

# NJ MUNICIPAL ENVIRONMENTAL RISK MANAGEMENT FUND

## 2016 RISK MANAGEMENT PLAN

### Introduction

In 1984, the commercial insurance marketplace excluded all environmental risk from general liability insurance policies underwritten for public entities and other local units, and for many years subsequent, there had been no coverage available for these exposures. As a result of the liability insurance crisis beginning the following year, New Jersey Public entities developed joint insurance funds and in 1988 formed the Municipal Excess Liability Joint Insurance Fund (MEL) to provide excess casualty coverage for the newly created pools. At that time, the pools were not large enough to address the environmental liability issue and environmental coverage remained a void. However, by 1991, the MEL had grown to over 200 communities and adopted a long-range plan that proposed the establishment of a specialized pool to provide environmental coverage. A study committee was formed in 1992 and enabling legislation was signed into law in October 1993.

The New Jersey Municipal Environmental Risk Management Fund, hereinafter referred to as the “FUND” was established by property/casualty joint insurance funds which seek to provide their member public entities and utility authorities with environmental coverage in six (6) areas:

#### **Coverage A: Third Party Liability**

#### **Coverage B: On-Site Clean-up Costs**

#### **Coverage C: Public Officials Pollution Liability**

#### **Coverage D: De Minimus Abandoned Waste Sites**

#### **Coverage E: Defense Costs**

#### **Coverage F: Storage Tank Systems**

One of the primary objectives of the FUND is the containment of costs through sound environmental control practices, as well as effectively administered claims adjustment practices. To achieve these objectives, the FUND has engaged environmental engineering companies to work closely with member public entities in the establishment of an effective loss control program. The FUND has also arranged with an experienced claims-servicing company and a panel of environmental defense attorneys to provide claims adjustment services. It is the goal of the FUND to expand the range of coverage and services based on experience and evolving needs of member local units.

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## **COVERAGE A - THIRD PARTY LIABILITY**

### **1. Background:**

The activities of public entities may result in an actual or alleged pollution conditions which causes bodily injury or damage to property of others. The extent of the coverage under Coverage A is to provide protection to the local unit for claims triggered by pollution conditions for which the local unit is alleged to be responsible.

### **2. Scope of Coverage:**

To pay on behalf of the Local Unit losses due to liability for bodily injury and/or property damage caused by pollution conditions emanating from a covered location or arising from covered operations.

### **3. POLLUTION CONDITIONS:**

The FUND intends to cover, under Coverage A, the discharge, dispersal, release, escape, migration or seepage of any solid, liquid, gaseous or thermal irritant, contaminant or pollutant, including smoke, soot, vapors, fumes, acids, alkalis, chemicals, hazardous substances, materials or waste materials, on, in, into, or upon land and structures thereupon, the atmosphere, surface water, or groundwater. Waste materials include materials to be recycled, reconditioned or reclaimed.

### **4. Exclusions: (Partial Listing – REFER TO POLICY FOR COMPLETE LIST OF EXCLUSIONS)**

The FUND will not pay nor defend any loss from pollution conditions caused by, due, based upon, arising out of or directly related to any one or more of the following:

- a) Pollution conditions that existed prior to the inception date of this policy**
- b) Injunctive or non-monetary relief**
- c) Lead**
- d) Asbestos**
- e) Workers Compensation, unemployment compensation or disability benefits**
- f) Employment Practices Liability**
- g) Mold or fungi**

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- h) **Contractual Liability, except where coverage would apply in absence of contract**
- i) **Acid rain**
- j) **Automobile, aircraft, watercraft**
- k) **Pollution conditions after location has been sold, leased, or abandoned**
- l) **Chlorine based products**
- m) **Airports**
- n) **Willful, deliberate non-compliance with regulation, statute, or other law**

**5. Limit of Liability:**

\$1,000,000 per loss per local unit

\$1,000,000 annual aggregate per local unit

**COVERAGE B – ONSITE CLEANUP COSTS**

**1. Background:**

Public property is subject to being polluted by third parties such as an illegal toxic dumping in a park. The intent of the coverage, under Coverage B, is to provide protection to the public entity for the costs of remediation triggered by pollution conditions caused by an unrelated third party on any public lands of the local unit.

**2. Scope of Coverage:**

Emergency Remediation of pollutants deposited by third parties:

\$ 50,000 per loss per local unit

\$ 100,000 annual aggregate per local unit

**Note:** Local unit will be required to make application to the NJ Spill Fund for reimbursement. Reimbursement, if any, to be paid back to the FUND.

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## **COVERAGE C - PUBLIC OFFICIALS POLLUTION LIABILITY**

### **1. Background:**

The acts or omission by public officials that may result in claims by third parties of bodily injury or property damage related to environmental conditions are excluded under conventional Public Officials Liability coverage. It is the intent of Coverage C to provide protection to the officials of the local unit for such claims.

