MEMORANDUM OF COVERAGE – LIABILITY

Approved June 11, 2008
Effective Date July 1, 2008

MEMORANDUM OF COVERAGE -- LIABILITY

DECLARATIONS

ENTITY COVERED: _____

MAILING ADDRESS: _____
_____
_____

COVERAGE PERIOD: FROM: _____ 12:01 A.M., Pacific Time
TO: _____ 12:01 A.M., Pacific Time

PREMIUM: $_____

DEDUCTIBLE: $_____ per **Occurrence**

LIMIT OF COVERAGE: Five Million Dollars ($5,000,000) per **Occurrence** *EXCEPT* with respect to **Employee Benefit Plan Administration Liability**. With respect to **Employee Benefit Plan Administration Liability** the LIMIT OF COVERAGE is Two Hundred Fifty Thousand Dollars ($250,000) per **Occurrence**.

In consideration for the payment of the premium, **ABAG** and the ENTITY COVERED which is designated in the DECLARATIONS to this **Memorandum** agree as follows:

SECTION I - DEFINITIONS

Words and phrases in bold print within this **Memorandum** (including any and all endorsements hereto and forming a part hereof) have special meanings, as defined below:

A. **ABAG** means the Association Of Bay Area Governments. Where appropriate in context, **ABAG** shall also include Association of Bay Area Governments PLAN Corporation.

B. **Aircraft** means a vehicle designed for the transport of persons or property principally in the air.

C. **Bodily Injury** means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

D. **Covered Party** means any person, entity, or other organization constituting a Covered Party under SECTION II - WHO IS A COVERED PARTY.

E. **Coverage Period** means the COVERAGE PERIOD that is designated in the DECLARATIONS to this **Memorandum**.

F. **Dam** means any artificial barrier, together with appurtenant works, which does or may impound or divert water, and which:

1. Is twenty-five (25) feet or more in height from the natural bed of the stream or watercourse at the downstream toe of the barrier to the maximum possible water storage elevation;

2. Is twenty-five (25) feet or more in height 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

3. Has an impounding capacity of fifty (50) acre-feet or more.

However, the following shall not be considered a **Dam**:

1. Any artificial barrier, together with appurtenant works, which does or may impound or divert water, but which is not in excess of six (6) feet in height, regardless of storage capacity;

2. Any artificial barrier, together with appurtenant works, which does or may impound or divert water, but which has a storage capacity not in excess of fifteen (15) acre-feet, regardless of height;

3. Any obstruction in a canal used to raise or lower water therein or divert water therefrom;

4. Any levee, including but not limited to a levee on the bed of a natural lake, the primary purpose of which levee is to control floodwaters;

5. Any railroad fill or structure;

6. Any tank constructed of steel or concrete or of a combination thereof;

7. Any tank elevated above the ground;

8. Any 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; and

9. Any obstruction in the channel of a stream or watercourse which is fifteen (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.

Regardless of the language of the above definition, however, no structure specifically exempted from jurisdiction by the State of California Department of Water Resources, Division of Safety of Dams shall be considered a "Dam," unless such structure is under the jurisdiction of an agency of the federal government.

G. **Damages** means monetary sums paid or awarded as compensation for **Bodily Injury, Property Damage, Personal Injury, Public Officials Errors and Omissions Injury**, or **Employee Benefit Plan Administration Liability** covered by this **Memorandum**.

Damages does not include:

1. Any monetary sum paid or awarded as or for restitution;

2. Any monetary sum paid or awarded as or for attorney fees or costs;

3. Any monetary sum paid or awarded as or for fees, fines, sanctions, penalties, punitive damages or exemplary damages;

4. Any monetary sum paid or awarded as or for double, treble or any other mathematical multiplier of **Damages**;

5. Any costs of complying with equitable or other injunctive relief;

6. Any monetary sum paid or awarded as or for any loss, cost or expense 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 government authority 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**;

7. Any monetary sum paid or awarded to satisfy any obligation of a **Covered Party** (or any insurance company as a **Covered Party**'s insurer) under any workers' compensation, disability benefits or unemployment compensation law or any similar law.

