical inverse exclusion or the expansive regulatory inverse exclusion. Staff recommends building on this strategy by taking the additional steps described below.

The new wording of the regulatory inverse exclusion is designed to capture all currently conceivable circumstances and claims to which the exclusion might apply, including bogus or premature regulatory inverse claims. Bogus regulatory inverse claims are those based on novel legal theories regarding regulatory inverse, or simply labeled as such by the claimant. Premature regulatory inverse claims are those made before the regulatory process has advanced to the point where regulatory inverse can be recognized as such.

The PLAN and its members need to identify the circumstances and claims that are inadvertently captured by the expansive definition of the regulatory inverse exclusion and render a coverage analysis and determination. Staff recommends PLAN undertake the following steps:

- ◇ acknowledge that current wording of the exclusion is expansive – capturing some claims where it is unclear whether the exclusion should apply,

- ◇ articulate the principles that support the exclusion,
- ◇ agree on a process (tribunal) to make coverage determinations based on the principles of the exclusion and whether they apply to a specific claim, and
- ◇ state the members' preference that coverage determinations be made using the process.

This memorandum initiates the first step. This will be repeated in subsequent memoranda to the Board of Directors and the members, and documented in the Risk Coverage Agreement and MOC.

For the second step, below are the principles that staff believes supports the decisions to exclude regulatory inverse claims and to not defend mixed claims involving regulatory inverse:

- a) The PLAN program relies on member participation in an active risk management program to help ensure the stability and solvency of the pool. Compared to other risks covered by PLAN, the exposure for a member's exercise of its land use authority is extremely difficult to manage. The primary factors in a member's land use decisions are politics, policy and the public fisc. These factors tend to operate independently of even the best risk management practices. Moreover, the potential claimants are typically highly motivated and well funded and may not be susceptible to any risk management techniques.
- b) The cost of defending regulatory inverse claims is very high:
  - (1) defense counsel rates for such claims are typically twice the standard PLAN rate and
  - (2) regulatory inverse claims usually generate complicated and protracted litigation and are very difficult to settle. First, claimants' settlement demands often include concessions in, or modifications of, the underlying land use decision. The same trio of politics, policy and the public fisc makes settlement negotiations on these points difficult if not impossible. Second, successful regulatory inverse claims can generate very large monetary damages. This often inflates a claimant's monetary settlement demands.
- c) The membership has concluded that sound policy making and business principles argue against insuring risks created by a municipality exercising its policy prerogatives:
  - (1) policy making may occur under the threat of legal challenge from a variety of stakeholders and insuring the municipality for challenges from some of the stakeholders disadvantages the others – PLAN coverage becomes a political issue and
  - (2) since the risks incurred are not subject to standard risk and loss management principles they should not be covered.

Staff requests the Executive Committee discuss these as principles and any others that will guide the application of the regulatory inverse exclusion with the objective of ultimately forwarding a recommendation for full Board consideration. To assist the committee in its deliberations, it might wish to review the fact patterns attached as Appendices B-1 and B-2 and make a coverage determination based on these, or alternative/additional principles.

## **2. Consider adding exclusions for claims arising out of a member's compliance with State and Federal laws, regulations and rules, or with grant requirements**

- (a) Municipalities are subject to State and Federal regulations either as a public entity or as a member of a regulated group that includes private entities. Enforcement by regulatory authorities can be by the issuance of orders to comply or the imposition of fines or penalties. Most of these enforcement actions fall outside coverage. However, if regulations are intended to benefit a defined class then the members of the class may have a right to enforce the regulation.

Some of the regulations are related to health and safety: workplace safety, hazardous materials handling, etc. When these types of regulations are broken and a claim is made, there is usually bodily injury or property damage. By definition, health and safety regulations set performance standards designed to prevent injury or property damage. They often function as the minimum performance standards for "non-negligent" behavior. Put another way, violation of a health and safety standard is negligence *per se*. Staff does not propose excluding claims based on violations of health and safety regulations: those that result in bodily injury and/property damage.

Other regulations are related to accomplishing a social goal: Americans with Disabilities Act, CEQA, etc. When these types of regulations are broken, there is usually no bodily injury or property damage. Staff proposes excluding claims based on violations of State or Federal laws and regulations from public official's errors and omissions coverage – claims for economic damages only.