### **2. Scope of Coverage:**

Pay on behalf of the local unit and its public officials that are legally obligated to pay as a result of pollution conditions caused by the wrongful acts of Public Officials.

### **3. Limit of Liability:**

\$1,000,000 per loss per local unit

\$1,000,000 annual aggregate per local unit

## **COVERAGE D - DE MINIMUS ABANDONED WASTE SITES**

### **1. Background:**

Public entities, through their various departments and refuse collection responsibilities, have in the past contributed waste to hazardous waste landfills. Through actions by the EPA and/or NJDEP, efforts are being made to remediate all hazardous waste sites and to assign associated costs to potentially responsible parties (PRPs) who likely contributed to the problem. In many cases it is unclear who was truly responsible for the hazardous waste that was sent. Public entities have been identified as general contributors with potentially “deep pockets” and therefore, under CERCLA guidelines of strict joint and several liability, could be forced to contribute a significant amount to the clean-up. Contributors who have not been specifically identified as major contributors, however, have often been in a position, particularly when mediated as a group, to negotiate an equitable settlement with the EPA, NJDEP and major PRP’s to indemnify them from further liability. The intent of the FUND, under Coverage D, is to provide a means for insureds that are deemed minor contributors (De Minimus) to an abandoned waste site to negotiate reasonable settlements. To a significant extent, this is part of a defense strategy.

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**2. Scope of Coverage:**

The FUND, under Coverage D, will pay on behalf of the insured(s) for the negotiated settlement amount, up to policy sub-limits, to fund remedial efforts and a settlement agreement that will indemnify the insured(s) from future liability at a Federal or State Abandoned Toxic Waste Site. Legal defense shall be included subject to the policy limits.

**3. Abandoned Waste Site & Minor PRP Designation**

The FUND intends to cover only those events where the local unit is clearly identified as a de minimus (PRP) contributor of the specified hazardous waste at a Federal or State Abandoned Toxic Waste Site where the local unit was not aware, nor given actual or constructive notice that the pollution conditions existed prior to the inception date of coverage, nor that any elected or appointed official of the local unit knew or could have reasonably foreseen that such pollution conditions could have been expected to give rise to a claim.

**4. Exclusions: (Partial Listing - Refer to Policy for all Exclusions)**

The FUND will neither pay nor defend any loss from an abandoned waste site buy-out agreement caused by, due to, based upon, arising out of or directly related to any one or more of the Exclusions listed under Section IV of the policy.

**5. Conditions:**

- a) Legal services will be provided solely by the approved FUND attorney(s).
- b) The local unit must agree to participate in any group settlement proceedings deemed appropriate by the FUND attorney(s).
- c) The FUND must agree to the negotiated settlement.
- d) The local unit and the FUND must be indemnified from further liability at site as a result of payment.

**6. Limit of Liability:**

\$50,000 per local unit

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## **COVERAGE E – DEFENSE COSTS**

### **1. Background:**

Public entities may be faced with future environmental litigation arising from past and present operations including those for the disposal of trash, sludge and other pollutants. While the FUND provides coverage for claims arising from pollution conditions occurring on owned property after inception and for storage tank systems, no coverage under Coverages A & B is offered for the past pollution event or for off premise environmental liability.

### **2. Scope of Coverage:**

The FUND will provide legal representation to the local unit arising from any pollution conditions to which this policy applies.

### **3. Exclusions:** SEE EXCLUSIONS UNDER SECTION IV of the policy.

### **4. Conditions:**

- a) Legal service provided only for a claim to which this policy applies.
- b) Legal service provided solely by approved FUND attorney(s).

### **5. Limit of Liability:**

\$500,000 per loss per local unit

\$500,000 annual aggregate per local unit

## **COVERAGE F - STORAGE TANK SYSTEMS COVERAGE (STANDALONE POLICY FORM)**

### **1. Background**

EPA and the NJDEP have existing regulations requiring tank owners to provide financial responsibility for the pollution exposure of underground storage tanks. The intent of the FUND, under Coverage F, is to fulfill the requirements as well as provide coverage for above ground storage tanks. The policy form itself is subject to EPA/NJDEP acceptance.

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## **2. Scope of Coverage:**

The FUND will pay on behalf of the local unit, sums, which the local unit shall be legally obligated to pay as damages as a result of bodily injury or property damage, a cleanup caused by a release arising from the operation of an underground storage tank at any scheduled site. The claim must be first made against the local unit during the policy period and reported to the FUND during the policy period. Above ground storage tanks must comply with all underwriting requirements established by the fund, including compliance testing for above ground storage tanks with underground piping. The deadline for compliance testing was 7/1/2013. After 7/1/2013, new EJIF members AND current members that acquire the described system must demonstrate compliance with the FUND standards in order to secure coverage for that system.