8. Any premium, employer or employee contribution, fee, tax, assessment, or other amount, to enroll or maintain the enrollment of any employee in any **Employee Benefit Plan**

H. **Deductible** means the DEDUCTIBLE that is designated in the DECLARATIONS to this **Memorandum**.

I. **Defense Costs** means:

1. All fees (including attorney's fees), costs (including court costs), and expenses incurred in connection with the adjustment, investigation, defense and appeal of a claim or suit to which this **Memorandum** applies; and

2. Interest on any judgment or portion thereof (accruing after entry of judgment) to which this **Memorandum** applies.

However, **Defense Costs** does not include any of the following:

1. Any office expenses of **ABAG** or a **Covered Party**;

2. Any salaries of employees of **ABAG** or a **Covered Party**;

3. Any salaries of or other monetary payments (including but not limited to per diems, honorariums or reimbursements) to elected or appointed officials of **ABAG** or a **Covered Party**;

4. Any fees or expenses of any claims administrator engaged by a **Covered Party**; or

5. Any fees or expenses incurred for services of any individual or entity (including any attorney, city attorney, city engineer, or city manager) unless such services are provided pursuant to the express written consent of **ABAG**.

J. **Employee Benefit Plan Administration Liability** means liability of a **Covered Party** arising from any act, error, or omission in **Employee Benefit Plan Administration.** For purposes of this definition:

1. **Employee Benefit Plan** means only the following employee benefit plans:

1. Educational tuition reimbursement plans

2. Group plans for life, health, dental, disability, automobile, homeowners, or legal expense insurance

3. Pension plans

4. Salary Reduction plans under Internal Revenue Code Section 457, including any amendments

5. Pre-tax medical and dependent care savings plans

6. Social security system benefits

7. Workers Compensation and unemployment insurance benefits

8. California Public Employees Retirement System benefits

2. **Administration** means only the following administrative functions, with respect to an **Employee Benefit Plan**:

   a. Explaining or interpreting an **Employee Benefit Plan**

   b. Calculating or communicating benefits and costs for an **Employee Benefit Plan**

   c. Enrolling participants, or terminating participation, in an **Employee Benefit Plan**

   d. Estimating or projecting future **Employee Benefit Plan** values

   e. Handling or processing of **Employee Benefit Plan** records

3. **Employee Benefit Administration Liability** shall not include:

   a. any liability arising out of an insufficiency of funds to meet any obligation under any **Employee Benefit Plan**.

   b. any liability arising out of act, error, or omission by any **Covered Party** to effect and maintain insurance or bonding for plan property or assets of any **Employee Benefit Plan**.

   c. any liability arising out of any representations made at any time in relation to the price or value of any security, debt, bank deposit, or similar financial instrument or investment, including, but not limited to, advice given to any person to participate in any **Employee Benefit Plan**.

   d. any liability for premiums, employer or employee contributions, fees, taxes, assessments, or other amounts, to enroll or maintain

the enrollment of any employee(s) in any **Employee Benefit Plan**.

K. **Entity** means:

1. The ENTITY COVERED which is designated in the DECLARATIONS to this **Memorandum**; and

2. Any commission, agency, district, authority, board, or similar body, the governing board of which is exclusively comprised of elected or appointed officials, employees, or volunteers (whether or not compensated) of the ENTITY COVERED which is designated in the DECLARATIONS to this **Memorandum**

L. **Insurance** means insurance or coverage other than the coverage afforded by this **Memorandum**, including but not limited to the following:

1. Valid and collectible insurance (whether stated to be primary, pro rata, contributory, excess, contingent, or otherwise);

2. Any self-funding mechanism, including but not limited to a joint powers authority (whether stated to be primary, pro rata, contributory, excess, contingent, or otherwise); and

3. Specific self-insurance (whether stated to be primary, pro rata, contributory, excess, contingent or otherwise).

M. **Limit of** Coverage means the LIMIT OF COVERAGE that is designated in the DECLARATIONS to this **Memorandum**.

N. **Memorandum** means this MEMORANDUM OF COVERAGE -- LIABILITY, including the DECLARATIONS and all endorsements hereto.

