

CENTRAL SAN JOAQUIN VALLEY RISK MANAGEMENT AUTHORITY

MINUTES OF THE EXECUTIVE COMMITTEE
MEETING OF MAY 27, 2010

AMENDED

A meeting of the Executive Committee of the Central San Joaquin Valley Risk Management Authority (CSJVRMA) was held on May 27, 2010, at the Piccadilly Inn-Shaw, Fresno, California.

COMMITTEE MEMBERS PRESENT: Bill Lewis, President, Woodlake
Jeff Cardell, First Vice President, Clovis (left during item 8.E.)
Leon Compton, Past President, Ripon
Felix Ortiz, Exeter (arrived during item 6.D.)
Dave Elias, Fowler
Tim Przybyla, Kerman (arrived during item 6.D.)
Wendy Silva, Madera
Bob Wilburn, Maricopa
Jo Barrick, Shafter (arrived during item 6.D.)

COMMITTEE MEMBERS ABSENT: Linda Abid-Cummings, Second Vice President, Riverbank
Greg Applegate, Sonora

ALTERNATE MEMBERS PRESENT: Mike Barrows, Sonora
Margee Fallert, Tulare

ALTERNATE MEMBERS ABSENT: Cruz Ramos, San Joaquin

OTHERS PRESENT: Jeanette Workman, Administrator
Mary Ann Reilly, Board Secretary
Linzie Kramer, Litigation Manager
Charlotte Hemker-Smith, Legal Counsel
Judy Sullivan, AIMS
Ken Wilkerson, AIMS
James Zervis, Wasco (left after item 10)
Richard Osen, McDonough Holldan & Allen PC, representing City of Wasco (left after item 10)
Jeanne Schechter, Deputy City Attorney, City of Merced (arrived during item 8.E., left after item 10)
Bill Brown, Brown and Winters, representing City of Merced (arrived during item 8.E., left after item 10)
Scott Patterson, Brown and Winters, representing City of Merced (arrived during item 8.E., left after item 10)

1. CALL TO ORDER

President Bill Lewis called the meeting to order at 10:00 a.m.

2. INTRODUCTIONS

Introductions of those present took place.

3. APPROVAL OF AGENDA AS POSTED (OR AMENDED)

Jeff Cardell moved to approve the agenda as posted. Seconded by Bob Wilburn. Motion passed unanimously.

4. PUBLIC COMMENTS

None.

5. CONSENT CALENDAR

Bob Wilburn moved to approve/accept the following items: A) Minutes of the May 25, 2010, Executive Committee meeting; B) Warrants for February 25, 2010 ~ March 22, 2010, and March 23, 2010 ~ April 21, 2010; C) Treasurer's Reports as of December 31, 2009, and March 31, 2010; D) Financial Statements as of March 31, 2010; E) Farley Consulting Services 2009 CSJVRMA Liability Claims Audit Report; F) Pooled Workers' Compensation Program Memorandum of Coverage for Program Year 2010/11; G) Pooled Property Program Memorandum of Coverage for Program Year 2010/11; H) Pooled Auto Physical Damage Program Memorandum of Coverage for Program Year 2010/11; I) Pooled Low Value Vehicle Program Memorandum of Coverage for Program Year 2010/11; J) PEPPIP Loss Run as of February 28, 2010; K) Q1 2010 EAP Utilization Summary Reports; L) Evaluation Summary for CSJVRMA "Traffic Control & Flagging (March 16, 17, & 18, 2010)" Public Works Forum; M) Evaluation Summary for CSJVRMA "Traffic Control & Flagging (March 30, 2010)" Public Works Forum; N) Evaluation Summary for CSJVRMA "Classroom Driver Training" Workshop; O) Nominating Subcommittee Report; P) List of Subcommittees; and Q) Chandler Bond Market Review – April and May 2010. Seconded by Margee Fallert. Motion passed unanimously.

6. WORKERS' COMPENSATION PROGRAM

A. Reports by Staff and Service Providers

1. Report by Claims Administrator (AIMS)

Prior to the meeting, the Executive Committee received written reports pertaining to claims for March and April 2010, as prepared by Ms. Judy Sullivan.

At the meeting Ms. Sullivan provided a report on the efforts to close claims via Compromise & Release (C&R). Ms. Sullivan reported that there are currently 205 open claims eligible for closure by C&R as opposed to the 230 claims in July 2009 when AIMS began reporting on their efforts to close these claims. The additional closed claims resulted in a decrease of over \$1M in outstanding reserves.

B. Local Agency Workers' Compensation Excess JPA (LAWCX)

The Local Agency Workers' Compensation Excess JPA (LAWCX) provides excess workers' compensation coverage to the CSJVRMA.

Ms. Jeanette Workman, Administrator, reported that the most recent LAWCX Executive Committee meeting was cancelled due to lack of a quorum; the next LAWCX Board of Directors' meeting will be held in June 2010.

Ms. Workman reported the CSJVRMA has two new LAWCX representatives, Ms. Wendy Silva, City of Madera, and Ms. Margee Fallert, City of Tulare, who replaced Mr. Greg Applegate and Mr. Leon Compton due to their recent resignations as CSJVRMA representatives to the LAWCX Board.

Ms. Workman reminded the Committee that LAWCX has a loss prevention platform that CSJVRMA members have been qualified to participate in via LAWCX's participation in CSAC-EIA. Ms. Workman reported the platform is changing wherein CSAC-EIA is going to begin charging members for utilization. Ms. Workman noted she has recently received several calls from members requesting information to sign up for services and reported that they are unable to do so until LAWCX reaches a decision regarding the fees. If LAWCX does not agree to pay the \$1,000 fee, individual members will be required to do so. Ms. Workman contacted CSAC-EIA to inquire if the CSJVRMA could pay the \$1,000 fee on behalf of their members should LAWCX decide not to offer this service, and CSAC-EIA agreed the CSJVRMA could. Ms. Workman reported that the LAWCX Board will vote on this issue at their June 8, 2010, meeting. Mr. Jeff Cardell, City of Clovis and LAWCX Past President, reported the LAWCX Executive Committee will also meet on June 8, 2010, prior to the Board meeting.