The underlying principle for this exclusion is that such risks are difficult to manage and losses are difficult to anticipate. In devising a plan of action to comply with Federal and State social mandates, a member balances a complex array of factors such as costs, acceptance of the underlying Federal/State policies and impacts on local issues, policies and politics. Often the compliance strategy ultimately adopted by the member has some risk attached. The strategy may be to take a minimalist approach, implicitly accepting the risk that it falls short. The strategy may incorporate some flawed elements that are included after due deliberation by the member. Finally, the strategy may fail due simply to misjudgment. None of these scenarios are amendable to traditional risk or loss management techniques.

(b) Municipalities are recipients of State and Federal grants that often include requirements contained in statutes, regulations, Executive Orders, administrative procedures and the like. The requirements are contractual in nature but may not be excluded under the standard exclusion for contract claims since the requirements are imposed by 'statute'.

The underlying principle for this exclusion is that the risks are contract based and should not be "insured". The fact that the State and Federal governments have the ability to impose contract provisions by legislation or rule-making is a loophole and should be eliminated.

### **3. Consider covering awards of plaintiff's attorneys fees as 'Damages' under the MOC**

The City of Pacifica has requested that PLAN provide coverage for plaintiff's attorneys fees. All versions of the MOC have excluded plaintiff's attorneys fees from the definition of damages. This effectively precludes indemnity for such fees when awarded as part of a judgment or settlement for which the PLAN Program must indemnify a member.

There are two general circumstances under which plaintiff's attorneys fees are awarded: a statute authorizes it or an agreement that is legally binding on the member provides that the prevailing party in a contract dispute be awarded such fees (these claims are already excluded). The first is usually premised on the notion that the plaintiff advances the common good through the underlying litigation and should not bear the costs for doing so. The committee should discuss whether the PLAN should indemnify a member under these circumstances.

Please note that settlements – in contrast to judgments – often factor in the plaintiff's costs of suit (including attorneys fees). Depending on the specific circumstances, the settlement offer may factor in plaintiff's costs of suit in order to reach agreement. In almost all instances, the settlement does not explicitly reflect such factors. Thus, it is possible to argue that PLAN 'pays'.

PLAN and plaintiff's attorney's fees in a settlement should provide a comparable benefit for a judgment. Finally, the proposal as staff understands it only extends to covered claims. If the PLAN is not obligated to indemnify the member for the claim, the proposed change does not impose a separate obligation to pay a plaintiff's attorneys fees. Thus, plaintiff's attorneys fees awards in a regulatory inverse claim remain excluded.

### **4. How best to make coverage determinations**

Two factors account for most of the questions regarding whether a claim is covered under the MOC:

- a) Does the claim fit within the language of the exclusion?
- b) Is the treatment of the claim consistent with past practice?

Staff recommends that the PLAN articulate a process for resolving coverage questions in a manner designed to affirm the group's intent regarding coverage.

First, we propose following the current claims policy. If a member disagrees with the staff's coverage determination denying a claim based on the regulatory inverse exclusion, the following process is then used:

- a) The final PLAN decision making body tribunal is comprised of representatives of the members.

- b) The formal process requires the tribunal to take evidence, apply the principles behind the exclusion(s) to the facts as determined, and prepare a written decision.
- c) Maintain an archive of coverage determinations to promote consistency or reasoned deviations over time.

The committee should discuss whether the tribunal should be an existing policy body. If not, it should discuss the size and composition of the tribunal.

For both the principles and the process, the members should consider adding flexibility. They may do so by agreeing that changes to principles and process can be made in response to changes in the law or to the PLAN's experience with coverage questions. The committee should discuss whether changes may only be effected by a supermajority of the Board or membership.

Section B.1 of this memorandum sets forth some sound legal and business arguments for the regulatory inverse exclusion. We have also done the same for the exclusion described in B.2(a). If the committee wishes to extend the coverage determination process described in this section to coverage determinations for that exclusion, we can do so.

### **C. Comparison to commercial products and other pools**

PLAN is a service for members that can be provided by the commercial market and by other pools. For members to make informed decisions about the features of PLAN and their continued participation, comparisons to commercial policies and other pools serve two objectives: (a) information – learn from experience of the commercial market and other pools with certain program features and (b) benchmarking – compete intelligently with the commercial market and other pools to meet member needs.