O. **Nuclear Material** means source material, special nuclear material or byproduct material. "Source Material," "Special Nuclear Material" and "Byproduct Material" have the meanings given them in the Atomic Energy Act of 1954 or in any law amendatory thereof.

P. **Occurrence** means:

1. With respect to **Bodily Injury**, an accident, including continuous or repeated exposure to substantially the same general harmful conditions, during the **Coverage Period**.

2. With respect to **Property Damage**, an accident, including continuous or repeated exposure to substantially the same general harmful conditions, during the **Coverage Period**.

3. With respect to **Personal Injury**, the commission of one of the offenses listed in the definition of **Personal Injury** during the **Coverage Period**. All such acts committed against any individual during the **Coverage Period** shall be deemed to be one **Occurrence**.

4. With respect to **Public Officials Errors and Omissions Injury**, the commission of one of the acts listed in the definition of **Public Officials Errors and Omissions Injury** during the **Coverage Period**. All such acts committed against any individual during the **Coverage Period** shall be deemed to be one **Occurrence**.

5. With respect to **Employee Benefit Plan Administration**, an act, error, or omission in the performance during the **Coverage Period** of any of the administrative functions listed in the definition of **Employee Benefit Plan Administration** with respect to an **Employee Benefit Plan**. All such acts, errors, or omissions during the **Coverage Period** with respect to any **Employee Benefit Plan** shall be deemed to be one **Occurrence**.

Q. **Personal Injury** means economic loss, emotional distress, and consequential **Bodily Injury**, arising out of the commission of one or more of the following offenses by a **Covered Party** in the discharge of duties for the **Entity**:

1. False arrest, detention or imprisonment;

2. Malicious prosecution;

3. Oral or written publication of material that slanders or libels a person or organization, including disparaging statements concerning the condition, value, quality or use of that person's or organization's real or personal property, but only where the first publication of such material occurs during the **Coverage Period**;

4. Oral or written publication of material that violates a person's right of privacy, but only where the first publication of such material occurs during the **Coverage Period**; or

5. Discrimination or violation of civil rights;

Personal Injury does not include written or oral publication of material by or at the direction of any **Covered Party** with knowledge of its falsity.

R. **Pollutants** means without limitation any solid, liquid, gaseous or thermal irritant or contaminant, including but not limited to smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes without limitation materials to be recycled, reconditioned or reclaimed. The term **Pollutants** does not include any of the following:

1. Potable water,

2. Agricultural water,

3. Water furnished to commercial users,

4. Water used for fire suppression,

5. Raw sewage,

6. Combined sewage,

7. Storm water run-off,

8. Partially treated sewage,

9. Fully treated sewage (as defined by the applicable NPDES permit), and

10. Residual streams of waste water treatment.

S. **Property Damage** means:

1. Physical injury to tangible property, including the loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

2. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the **Occurrence** that caused it.

Money, cash equivalents, checks, bonds, and all other financial instruments shall not be considered tangible property.

T. **Public Officials Errors and Omissions Injury** means economic loss and emotional distress arising out of any act or omission, any misstatement or misleading statement, any neglect or breach of duty, or any misfeasance, malfeasance or nonfeasance, by a **Covered Party** in the discharge of duties for the **Entity.**

Public Officials Errors and Omissions Injury does not include **Bodily Injury**, **Property Damage**, **Personal Injury**, or **Employee Benefit Plan Administration Liability**.

U. **Risk Coverage Agreement** means the revised Liability Risk Coverage Agreement dated as of July 1, 1992 among **ABAG**, the ENTITY COVERED which is designated in the DECLARATIONS, and all other participants in the **ABAG** Pooled Liability Assurance Network (PLAN) program.

V. **Watercraft** means any form of vessel, including but not limited to barge, boat, ship, yacht, canoe, kayak, and jet ski or similar personal recreational watercraft, intended for use in or on water.