7. ADMINISTRATIVE MATTERS

A. Chandler Asset Management Contract Update

Ms. Workman reported that during a recent review of financial documents, staff determined that it would be beneficial to update the CSJVRMA contract with Chandler Asset Management (Chandler) due to the age of the original contract. Ms. Workman noted staff requested a new contract from Mr. Marty Cassell, Chandler, and the draft contract was then reviewed by Ms. Charlotte Hemker-Smith, Legal Counsel, and Mr. Jim Elledge, Assistant Treasurer. Chandler was provided an amended document with Ms. Hemker-Smith's and Mr. Elledge's suggestions and they have agreed to the amendments. Ms. Workman noted

the contract, in underline/strikeout text, was included in the agenda packet for the Executive Committee's review.

Margee Fallert moved to approve the updated contract between CSJVRMA and Chandler Asset Management. Seconded by Leon Compton. Motion passed unanimously.

B. Calendar of Meetings for the 2010/11 Program Year

Ms. Workman reported that included in the agenda packet was a draft Resolution containing the calendar of meetings for the 2010/11 program year.

Margee Fallert moved to approve the calendar of meetings for the 2010/11 program year. Seconded by Jeff Cardell. Motion passed unanimously.

C. Request from the City of Delano to Waive the Late Payment Penalty for the 2009/10 3rd Quarter Premium Deposit

Ms. Workman reported this item was on the agenda at the request of City of Delano. Ms. Workman noted the City of Delano was late in paying the city's 3rd Quarter 2009/10 invoice and incurred late penalties. The city, in their letters included in the agenda packet, reported the delay was due to a clerical error. Ms. Workman also noted that the City of Delano has since paid the invoice and the late fees, to avoid incurring additional penalties, but is requesting a waiver of the penalty and a reimbursement of the payment of the same. Ms. Workman reported she had received an inquiry from an Executive Committee member regarding the late request of this item, and Ms. Workman explained the request from the City of Delano was received after the March 2010 agenda was finalized. As the Executive Committee no longer holds a meeting in April, this May meeting was the first opportunity to address this item. Ms. Wendy Silva, City of Madera, inquired if the delay in payment had anything to do with the electronic distribution of invoices. Ms. Workman replied that it did not and that staff retains electronic notifications that invoices have been received.

Dave Elias moved to deny the request by the City of Delano to waive the late payment penalty for the 2009/10 3rd quarter premium deposit. Seconded by Leon Compton. Motion passed unanimously.

D. Amendment to the Agreement for Risk Management, Financial, and Administrative Services Regarding the Department of Motor Vehicles Electronic Pull Notice Program

Ms. Workman reported Bickmore Risk Services (BRS) has handled the Department of Motor Vehicles (DMV) Electronic Pull Notice (EPN) Program for members since 2006. Prior to 2006, BRS handled the manual EPN Program. Ms. Workman reminded the Committee that at the January 2010 Executive Committee meeting, staff notified the Committee about an EPN program through TargetSafety. At that meeting, staff reported that the City of Riverbank volunteered to test the program and was very happy with the service.

It was also reported at that meeting that the fees for the TargetSafety program are less than BRS is able to offer the CSJVRMA. In addition, TargetSafety is able to provide the pull notices electronically directly to members.

At the January 2010 meeting, the Committee took action to transfer the EPN Program to TargetSafety in exchange for a \$24,500 reduction in the BRS contract once all members have transferred to the new program. Ms. Workman reported that staff has been working with members, TargetSafety, and the DMV in an effort to move all participating members into the new program as BRS cannot discontinue their program until this is accomplished. Ms. Workman reported that as of a week ago there were eight or nine members who had not completed the required paperwork; however, currently only two members now remain who still need to complete this process. Ms. Margee Fallert, City of Tulare, inquired as to the final cutoff date. Ms. Workman replied that she has notified the two members that the cutoff date is June 4, 2010; if they do not complete the required paperwork by then, they will need to handle the transfer to a new EPN provider themselves.

Ms. Workman noted that included for the Committee's review was an amended contract between BRS and the CSJVRMA, in underline/strikeout text, reducing the contract price by \$24,500, and addressing the reduction in the scope of services regarding the EPN program, to become effective July 1, 2010.

Mr. Cardell noted that the list of employees the DMV gave to A-Check is very outdated and cities are having to complete a great deal of clean up to ensure the correct reports are received. Staff noted that all changes provided to the CSJVRMA have also been provided to the DMV; BRS has records of the uploads to the DMV of the changes. Why the DMV's data is not accurate is unclear to staff. Mr. Cardell also inquired as to the net savings of using the TargetSafety program over BRS. Ms. Workman reported that the net savings are \$16,725 (BRS contract of \$24,500 less TargetSafety fee of \$7,775.) Ms. Workman noted the TargetSafety pricing is based on the number of enrolled drivers and therefore can fluctuate.

Wendy Silva moved to approve the Amendment to the Agreement for Risk Management, Financial, and Administrative Services between CSJVRMA and BRS regarding the Department of Motor Vehicles Electronic Pull Notice Program. Seconded by Dave Elias. Motion passed unanimously.

