

# Agenda Item # 11

## ITC Program Overview



**To:** Board of Directors, ABAG PLAN Corporation  
**From:** Kenneth Moy, Program Counsel  
**Date:** June 12, 2013  
**Re:** Inverse Tail Claim Program – Status Report

**Requested Action:** Accept report as presented.

**Summary:** On June 30, 2013 the Inverse Tail Claim (ITC) Program will close for active claims. It is also the final due date for member cities to report all potential ITC claims for inclusion in the program as warranted claims.

**Background and Discussion:** On February 2, 2010, the PLAN Board adopted an Inverse Tail Claim Policy that established the ITC Program. Member cities who have been presented claims with dates of occurrence prior to July 1, 2008 that would have otherwise been excluded as regulatory inverse claims (ITCs) under section IV.G and H of the Memorandum of Coverage – Liability for FY 2008-09 (FY 2008-09 MOC) can present such claims for inclusion in the ITC Program.

Once a city submits any ITC claim into the program, it must enter all ITCs into the program. There is a \$1 Million limit on total claim payments to any city under the ITC Program. Payments are limited to defense costs only. The Board authorized an initial ‘reserve’ of \$7 Million for the entire ITC Program. PLAN accounted for \$7 million dollars of potential ITC exposure within the SIR Fund (excess surplus). The ITC program officially closes on June 30, 2013.

Following is the PLAN inventory of open claims by member, including incurred cost to date:

<u>Member</u>	<u>Claimant (Claim #)</u>	<u>Incident</u>	<u>Reported</u>	<u>Incurred</u>
So. San Francisco	Metwally Trust (071389)	3/4/2001	7/18/2011	\$275,050
Portola Valley	Douglas, Michael (070007)	7/9/2001	11/02/2009	\$60,555
East Palo Alto	Vierra Enterprises (070185)	12/10/2007	1/6/2010	<u>\$250,001</u>
<b>Total Open Incurred</b>				<b>\$585,605</b>

Since program inception, we have recorded 7 claims in the ITC program. Total incurred on all reported ITC claims since inception is **\$1,808,092**. The total exposure of the ITC program has fallen well below the preliminary assumptions and expectations (\$7 million within SIR Fund).

The ITC program includes provisions for cities to report potential ITC claims that have not yet been asserted (warranted claims) by June 30. If a warranted claim is asserted after June 30, it will be covered under the ITC program. ABAG staff notified all members of the June 30 closing date for reporting active ITCs and for reporting warranted claims. No warranted claims have been reported as of the date of this memorandum.

Since the due date falls on a Sunday, we will accept your report of warranted claims up to the close of business on Monday, July 1, 2013.



February 27, 2013

A B A G P L A N  
C O R P O R A T I O N

Dear ABAG PLAN Directors:

The ABAG PLAN Corporation Board of Directors (Board) adopted Resolution 01-2010 at its February 2, 2010 meeting, establishing the Inverse Tail Claim Program (ITC Program). This letter begins the closure period for the ITC Program.

A trial court decision in 2005 created a potential loophole in the ABAG PLAN Program's exclusion of inverse condemnation claims. To close the potential loophole, the Board:

- o revised the Memorandum of Coverage to strengthen the exclusion of inverse condemnation claims effective July 1, 2008, and
- o created an Inverse Tail Claim Program (ITC Program) for claims based on the member's exercise of its land use authority prior to July 1, 2008 (inverse tail claim or 'ITC').

Coverage under the ITC Program is limited in two major ways: (a) it covers only the member's costs of defending the claim and (b) the total amount that can be paid to a member for all ITC claims is limited to One Million Dollars (\$1,000,000).

The ITC Program is also time-limited and will be closed on June 30, 2013. If your jurisdiction has received a claim for damages based on a land use decision which occurred prior to July 1, 2008, the claim should be submitted to ABAG via the ITC Reporting Form along with the ITC Program Waiver.

The ITC Program also allows your jurisdiction to present 'Warranted Claims' for possible inclusion in the ITC Program after the July 1, 2013 deadline. A Warranted Claim consists of circumstances that could give rise to a claim for damages based on your jurisdiction's land use decision prior to July 1, 2008. To preserve your right to present a Warranted Claim, your jurisdiction must submit the ITC Report of Warranted Claim to ABAG on or before June 30, 2013. Thereafter, if a Warranted Claim is made against your jurisdiction, it can presented to ABAG for coverage under the ITC Program.