SECTION II - WHO IS A COVERED PARTY

A. Subject to the terms of provision B. below, each of the following constitutes a **Covered Party** under this **Memorandum**:

1. The **Entity**,

2. Any person who was or is now an elected or appointed official, employee or volunteer of the **Entity**, whether or not compensated, but only while acting for or on behalf of the **Entity** (including while acting on outside boards at the direction of the **Entity**), and

3. Any person or organization to whom or to which the **Entity** is obligated by virtue of a written contract to provide coverage such as is afforded by this **Memorandum**, but only with respect to:

a. Operations performed by the **Entity**, or

b. Operations performed by such person or organization on behalf of the **Entity**, or

c. Property (including vehicles and facilities) owned by the **Entity** and used by such person or organization, or

d. Property (including vehicles and facilities) owned by such person or organization and used by the **Entity**.

B. None of the above shall constitute a **Covered Party** with respect to any claim or suit brought by or on behalf of any **Entity**.

SECTION III - COVERAGES

Subject to the terms and conditions of this **Memorandum**, **ABAG** agrees to pay on behalf of the **Covered Party**, and this **Memorandum** applies only to, **Damages** that the **Covered Party** becomes legally obligated to pay because of

A. **Bodily Injury**,

B. **Property Damage**,

C. **Personal Injury**,

D. **Public Officials Errors and Omissions Injury**, or

E. **Employee Benefit Plan Administration Liability**

caused by an **Occurrence**, and which are not excluded.

If the **Covered Party** has **Insurance** which affords coverage for any **Bodily Injury**, **Property Damage**, **Personal Injury**, **Public Officials Errors and Omissions Injury** or **Employee Benefit Plan Administration Liability** covered by this **Memorandum**, this **Memorandum** shall only apply in excess of any amounts payable under such **Insurance**.

The amount that **ABAG** will pay is limited as described under SECTION V - LIMIT OF COVERAGE.

SECTION IV - EXCLUSIONS

This **Memorandum** does not apply to **Damages**:

A. For **Bodily Injury**, **Property Damage**, **Personal Injury**, **Public Officials Errors and Omissions Injury**, or **Employee Benefit Plan Administration Liability** which is either expected or intended from the standpoint of a **Covered Party**; but this exclusion does not apply to **Bodily Injury** resulting from assault and battery committed by, at the direction of, or with the consent of the Entity, for the purpose of protecting persons or property from injury or death.

B. Arising out of the actual, alleged, or threatened, exposure to, or discharge, dispersal, seepage, migration, release or escape of, **Pollutants**:

1. At or from any premises, site, or location which is or was at any time owned or occupied by, or loaned, rented, or leased to, any **Covered Party**;

2. At or from any premises, site, or location which is or was at any time used for the handling, storage, disposal, processing, or treatment of waste;

3. Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for any **Covered Party** or any person or organization for whom a **Covered Party** may be legally responsible; or

4. At or from any premises, site, or location on which any **Covered Party** or any contractor or subcontractor working directly or indirectly on any **Covered Party**'s behalf is performing operations.

C. Arising out of the ownership, management, governance, use, or operation of any hospital or airport.

D. Arising out of medical professional services performed by or on behalf of a **Covered Party**; but this exclusion does not apply to such services performed by emergency medical technicians, paramedics and other similar classes of personnel.

E. Arising out of any partial or complete structural failure of any **Dam**.

F. Arising out of any hazardous properties of **Nuclear Material**.

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.

K. Arising out of a **Covered Party's** ownership, operation, use, maintenance, or entrustment to others of any **Aircraft** or **Watercraft**

L. Arising out of any transit authority, transit system or public transportation system owned or operated by a **Covered Party**; but this exclusion does not apply to any transit system operating over non-fixed routes, including dial-a-ride, senior citizen transportation or handicapped transportation.

M. Arising out of the failure to supply or provide an adequate supply of gas, water or electricity.

N. Arising out of any obligation to pay compensation or benefits (or other monetary sums) under workers' compensation, disability benefits or unemployment compensation law or any similar law.