E. Lexipol Police Manuals for City of Avenal Due to the Establishment of a New Police Department

Ms. Workman reported that the City of Avenal is establishing a police department effective January 1, 2011, and the city has entered into an agreement with Lexipol for the development of a police manual. Ms. Workman reported that as the City of Avenal was not part of the original agreement with Lexipol to develop police manuals, those costs were not included in either the Lexipol pricing structure or the 2010/11 CSJVRMA budget.

Ms. Workman reported this item was placed on the agenda at the request of the City of Avenal as the city is requesting assistance of payment for the development of their police

manual. The cost per manual is \$4,950. Ms. Workman reminded the Committee that in October 2009, the Executive Committee approved payment of one-half of the costs of the development of police manuals for the cities of McFarland, Mendota, and Orange Cove.

Margee Fallert moved to approve payment of one-half of the development cost for a Lexipol Police Manual for the City of Avenal. Seconded by Dave Elias. Motion passed unanimously.

8. LIABILITY PROGRAM

A. Reports by Staff and Service Providers

1. Oral Report by Litigation Manager

Mr. Linzie Kramer, Litigation Manager, reviewed the claims for the month of April with the Executive Committee noting there were 42 new claims including three serious claims. Mr. Kramer reported he will provide information on the May claims at the next meeting.

2. Report on Coverage Denials

Ms. Hemker-Smith reported there are no new coverage denials since the last meeting, and the coverage denials included with the agenda packet are in reference to the two appeals on today's agenda, Affholter v. Merced and McIntosh v. Wasco.

3. Report by Claims Administrator (AIMS)

Mr. Ken Wilkerson, AIMS, reiterated Mr. Kramer's comments regarding recent claims. In addition, Mr. Wilkerson reported that Mr. Bob Smoke of AIMS' Modesto office was on medical leave and Mr. Wilkerson is making trips to Modesto to assist during Mr. Smoke's absence.

4. Report on California Affiliated Risk Management Authorities (CARMA)

CARMA is the excess pool through which the CSJVRMA obtains excess liability coverage.

Ms. Workman reported the CSJVRMA representative on the CARMA Board of Directors was Mr. Joe Donabed who recently left the City of Hughson; therefore, a vacancy was created in the position of CSJVRMA representative to the CARMA Board. The alternate representative, Ms. Linda Abid-Cummings, City of Riverbank, agreed to fill that position and staff solicited interest from members regarding the alternate position. Ms. Jo Barrick, City of Shafter, and Mr. Cardell, City of Clovis, both expressed interest in the position. After speaking to both candidates,

Ms. Barrick consented to defer her interest in the position. President Lewis appointed Mr. Cardell to the position.

Ms. Workman reported CARMA's Summary of Action Items from their April 2010 meeting was included in the agenda packet and she would address any questions regarding those items.

President Lewis inquired if CARMA had adopted their 2010/11 budget, and Ms. Workman replied CARMA has adopted a preliminary budget. Ms. Workman noted that when the final CSJVRMA budget is reviewed in June, there should be good news for both CARMA and ERMA as both budgets have been lowered. Ms. Workman also reported there will be no ERMA assessment for the 2010/11 program year.

5. Report on Employment Risk Management Authority (ERMA)

The Employment Risk Management Authority (ERMA) provides employment practices liability coverage to its members. ERMA is an optional program of the CSJVRMA.

The CSJVRMA representative on the ERMA Board of Directors is Mr. Dave Elias, City of Fowler. The alternate representative was Ms. Margaret Silveira who recently left the City of Gustine. Mr. Cary Keaten, City of Lathrop, expressed interest in the position and President Lewis has appointed Mr. Keaten to the position.

Ms. Workman reported that ERMA Loss Run Reports for March and April 2010 were included in the agenda packet.

Ms. Workman reminded the Committee that ERMA restructured their training process from mandatory online training to in-person training conducted at the member's facilities. Each year, certain members are assigned training which is available to them free of charge. Only two CSJVRMA members assigned training for this year have taken advantage of the available training, and Ms. Workman reported she has contacted ERMA and requested a 30-day extension for the utilization of the training. Ms. Workman has also contacted the members with training available to encourage them to utilize the training and to open them up to all CSJVRMA members. Ms. Workman noted the City of Ceres will be holding a training session in July, and she will forward the information on the training to all members as soon as it is available.

B. Pooled Liability Program Memorandum of Coverage for Program Year 2010/2011

Ms. Workman reminded the Committee that staff previously brought an item before them regarding city personnel assisting with administering medications in custodial care programs and the Committee requested the Memorandum of Coverage (MOC) Subcommittee meet to review this practice. The MOC Subcommittee met on March 11, 2010, via teleconference, to

review the draft Memoranda of Coverage for all the CSJVRMA programs for the 2010/11 program year as well as the assistance with administering medications issue. In review of the Pooled Liability Program MOC, staff recommended and the Subcommittee approved the following changes: amend the dates of coverage to become effective for the 2010/11 program year and amend the form number. In addition, Ms. Hemker-Smith pointed out a formatting error in the MOC for correction.

In addition, the Executive Committee's approval of an increase to the City of Tehachapi's retained limit from \$10,000 to \$25,000 and an increase in the City of Parlier's retained limit from \$10,000 to \$25,000, made at the February 2010 Executive Committee meeting in response to the actuary's retained limit study, was incorporated into the MOC.

During the Subcommittee's March 2009 meeting, a thorough discussion took place regarding city personnel assisting with the administering of medication in custodial care programs. The Subcommittee determined they did not want to expand coverage to include the assistance of administering medications in day care or other city programs and this required a tightening up of the language in the Pooled Liability Program MOC. However, a sample policy for those cities whose practice is to assist with the administering of medications will be addressed in Agenda Item 8C. Ms. Workman noted a draft of the Pooled Liability Program MOC was attached in underline/strikeout format for the Committee's review.