Attached are the following documents for your reference and use:

- ABAG PLAN Corporation Board of Directors Resolution 01-2010
- ITC Reporting Form
- ITC Program Waiver
- ITC Report of Warranted Claim



# ASSOCIATION OF BAY AREA GOVERNMENTS

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Representing City and County Governments of the San Francisco Bay Area



ABAG

## A B A G P L A N C O R P O R A T I O N

If you would like an electronic version of the 'ITC Reporting Form', or the 'ITC Report of Warranted Claim' please request them from Kim Chase the ABAG PLAN Administrative Assistant and she will email you the soft copy of these documents for reporting purposes.

She can be reached at  
KimC@abag.ca.gov  
510) 464-7962

Please contact myself, or Kenneth Moy (x7914) with any questions.

Jim Hill, ARM-P  
Risk Management Officer  
ABAG PLAN Corporation  
(510) 464-7969 Phone  
(510) 464-7989 Fax



**RESOLUTION 01-2010**

**BOARD OF DIRECTORS**

**ABAG PLAN CORPORATION**

Whereas, the self funded municipal liability pool commonly know as the ABAG PLAN Program has been operating since 1986 under the auspices of the Association of Bay Area Governments (ABAG) and the ABAG PLAN Corporation (PLAN), and

Whereas, in 2005 one member of the program sued ABAG and PLAN and obtained a decision (Decision) that allowed the member to recover defense costs for two claims, each of which included a cause of action for inverse condemnation based on the member's exercise of, or failure to exercise, its land use authority (regulatory inverse condemnation claims), and

Whereas, prior to the Decision, the ABAG PLAN Program had denied coverage for regulatory inverse condemnation claims and the members had acceded to all such denials, and some members forbore from tendering such claims, and

Whereas, after the Decision, the PLAN approved changes to the ABAG PLAN Program intended and designed to exclude any regulatory inverse condemnation claims with a date of occurrence later than July 1, 2008, and

Whereas, PLAN anticipates that members will tender regulatory inverse condemnation claims with dates of occurrence prior to July 1, 2008 ("inverse tails claim" or ITC) to PLAN for possible coverage under the ABAG PLAN Program, and

Whereas, PLAN is required to respond to such tenders, and

Whereas, case-by-case responses to tenders of ITCs will prolong and exacerbate the ongoing controversy among the members over how to respond to such tenders with the attendant risks of more litigation between members and PLAN and/or the dissolution of the ABAG PLAN Program, and

Whereas, legally binding all members to a specific method for resolving ITCs requires agreement by the governing bodies of each and every member, which the PLAN has deemed to be impracticable, and

Whereas, the Board of Directors of PLAN participated in an interest based facilitation on November 4, 2009 to devise a strategy for handling ITCs, as described in Attachment 1, including exhibits, to this resolution, and

Whereas, as a result of the facilitation, the Board of Directors concluded that:

- (a) the common interest of the members in continuing the ABAG PLAN Program
- (b) justified the adoption and implementation of a strategy to handle ITCs
- (c) which offers each member with ITC(s) the certainty of coverage for such claim(s) and
- (d) limits the coverage to an amount that is potentially less than that which a member might be able to obtain by successfully litigating each ITC with results similar to the Decision
- (e) in return for avoiding the uncertainty and costs inherent in litigation, and the possibility that such litigation, or multiple litigation, would lead to a dissolution of the ABAG PLAN Program, and

Whereas, as a result of the facilitation, the Board of Directors also concluded that:

- (A) the common interest of the members in continuing the ABAG PLAN Program
- (B) justified the adoption and implementation of a strategy to handle ITCs
- (C) which is dependent on members without ITCs accepting some of the impacts of providing more coverage for ITCs than PLAN would provide if it were to successfully defend the denial of coverage for each ITC
- (D) in return for avoiding the uncertainty and costs inherent in litigation, and the possibility that such litigation, or multiple litigation, would lead to a dissolution of the ABAG PLAN Program.