Based on these objectives, the following are our recommendations for Executive Committee consideration:

- Retain existing coverage for bodily injury and property damage. PLAN provisions are very similar to commercial policies. These coverages have been extensively tested and are mature with predictable outcomes. Thus, there is nothing to be gained from deviating from the norm.
- Retain existing coverage for personal injury and public officials errors and omissions except as noted above. PLAN provisions are very similar to commercial policies and offerings by other pools except for the coverage changes covered in sections B.2(a), B.2(b) and B.3.

## Appendix A

### Survey

#### I. LAND USE DECISIONS, ENTITLEMENTS AND DEVELOPMENT AGREEMENTS

A. List each land use decision, entitlement and development agreement in which the city/town was involved that meets the following criteria:

- 1) The project was completed less than \_\_\_ years ago, or
- 2) The applicant/project was denied less than \_\_\_ years ago.

B. Include in the list the following information:

- 1) Project location
- 2) Applicant name and address
- 3) Application date
- 4) Decision and decision date

#### II. CURRENT APPLICATIONS

A. List each land use decision, entitlement and development agreement currently before any policy body of the city/town which may be decided by June 30, 2009.

B. Include in the list the following information:

- 1) Project location
- 2) Applicant name and address
- 3) Application date
- 4) Anticipated decision date

#### III. ENACTMENTS AFFECTING USE OF LAND

List all enactments including ordinances, municipal codes, regulations, administrative guidelines and ballot measures that directly or indirectly affect the use of land which was enacted since 2000.

IV. List and describe all public processes, studies or planning exercises conducted by the city/town or in which the city/town participated since 2000 which directly or indirectly affect the use of land.

### **Appendix B-1**

Border is a real estate development company which was developing a business park in an unincorporated area in the county and was later annexed by the city.

Border asserted two causes of action for inverse condemnation. The first arose from the city's actions in connection with its announcements of a plan to create an international airport in city.

Border contended that the city's announcements of airport construction plans, some of which showed possible configurations of the airport that would place runways directly through the owner's business park, substantially interfered with sales of property within the business park and diminished the value of the property.

The second inverse condemnation cause of action arose from the city's diversion of truck traffic, engendered by a newly opened crossing at the Mexican border, which caused frequent traffic congestion on the nearby streets, hampered access to the business park.

OUTCOME UNDER 2008 MOC: The claim is denied under section IV.G.3. Only inverse condemnation is pled and none of the exceptions in IV.G.3(i)-(iii) applies.

## Appendix B-2

In July 2008, the city undertook a beautification program aimed at enhancing the appearance of Main Street, a primary access route to and from the airport. As part of this project, the city planted mature palm trees along the north and south sides of the road and in the median of the roadway. This landscaping all occurred on property owned by the city.

Regency owned numerous billboard facings located near the airport. Several of these displays lined Main Street, occupying property leased by Regency for commercial advertisement purposes. Regency protested when the city planted the palm trees along the road. Regency claims that the trees screened at least six of its billboard facings from motorists traveling along Main Street. Since fewer people could see its billboards clearly with the trees in the way, Regency argues that the city must compensate it for the supposedly reduced value of the obscured facings.

Regency pursued these arguments by way of an inverse condemnation claim alleged in a complaint filed in Superior Court. Regency subsequently filed an amended complaint that added a claim alleging that the plantings breached a contract between itself and the city, pursuant to which the city had agreed not to obstruct the visibility of Regency's billboards.

OUTCOME UNDER 2008 MOC: The claim is denied. Inverse is pled and excluded under section IV.G.3 and none of the exceptions in IV.G.3(i)-(iii) applies. The contract cause of action is not excluded under the list in subsection IV.H. However, the contract cause of action is excluded under section IV.W.



## Staff Report

**Date:** September 5, 2008  
**To:** Executive Committee  
**From:** Marcus Beverly  
**Re:** Benchmarking Study

---

**Recommendation:** None – for information only. Staff requests the Committee review the attached benchmarking study compiled by consulting firm ARMTEch comparing PLAN to eight other pools on a variety of measurements.

**Background:** the report was prepared to provide members useful information for comparing features and services offered by PLAN as well as to provide ideas and guidance for addressing a number of strategic issues concerning coverage, dispute resolution and loss sharing.

**Analysis:** the key areas of focus and differences are outlined below and will be discussed in more detail during the meeting.

**Liability Limit:** at \$25 million, lower than all but one other pool.

**Pooled Retention:** PLAN at \$5 million, highest by far of all but one other pool, with the rest at \$1 or \$2 million.

