

THE NORTHWEST SEAPORT ALLIANCE
MEMORANDUM

MANAGING MEMBERS
ACTION ITEM

Item No.	<u>9C</u>
Date of Meeting	<u>November 1, 2022</u>

DATE: October 24, 2022

TO: Managing Members

FROM: John Wolfe, CEO

Sponsor: NWSA Internal Governance Work Group

Project Manager: Dana Henderson, General Counsel

SUBJECT: Proposed Charter Revisions and Additions: Addition or Removal of Properties Licensed to NWSA (Section 3.1.c.ii); Litigation Management (6.6); Contributed Capital (new section); and Insurance (new section)

A. ACTION REQUESTED

The Internal Governance Work Group (IGWG) Requests Managing Members' approval of proposed changes and additions to the NWSA Charter on the following topics: Addition or Removal of Properties Licensed to NWSA (Section 3.1.c.ii); Litigation Management (6.6); Contributed Capital (new section); and Insurance (new section).

B. SYNOPSIS

The IGWG has evaluated options for certain revisions to the NWSA Charter. While additional issues are forthcoming and will be discussed by the IGWG this year, the work group agrees that the below changes should be made and recommends adoption of these revisions and additions by the Managing Members.

C. BACKGROUND

The IGWG has been charged with periodic review and revision of various NWSA founding and governance documents, including the Charter. The IGWG is still working its way through a comprehensive Charter review but would like to move interim revisions through for approval so staff and the NWSA may start benefiting from the direction provided and efficiencies created by the below-described proposed revisions and additions.

1. Addition or Removal of Properties Licensed to PDA¹ (3.1.c.ii)

The following revision is proposed for Section 3.1.c.ii on adding or removing properties to the NWSA:

From time to time, upon recommendation of the CEO, the Managing Members may approve by vote to add or remove Licensed Properties from the PDA, specifying the effective date of such addition or removal. Revenues of each Licensed Property so removed or so added as a Licensed Property ~~shall~~ may be valued consistently using the methodology used to calculate the initial Membership Interest, and the Membership Interests shall be adjusted accordingly.

The rationale for this change is that when the NWSA was formed, the methodology used for valuation of the properties licensed to the NWSA was based on a ten-year forecast of revenues anticipated for the properties. This methodology does not work for newly acquired properties, the analysis of which should probably include purchase price, environmental remediation, or other capital improvements. This would surface when, for example, a homeport is purchasing real property for NWSA business with no existing revenue. The original valuation methodology would not take into account the purchase price and would require use of “steady” state income and planned maintenance to maintain that steady state revenue.

Finance staff recommends the flexibility to use an alternative valuation methodology that would take into account the value of the assets being purchased and developed, and the future cash flows for a new growing business. Both Managing Members would vote on the proposed valuation and both homeport finance teams would be involved in the financial modeling.

The recommended changes give the flexibility for the Managing Members to take into account other factors in valuation such as fair market value of the property at acquisition, maintenance, environmental cleanup and liabilities, and operating expenses such as maintenance.

2. Litigation Management Involving PDA and or Homeports (6.6)

The following revision is proposed for section 6.6:

When the PDA or a Homeport is sued or notified of a potential claim related to acts, omissions, assets or operations with potential liability reasonably anticipated to be in excess of \$100,000, and the Homeport reasonably identifies such claim as a PDA responsibility, or the PDA reasonably identifies such claim as a Homeport responsibility, the Executive recipient of the suit or claim shall

¹ Throughout the Charter, the NWSA is referred to as the “PDA”, which stands for “Port Development Authority,” language in alignment with the statute that allowed for formation of the NWSA, RCW 53.57.

notify the other affected Executive and its Legal Counsel(s) of such claim as soon as practicable. The PDA CEO and Homeport Executive Director and their Legal counsel(s) shall promptly advise Managing Members of such claim and of the Executives' determination of which entity shall assume lead responsibility and whether and to what extent one entity will defend and/or indemnify the other. If the Executives cannot reach agreement, the matter shall be referred to the Managing Members for a vote. Thereafter, litigation shall be managed in accordance with the requirements the Delegation of Authority Master Policy Resolution of the entity assuming lead responsibility.