O. For **Bodily Injury**, **Property Damage**, **Personal Injury**, or **Public Officials Errors and Omissions Injury** to:

1. An employee, volunteer, elected or appointed official of a **Covered Party** arising out of and in the course of:

   a. Employment by a **Covered Party**; or

   b. Performing duties related to the conduct of a **Covered Party's** activities;

or

2. The spouse or partner, child, parent, brother, sister or other relative of that employee, volunteer, elected or appointed official, as a consequence of paragraph (1) above.

   This exclusion applies:

   a. Whether the **Covered Party** may be liable as an employer or in any other capacity; and

   b. To any obligation to share payment with, or repay someone else who must pay, any amount because of the injury.

P. Arising out of any:

1. Refusal to employ, elect, or appoint any person, or to allow any person to participate as a volunteer

2. Termination of any person's employment or volunteer participation, or termination of any person's position as an elected or appointed official

3. Practice, policy, act or omission which is in any way related (whether logically or causally) to employment, to serving as an elected or appointed official, or to serving as a volunteer, all including but not limited to any of the following: coercion, demotion, promotion, evaluation, reassignment, discipline, defamation, violation of civil rights, harassment, humiliation or discrimination.

   This exclusion applies:

   a. Whether the **Covered Party** may be liable as an employer or in any other capacity; and

   b. To any obligation to share payment with, or repay someone else who must pay, any amount because of the injury.

Q. For claims by any **Covered Party**. This exclusion shall not apply to claims for **Employee Benefits Administration Liability**.

R. For **Property Damage** to:

1. Property owned by the **Entity;**

2. Property rented to or leased to the **Entity**; or

3. **Aircraft** or **Watercraft** in a **Covered Party's** care, custody or control.

S. Arising out of the willful violation of a penal statute or penal ordinance:

1. Committed by a **Covered Party**; or

2. Committed with the knowledge or consent of a **Covered Party**.

T. **Public Officials Errors and Omissions Injury** arising out of the imposition, collection, refund, or refusal to refund, of taxes, fees or assessments.

U. **Public Officials Errors and Omissions Injury** arising out of:

1. Any **Covered Party** obtaining remuneration or financial gain to which the **Covered Party** was not legally entitled, or

2. Any **Covered Party's** liability for any other **Covered Party** obtaining remuneration or financial gain to which such **Covered Party** was not legally entitled.

V. **Public Officials Errors and Omissions Injury** arising out of any bidding or contracting process if such **Public Officials Errors and Omissions Injury** is due to:

1. Estimates of probable costs or cost estimates being exceeded,

2. Preparation of bid specifications or plans, including architectural plans, or

3. Failure to award any contract in accordance with any statute or ordinance.

W. **Public Officials Errors and Omissions Injury** arising out of any failure to perform or breach of a contractual obligation.

X. Arising out of the purchase, sale, offer of sale, solicitation, depreciation, or decline in price or value, of any security, debt, bank deposit or financial interest or instrument**.** This exclusion shall not apply to economic loss suffered by a governmental entity other than a **Covered Party,** as a result of **Public Officials Errors and Omissions Injury** to which this **Memorandum** applies, arising out of financial investment services undertaken by an **Entity** for compensation on behalf of that governmental entity.

SECTION V - DEFENSE AND SETTLEMENT

A. **Defense Of Claims Or Suits.**

1. **ABAG** shall have the right and duty to defend any claim or suit against a **Covered Party** seeking **Damages** to which this **Memorandum** applies, even if any allegations are groundless, false or fraudulent. In the event this **Memorandum** is excess over any **Insurance** with respect to a claim or suit, then **ABAG** shall not have any duty to

defend such claim or suit until the available limits of liability of all such **Insurance** are exhausted and the defense obligation under all such **Insurance** has terminated.

2. The **Covered Party** may select counsel to represent its interests, subject to approval of counsel by **ABAG**.

3. The **Covered Party** shall:

   a. Cooperate with **ABAG** in the investigation, defense and settlement of any claim or suit,

   b. Upon the request of **ABAG**, attend hearings and trials, assist in securing and giving evidence, and assist in obtaining the attendance of witnesses, and

   c. Upon the request of **ABAG**, authorize **ABAG** to obtain records and other information.

