

Item No: 4A_Supp
Date of Meeting: October 28, 2021



**THE NORTHWEST
SEAPORT ALLIANCE**
Gateway to Solutions

APL Modification Agreement

Tong Zhu, Chief Commercial & Strategy Officer
Dana Henderson, General Counsel
David Morrison, Chief Financial Officer

Action Requested

Request Managing Members of The Northwest Seaport Alliance (NWSA) authorization for the NWSA Chief Executive Officer (CEO) or their delegate to execute the Modification Agreement with American President Lines, LTD. (APL) and CMA CGM S.A., and CMA CGM (AMERICA) LLC, in substantially the same form as presented.



Background

- A Lease Termination Agreement with Eagle Marine Services (EMS) and its parent company APL, for their Terminal 5 Lease was signed by the Port of Seattle June 2014.
- The Port of Seattle, SSA and APL also entered into a Conditional Consent to Sublease in Sept. 2014 regarding a sublease of part of Terminal 18 between SSA as sublessor and APL as sublessee. The Sublease Agreement imposed certain obligations as conditions to the Port's consent to the Sublease, including an annual payment of \$9 million on August 1st of each year for 10 years.
- APL failed to meet several of the requirements of the Terminal Agreement, primarily due to lift or vessel shortfalls.



Background

- First Amendment to the Termination Agreement was approved by the NWSA Managing Members on May 5th, 2020 to resolve outstanding shortfall issues and extend volume requirements to 2026.
- Subsequent to the First Amendment, APL failed to meet its 2021 annual payment of \$9 million and guaranteed annual lifts and vessel calls.
- The NWSA Managing Members directed staff to negotiate a Modification Agreement to fully address past due and future Sublease Consent Fees in consideration of CMA CGM's expressed interest in a continued and expanded presence in our gateway.



Key Terms

- 1) **Term:** Sets Guaranteed Lift requirements through June 30, 2031
- 2) **Parties:** EMS, APL and CMA CGM S.A., the parent company of APL, is now a party
- 3) **Amounts Currently Past Due:** APL to make a one-time payment of \$10,041,677 by December 1, 2021. NWSA waives payments of all future and remaining amounts of the APL Sublease Consent Fee and of all outstanding balance due.
 - *Total of \$20,000,000 will be received in 2021.*
 - *\$9,958,323 from \$9M payment due August of 2020 plus interest*
 - *\$ 10,041,677 for agreeing to this “deal”*
 - *Includes the \$9M payment due August 2021*



Financial Obligations (Current & Future)

Northwest Seaport Alliance

CMA-CGM/APL amounts due as of: **10/31/2021**

Invoice	Description	Due Date	Days Past Due	Invoice Balance	Interest	Total	
RB50011797	Early Termination Annual Payment 2020	8/1/2020	2	\$ -	\$ 4,602	\$ 4,602	***interest paid through 7/10, payment received on 7/13 - interest still due for 7/11 and 7/12 still due
RB50012110	Vessel Call Shortfall (8/1/2019 - 7/31/2020)	11/1/2020	364	\$ 1,300,000	\$ 155,571	\$ 1,455,571	
RB50012782	Early Termination Annual Payment 2021	8/1/2021	91	\$ 9,000,000	\$ 269,260	\$ 9,269,260	
RB50012960	Vessel Call & Lift Shortfall (8/1/2020 - 7/31/2021)	10/31/2021	0	\$ 3,911,825	\$ -	\$ 3,911,825	***invoice not due until 10/31/2021
Total Amounts Due				\$ 14,211,825	\$ 429,433	\$ 14,641,258	
						-	
						2022 & 2023 Termination Claim	\$ 18,000,000
						TOTAL	\$ 32,641,257.88
						Payment	\$ (10,041,677.00)
						Net	\$ 22,599,580.88
						LOC Rounded	\$2,260,000.00



Key Terms, Cont.

4) **Annual Guaranteed Lift Requirement:** Containers of APL, ANL, CMA CGM and other entities majority-owned/controlled by CMA CGM count towards annual Guaranteed Lift Requirement (MAG).

- APL commits to an expanded and extended MAG to the gateway:

Contract year	2021-22	2022-23	2023-24	2024-25	2025-26	2026-27	2027-28	2028-29	2029-30	2030-31
Seattle	200,000	200,000	200,000	200,000	200,000	200,000	200,000	200,000	200,000	200,000
Tacoma or Seattle	25,000	30,000	35,000	40,000	45,000	47,450	49,925	52,424	54,948	57,497
TOTAL	225,000	230,000	235,000	240,000	245,000	247,450	249,925	252,424	254,948	257,497

Note: 2026 through 2031 volumes are incremental, not part of the First Amendment volume commitment



Key Terms, Cont.