Jeff Cardell moved to approve the Pooled Liability Program Memorandum of Coverage as amended. Seconded by Margee Fallert. Motion passed unanimously.

C. Administration of Medications in Custodial Care Programs

The Committee was provided a draft "Policy for Assisting with the Administration of Medically Necessary Prescribed Medications to Participants in Custodial Care Programs." Ms. Workman reported this is the actual policy that the Subcommittee recommends members adopt if they are considering assisting with the administration of medications in custodial care programs. Ms. Workman noted the policy had been updated since last reviewed by the Committee to change "child" to "dependent" and "parent" to "guardian." Ms. Workman noted this is being brought to the Committee as a best practices policy and if a member comes to the Committee requesting this coverage be endorsed onto the MOC, the best practices would be a minimum requirement.

Tim Przybyla moved to approve: 1) Send the information packet on the "Policy for Assisting with the Administration of Medically Necessary Prescribed Medications to Participants in Custodial Care Programs," to all members as a best practice with notification that the CSJVRMA does not cover this practice; and 2) Recommend the Executive Committee entertain requests for endorsement of the practice of assisting with the administration of medications to those in Custodial Care Programs. Adherence to the best practices would be the minimum requirement for requesting coverage and the members requesting such coverage would be required to appear before the Executive Committee and plead their case for such coverage. If granted,

such coverage would only be awarded for the current program year and would be reviewed annually. Seconded by Felix Ortiz. Motion passed unanimously.

D. McIntosh v. Wasco

Since this case is still active and on appeal, the City of Wasco requested all discussions on this item be under Closed Session.

9. CLOSED SESSION

Pursuant to Government Code Section 54956.9 the Executive Committee recessed to closed session at 10:40 a.m. to discuss the following liability claim:

McIntosh v. Wasco

10. REPORT FROM CLOSED SESSION

Pursuant to Government Code Section 54957.1 the Executive Committee reconvened to open session at 12:08 p.m. Ms. Hemker-Smith reported this was an extremely difficult case for the Executive Committee to consider because it appears this may be an exposure that many CSJVRMA members may have. However, based on the facts of the case, and the intent of the MOC with regard to public officers' Error and Omissions coverage, the land use/land planning exclusion, and the violation of law exclusion, the Executive Committee took action to unanimously deny the appeal of the City of Wasco on the coverage decision regarding McIntosh v. Wasco. Ms. Hemker-Smith noted the City has the right to appeal the decision to the full Board of Directors and noted the next Board meeting is in June 2010. Ms. Hemker-Smith stated the City should contact the Board Secretary regarding adding an appeal to the agenda if they choose to do so.

Ms. Hemker-Smith noted the Committee also asked that the City of Wasco be advised that both Mr. Kramer and she would be happy to discuss the matter with the city at any time. The Committee also asked that the CSJVRMA be kept advised about the case.

8. LIABILITY PROGRAM

E. Affholter v. Merced

This item was on the agenda at the request of the City of Merced. The City of Merced presented a claim for coverage, Affholter v. Merced, on October 5, 2006. Ms. Hemker-Smith was asked to render a coverage opinion. Ms. Hemker-Smith opined that based on the CSJVRMA Pooled Liability Program MOC, the City of Merced did not have coverage for this claim through the CSJVRMA as it was based on pollution claims for which there is no coverage by reason of Exclusion (A)(1), the inverse condemnation exclusion, Exclusion

(A)(13), and the exclusion for statutory violations, Exclusion (A)(22). Ms. Hemker-Smith sent the City of Merced a letter regarding her coverage denial opinion. (This coverage denial was included in the 2007-2008 Coverage Denial Summary.)

The City of Merced requested a hearing with the Executive Committee to appeal the coverage denial. That hearing took place during the March 27, 2008, Executive Committee meeting, and the Committee took action to deny the City of Merced's appeal on the coverage decision. Ms. Hemker-Smith notified the City of Merced that they had the right to appeal the decision to the full Board of Directors. Ms. Hemker-Smith also informed the City of Merced that should any changes occur to the pleading, the Committee would like the opportunity to reconsider its coverage decision based on that information.

The CSJVRMA received a request from the City of Merced to appeal the coverage denial decision to the full Board of Directors and provided new information on the claim. In consideration of this new information, the Executive Committee at their February 26, 2009, meeting, directed Legal Counsel to offer a compromise agreeing to participate in one-half of the cost of the City of Merced's defense in the case over the City's Self-Insured Retention (SIR), from July 8, 2008, which is the filing date of the fourth amended complaint. Ms. Hemker-Smith offered the compromise in a letter dated March 3, 2009, to the City of Merced. The City of Merced reviewed this matter with their City Council on Monday, March 16, 2009, and requested further clarification as to the CSJVRMA's offer, which was provided. The Defense Funding Agreement was executed in June 2009.

Subsequently, the City of Merced requested the CSJVRMA pay their full limit of \$1,000,000, rather than just one-half, for defense costs. In response to a denial for coverage over and above the compromise in the Defense Funding Agreement, the City of Merced requested another hearing with the Executive Committee on this matter.

Ms. Hemker-Smith reported that thereafter the City began to provide defense counsel reports. However, several issues have arisen since the executed agreement. The CSJVRMA learned from the defense counsel reports and from a meeting with defense counsel in February 2010 that the city has three primary commercial insurers who are participating in the defense. Ms. Hemker-Smith reported the CSJVRMA's coverage is written excess to any other insurance, and the CSJVRMA was not aware of this coverage at the time of the agreement execution.

