



# Memorandum

**TO:** HONORABLE MAYOR  
AND CITY COUNCIL

**FROM:** Julia H. Cooper

**SUBJECT:** SEE BELOW

**DATE:** January 5, 2022

Approved

Date

**1/6/2022**

**SUBJECT: REPORT ON PROCUREMENT OF INSURANCE PRODUCTS FOR  
CONTINUATION OF AN OWNER-CONTROLLED INSURANCE  
PROGRAM FOR THE SAN JOSE-SANTA CLARA REGIONAL  
WASTEWATER FACILITY**

## RECOMMENDATION

Adopt a resolution authorizing the Director of Finance to:

- (a) Purchase insurance policies for the San José-Santa Clara Regional Wastewater Facility Capital Improvement Program with total cost not to exceed \$7,221,283 including estimated insurance premiums of \$4,661,872 and a total maximum deductible \$2,559,411, as well as a cash collateral fund of \$1,496,471 with premiums to be paid in four (4) annual installments, and subject to the annual appropriation of funds, as follows:
  - (1) Federal Insurance Company: Commercial General Liability Insurance and Workers' Compensation Insurance with a Program Agreement Endorsement stipulating terms of the cash collateral fund management;
  - (2) Allied World Assurance Company, Inc.: Commercial Excess Liability Insurance;
  - (3) Endurance Risk Solutions Assurance Company: Commercial Excess Liability Insurance;
  - (4) Liberty Surplus Insurance Corporation: Commercial Excess Liability Insurance;
  - (5) Great American Assurance Company: Commercial Excess Liability Insurance;
  - (6) Westchester Surplus Lines Insurance Company: Commercial Excess Liability Insurance;
  - (7) Ironshore Specialty Insurance Company: Contractors Pollution Liability Insurance;
  - (8) Berkley Assurance Company: Owners Protective Professional Liability Insurance; and
- (b) Either renew an existing, or secure quotes and purchase a new, Master Builder's Risk Insurance policy with special endorsement for Flood to provide builder's risk coverage through 2026 as necessary, with a projected \$906,000 in premiums, the cost of which is included in the estimated insurance premiums above.

## **OUTCOME**

Implementation of a second multiline owner-controlled insurance program (OCIP) for Capital Improvement Program (CIP) projects to be performed at the San José-Santa Clara Regional Wastewater Facility (RWF) will generate program savings and enhance safety, risk, and claims management services.

## **EXECUTIVE SUMMARY**

An OCIP provides a centralized insurance program for losses associated with onsite construction of CIP projects at the RWF. The implementation of an OCIP is anticipated to generate cost savings, provide broader insurance coverage, and deliver improved claims, loss control, and safety management services for the City. Based on market rates and the best value insurance products available, staff recommends procuring \$100 million in combined commercial general and excess liability insurance, worker's compensation coverage, builder's risk insurance for replacement value of scheduled projects, excess professional liability insurance up to \$10 million per claim, and \$10 million per occurrence pollution liability insurance.

## **BACKGROUND**

On December 13, 2016, City Council approved an agreement with Alliant Risk Insurance Services, Inc. (Alliant) to provide broker, administrative, and claims management services to assist the City with the marketing and implementation of an OCIP for the capital improvement projects at the RWF<sup>1</sup> for an initial term of December 14, 2016, through December 13, 2021, with the ability to exercise up to two (2) five-year options to extend the term of the agreement through December 13, 2031. At that time, the City implemented an OCIP in accordance with the recommendations of a feasibility study that concluded the City would likely achieve cost savings and increased scope of coverage through use of an OCIP to insure the CIP projects at the RWF. Through an OCIP, the City would arrange a master insurance program to protect and manage risk for contractors and subcontractors involved in the CIP projects at the RWF.

On June 20, 2017, City Council approved the purchase of insurance products for an OCIP at the RWF<sup>2</sup>, and in July 2017, the City implemented an OCIP with the Cogeneration Facility being the first capital project covered by the program. Included coverage lines were commercial general liability, excess liability, workers' compensation, builder's risk, and pollution liability insurance. The City elected against adding professional liability to the OCIP. Coverage applied to contractors and subcontractors that performed onsite work for capital projects that were not yet in construction as of the execution date of the OCIP policies but scheduled to start

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<sup>1</sup> Council Agenda December 13, 2016, Item 2.23:

[http://sanjose.granicus.com/GeneratedAgendaViewer.php?event\\_id=a3998d1a-c7f0-4371-8ba5-ffab3d9c497b](http://sanjose.granicus.com/GeneratedAgendaViewer.php?event_id=a3998d1a-c7f0-4371-8ba5-ffab3d9c497b)

<sup>2</sup> Council Agenda June 20, 2017, Item 7.1:

<https://www.sanjoseca.gov/home/showpublisheddocument/58536/637249852763170000>

construction on or before December 2022 (“Program Participants”). Due to available insurance products and policy terms, capital improvement projects at the RWF concluding after March 30, 2023 would be covered through a second OCIP or through the requirement of contractor provided insurance.