There is a biennial testing requirement for those systems that previously qualified for coverage during the initial testing period.

This policy is site specific: Only scheduled underground storage tanks at scheduled locations are covered.

No coverage applies to underground storage tanks that are rejected, unknown and/or unscheduled. These tanks may be eligible for up to \$10,000 in remediation expenses, subject to the approval of the FUND.

## **3. Accidental Release:**

The FUND intends to cover only those events emanating from any sudden or non-sudden release of petroleum arising from the operation of a storage tank at any scheduled site that results in a need for clean-up and/or compensation for bodily injury or property damage neither expected nor intended by the insured.

## **4. Exclusions: (Partial Listing - Refer to Policy for all Exclusions)**

The coverage does not apply to:

- 1) Any claim arising from any knowingly unlawful, dishonest, fraudulent, criminal, malicious or wrongful act or omission committed by or at the direction of any supervisor, department head, elected or appointed official of the local unit.
- 2) Any claim with respect to which the local unit was aware of non-compliance with any applicable statute, regulation, instruction or court order relating to the petroleum tanks.

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**Storage Tank Exclusions continued-**

- 3) Any claim arising from any accidental release at any place other than scheduled sites.
- 4) The cost of installation, replacement or repair of any storage tank or any other receptacle including the cost of excavation or backfilling, piping and valves, all leak detection systems and all containment systems and all monitoring systems.
- 5) Any routine maintenance, measurement or testing expense which is not occasioned by a pollution event.
- 6) Any fines, exemplary or punitive damages, statutory or other penalties, trebled or other multiple damages.
- 7) Any unregulated tanks that exceed the 20 year age limit as of January 1, 2014.

**5. Limit of Liability:**

\$ 1,000,000 each incident -Coverage A

\$ 1,000,000 each corrective action -Coverage B

\$ 1,000,000 Aggregate Limit

\$ 100,000 Aggregate Defense Limit

\$ 10,000 Sub Limit – Undisclosed Tanks Per location, Per Policy/Fund Year

**RISK RETAINED BY THE FUND**

The Fund has contracted with an Insurer to provide an excess of loss agreement. The intention is to provide aggregate budget protection. The limits afforded are **\$8,000,000 aggregate limit** per year that attaches after retention of **\$3,000,000**.

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## **AMOUNT OF RESERVE TO BE ESTABLISHED**

A dollar reserve is established by the FUND as to its potential exposure on a given claim based on the severity of the damages adjusted by the limits of legal liability.

All elements of the liability claim investigation are considered in establishing a reserve after the FUND is notified of its potential exposure. While conditions may change as further information becomes available, “stair stepping” or frequent changes in reserves is to be avoided.

Claim reserves are subject to regular review by the FUND’s Executive Director/Administrator, Attorney, Underwriting Managers, Fund Engineer, Fund Commissioners/Executive Committee and Claims Servicing Company Reserves on large or unusual claims are also subject to review by the claims departments of the commercial insurance companies or reinsurance companies providing excess coverage to the FUND (if any).

## **ASSESSMENTS**

### **A. Budget Preparation:**

- 1) In or before September of each year, the FUND shall prepare the budget for the upcoming calendar year. The budget shall identify the proposed items and amounts of expenditure for its operations, including an acquisition cost not to exceed six percent (6%), the anticipated amounts and sources of assessments and other income to be received during the calendar year and the status of the self insurance or loss retention accounts.
- 2) The budget shall be reviewed by an Actuary who shall comment on its adequacy and shall recommend changes, as appropriate.

### **B. Budget Adoption:**

- 1) Not later than November of each year, the Fund Commissioners/Executive Committee shall adopt by majority vote, the budget for the FUND’s operations for the coming calendar year.
- 2) A copy of the FUND’s proposed budget as changed to reflect the actuary report shall be sent to each participant at least two (2) weeks prior to the time scheduled for its adoption. No budget or amendment shall be adopted until a hearing has been held giving all participating local units the opportunity to present comments or objections.

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- 3) An adopted budget may be amended by majority vote of Fund Commissioners/Executive Committee after giving the participants two (2) weeks advance written notice and conducting a hearing on the proposed amendment.
- 4) A copy of the adopted budget and any amendment shall be filed within thirty (30) days of its adoption with the governing body of each participating local unit, the Commissioner of Insurance and the Commissioner of the Department of Community Affairs.