**Employment Practices Liability:** covered only by excess insurance. All others include.

**CAJPA Accreditation:** PLAN not accredited, all but one other pool are.

**Pool Surplus:** third highest total, with ratio to premium second best.

**Expense Ratio:** highest of those compared and staff is requesting additional information to compare.

**Withdrawal Penalties:** forfeit equity with two pools, two others hold until termination.

**Liability Program Dividends:** six other pools provide, allocated based on premium contribution.

**Claims Administration:** PLAN and only one other provide in-house. PLAN only pool to provide property recovery service.

**Claim Dispute Resolution Process:** two end appeal with Board, all but one other has binding arbitration.

**Other Dispute Resolution Process:** only two have written process.

**Loss Control Budget:** significantly more than all but one pool, and they have in-house staff.

**Inverse Exclusion:** similar in most respects and in practice among pools. Two pools have \$250,000 sublimit for “pure” inverse claims. Staff will have more details re practice at meeting.

**Requested Action:** staff requests the committee review the report and use in it the context of making recommendations as appropriate.

## Pool Program Comparison July 2008

Comparison Point	ABAG	PARSAC	PERMA	CJPRMA	ICRMA	MPA	CJPIA	SANDPIPA	Bay Cities
<b>Coverage Features</b>									
Liability Limit	\$25 million (\$20 million aggregate on public officials)	\$29 million	\$50 million	\$40 million	\$20 million	\$29 million	\$50 million \$25 million subsidence	\$47 million	\$29 million
Member Liability Retentions	\$25,000 to \$250,000	\$5,000 to \$500,000	\$0 to \$500,000	\$500,000 or \$1 million	\$100,000 to \$2 million	\$5,000 to \$250,000 (deductible, not retention)	\$30,000	\$100,000 to \$1,500,000	\$5,000 to \$500,000
Pool Liability Program Retention	\$5 million	\$1 million	\$1 million	\$4,500,000	\$2 million	\$1 million	\$2 million (\$10 million for land movement claims)	\$2 million	\$1 million
Liability Coverage Includes General, Auto, Public Officials	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Employment Practices Liability Limit	Not covered by pool. Excess carrier provides \$20 million excess \$5 million (so each member has \$5MM SIR)	\$2 million	\$50 million \$1 million (ERMA) \$49 million excess \$1 million (CSAC EIA)	Included in total program limit	Included in total program limit	\$1 million	Included in total program limit	Included in total program limit	\$3 million \$1 million (ERMA) \$2 million (Lexington/AIG group purchase)
Workers Compensation Program Limit	Statutory	Statutory	Statutory	N/A	\$100 million	Statutory	Statutory	N/A	\$300 million
Pool Workers Compensation Program Retention	\$250,000	\$500,000	\$500,000	N/A	\$5 million	\$500,000	\$2 million	N/A	\$1 million
Member Workers Compensation Retention	\$0	\$0 to \$350,000	\$0 to \$250,000	N/A	\$350,000 to \$1 million	\$0	\$50,000	N/A	\$150,000 to \$500,000
Group Purchase Insurance Programs Offered	Crime, special events, builder's risk, property, auto physical damage	Property, crime, special events, employee benefits	Property, crime, special events, employee benefits	Property, auto physical damage	Property	Property, crime, employee benefits, EAP	Property, earthquake/flood, pollution legal liability, commercial, crime, bond, special events	Property, crime, employee benefits	Property, crime, excess EPL, EAP, marina operator liability, earthquake/flood
<b>Financial Features</b>									
CAJPA Accreditation Status	Not accredited	Excellence	Excellence	Excellence	Excellence	Excellence	Not accredited	Excellence	Excellence
Pool Surplus	\$28,263,965	\$5,802,164	\$10,462,055	\$35,929,772	\$44,096,019	\$8,578,351	\$8,762,377	\$10,898,590	\$1,606,306
Gross Member Contributions	\$7,604,880	\$5,725,503	\$5,496,148	\$15,269,111	\$8,285,445	\$8,779,372	\$29,007,779	\$6,011,070	\$3,613,972