In May 2021, staff began evaluating the feasibility of implementing a second OCIP to cover projects that concluded after March 30, 2023, including the Digested Sludge Dewatering Facility project, which is expected to commence in early 2022, but is not projected to achieve beneficial use until January 2025.

## **ANALYSIS**

In November 2021, Alliant presented insurance quotations to City staff for review. The quotes were based on \$310.6 million in construction values. Staff compared the quotes and evaluated for scope of coverage, cost, the insurer’s financial strength as measured by its A.M. Best Financial Strength Rating, the insurer’s reputation on paying and administering claims, and the insurer’s resources to provide industry-related services such as risk related and loss control services.

### **Cost Analysis**

Total insurance premiums for the recommended products over the next five years are \$4,661,872 versus estimated contractor costs for insurance covering the same construction values of approximately \$7,765,000<sup>3</sup>. Additional program costs may arise from payment of claims deductibles, revisions in CIP project costs, or scheduling of additional projects. The City will annually submit updated construction values and payrolls to the selected insurance carrier who will review the data to determine if there are any policy premium adjustments because of additional scheduled projects or increased construction values.

In addition to premium costs, a cash collateral fund will be established at \$1,496,471 with \$374,118 to be paid in FY 2021-2022 and every year thereafter for four (4) years. Any remaining collateral will be released on or before the end of the policy period, including the product warranty phase, and close out of pending claims and as set forth in the Reimbursement, Indemnification, and Security Agreement (Security Agreement), which stipulates the terms of the cash collateral fund management. Failure to make premium payments or collateral payments may result in cancellation of insurance coverage.

In addition to fixed premium costs, the City is subject to a maximum aggregate deductible of \$2,559,411 for losses under the applicable deductible. Each individual occurrence has a \$250,000 deductible for the commercial general liability and workers’ compensation insurance. As losses arise, the City will be required to replenish the collateral fund as required by the

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<sup>3</sup> Based on Alliant estimate of contractor insurance costs at approximately 2.50% of total construction values

Security Agreement. At maximum loss, the total cost of the OCIP is \$7.22 million compared to estimated contractor costs through traditional contractor provided insurance of \$7.77 million. Please see Appendix A for a summary of insurance coverage by product. Historically, with other City-administered OCIPs, program losses reported were below 35% of the maximum loss exposure of the OCIP. The current RWF OCIP has incurred under \$2,000 in losses as of this date.

### **Commercial General Liability and Worker's Compensation Insurance (combined product)**

The OCIP, with the recommended carrier, Federal Insurance Company, includes primary and noncontributory coverage through a multiline policy for commercial general liability and workers' compensation insurance. The commercial general liability insurance provides coverage for third party property damage or bodily injury for liabilities arising out of premises, operations, products and completed operations, personal and advertising injury, and liability assumed under an insured contract. Policy limits are \$2.0 million per occurrence with a \$4.0 million aggregate and are subject to a \$250,000 per occurrence deductible including any claims handling fees. Products and completed operations coverage is for ten (10) years from completion of the scheduled CIP project or until end of the statute of repose, whichever is shorter.

Workers' Compensation insurance includes employer's liability coverage and statutory workers' compensation claims coverage for Program Participants for on-site, work-related injuries. Coverage excludes City employees and work performed offsite unless added by special endorsement.

The total policy premium is \$1,554,802. Substantial increases in construction costs or additional projects may result in increased policy premiums above the noted premiums. As a condition of coverage, the City will execute a Security Agreement stipulating the terms of collateral management to fund losses for total collateral of \$1,496,471 which authorizes full release of collateral upon release by the insurance carrier or termination of coverage during the products and completed operations phase, whichever shall occur first.

Policy premiums shall be paid annually in five equal installments of \$388,701 excluding surplus lines taxes and fees. Cash collateral will be provided in four (4) equal installments of \$374,118.

### **Commercial Excess Liability Insurance**

Excess liability insurance follows the form of the commercial general liability and employers liability coverages. Five (5) carriers, Allied World Assurance Company, Inc; Endurance Risk Solutions Assurance Company; Liberty Surplus Insurance Corporation; Great American Assurance Company, and Westchester Surplus Lines Insurance Company are layered to provide \$100 million in excess limits. The total premium for all excess liability policies, including estimated taxes and fees is \$1,695,475. All premiums for excess liability will need to be paid in FY 2021-2022.