4. In the event a **Covered Party** elects not to appeal a judgment, **ABAG** may elect to do so if it pays the fees and costs of that appeal.

5. The **Covered Party** must disclose to **ABAG** all information concerning the claim or suit (including but not limited to all facts giving rise to the claim or suit) which may assist in the defense of the claim or suit. The **Covered Party** is required to provide such information even if the information may relate to or affect matters pertaining to coverage under this **Memorandum**. The **Covered Party** shall instruct its defense counsel to disclose all such information to **ABAG**, and hereby waives any and all privileges (including but not limited to the attorney/client privilege and the attorney work product privilege) to the extent necessary to allow for the disclosure of that information to **ABAG**. Any such waiver of a privilege shall extend only to **ABAG**, and shall not be construed to allow for the disclosure of any such information to any claimant.

6. It is understood and agreed that the purpose of this provision is to ensure that **ABAG** is provided with all information which is or may be useful in defending the claim or suit, in whole or part, notwithstanding the existence of any coverage limitation or dispute.

B. **Settlement Of Claims Or Suits.**

1. **ABAG** shall not have any obligation to pay any sum on behalf of a **Covered Party** under the terms of a settlement of any claim or suit, unless such settlement is finalized in a written agreement signed by the **Covered Party**, the claimant and **ABAG**.

2. No **Covered Party** shall have the right to enter into a settlement of any claim or suit, which seeks **Damages** to which this **Memorandum** applies without the express written consent of **ABAG**.

SECTION VI - LIMIT OF COVERAGE

A. **Limit Of Coverage - Per Occurrence.**

1. The **Limit of Coverage**, and the rule set forth under paragraph 2 below, fix the most that **ABAG** will pay with respect to an **Occurrence**, regardless of:

   a. The number of **Covered Parties**,

   b. The number of claims made or suits brought,

   c. The number of persons or organizations making claims or bringing suits,

   d. The number of persons or organizations who sustain injury or damage,

   e. The nature and types of injuries or damage sustained,

   f. The number of coverages under this **Memorandum** which may be applicable to the **Occurrence**.

2. All Defense Costs shall be paid and applied first against, and shall reduce, the Limit of Coverage. The difference between the Limit of Coverage and the total amount of Defense Costs shall be the amount available, if any, to pay on behalf of all Covered Parties with respect to an Occurrence.

B**.** **Deductible - Per Occurrence.**

1. The amount of the **Deductible** is the amount that the **Entity** must pay (or cause to be paid) before **ABAG** is obligated to pay any amount under the terms of this **Memorandum**.

2. The **Entity** shall be obligated to pay one **Deductible** with respect to all claims and suits relating to an **Occurrence**.

3. The **Deductible** is the sole responsibility of the **Entity**. **ABAG** shall not be responsible for payment of the **Deductible** or any part thereof.

C. **ABAG's Obligations Upon Exhaustion Of Limit Of Coverage.**

1. **ABAG**'s duties under this **Memorandum** end with respect to any **Occurrence** when **ABAG** has used up the **Limit of Coverage** by payments with respect to claims and suits relating to or arising out of that **Occurrence** (including payment of **Defense Costs**). In that event:

   a. **ABAG** shall not have any further obligation to pay **Defense Costs** and shall have the right to withdraw from the further investigation and defense of any and all claims and suits relating to such **Occurrence**,

   b. **ABAG** shall not have any further obligation to pay any judgment or settlement, and

   c. **ABAG** shall not have any other obligation under this **Memorandum**.

SECTION VII - CONDITIONS

A. **Duties In The Event Of Occurrence, Claim Or Suit.**

1. In the event of an **Occurrence**, the **Entity** must provide to **ABAG** (or any of its authorized agents), as soon as practicable, written notice of the **Occurrence**, which includes the following information:

   a. The identity of each **Covered Party** involved in the **Occurrence**,

   b. How, when and where the **Occurrence** took place,

c. The names and addresses of any injured persons,

d. The names and addresses of any witnesses,

e. The nature and location of any injury or damage arising out of the **Occurrence**, and

f. Any and all other information which is available and reasonably obtainable pertaining to the **Occurrence**.