4) Annual Guaranteed Lift Requirement, Cont.

- Shortfall fee of \$75/lift through 2025-2026; \$50 per lift through 2030-2031.
- If APL fails to meet the MAG in any Contract Year, assessed a Shortfall Lift Fee for such year.
 - Shortfall Lift Fee paid at the end of the shortfall year.
 - But, a 2-year cycle such that if APL exceeds the MAG in the following year, the number of lifts above the MAG in the same harbor for the following year are credited to the Shortfall Year and APL reimbursed any overpayment.
 - No carry-forward. No double counting.
 - Seattle Harbor lift shortfall can only be made up with Seattle Harbor Lifts.
- Dispute resolution provision for disputed shortfall lift fee provides for 120 day binding, non-appealable arbitration cycle.



Key Terms, Cont.

5) Liquidated Damages

- If APL is late on its \$10,041,677 payment in December of 2021, APL will be obligated to pay \$32,641,257, which includes total amount due as of October 31, 2021 plus the 2022 and 2023 Sublease Consent Fees of \$9M/yr. APL would not be released from its lift commitments through 2026 under the First Amendment.
- If APL defaults in paying any shortfall fee or otherwise breaches its obligations to NWSA prior to July 1, 2026, NWSA may elect to terminate this agreement by seeking, in addition to amounts due, a Breach Damages Penalty in the amount of \$22,600,000. APL would not be released from its lift commitments through 2026 under the First Amendment.
- If APL defaults in paying any shortfall fee or otherwise breaches its obligations to NWSA post July 1, 2026, NWSA may elect to terminate this agreement by seeking, in addition to amounts due, a Breach Damages Penalty in the amount of \$22,600,000. APL would then be released from any further Guaranteed Lifts requirement under this Modification Agreement. On July 1, 2027 and on each July 1st thereafter, the amount of Breach Damages Penalty will be reduced by \$4,520,000.



Key Terms, Cont.

- 6) **Security:** The Late Shortfall Lift Fee penalty of \$2,260,000/year will be secured through an annual (Jan 1st through Dec. 31st) Letter of Credit (non-refundable, non-returnable and issued by a credited US bank). LOC/Penalty equals 10% of remaining cash value of Sublease Consent Fees that would otherwise be due after \$10.1M payment by Dec. 2021.
 - NWSA immediately calls the LOC if APL is late in paying any shortfall lift fee payment when due under this Agreement.
- 7) **Extension of T18 Sublease Consent:** NWSA will give its consent to the extension of the term of the T18 Sublease Agreement to June 30, 2031 subject to APL and SSAT agreeing on the same.
- 8) **Force Majeure (FM):** Provides relief proportionately and pro rata for number of days that a NWSA terminal is unavailable. Language further tightens and clarifies existing FM clause, confirming that FM does not apply if there are congestion or labor issues due to CMA CGM employees only or due to acts of employers deemed unfair by arbitrator. Congestion alone does not constitute FM.



Key Terms, Cont.

- 9) **Alternate Service Provider:** Carry-through concept but modified to provide that the NWSA would help APL find alternative if APL is given short notice of terminal operator's inability to provide service, but not if due to APL delay in payment.
- 10) **Limited Release:** This agreement replaces all remaining commitments under T5 Termination Agreement (vessel call and lift requirements) under T18 Sublease Consent (\$9M annual payment through 2023) and the NWSA waives all claims it may have under these existing agreements except for the commitments carried through into this Modification Agreement.
- 11) **Governing Law, Venue, Attorney's Fees:** Washington law to apply, and confirms litigation in state or federal court in Washington as an option for disputes arising out of this agreement. Substantially prevailing party may recover attorney's fees and costs.



Financial Implications

In lieu of collecting approximately \$32.4 million between now and July 2023, The NWSA will receive an incremental \$10.1 million in 2021 in exchange for future volume guarantees through 2031 in the gateway. Performance of APL/CMA CGM will be guaranteed by the letter of credit and the risk of penalty payments (liquidated damages) that will allow the NWSA to impose the \$22.6M as a penalty through June 2027. The penalty payment then decreases by straight line amortization of approximately \$4.5M starting July 2027 until the agreement terminates in June 2031. Failure by APL/CMA CGM to pay any shortfall or penalty will result in the collection of the Letter of Credit of \$2.26M. This agreement encourages high volume in the gateway by implementing a high penalty for failure to pay any shortfall payments due.

The proposed Modification Agreement results in \$11M more revenue from APL in 2021 than was included in the original budget and \$9M less in revenue for 2022 and 2023, and \$5.75M less in 2024 than was included in the 2021 -2025 budget presented last year. 2020 had \$3.75M lower revenue due to delay in payment from APL. The 2022 draft budget and 2023-2026 draft operating forecast includes these changes.



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