Ms. Hemker-Smith next reported it has come to legal counsel's attention that the court has severed and phased all the complaints and claims and stayed the water damage claims; the only active litigation at this point is for the contamination claims for which the CSJVRMA does not provide coverage. To date, the CSJVRMA has paid \$500,000, one-half of the defense costs up to \$1M, and the city in their last letter advised the CSJVRMA that they have paid \$700K towards the defense from their own pocket and have not been reimbursed for those costs either by their commercial carriers or by the CSJVRMA. Ms. Hemker-Smith noted this is a total of \$1.2M paid in defense costs by the CSJVRMA and the city, which would fulfill CSJVRMA's \$1M retention for CARMA.

Ms. Hemker-Smith provided the following points found in the City of Merced's appeal. First the city thinks the CSJVRMA should have separate counsel to advise them in closed session because of due process. Ms. Hemker-Smith noted her disagreement with that point. The city's second point is the city thought that under the 2009 Defense Costs Agreement that one-half meant the CSJVRMA was going to pay \$1M, not \$500k, so that the city and the CSJVRMA together would pay a total of \$2M although CARMA's coverage attaches at \$1M. The city's third point is the CSJVRMA can't rely on the other coverage provision and claim the CSJVRMA is excess to other coverage because the CSJVRMA should have known about it, even though it did not at the time the agreement was entered into. The city's fourth point is that there are more covered claims in the complaint than the CSJVRMA seems to recognize.

Mr. Bill Brown, Brown and Winters, provided the City of Merced's position noting the city really needs the CSJVRMA's help. Mr. Brown stated the city believes the CSJVRMA is clearly and contractually bound to this case and the equities are in the city's favor. Mr. Brown also stated that if the Committee continues to deny coverage, it will not save the CSJVRMA any money.

Mr. Brown stated he believes one of the ways this issue has gone off track is due to the idea that the city has other insurance. Mr. Brown reported the city is not fully covered in the absence of the CSJVRMA's participation for the following reasons: 1) The city has already paid out \$700k of its own money that will not be reimbursed; and 2) The insurance carriers do not pay the full rates of the attorneys the city hires. Mr. Brown also reported the city has received a letter from counsel for one of their insurance carriers informing the city they would only pay 50% of whatever the city is out of pocket. Mr. Brown reported in prior litigation the city exhausted a policy by Pacific Indemnity and because those policies are no longer available to the city, the carriers are holding the city responsible for that portion of the claims. In response to a request for clarification, Mr. Brown reported the city bought a variety of insurance policies over the years and due to some serious sewer litigation, the city agreed to exhaust some of the insurance policies so they could pay out and fix the problems. Because those policies are no longer available to the City of Merced, the historical commercial carriers are telling the city they are responsible for 53% of the costs of the current claim. Mr. Brown noted if the city could get the money from someone else, they wouldn't be appealing this issue to the CSJVRMA.

Mr. Brown reported the summary judgment motions will be filed the following week on the contamination causes of actions and counsel believes there is an excellent chance that the contamination portion of the case will resolve in the city's favor; therefore, the gist of the remaining case is flooding. The historical insurance policies are from a time period that would not cover flooding. This flooding occurred in 2006 and the policies were from the 70's and 80's. Mr. Brown stated the real danger to the city in this case is the flooding claim and these types of claims can be devastating and the city is in a position where it believes it will not have any coverage in the very near future. Another large concern is the city does not have any acknowledgement from CARMA that they believe the \$1M SIR is satisfied. Mr. Brown stated CARMA will likely make the argument that it has to be paid by the CSJVRMA. That is a typical argument from an excess insurance carrier. Mr. Brown

reported the city has not had CARMA come forward and agree to pay any portion of the city's defense at this point. Therefore, Mr. Brown stated the city is looking at a situation where it believes it will be devastating to the city if they lose their coverage.

Mr. Brown next produced an enlargement of the language in the defense agreement for the Committee. Mr. Brown stated the agreement says "the city will participate in one-half of the cost of the defense of the city in the Affholter case." Mr. Brown noted it does not say the CSJVRMA will participate up to a level of \$500k. The city received correspondence that is included in the city's brief saying that somehow the City of Merced agreed to raise their SIR to \$500k in this case. Mr. Brown reported the City of Merced would never agree to alter its SIR, noting there was no discussion that the city was going to be paid \$500k. Mr. Brown continued that there was nothing in the agreement language to this effect; it says the city will participate in one-half of the defense and there is no limitation as to the dollar amount. Mr. Brown stated that if the CSJVRMA intended to limit their exposure to \$500k, that needed to be written somewhere in the document.

Mr. Brown also reported there has been no attempt to hide the fact that the city was pursuing insurance money. Mr. Brown continued that the city owes it to the CSJVRMA to notify them and this information has been public record for a long, long time.

Mr. Brown next discussed the role of CSJVRMA legal counsel noting that the CSJVRMA has a person advising them who is serving two duties: one is trying to protect the CSJVRMA and the second is to trying to give an impartial analysis. Mr. Brown stated that in his opinion this is an impossible task for anybody.

Mr. Brown stated the CSJVRMA has two duties; one is to help out their neighbors and the other is to save the assets of the group. Mr. Brown reiterated that he didn't see how the CSJVRMA decision to deny coverage would protect the assets of the group. Mr. Brown stated that this case is going to be expensive and none of the reports from any of the attorneys for any of the public entities suggest that the flood case will be defeated.

Mr. Brown noted the exclusion that has been pointed out, inverse condemnation, only applies if there is no accidental flooding which means the bank did not fail accidentally and as CSJVRMA counsel points out, the allegations are that the bank collapsed accidentally. Secondly, the inverse condemnation exclusion requires an act by a regulatory board. Mr. Brown reported the city council never voted to have this flooding occur. Mr. Brown stated the inverse condemnation exception is for use when a public entity wants to go out and acquire some kind of property and they take an action to do so. This didn't happen. This was a flood, an emergency, a catastrophe. Lastly, Mr. Brown noted the other insurance clause won't assist the CSJVRMA because there isn't going to be other insurance. For the flooding part of the case, there is no argument that the historic insurance does not apply.