2. If a claim is made or suit is brought against any **Covered Party**, the **Entity** must:

   a. Immediately provide **ABAG** with written notice of the claim or suit,

   b. Immediately make a record of the specifics of the claim or suit, and

   c. Immediately forward to **ABAG** a copy of all documents related to the claim or suit, including but not limited to all correspondence, demands, notices, summonses and pleadings.

3. Upon the request of **ABAG**, each **Covered Party** involved in the **Occurrence** shall assist **ABAG** in the enforcement of any right (including but not limited to any right of contribution or indemnity) against any person or organization which may be liable to a **Covered Party** because of actual or alleged damages to which this **Memorandum** may also apply.

4. No **Covered Party** shall, except at its own cost, make a payment, assume any obligation or incur any expense (including but not limited to any attorney fees) without the prior express consent of **ABAG**. In the event a **Covered Party** makes any payment, assumes any obligation or incurs any expense (including but not limited to any attorney fees) without the prior express consent of **ABAG**, then any such payment, obligation or expense shall be the sole responsibility of that **Covered Party**.

B. **Bankruptcy.**

Bankruptcy or insolvency of the **Covered Party** shall not relieve **ABAG** of any of its obligations under this **Memorandum**.

C. **Insurance.**

1. This **Memorandum** shall be in excess of the amount of any **Insurance** available to pay any sum otherwise covered under this **Memorandum**, except with respect to any such **Insurance** which is written only as specific excess insurance over the **Limit of Coverage**.

2. Regardless of the duration of any Occurrence and the number of other Memorandums between ABAG and the Entity, under no circumstances shall this **Memorandum** and any other memorandum of coverage between **ABAG** and an **Entity** both apply to a claim or suit. In the event of a dispute as to whether:

   a. This **Memorandum**, or

   b. Another memorandum of coverage between **ABAG** and an **Entity**

   is applicable to a claim or suit, such dispute shall be resolved by application of the following rule. The first memorandum of coverage (between **ABAG** and the **Entity**) issued by **ABAG** shall be deemed the memorandum of coverage which is applicable (and only that memorandum of coverage shall be applicable). *A "continuous trigger" rule or similar rule shall not apply.*

D. **Cancellation.**

This **Memorandum** may be canceled at any time in accordance with the provisions of the **Liability Risk Coverage Agreement**.

E. **Legal Action Against ABAG.**

1. No person or organization may join **ABAG** as a party, or otherwise bring **ABAG** into a suit seeking damages from a **Covered Party**.

2. A person or organization may sue **ABAG** to recover on an agreed settlement (meaning a settlement and release of liability signed by **ABAG**, the **Covered Party** and the claimant or the claimant's legal representative) or on a final judgment against a **Covered Party** obtained after an actual trial; but **ABAG** will not be liable for damages that are not payable under the terms of this **Memorandum** or that are in excess of the **Limit of Coverage**.

3. No **Covered Party** may pursue any claim or file any action against **ABAG** unless and until it has fully complied with the procedures established by **ABAG** for presentation and resolution of disputes, including but not limited to the **Risk Coverage Agreement**.

F. **Transfer Of Rights Of Recovery Against Others To ABAG**.

1. If the **Covered Party** has rights to recover all or part of any payment **ABAG** has made under this Memorandum, those rights are transferred to **ABAG**. The **Covered Party** must do nothing after an **Occurrence** to impair them. At **ABAG**'s request, the **Covered Party** will bring suit or transfer those rights to **ABAG** and help enforce them. All amounts so recovered shall be paid to **ABAG**.

2. In the event any amounts recovered exceed the costs incurred to recover them plus the amount of **ABAG**'s payments, then those additional amounts shall be apportioned as follows:

   a. The **Covered Party** shall first be reimbursed in an amount up to any payments it made, and

   b. The remainder shall be paid to **ABAG** and the **Covered Party** in proportion to the ratio of their respective recoveries

G. **Premium**.

1. The **Entity** is authorized to act on behalf of all **Covered Parties** with respect to all matters pertaining to premium.