Comparison Point	ABAG	PARSAC	PERMA	CJPRMA	ICRMA	MPA	CJPIA	SANDPIPA	Bay Cities
Net Member Contributions	\$6,827,936	\$3,225,292	\$4,088,256	\$11,637,637	\$6,483,278	\$5,320,176	\$28,002,626	\$3,212,652	\$2,115,458
Loss Reserves	\$15,722,091	\$5,297,147	\$2,480,302	\$43,113,576	\$22,067,074	\$11,201,000	\$86,156,000	\$12,634,654	\$5,921,724
Expenses	\$2,292,967	\$757,403	\$834,294	\$1,129,768	\$1,126,727	\$1,132,902	\$4,543,810	\$816,999	\$670,408
<b>Financial Ratio Comparison</b>									
Net Premium to Surplus <3.0	0.24	0.56	0.39	0.32	0.15	0.62	1.20	0.29	1.32
Loss Reserves to Surplus <2.5 - 3.5	0.56	0.91	0.24	1.20	0.50	1.31	2.69	1.16	3.69
Surplus to SIR >10.0	5.65	5.80	10.46	7.98	22.05	8.58	1.61	5.45	1.61
Gross Expense Ratio	0.30	0.13	0.15	0.07	0.14	0.13	0.16	0.14	0.19
<b>Membership / Withdrawal Features</b>									
Minimum Commitment Period	3 years	3 years	3 years	3 years	3 Years	3 years	3 years	No	3 years
Notice of Withdrawal Requirement	6 months	6 months	6 months	6 months	6 months	6 months	12 months	Advance written notice	6 months
Withdrawal Penalties	None	None	None	None	None	Forfeit all equity	None	Forfeit equity	No rescinding of notice unless BOD approves.
<b>Underwriting Features</b>									
Liability Rating Basis	Payroll and loss experience	Payroll and loss experience	Payroll and loss experience	Payroll	Payroll and loss experience	Payroll and exposure with an ex mod formula and retro rating formula	Payroll and loss experience; police and non-police rated separately	Payroll and loss experience	Payroll
Liability Program is Assessable	Yes	Yes (assessments are capped at 125% of member premium)	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Liability Program Dividends are Calculated	Paid in the form of risk management grants. No written formula, but in practice, 3 years after program year based on surplus over 90% confidence level and annual amount is at least 10% current year premium	4 years after close of program year and annually thereafter (over next 4 years) based on surplus funds over 90% confidence level if minimum pool ratios are met. Allocated based on member's share of deposit premium.	3 years after close of program and annually thereafter based on surplus funds over 70% confidence level, and allocated based on share of premium.	3 years after close of program and annually thereafter based on surplus funds over 70% confidence level	5 years after program year closed surplus over 90% confidence level (discounted) allocated based on share of premium.	Eligible after second year for 25% of pro rata share of unmodified premium over four years (graduates to 100% in five years). Surplus funds over 90% confidence level (discounted)	No dividend. Retrospective deposit calculation performed annually; additional deposit or refund spread over 8 years; refund of total net assets to members when surplus above 95% confidence level.	No dividend	Five years after close of program year, 90% confidence level (discounted) for current program year and for all years. Equity at expected confidence level must be three times pool retention weighted by payroll of most recent program year.
<b>Claim Management</b>									
Member Can Select TPA (Yes or No)	No	Yes	Yes, w/ board approval	Yes	Yes	No	No	Yes	No