### **Builder's Risk Insurance**

Builder's Risk insurance provides total replacement cost for scheduled projects for all risks of physical loss and/ or damage including flood and excluding earthquake. The City participates in a Master Builder's Risk (MBR) insurance policy for the RWF OCIP. An MBR insurance policy is generally used when multiple construction projects are planned with varying start and end dates, and typically has a coverage period of 24 months.

The current coverage with Liberty Mutual Fire Insurance Company in place for all projects starting prior to April 1, 2022, includes a \$25 million flood sublimit per occurrence and annual aggregate. The policy has a \$50,000 deductible for all risk of loss excluding flood. The flood coverage deductible is 5% minimum loss of total insured value with minimum of \$250,000 deductible and maximum policy limits of \$25 million. The policy will be endorsed to add Program Participants as additional named insureds, as their interests may appear. The City's current policy ends on April 1, 2022.

For the second OCIP, the City will require two (2) MBR insurance policies to provide builder's risk coverage through the course of construction. In early 2022, Alliant will go out to market to secure quotes to place a new MBR insurance policy or renew the City's existing policy for coverage through 2024. In 2024, staff will assess and seek placement of a new policy or renewal of the existing policy for coverage through 2026, as necessary.

The estimated premiums for builder's risk insurance based on the construction values for the second OCIP are estimated to be \$906,000. Staff estimates that \$325,000 in premiums will be due in FY 2021-2022.

### **Excess Professional Liability Insurance**

Excess professional liability coverage provides claims-made, project specific coverage to the City for liabilities and exposures resulting from breach of the performance of professional services providers, including design, architecture and engineering work. The \$10 million in professional liability coverage is in excess of the individual policies of these professionals, which must provide a minimum of \$2 million in professional liability coverage, and applies only after exhaustion of proceeds on those policies. The City elected against purchasing Excess Professional Liability insurance for the first OCIP but is recommending purchasing a policy for the second OCIP for \$315,263, a nominal 0.1% of the \$310.6 million in construction values and to provide additional coverage for the respective projects.

Total premiums for Excess Professional Liability insurance with the recommended carrier Berkley Assurance Company including taxes and fees are \$315,263. All premiums for excess professional liability insurance will need to be paid in FY 2021-2022.

### **Pollution Liability Insurance**

Pollution liability insurance protects the City from third party claims for damages caused by pollution conditions arising from the insured's covered operations. The policy has a ten-year completed operations endorsement. Non-owned disposal site coverage, designed to protect insureds against claims for bodily injury, property damage, or cleanup costs made against a disposal facility and environmental regulators or attorneys representing the disposal facility, is also provided for in the policy.

Total premiums for pollution liability insurance with the recommended carrier Ironshore Specialty Insurance Company total \$190,332. All premiums for pollution liability insurance will need to be paid in FY 2021-2022.

### **Terrorism Risk Insurance Act (TRIA) of 2002 as Amended**

The TRIA coverage provides an insurance mechanism (shared by private carrier and federal government) for losses arising from acts of terrorism as certified by the Secretary of Treasury. TRIA coverage is recommended for the aforementioned policies and has been calculated as part of the total premium due for each insurance policy described in the memorandum.

### **CONCLUSION**

Approval of this recommendation will ensure the City maintains appropriate property and casualty insurance coverage to provide financial protection from certain types of catastrophic or financial losses during the next five years of capital projects at the RWF.

### **EVALUATION AND FOLLOW-UP**

A progress report on the OCIP and other RWF capital projects will be made to the Transportation and Environment Committee on a semi-annual basis. In 2022, the City will place or renew the Builder's Risk policy and repeat the exercise in 2024. In 2025, the City will evaluate and make recommendations on whether to issue a Phase III OCIP for ongoing and not yet commenced CIP projects at the RWF.

### **CLIMATE SMART SAN JOSE**

The recommendation in this memo has no effect on Climate Smart San José energy, water, or mobility goals.

## **POLICY ALTERNATIVES**

**Alternative # 1:** Decline to procure and implement an OCIP and apply traditional contractor provided insurance requirements to contracts for the capital projects to be performed at the RWF.

**Pros:** Unlike with an OCIP, if the City elected this approach, the City would not require the use of broker, claims, and administrative services or internal resources as may be required to implement an OCIP. The City would not have a variable cost exposure associated with the insurance product.