Mr. Tim Przybyla, City of Kerman, questioned how much the city has spent so far on attorney costs. Mr. Brown replied the city has paid \$700k, the CSJVRMA has paid \$500k, and he believes there has been some reimbursement by the historical insurance companies. Ms. Jean Schechter, Deputy City Attorney, City of Merced, stated the \$700k was the money

that the city paid prior to ever being entitled to receive any reimbursement or agreement by the carriers or by the CSJVRMA. Ms. Schechter stated the city has spent close to \$2M defending this case and has been involved since 2006 since that was when the floods occurred, and the claims began coming in towards the end of 2006.

Ms. Hemker-Smith inquired if the insurance carriers had reimbursed the city for its payments. Ms. Schechter replied not the \$700k and explained that prior to retaining coverage counsel the city tendered to the carriers in November 2008, and the carriers came onboard with the assistance of coverage counsel from Brown and Winters and agreed to reimburse the city back to November 2008.

Ms. Hemker-Smith inquired as to when the commercial carriers informed the city they would defend. Mr. Brown stated that while he didn't remember the exact date, it was subsequent to the defense agreement with the CSJVRMA. Mr. Brown noted this is one of the critical issues because the CSJVRMA wants to know if the city knew it had other coverage at the time the CSJVRMA agreed to defend. Ms. Schechter stated it was at least a month or two after the city entered into the agreement with the CSJVRMA before the insurance carriers decided to participate.

Ms. Hemker-Smith again asked if the claim had been tendered to the carriers prior to the time the CSJVRMA entered into the agreement. Ms. Schechter replied yes and noted that she had at least verbally advised Mr. Linzie Kramer, Litigation Manager, or Mr. Ken Wilkerson, AIMS, that the city had tendered the claim. Mr. Kramer asked what percentage the commercial carriers finally arrived at when they agreed to participate and if that percentage was in any way influenced by the fact that the CSJVRMA had agreed to contribute also. Mr. Brown replied that the carriers had inquired if anyone else was paying defense costs and they acknowledged that the CSJVRMA had agreed to pay 50% at that time. The carriers then agreed to bridge the 50% gap and since that time, have retreated from that position and are trying to pull coverage. Ms. Hemker-Smith requested clarification on the gap and Mr. Brown replied that if a monthly bill was submitted for \$100k and the CSJVRMA was reimbursing \$50k, the commercial carrier had agreed to pay the other \$50k, more or less.

President Lewis inquired as to the carriers' argument for retreating. Mr. Brown explained that the indemnity policies were exhausted in the prior sewage litigation, so the carriers are saying the city has to take the place of Pacific Indemnity which means the city owes 53% of the commercial coverage. Mr. Brown continued that the carriers believe the environmental claim is bogus and they've blocked summary judgments which are being filed regardless; however, the carriers have said if the summary judgments are successful on contamination, the carriers "will be out of here." Ms. Schechter stated this also creates other issues because the city had excess carriers over Pacific Indemnity and because they are gone, she believes there are other legal issues for the city to be able to even access the excess carriers. Mr. Brown stated the excess carriers have stated they have no obligation to participate because the primary policy has not been exhausted. The city anticipates they are going to hear the same argument from CARMA if the CSJVRMA limits their participation in this case to \$500k because the agreement says the CSJVRMA's limit with CARMA is \$1M.

Ms. Jo Barrick, City of Shafter, asked if CARMA had confirmed this. Mr. Brown replied that Ms. Hemker-Smith knows, as she has been in CARMA meetings, that they have not come in and said they will do anything. Ms. Hemker-Smith asked if the city had asked CARMA to assist. Ms. Hemker-Smith noted that Mr. Brown's letter of May 24, 2010, is the very first time the CSJVRMA is aware that the city has spent \$700k in defense costs. Ms. Hemker-Smith reported she emailed this letter to CARMA's general counsel, Mr. Craig Farmer, and this is the first time he is aware of this also. Ms. Hemker-Smith further stated that she is not aware of when the city paid the \$700k, but that amount combined with the CSJVRMA's payments of \$500k will get the city CARMA's coverage. Mr. Brown replied that CARMA does not acknowledge that. Ms. Hemker-Smith inquired if the city had put that question to CARMA, and Mr. Brown replied they had not as the city's first appeal is to the CSJVRMA. Discussion continued on the topic of directing this question to CARMA now that the \$1M SIR has been paid. Mr. Scott Patterson, Brown and Winters, stated that CARMA has made it clear in writing that they do not have a dollar one defense obligation. In response to questions, Mr. Brown stated he would provide documentation to the CSJVRMA of CARMA's opinion.

Ms. Hemker-Smith inquired if at the time of their opinion, was CARMA aware that the city had spent \$700k on defense costs. Mr. Brown replied that he was not sure, and Ms. Hemker-Smith reiterated that the city should again tender the claim to CARMA.

As a follow up question to the fact that the CSJVRMA does not have record of the CARMA opinion, Mr. Bob Wilburn, City of McFarland, questioned if the communications from City of Merced had been adequate. Ms. Hemker-Smith replied that at the time the CSJVRMA entered into the defense agreement they were not aware that Merced had insurance coverage they were looking to for assistance as the CSJVRMA coverage is excess to all other insurance policies and all other coverage. Ms. Hemker-Smith reported that had the CSJVRMA known this, her recommendation would have been not to enter into a defense agreement until all other coverage had been exhausted because the CSJVRMA is excess to such coverage.