Comparison Point	ABAG	PARSAC	PERMA	CJPRMA	ICRMA	MPA	CJPIA	SANDPIPA	Bay Cities
Member can Self-Administer Claims (Yes or No)	PD only claims up to 10% of member retention	Yes	Yes, w/ board approval	Yes	Yes	No	No	Yes	Yes
Member Can Select Defense Counsel (Yes or No)	Yes (w/ restrictions)	Yes (must select from a panel)	Yes (w/ restrictions)	Yes	Workers compensation only. Must select from panel for liability claims	Yes	No	Yes	Yes, but must be approved by Litigation Manager
Claim Administration (In-House or Contracted Service)	Liability - In-House WC – TPA (paid by pool)	Contract	Contract	Contract	Contract	In house	Contract	Contract	Contract
Claim Dispute Resolution Process (Source Document)	Appeal to Board, then binding arbitration (Bylaws)	Appeal to Board only (Memorandum of Liability Coverage)	Appeal to Board, then arbitration (Memorandum of Liability Coverage)	Appeal to Board, then declaratory relief action in Superior Court (Memorandum of Liability Coverage)	Appeal to Board then binding arbitration (Memorandum of Liability Coverage).	Appeal to Board then binding arbitration (Memorandum of Liability Coverage)	Letter to Executive Director, appeal to Appeals Committee, mandatory arbitration before randomly selected committee of members (Memorandum of Liability Coverage)	Binding arbitration before 3 arbitrators according to the rules of the American Arbitration Association (Memorandum of Liability Coverage)	Appeal to the Board of Directors (Memorandum of Liability Coverage)
Resolution Process for Other Disputes (Source Document)	Governing documents silent	Appeal to Executive Committee and/or Board in practice (governing documents silent)	JPA and Bylaws silent	—	To the Board President who will bring to Administrative Committee then to full Board (Dispute Resolution Policy)	Governing documents silent	Governing documents silent	Disputes among members to be resolved by arbitration (Joint Powers Agreement)	Appeal to the Executive Committee in practice (governing documents silent)
<b>Membership</b>									
Number of Liability Program Members	31	36	26	22	22	19	119	13	19
Total Payroll of Pool Members	\$482 million	\$216 million	\$189 million	\$1.6 billion	\$581 million	\$275 million	\$795 million	\$345 million	\$390 million
Average Payroll per Member	\$15.5 million	\$6 million	\$7.3 million	5 JPAs and 17 Cities Average Member Population	\$26.4 million	\$18.3 million	\$6.7 million	\$26.5 million	\$20.5 million
Percent of Liability Program Members that are Full-Service Cities	78%	53%	34%	99%	41% Fire 4.5% Police & Fire	75% Police 15% Fire	25%	—	83% Police 61% Fire
<b>Program Governance Features</b>									
Number of Board Members	31	36	26	22	22	20	119	12	19 (18 with voting rights)
Annual Board Meetings	2	2	4	6	6	5	1 (plus any special meetings)	4	2
Number of Executive Committee Members	7	11	7	7	No Executive Committee	6 (1 is ex-officio number)	9	4	7

Comparison Point	ABAG	PARSAC	PERMA	CJPRMA	ICRMA	MPA	CJPIA	SANDPIPA	Bay Cities
Annual Executive Committee Meetings	1	4	11	6	N/A	5	12	4	4
Liability Program Administration Staff Expressed as FTE, Whether In-House or Contracted	12.5	5.0	2.0	5.0	3.0	13.0	23.0	1.0	1.5
Services Contracted Out	Actuarial, financial audit, insurance broker, claim audit, WC claims administration, risk management consultants	Claims administration and loss control	Risk Control Services contracted out to Bickmore Risk Services	Actuarial, financial audit, general counsel, insurance broker, investment advisor, underwriting thru the broker, claims audit	All	Investment advisor, general counsel, defense counsel, bill review and other WC cost containment vendors	Risk management evaluation of members, I.T. support, media production, training instructors	All except litigation management	Admin, Liability Litigation Manager, Accounting, Risk Control, WC TPA Oversight, GL/WC TPA, Brokerage, Claims Auditor, Actuarial, Financial Auditor, Legal Counsel
General Administration (In house or contract service)	In house	In house	In house	In house	Contract	In house	In house	In house	Contract
<b>Member Services</b>									
Number of Training Sessions Annually	24	27	10	10 to 25	30	10	Over 500	1 plus \$2,000 for outside training	6
Areas of Training Offered Annually	Safety training, on-line training, insurance requirements for contracts, police practices, park & recreation practices, public works practices, EPL	Safety, driver training, insurance requirements for contracts, EPL, police practices, other specialized programs	Safety, driver training, EPL, other specialized programs	Safety, insurance requirements for contracts, public works, other specialized programs	Workplace safety, defense driving, law enforcement liability, public works	Safety, driver training, EPL, other specialized programs	OSHA required training, safety, driver training, insurance requirements for contracts, EPL, CPR, other specialized programs	Liability loss control, member development	Safety, public works, police and other specialized programs
Loss Control Inspections	Yes	Every 2 years	Every 3 years	Yes	No	Yes, upon request	Every 2 years	Every 3 years	No
Loss Control Budget	\$1.2 million	\$133,000	\$130,000	\$88,000	\$127,000	\$75,000	\$1,375,000	\$150,000	\$230,000
Risk Management Assistance	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Video Materials Liability	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<b>Member Communications</b>									
Website	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Annual Report to Members	Yes	Yes	Yes	Yes	Yes	Yes	No	No	Yes