**Cons:** The City would lose control on negotiating policy terms, have a narrower scope of coverage, assume costs related to multiparty litigation and limits issues, and would not have a centralized safety program, which promotes better control and fosters the City's zero accident initiative. Extended warranty coverage may result in a reduction in the period of coverage. Prime contractors also often include insurance product markups in their costings.

**Reason for not recommending:** Anticipated cost savings, improved coverage terms and conditions, and improved safety are the three main objectives of an insurance program. In this instance, traditional, contractor provided insurance requirements are unlikely to meet these objectives.

## **PUBLIC OUTREACH**

This memorandum will be posted on the Treatment Plant Advisory Committee (TPAC) website for the January 13, 2022 meeting and the City Council website for the January 25, 2022 meeting.

## **COORDINATION**

This memorandum has been coordinated with the Environmental Services Department, the City Attorney's Office, and the City Manager's Budget Office.

## **COMMISSION RECOMMENDATION/INPUT**

This item is scheduled to be heard at the January 13, 2022 Treatment Plant Advisory Committee (TPAC) meeting. A supplemental memo with TPAC's recommendation will be included in the amended January 25, 2022 City Council meeting agenda.

## **FISCAL/POLICY ALIGNMENT**

This Project is consistent with the City Council approved budget strategy to focus on rehabilitating aging RWF infrastructure, improve efficiency and reduce operating costs. This

product is also consistent with the budget strategy principle of focusing on protecting our vital core services.

**COST SUMMARY/IMPLICATIONS**

1. **AMOUNT OF RECOMMENDATION/COST OF PROJECT:**

Premium Summary

Commercial General Liability and Worker’s Comp. Insurance	\$1,554,802
Commercial Excess Liability Insurance	1,695,475
Builder’s Risk Insurance (Estimated)	906,000
Excess Professional Liability Insurance	315,263
Contractors Pollution Liability	190,332
<b>Total Premium Costs</b>	<b>\$4,661,872</b>
<b>Total Collateral (cash collateral posted to cover estimated claim payments for losses under applicable policy deductible)</b>	<b>\$1,496,471</b>

Premium Costs and Collateral to be paid in 2021-2022

Commercial General Liability and Worker’s Comp. Insurance	\$388,701
Commercial Excess Liability Insurance	1,695,475
Builder’s Risk Insurance (Estimated)	325,000
Excess Professional Liability Insurance	315,263
Contractors Pollution Liability	190,332
Collateral	374,118
<b>Total for 2021-2022</b>	<b>\$3,288,889</b>

2. **COST ELEMENTS OF AGREEMENT/CONTRACT:**

Total Premium Costs	\$4,661,872
Potential Deductible Costs (Maximum Aggregate Deductible)	2,559,411
<b>Program Cost at Maximum Aggregate Deductible</b>	<b>\$7,221,283</b>
<b>Total Collateral (replenished, as needed from payments up to the aggregate loss deductible for the program)</b>	<b>\$1,496,471</b>

3. **SOURCE OF FUNDING:** 512-San José-Santa Clara Treatment Plant Capital Fund.

4. **FISCAL IMPACT:** This contract will have no additional impact on the San-José-Santa Clara Treatment Plant Operating Fund (Fund 513) or the General Fund.

5. **PROJECT COST ALLOCATION:** In accordance with the recommendations set forth in Capital Project Cost Allocations Technical Memorandum (Carollo Engineers, March 2016), the cost for programmatic services including insurance coverage will be allocated



among the users of the RWF between the four billable parameters relative to the rolling weighted average distribution of all RWF assets.

**BUDGET REFERENCE**

Fund #	Appn #	Appn Name	Current Total Appn*	Amt for Costs	2022-2026 Adopted Capital Budget (Page)	Last Budget Action (Date, Ord. No.)
512	401B	Owner-Controlled Insurance Program	\$8,189,000	\$3,288,889	262	10/19/2021 30682

\*There is adequate funding available in 2021-2022 for the premium and collateral costs. Future funding is subject to appropriation and, if needed, will be included in the development of future year budgets during the annual budget process.

**CEQA**

Not a Project, File No. PP17-003, Agreements/Contracts (New or Amended) resulting in no physical changes to the environment.

/s/  
JULIA H. COOPER  
Director of Finance

For questions, please contact Jennifer Cheng, Deputy Director, Finance at [jennifer.cheng@sanjoseca.gov](mailto:jennifer.cheng@sanjoseca.gov).