**C. Annual Assessment:**

- 1) The annual assessment of each participant shall be its pro rata share of the budget for the upcoming year for each line of coverage as computed by the actuary.
- 2) The calculation of pro rata shares shall be based on each participant's composite premium by fund year for that line of coverage.
- 3) The total amount of each participant's annual assessment shall be certified by a majority vote of the Fund Commissioners/Executive Committee to the governing body of each participant at least one month prior to the beginning of the next calendar year.
- 4) The annual assessment shall be paid to the FUND in two (2) installments, to be determined by the Fund Commissioners/Executive Committee, which shall conform with N.J.A.C. 12:15-2.15(a).
- 5) The Treasurer shall deposit each participant's assessment into the appropriate accounts, including the administrative account, the claim or loss retention trust fund accounts, or any other account as permitted by law.
- 6) If a participant becomes a member of the FUND or elects to participate in a line of coverage after the start of the fund year, such participant's assessments and supplemental assessments shall be reduced in proportion to that part of the year which has elapsed.

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**D. Supplemental Assessments:**

1) The Fund Commissioners/Executive Committee shall, by majority vote, levy upon the participants additional assessments wherever needed or so ordered by the Commissioner of Insurance to supplement the FUND's claim, loss retention or administrative accounts to assure the payment of the FUND's obligations.

a) All supplemental assessments shall be charged to the participants by applicable fund year and shall be apportioned by that year's earned assessments for that line of coverage.

b) All participants shall be given thirty (30) days advance written notice of the FUND's intention to charge an additional assessment, and the FUND shall conduct a hearing before adopting the supplemental assessment.

c) Participants shall have thirty (30) days to pay the FUND from the date any supplemental assessment is adopted.

2) The FUND shall submit to the Commissioner of Insurance and the Commissioner of Community Affairs a report of the causes of the FUND's insufficiency, the assessments necessary to replenish it and the steps taken to prevent a reoccurrence of such circumstances.

**E. Failure or Refusal to Provide Required Assessments:**

Should any member fail or refuse to pay its assessments or supplemental assessments, or should the FUND fail to assess funds required to meet its obligations, the Chairperson, or in the event by his or her failure to do so, the custodian of the FUND's assets, shall notify the Commissioner of Insurance and the Commissioner of Community Affairs. Past due assessments shall bear interest at the rate of interest to be established annually by the Fund Commissioners/Executive Committee.

**F. Insolvency and/or Bankruptcy of Fund Members**

The insolvency or bankruptcy of a participant does not release the FUND, or any other member, of joint and several liability for the payment of any claim or liability incurred by the member during the period of its membership, including, but not limited to, being subject to and liable for supplemental assessments.

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## **LOSS ADJUSTMENT PROCEDURES**

The FUND will be presented with various claims against the coverage provided to the participating public entities. These claims can be large or small, justified or frivolous. The primary function of the Fund Attorney and Claims Servicing Company will be to investigate each claim for the FUND and make a determination as to the validity, scope and value of the claim.

While the flavor of the investigation will differ per line of coverage, there are basic factors which are common to all liability claim investigations. The following factors will be addressed by the Claims Servicing Company when handling a liability claim:

### **A. Coverage:**

The first step in claim investigation is the verification of coverage.

### **B. Facts:**

A complete and thorough knowledge of the accident or occurrence will be the criteria on which liability is determined.

### **C. Liability:**

Is there validity to the claim? Careful consideration must be given to this question. An analysis of the facts and applicable laws will determine the negligence factor.

### **D. Injuries:**

The Claims Servicing Company must gather all information with respect to the extent of injuries and property damage sustained by the claimant(s). An early determination as to the extent of damages may help mitigate exposure and damages.

### **E. Reserves:**

A careful examination of the preceding factors will help the claims service company to establish an intelligent loss reserve. It is the best estimate of the FUND's exposure with respect to each loss.

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**F. Claims Control:**

The FUND's liability claim handling process goes beyond what would normally be considered insurance industry standards. The central theme is teamwork. Teamwork among the Executive Director/Administrator, Fund Attorney and other professionals, the Claims Servicing and Loss Control companies and the member public entities. The ultimate goal is to protect the FUND by settling claims fairly but at the lowest possible costs.

**G. Legal Defense and Fees:**

The FUND has established procedures to provide quality defense of claims and monitor the defense procedures and costs. These procedures include

- 1) Establishing a list of approved defense attorneys. This list includes attorneys with special qualifications, previous experience and a reasonable fee structure. It is expected that the approved defense attorneys will provide the highest quality defense for the FUND at the most reasonable cost.
- 2) The FUND will monitor the activities of the defense attorneys and the Fund Attorney may direct the amount of legal discovery to be conducted in an effort to control costs. The Fund Attorney actively maintains control on legal defense activity and expense.

**NOTE:** Each local unit participating in the FUND is provided with a claim manual or claim packet explaining how and where to report claims.

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