Comparison Point	ABAG	PARSAC	PERMA	CJPRMA	ICRMA	MPA	CJPIA	SANDPIPA	Bay Cities
Periodic Newsletter to Members	Yes	Yes – Quarterly Plus weekly executive committee bulletin	Yes	No	No	Yes - Quarterly	Yes	Yes - Monthly	Occasional safety newsletters
On-Line Training	Yes	Yes	Yes	No	Yes	Yes	No	Pilot program with one member	No
Inverse Condemnation Exclusion	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)

- Notes: (1) G. For **Property Damage Injury, Personal Injury or Public Officials Errors and Omissions Injury** arising out of:
- 1.the existence, anticipated exercise or actual exercise of the powers of eminent domain (by whatever name called), or
  - 2.any condemnation proceedings, or
  - 3.any circumstances that give rise to (or could give rise to) or result in (or could result in) an inverse condemnation claim, such circumstances shall include but are not limited to:
    - a.Any action or inaction affecting the use of, or rights or entitlements in, any real property or improvements to real property;
    - b.Any action or inaction on any data collecting, analysis, study, finding, policy, ordinance, statute, code, law, regulation or program that directly or indirectly affects the use of, or rights or entitlements in, any real property or improvements to real property; and
    - c.Any announcement or publication concerning the circumstances described in subparts a and b. provided that such circumstances shall not include:
      - i.Any circumstances that directly or indirectly cause physical injury to tangible property; or
      - ii.the reverse flow of sewage, water and/or other contents through a sanitary sewer system and out of an inlet of such a system; or
      - iii.the circumstances described under section IV.I.
- H. For **Personal Injury or Public Officials Errors and Omissions Injury** arising out of any one of, or any combination of, the following:
- 1.Adverse possession, or
  - 2.Nuisance, or
  - 3.Trespass, or
  - 4.Violation of a right of substantive or procedural due process, or
  - 5.Violation of a right of equal protection; or
  - 6.Violation of a civil right, or
  - 7.Unlawful discrimination, or
  - 8.Negligence.
- This exclusion applies only where the claim or suit seeks Damages arising out of one or more of the matters excluded in Exclusion G above.
- I.For an inverse condemnation claim arising solely out of the non-negligent operation of any public improvement, however acquired; provided, that such circumstances shall not include the reverse flow of sewage, water and/or other contents through a sanitary sewer system and out of an inlet of such a system.
- J.For any one of, or any combination of, the following:
- 1.Adverse possession, or
  - 2.Nuisance, or
  - 3.Trespass, or
  - 4.Violation of a right of substantive or procedural due process, or
  - 5.Violation of a right of equal protection; or
  - 6.Violation of a civil right, or
  - 7.Unlawful discrimination, or
  - 8.Dangerous condition of public property.
- This exclusion applies only where the claim or suit seeks Damages arising out of one or more of the matters excluded in Exclusion I above.
- (2) **Claims** arising out of or in connection with land-use regulation, land-use planning, the principles of eminent domain or inverse condemnation, by whatever name called, or condemnation proceedings, regardless of whether such claims are made directly against the **Protected Party** or by virtue of any agreement entered into by or on behalf of the **Protected Party**. However, this limitation shall not apply to claims arising from physical damage to tangible property. With respect to any coverage granted by this provision that is not otherwise provided by the **Memorandum**, the **Protection Limit** is \$250,000 **Ultimate Net Loss** as the result of any one **Occurrence**.
  - (3) Claims arising out of the principles of eminent domain, condemnation proceedings or inverse condemnation (California Constitution, Article 1, Section 19, U.S. Constitution, 5th and 14th Amendments), whether liability accrues directly or indirectly against the Covered Party, including attorney fees and costs. Provided, however, if the Authority in its sole discretion determines that the subject claim is for physical property damage

caused by the negligence of the Covered Party, the Authority may provide coverage in whole or in part. The decision of the Authority is final and not subject to arbitration or judicial review, notwithstanding any other provision in this Memorandum.

- (4) 22) 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*.
- (5) Any CLAIM arising out of or in connection with the principles of eminent domain, condemnation proceedings or INVERSE CONDEMNATION, land use planning or regulation, annexation, or other condemnation proceedings by whatever name called, and whether or not liability accrues directly against the MEMBER or by virtue of any agreement entered into by or on behalf of the MEMBER, where such CLAIM results from:
  - a) The deliberate decision-making conduct of the MEMBER; or
  - b) A judicial, administrative, or legislative order; or
  - c) The initiative process.