Now therefore be it resolved that the Board of Directors of the ABAG PLAN Corporation hereby authorizes the following components of a comprehensive program to manage the ABAG PLAN Program's exposure to ITCs (ITC Program):

- (1) Set aside Seven Million Dollars (\$7,000,000) from the ABAG PLAN Program "Self-Insurance Retention Fund" for the purpose of funding the ITC Program with periodic reviews, and possible increases in the set aside, by the Board of Directors to ensure adequate funding of the ITC Program.
- (2) To determine whether a claim is an ITC for the purpose of participating in the ITC Program, the exclusions set forth in sections IV.G and IV.H of the Memorandum of Coverage – Liability dated July 1, 2008 (MOC) will be applied to all claims with dates of occurrence prior to July 1, 2008 that are tendered to PLAN after that date. A claim that is excluded by these sections will be deemed an ITC. If a member tenders a claim as an ITC, it will be deemed an ITC upon a majority vote of the Executive Committee with the proviso that if a representative of the member submitting the claim is on the Executive Committee, that representative cannot vote. If there is a dispute as to whether a tendered claim is an ITC, the Chair of the Board of Directors of the ABAG PLAN Corporation will appoint an *as hoc* committee comprised of representatives from no less than three (3) members to determine whether the claim is an ITC for the purposes described in this paragraph.

(3) In response to the tender of an ITC, PLAN will offer to pay defense costs (as defined in the MOC) that exceed the member's deductible, subject to the limitations and conditions of the ITC Program.

(4) The offer described in (3) above will be conditioned on the member agreeing to accept the amounts payable under the ITC Program as fully discharging the PLAN's and ABAG's obligations to the member for defending or indemnifying said member for all of the member's ITCs, known and unknown, and regardless of whether an ITC was actually tendered to PLAN.

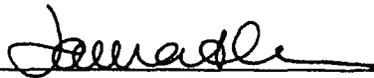
(5) The amount paid under the ITC Program to any one member, including all amounts paid to any entity(ies) claiming coverage through said member, shall be limited to One Million Dollars (\$1,000,000).

(6) Terminate the ITC Program effective July 1, 2013 so that, except for Warranted Claims described in (7) below, neither PLAN nor ABAG will have any liability or obligation to defend or indemnify a member for an ITC tendered on or after that date.

(7) Prior to July 1, 2013, a member may notify PLAN of an unasserted ITC by describing the property and the occurrence that gives rise to the ITC (Warranted Claim). If a member tenders a Warranted Claim to PLAN after July 1, 2013, PLAN will process the claim in accordance with the terms of the ITC Program. The process described in (2) above used to determine whether a claim is an ITC will be used to determine whether a claim is a Warranted Claim.

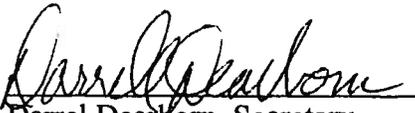
(8) For the purposes of a member's experience modification factor that is used to calculate the member's premiums, the date of occurrence for each ITC or Warranted Claim is deemed to be the date on which the claim is tendered to PLAN and the amounts paid to the member under the ITC program for each such claim will remain in the member's experience modification factor for five (5) years.

The foregoing adopted by Roll Call Vote at a special meeting of the Board of Directors held on February 2, 2010.

  
 \_\_\_\_\_  
 Laura Allen, President

**Certification of Board of Directors Approval**

I, the undersigned, the appointed and qualified Secretary of the ABAG PLAN Corporation (Corporation), do hereby certify that the foregoing resolution was adopted by the Board of Directors of the Corporation at a duly called meeting held on the 2<sup>nd</sup> day of February 2010.

  
 \_\_\_\_\_  
 Darrel Dearborn, Secretary

Roll:            17    Ayes            6    Nays

<u>Board Member</u>	<u>Jurisdiction</u>	<u>Aye</u>	<u>No</u>
Bronda Silva	American Canyon	X	
Clark "Gus" Guinan	Burlingam	X	
Connie Jackson	San Bruno	X	
Emma Karlen	Milpitas	X	
Gary Broad	Ross	X	
Gary Galliano	Newark	X	
Greg Larson	Los Gatos		X
Heather McLaughlin	Benicia	X	
J. Logan	Los Altos	X	
Jeff Maltbie	San Carlos		X
Jesse Takahashi	Campbell	X	
Julie Carter	Dublin	X	
Kathy Leroux	Hillsborough	X	
Kathy Mount	South San Francisco	X	
LaRae Brown	Millbrae	X	
Laura Allen	Colma	X	
LeeAnn McPhillips	Gilroy		X
Mark Joseph	Suisun City	X	
Michael Dolder	Half Moon Bay	X	
Michael Taylor	Saratoga		X
Rebecca Burnside	Foster City	X	
Shawn Mason	San Mateo		X
Susan George	Woodside		X

ABAG PLAN CORPORATION

ITC PROGRAM

REPORT FORM

Jurisdiction: \_\_\_\_\_

Name of Claim: \_\_\_\_\_

Nature of Claim: \_\_\_\_\_

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\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Contact Person for City/Town: \_\_\_\_\_

Please attach the document that best describes the claim (Notice of Claim, Complaint, etc.).