Attachments:  
Appendix A - Summary of Insurance Policies

## APPENDIX A

### 1. GENERAL LIABILITY

	<b>OCIP PROGRAM (71 MONTH TERM)</b>
Carrier	Federal Insurance company
Coverage and Deductible	\$2 million Per Occurrence \$4 million Aggregate \$250,000 Per Occurrence deductible \$375,000 Per Occurrence (clash deductible-combined deductible for same occurrence filed against both workers' compensation and general liability policies) \$2,559,411 (aggregate deductible for workers' compensation and general liability)
Fixed Premium	\$1,445,448
Estimated Taxes & Fees	Included
Program Rates	Fixed Costs - \$4.7 per \$1,000 of Construction Values Aggregated Deductible - \$8.24 per \$1,000 of Construction Values
Optional TRIA premium (recommended for purchase)	\$9,534
Claim Handling Charges	1.07
Program Rates	Fixed Costs: 80% (up to 20% return of premium for cancelled projects or reduced construction values) Aggregate Deductible: 100%
Total 5 Year Premiums (Including Estimated Taxes/Fees)	\$1,554,802
Total 5 Year Collateral (Including Taxes/Fees)	\$1,496,471

### 2. WORKERS' COMPENSATION

	<b>OCIP PROGRAM (71 MONTH TERM)</b>
Carrier	Federal Insurance Company
Coverage and Deductible	Statutory Workers' Compensation \$1 million Per Occurrence (Employer Liability) \$250,000 Per Occurrence Deductible \$375,000 Per Occurrence (clash deductible-for same occurrence filed against both workers' compensation and general liability policy) \$2,559,411 (aggregate deductible for workers' compensation and general liability)
Premium	Included with General Liability Policy
Optional TRIA premium (recommended for purchase)	Included with General Liability Policy
Total (Including Taxes/Fees)	Included with General Liability Policy

### 3. EXCESS LIABILITY

	<b>OCIP PROGRAM (71 MONTH TERM)</b>
Carriers	<ul style="list-style-type: none"> <li>• Allied World Assurance Company (\$10M over Commercial General Liability and Employer Liability)</li> <li>• Endurance Risk Solutions Assurance Company (\$15,000,000 over \$10,000,000)</li> <li>• Liberty Surplus Insurance Corporation (\$25,000,000 over \$25,000,000)</li> <li>• Great American Assurance Company (\$25,000,000 over \$50,000,000)</li> <li>• Westchester Surplus Lines Insurance Company (\$25,000,000 over \$75,000,000)</li> </ul>
Policy Type and Scope	Follows Form in Excess of the General Liability and Employers Liability Occurrence Form-Defense Outside Policy Limits Project Specific Program
Premium	\$1,678,330
Optional TRIA premium (recommended for purchase)	\$17,145
Total (Including Taxes/Fees)	\$1,695,475

### 4. BUILDER'S RISK

	<b>OCIP PROGRAM (24 MONTH TERM)</b>
Carrier	TBD
Coverage and Deductible	<p>Total replacement value of completed work for scheduled projects and follows form to a Master Builder's Risk Policy for all risks \$25 million sublimit for losses related to flood Earthquake is excluded</p> <p>Deductible TBD. <b>Note:</b> Deductibles have increased over the last several years. Presently, the market is indicating a minimum of \$100,000 Per Occurrence Deductible for all risks excluding flood</p> <p>Flood Deductible TBD – generally expect a similar deductible to the present program at 5% minimum loss of total insured value with minimum of \$250,000 deductible for flood</p>
Fixed Premium	Calculated on a project by project bases with estimated total premiums, of \$906,000 based on estimated schedule of rates per \$100 construction value
Program	Master Program with 2-year policy term that may be extended to cover on-going projects at the end of 2-year term subject to underwriting approval
Optional TRIA premium (recommended for purchase)	Included in estimate of fixed premium

## 5. EXCESS PROFESSIONAL LIABILITY

	<b>OCIP PROGRAM (71 MONTH TERM)</b>
Carrier	Berkley Assurance Company
Coverage and Deductible	Claims-Made-Project Specific with extended reporting period for ten years and owners protective policy. Policy in excess of other insurance and requires \$1,000,000 contractual insurance requirement for all professional services agreements. \$10 million per claim/aggregate limit \$100,000 per claim Deductible
Total Estimated Premium	\$315,263 (including surplus lines, taxes and fees)
Total (Including Taxes/Fees)	\$315,263

## 6. POLLUTION LIABILITY POLICY

	<b>OCIP PROGRAM (71 MONTH TERM)</b>
Carrier	Ironshore Specialty Insurance Company
Coverage and Deductible	Occurrence-Project Specific with completed operations extension for ten years. \$10 million per claim/aggregate limit \$100,000 self-insured retention Defense outside the Limit NODS Coverage within policy period
Total Premium	\$184,788 (including surplus lines, taxes and fees)
Optional TRIA	\$5,544
Total (Including Taxes/Fees)	\$190,332