The existing language in the Charter is not clear on what is meant by "assume lead responsibility" for litigation and whether or not lead responsibility includes assumption of defense and indemnity. Additionally, the existing language does not specify what the Managing Members should do upon referral of an issue from the Executives. The proposed revisions attempt to clarify that the Executives should seek to reach agreement on defense and indemnity, and if unable to do so, the Managing Members will vote to determine the correct path forward.

3. Contributed Capital (proposed new section)

The following new section is proposed for the Charter:

Contributed Capital. Separate from Working Capital and Capital Construction, Contributed Capital is additional cash or property, but not including real property, paid by one or both of the homeport(s) to the PDA and may be paid in amounts other than based on each Managing Member's pro rata respective Member Interests ("Contributed Capital"). Contributed Capital may only occur after a vote of each Managing Member, and may be authorized subject to conditions, if any, specified in the authorization. Contributed Capital does not impact or change either homeport's Membership Interest.

From time to time, certain funds should equitably flow to the NWSA from homeports, and there is no existing mechanism to do so.

Examples of this are instances where revenue relating to licensed properties (but otherwise unrelated to NWSA core business) is received by the homeport but because of the revenue's relationship to licensed property, should be paid to the NWSA. Recently, this has come up when another public agency (a city or WSDOT, for example) will only pay the property owner for a temporary easement, though the easement impacts NWSA -licensed property, NWSA's tenant, and could result in rent abatement. This could also arise if one homeport seeks to pay for a certain item (example: old crane removal, or a non-cargo-operations-driven improvement, or an element of a settlement) and the other homeport cannot or will not, for whatever reason, justify the expenditure.

Currently, when funds should flow from one entity to the other, the Managing Members are asked to approve either an Interlocal Agreement or a Service Agreement, which is inefficient and would be unnecessary if this proposed Contributed Capital provision were in place. Please note that this contribution contemplates voluntary payments, must be approved by Managing Members, and does not impact either homeport's Membership Interests.

4. Insurance (proposed new section)

The following new section is proposed for the Charter:

(a) **Property Insurance.** Each Homeport shall have an obligation to purchase first-party property insurance policies for the improvements and assets owned by the PDA within the respective Homeport. The insurance policies shall be for replacement value, and the individual Homeport shall be the first Named Insured with the PDA designated as Insured and included as a loss payee as its interests may appear.

(b) **Casualty Insurance.** To the extent policy terms and conditions permit, each casualty policy purchased by the PDA and the individual Homeports shall list the remaining two entities as Additional Insureds.

The proposed new language captures the parties' current practice and would require continued adherence to this approach. It is recommended that this issue be placed in the Charter so as to track and establish responsibility for coverage.

As the property owner, the homeports are in the best position to maintain first-party property insurance for assets and improvements placed on licensed properties by the NWSA and to do so at replacement value. The homeports have existing insurance, loss histories, and carrier relationships to best continue that coverage. The NWSA should, however, be listed as the loss payee should the NWSA-funded assets or improvements sustain damage. And, as the entities place casualty third party liability coverage, where possible and feasible, the entities should name the others as additional insureds, thereby extending insurance to the other entities for low or little additional insurance cost.

It should be noted that on certain policies, NWSA carries different and lower-deductible coverages than a homeport. This can be helpful, for example, if all three entities are named in a lawsuit, but the NWSA's coverage is triggered earlier, provides a first-dollar defense, and extends coverage to both homeports. In such an instance, the homeport would benefit from the NWSA policy.

D. ALTERNATIVES CONSIDERED AND THEIR IMPLICATIONS

- **No Action Alternative:** Do not adopt all or some of these proposed changes, in which case proposed efficiencies and/or clarification(s) would not occur.
- **Recommended Action:** Adopt the proposed Charter additions and changes in substantially the same form as presented.

E. ATTACHMENTS TO THIS REQUEST

Presentation showing draft revision to Charter in redline

F. PREVIOUS ACTIONS OR BRIEFINGS

Internal Governance Work Group, meetings on July 6, and October 24, 2022.