By submitting this form, the City/Town of \_\_\_\_\_ states its intent in having the above described claim included in the ITC Program.

Date: \_\_\_\_\_

\_\_\_\_\_  
Signature

Return to: [Kennethm@abag.ca.gov](mailto:Kennethm@abag.ca.gov)  
Or  
Kenneth Moy  
ABAG  
PO Box 2050  
Oakland, CA 94604-2050

## SETTLEMENT, RELEASE AND WAIVER OF EXISTING AND FUTURE

### INVERSE TAIL CLAIMS UNDER ABAG PLAN PROGRAM

The Association of Bay Area Governments (ABAG), the ABAG PLAN Corporation (PLAN) and the City/Town of \_\_\_\_\_ (Member) have entered in this Agreement effective \_\_\_\_\_, 201\_; ABAG, the PLAN and Member are also referred to herein as the "Parties".

#### Recitals

- A. The self funded municipal liability pool commonly known as the ABAG PLAN Program has been operating since 1986 under the auspices of ABAG and PLAN, pursuant to the Risk Coverage Agreement, as amended, dated July I, 1992, to which the Member is also a party.
- B. In 2005 one member of the ABAG PLAN Program sued ABAG and PLAN and obtained a judicial decision (Decision) that allowed the member to recover defense costs for two claims, each of which included a cause of action for inverse condemnation based on the member's exercise of, or failure to exercise, its land use authority (regulatory inverse condemnation claims).
- C. Prior to the Decision, the ABAG PLAN Program had denied coverage for regulatory inverse condemnation claims and the members had acceded to all such denials, and some members forbore from tendering such claims.
- D. After the Decision, PLAN approved changes to the ABAG PLAN Program intended and designed to exclude any regulatory inverse condemnation claims with a date of occurrence of July 1, 2008 or later.
- E. ABAG and PLAN anticipate that members may tender regulatory inverse condemnation claims with dates of occurrence prior to July 1, 2008 ("inverse tail claim" or ITC) to PLAN for possible coverage under the ABAG PLAN Program.
- F. ABAG and PLAN will be required to respond to such ITC tenders.
- G. On February 2, 2010, PLAN authorized the implementation of a comprehensive program to manage the ABAG PLAN Program's exposure to ITCs (ITC Program) which is more fully described in the attached Resolution 01-2010 of the Board of Directors of PLAN.

#### Terms and Conditions

1. The Member has tendered the matter of \_\_\_\_\_ (Claim) and the parties agree that the Claim is an ITC that is eligible for inclusion in the ITC Program.

2. The Member hereby agrees to participate in the ITC Program and affirms that it has read and understands the terms and conditions of the ITC Program as described in Resolution 01-2010.

3. The Member agrees to, and hereby does waive, relinquish, and dispose of all liability of ABAG and PLAN, jointly or severally, to the Member and to each of the assigns of the Member, and to any other person or entity that might now or in the future have a claim against ABAG and PLAN, jointly or severally, for benefits they should have received under the ABAG PLAN Program, or for the difference in the benefits they should have received under the ABAG PLAN Program and the benefits they actually received under the ITC Program.

4. Should any further claim be made by any person or entity to which ABAG and PLAN, jointly or severally, might be liable, directly or indirectly, as a result of the Member's participation in the ITC Program, the Member, for itself and on behalf its assigns, agrees to and will defend, and hold harmless and indemnify ABAG and PLAN, of and from any and all liability for such claim, including all costs, expenses and attorneys' fees in defending such claim.

5. The Member agrees to include any and all of its other ITCs, whenever presented by the claimant, in the ITC Program and further agrees that any and all other ITCs will be subject to the provisions of this Agreement and the ITC Program.

6. The Member agrees that the determination of whether a claim is an ITC will be conclusively determined through the process described in Resolution 01-2010.

7. The Parties understand and agree that all rights under Section 1542 of the Civil Code of California and any similar law of any state or territory of the United States are hereby expressly waived. Said section reads as follows:

“Certain claims not affected by general release. A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.”

8. The Parties agree that the other members of the ABAG PLAN Program are third party beneficiaries of this Agreement which benefits include, without limitation, the general release in section 3, the defense, hold harmless and indemnity in section 4 and the waiver in section 7.