Discussion ensued regarding the limits of CSJVRMA's responsibility to the defense agreement. The CSJVRMA contends the limit is \$500k as that is one half of the coverage limit of the Pooled Liability Program (PLP) with excess coverage (CARMA) handling coverage over \$1M. The City of Merced contends the defense agreement is one of half of the total defense costs; meaning the City of Merced believes the CSJVRMA will pay up to \$1M and the city will pay up to \$1M. Ms. Hemker-Smith reported that she is unsure why the city holds this belief as the limits of the PLP Memorandum of Coverage clearly state the \$1M in coverage. In addition, if the CSJVRMA were to contribute \$1M, there would have been no reason to enter into the defense agreement. Mr. Brown replied that the agreement was necessary because up to that point the CSJVRMA had not agreed to pay anything. After extended discussion, the Committee and the city agreed to disagree on the point of the amount of responsibility of each party in the defense agreement.

Committee members, Ms. Hemker-Smith, and Mr. Kramer all reiterated their request that the city tender this claim to CARMA. Mr. Brown asked if the Committee should even make a decision today or should they wait for CARMA's opinion.

Ms. Workman inquired whether CARMA would contribute to the defense if this was not a CARMA covered claim, and Mr. Kramer replied they would not.

Mr. Dave Elias, City of Fowler, inquired about the exhausted insurance policy previously mentioned that would have assisted in coverage for the current claim. Mr. Elias asked if the city received any benefit from essentially buying back the policy. Ms. Schechter replied the city received approximately \$800k in regards to completely separate litigation from the Affholter claim. Mr. Elias requested clarification, asking if the city did not sell back the policy would they have additional coverage today, and Ms. Schechter replied they would. Ms. Schechter noted that at the time the city thought this was prudent action and that it is easy in hindsight to say they wished the city had not taken this action.

Mr. Brown inquired if there was any precedent with this Committee regarding deferring the decision on the city's appeal until the city tenders the claim to CARMA and learns their opinion. Mr. Brown continued that the city would like to avoid receiving a negative response from the Committee today and going to CARMA and receiving a negative response from them. Mr. Brown stated he could hopefully receive an opinion from CARMA in a few days. Ms. Barrick suggested the city retract their appeal and President Lewis noted they could also defer this issue. Ms. Hemker-Smith noted that the Committee was in this awkward position because the CSJVRMA and CARMA only learned two days prior to the meeting that the city had paid \$700k to their defense. Mr. Brown stated he thought the Committee was in this awkward position because CARMA said they were not going to pay and Mr. Kramer stated that he has not seen the correspondence from CARMA, so he cannot address CARMA's position.

Ms. Schechter stated that the city had a different understanding of this agreement and the reason that the city believes it would be entered into is because the CSJVRMA was still reserving its right on indemnity. At that time, the city had no idea if they would be able to settle this case because that is certainly what the city wants to do, and they have encountered challenges with plaintiff's counsel about getting into mediation. The city is still working towards mediation. Ms. Schechter noted that could have left quite a bit of funding up to the \$1M, so that's why the city believes the CSJVRMA was entering into this agreement. Ms. Schechter continued that the three attorneys that have worked on this case, she, Greg Diaz and Steve Payne, never once discussed with their city council leaving \$500k on the table. So even if CARMA agrees, the city still must decide what they are going to recommend to their council and then go to the council to see if they would consent waiving the \$500k in question. Ms. Schechter advised that obviously the CSJVRMA has a very different position on this issue. Ms. Schechter noted that even if this issue is tabled for now, the city cannot withdraw the appeal because direction from council is to move forward on the appeal, and she is not sure if she would recommend the council waive the \$500k as that is a lot of money to the city. Ms. Hemker-Smith asked Ms. Schechter to bear in mind that since the city has paid over \$500k and the CSJVRMA has paid \$500k, if CARMA picks up

this claim the city would not be waiving anything. Ms. Schechter replied that she does not know what CARMA is going to do, and Ms. Hemker-Smith stated that no one does and that is why it is imperative that the city tender the claim to CARMA.

Bob Wilburn moved to table this issue until the June 24, 2010, Executive Committee meeting.

Mr. Kramer asked if the city was suggesting that under the governing documents where the total exposure of the CSJVRMA in the primary layer is \$1M, and in light of the agreement to pay half of the city's defense costs, that CARMA has an obligation to go past the combined payment of \$1M in attorney's fees. Mr. Kramer continued asking if the city expects that the CSJVRMA will pay \$1M and the City of Merced will pay \$1M before it gets into CARMA's layer. Mr. Brown replied yes. Ms. Schechter replied that she is not an insurance expert or a CSJVRMA expert so maybe her approach is simplistic but, yes, the city was under the assumption that they had to exhaust the lower layer, the \$1M, and from what she has been advised, ordinarily, it can't be exhausted by the city paying the first \$1M or even \$500k to get there. Mr. Kramer replied that was not true; however, he was seeking clarification on the request from the City of Merced. Mr. Kramer asked if the city was looking for the CSJVRMA to pay \$1M and the city to pay \$1M before they tender the claim to anyone else regardless of whether they accept the claim. Ms. Schechter replied no, what the city thought was that when the city hit the \$1M exhausting the CSJVRMA just through defense costs, then CARMA is the next level. The city may end up continuing to pay beyond that. Mr. Kramer asked if the city anticipated the CSJVRMA would pay the \$1M without the city paying any portion of it. Mr. Brown replied no, he believed the city would pay \$1M and then CARMA would pick up; however, he did not believe CARMA would pick up this claim based on their correspondence, but he believed the city and the CSJVRMA would each pay \$1M.