This exclusion also applies to any CLAIM arising out of the design, construction, ownership, maintenance, operation or use of any water treatment plant or wastewater treatment plant. This exclusion shall not apply to physical injury to tangible property, including all resulting loss of use to that property, resulting from the accidental failure of a COVERED PARTY'S property or equipment.

- (6) Claims arising out of or in connection with: (a) Land use regulation, land use planning, the principles of eminent domain, condemnation proceedings or inverse condemnation by whatever name called, resulting from deliberate decision making by the "*covered party*" and whether or not liability accrues directly against the "*covered party*" or by virtue of any agreement entered into by or on behalf of any "*covered party*." However, the above exclusion shall not apply to inverse condemnation liability arising from accidentally caused physical injury to or destruction of tangible property, including all resulting loss of use of such property, for which the "*covered party*" may be legally responsible. Notwithstanding what is stated in the applicable declarations, the "*limit of coverage*" for claims described in this exception will be subject to a per "*occurrence*" and/or aggregate sublimit of \$250,000 per member.  
Notwithstanding any of the above, this Memorandum of Coverage shall not apply to 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, unless it is a claim based upon the accidental failure of the equipment utilized or contained within the water treatment plant or waste water treatment plant.

- (7) (b) The initiative process, whether or not liability accrues directly against any "*covered party*" by reason of any agreement entered into by or on behalf of any "*covered party*."  
Any **Claim, Suit**, liability, alleged liability, loss, cost, or expense caused by, arising out of or in any way connected with the operation of the principles of eminent domain, condemnation proceedings, or inverse condemnation, by whatever name called, whether such liability accrues directly against the **Protected Party** or by virtue of any agreement entered into by or on behalf of the **Protected Party**. This exclusion E. shall not apply to liability, loss, cost or expense arising from **property damage** caused by earth movement, subsidence of land, sewer backup, or flooding, even though a legal theory upon which a claimant seeks recovery is the principle of inverse condemnation.

Any **Claim, Suit**, liability, alleged liability, loss, cost, or expense arising out of (1) the adoption or administration of any ordinance, resolution or regulation; or (2) the approval or disapproval of any land-use entitlement including but not limited to general plan amendments, zoning amendments, conditional-use permits, tract maps.

- (8) To claims for loss or damage or any liability arising out of or in connection with the principles of eminent domain, condemnation proceedings or inverse condemnation, by whatever name called, regardless of whether such claims are made directly against the Named Covered Party or by virtue of any agreement entered into by or on behalf of the Named Covered Party. However, this exclusion shall not apply to physical injury or destruction of tangible property, including all resulting loss of use of such property for which the Named Covered Party may be legally responsible and for which recovery is sought for claims or suits for inverse condemnation, by whatever name called, provided however, that in any case in which a claim or suit for inverse condemnation, by whatever name called, is made against the Covered Party, coverage shall only exist for physical injury to or destruction of tangible property, including all resulting loss of use of that property. There shall be no coverage for reduced value of property (diminution of value), attorney fees, expert fees, severance Damages, relocation costs, or any other form of relief, however denominated.
- (9) (12) (a) Claims arising out of or in connection with inverse condemnation caused by the construction of a public work or public improvement; land use regulation or planning; annexation; eminent domain; or other condemnation proceedings by whatever name called, where such claims result from:
  - (i) The deliberate decision-making conduct of the **covered party**; or
  - (ii) A judicial, administrative, or legislative order; or
  - (iii) The initiative process, whether or not liability accrues directly against the **covered party** by reason of any agreement into which the **covered party** has entered.(b) Exclusion (12)(a) does not apply to claims for **property damage** resulting from:
  - (i) Weather conditions, such as rainfall, overflow of watercourses or flooding, winds, snow, hail or ice, when, in conjunction with the negligent or inadequate design of, or the inadequate maintenance of, the **covered party's** public work or public improvement, such weather conditions act upon (or with) that public work or public improvement; or
  - (ii) The accidental failure of a **covered party's** property or equipment; or
  - (iii) Negligent or inadequate design or inadequate maintenance of a public work or public improvement. With respect to **damages** resulting from exception (12)(b)(i) and/or (12)(b)(iii) to exclusion (12)(a), the **covered party** will be responsible for paying one-half of the unpaid **damages**, attorney fees, and costs for any amount above its **retained limit**.

X:\CLIENTS\RISK MANAGEMENT\ABAG PLAN\REPORT\POOL\COMPARISON073008.DOC