9. The Member further declares and represents that no promise, inducement or agreement not herein expressed has been made to the Member with respect to the Claim or any of the other matters covered under this Agreement.

10. ABAG and PLAN agree to timely make all payments provided for under the ITC Program and to otherwise implement the ITC Program as described in Resolution 01-2010.
11. The Parties agree that the only remedy for a breach of this Agreement is injunctive relief.
12. The parties represent and warrant that the signatories to this Agreement are duly authorized to execute it on behalf of the Member, ABAG or PLAN, as the case may be.
13. The Parties agree and acknowledge that the terms of this Agreement constitute a full and complete compromise of matters involving ITCs; that none of the tender of the ITCs, payments made under the ITC Program nor any negotiations over this Agreement (including all statements, admissions, or communications) by the Parties and their attorneys and representatives shall be considered admissions by one of them; and that no past or present wrongdoing on the part of any of them shall be implied by such actions, payment or negotiations.
14. Integration Clause. This Agreement herein represents the entire agreement and understanding among the Parties hereto with respect to the subject matter of this Agreement, and supersedes any and all prior oral and written agreements and understandings, and no representation, warranty, condition, understanding or agreement of any kind with respect to the subject matter hereof shall be relied upon by the Parties unless incorporated herein. This Agreement may not be amended or modified except by an express written agreement signed by the Parties.
15. In entering into this Agreement, each Party represents that it has relied upon the legal advice of its own attorneys, who are the attorneys of its own choosing. Each Party further represents that it has read the terms of this Agreement and that they have been completely explained by its attorney, and that those terms are fully understood and voluntarily accepted by each Party.
16. The Parties and their counsel have reviewed this Agreement and participated in its drafting. Accordingly, the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of this Agreement.
17. In the event that one or more of the provisions, or portions thereof, of this Agreement is determined to be illegal or unenforceable, the remainder of this Agreement shall not be affected thereby and each remaining provision or portion thereof shall continue to be valid and effective and shall be enforceable to the fullest extent permitted by law.
18. This Agreement is entered into in the State of California and shall be construed and interpreted in accordance with its laws.

19. This Agreement may be executed in counterparts, each of which shall be deemed to be an original. Such counterparts, when taken together, shall constitute but one Agreement.

IN WITNESS WHEREOF, the Parties have executed this Agreement this \_\_\_\_ day of \_\_\_\_\_, 201\_.

ASSOCIATION OF BAY AREA GOVERNMENTS

By: \_\_\_\_\_  
Ezra Rapport, Executive Director

Date: \_\_\_\_\_

ABAG PLAN CORPORATION

By: \_\_\_\_\_  
Heather McLaughlin, President

Date: \_\_\_\_\_

MEMBER

By: \_\_\_\_\_

Date: \_\_\_\_\_

ABAG PLAN CORPORATION  
ITC PROGRAM  
REPORT of WARRANTED CLAIM

City/Town: \_\_\_\_\_

Description/Address of Property: \_\_\_\_\_

Occurrence that could support ITC Claim:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Contact Person for City/Town: \_\_\_\_\_

By submitting this form, the City/Town of \_\_\_\_\_ states its intent in having the above described claim included in the ITC Program if it is made against the City/Town.

Date: \_\_\_\_\_

\_\_\_\_\_  
Signature

Return to: Kennethm@abag.ca.gov  
Or  
Kenneth Moy  
ABAG  
PO Box 2050  
Oakland, CA 94604-2050

## ITC Closure Letter's

Member City	Date Rec'd
American Canyon	2/28/2013
Atherton	3/4/2013
Benicia	2/28/2013
Burlingame	3/4/2013
Campbell	2/28/2013
Colma	3/1/2013
Cupertino	3/1/2013
Dublin	2/28/2013
East Palo Alto	3/1/2013
Foster City	3/4/2013
Gilroy	3/1/2013
Half Moon Bay	3/1/2013
Hillsborough	3/1/2013
Los Altos Hills	3/1/2013
Los Gatos	3/1/2013
Millbrae	3/1/2013
Milpitas	3/1/2013
Morgan Hill	3/1/2013
Newark	2/28/2013
Pacifica	3/1/2013
Portola Valley	3/1/2013
Ross	3/1/2013
San Bruno	3/1/2013
San Carlos	3/1/2013
Saratoga	3/4/2013
So. San Francisco	3/4/2013
Suisun City	2/28/2013
Tiburon	3/4/2013
Woodside	3/1/2013