Ms. Barrick pointed out that the CSJVRMA only has a \$1M coverage layer above the city's insurance coverage. Mr. Kramer noted he was very sure the CARMA Board would be happy to hear that the city believes this agreement raises the CSJVRMA's retained limit to \$2M. Mr. Brown stated that is what the city anticipated was proceeding.

Jo Barrick seconded the motion.

Mr. Bob Wilburn reported that he made the motion to table this issue until June because the city was not willing to withdraw their appeal which he believes they should do, and this is a method of ending this discussion. Mr. Wilburn stated whether the Committee votes today or next month, the decision would be the same unless there is any new information presented. Tabling the issue would give the city the opportunity to present the claim to CARMA and this appeal may then be a moot point. Ms. Barrick stated it was a moot point now as the agreement was for 50% of the \$1M coverage limit of the CSJVRMA and the city is now trying to obtain more than \$500k from the CSJVRMA through the defense agreement is not tenable because the city doesn't have more than \$1M of coverage through the CSJVRMA. Ms. Barrick suggested the city may want to withdraw their appeal and resubmit it with new information; otherwise her mind is made up.

Ms. Workman noted that she is unclear on the city's interpretation of the defense agreement because if CARMA picks up the claim at \$1M, the city would only pay \$500k based on the defense agreement which is \$500k less than the city expected to pay.

Ms. Schechter replied that the city would still be out \$500k and everyone reserved their rights on the indemnity issue and the city is still of the opinion that the CSJVRMA's interpretation of the MOC is incorrect as to the inverse exclusion and so there really should be coverage for this claim and the \$500k should potentially not be coming out of the city's pocket. Ms. Hemker-Smith stated the city had agreed to pay this amount. Ms. Schechter reiterated the city reserved their rights under the defense agreement and the city does not believe they agreed to pay \$500k and has a different interpretation of the agreement.

Ms. Schechter stated that the reason she believes the inverse opinion is incorrect is because the opinion states the city is in a flood control district and the city did not enter into any formal agreement with any other public entity regarding the flood control, rather it was an informal working cooperative arrangement between staff without city council approval of any formal agreement and she wanted to make Ms. Hemker-Smith aware of that. Mr. Kramer stated that this was made clear at the meeting he and Ms. Hemker-Smith, along with City of Merced counsel, attended in Mr. Tanaka's office. But that in fact the city had participated with the other agencies in terms of doing repairs and such in the past which would probably be the only string to pull the city in as a defendant, the fact that in the past the city had participated in terms of repairs.

Ms. Barrick asked for clarification on the type of coverage the City of Merced would have from the CSJVRMA; would it be \$1M of coverage less any money coming from insurance companies. Ms. Hemker-Smith replied that the insurance companies would all have to pay out first.

President Lewis requested a roll-call vote. The motion failed with Leon Compton, Tim Przybyla, Dave Elias, Felix Ortiz, and Jo Barrick voting no.

9. CLOSED SESSION

Pursuant to Government Code Section 54956.9 the Executive Committee recessed into closed session at 1:15 p.m. to discuss the following liability claim:

Affholter v. Merced

10. REPORT FROM CLOSED SESSION

Pursuant to Government Code Section 54957.1 the Executive Committee reconvened to open session at 1:35 p.m. Ms. Hemker-Smith reported with regard to the city's appeal and request for coverage up to \$1M under the CSJVRMA's limit, the Executive Committee has denied the city's appeal in all particulars feeling that the intent of the agreement is that each

of the parties, the city and the CSJVRMA, was to pay one-half of the \$1M limit prior to CARMA's coverage.

Ms. Hemker-Smith noted the city has the right to appeal to the full Board of Directors if it wishes and the next meeting of the Board is June 25, 2010. If the city would like to make such an appeal to the full Board, the written request and documentation to be included in the agenda must be to Ms. Mary Ann Reilly, CSJVRMA Board Secretary, by June 9, 2010. Mr. Kramer noted the Board will not meet again, after the June meeting, until October 2010.

11. CLOSING COMMENTS

A. Executive Committee

Mr. Mike Barrows, City of Sonora, reported that the June 2010 Executive Committee and Board meetings will be the last CSJVRMA meetings for Mr. Greg Applegate. Mr. Applegate will retire from the City of Sonora effective August 24, 2010.

B. Staff

Ms. Workman reported that Mr. Cardell has offered to make his home available for the dinner on June 24, 2010. Staff will coordinate catering with Mr. Cardell.

Ms. Workman also reported that to better service the CSJVRMA account, BRS has hired another analyst, Rohit Sharma, to assist the CSJVRMA. Ms. Workman reported Ms. Mary Ann Reilly, Board Secretary, will remain on the account. Ms. Workman noted members will be receiving correspondence from him and a formal announcement will be sent out shortly, however, she wanted to let the Committee know as soon as possible. In response to a member's question, Ms. Workman reported that Ms. Chrissy Mack, who formally worked on the CSJVRMA account, is back working with BRS and is currently servicing the LAWCX and ERMA accounts.

Ms. Workman reported the City of Huron is joining the ERMA program effective July 1, 2010. Ms. Workman also reported that the 5% State of California proposed surcharge added to the Property Program budget will be removed as the surcharge did not pass legislation. Lastly, Ms. Workman reported that the CJPRMA had refunded approximately \$32,000 to the CSJVRMA for their workers' compensation program in which the CSJVRMA participated for three years, as all the claims have now closed and the program can be closed out. Ms. Workman noted this item would hopefully be on the June agendas; however, staff is awaiting clarification on disbursement from the CJPRMA.

12. ADJOURNMENT

The May 27, 2010, CSJVRMA Executive Committee meeting adjourned at 1:42 p.m. by general consent.



Mary Ann Reilly, Board Secretary