

THE NORTHWEST SEAPORT ALLIANCE
MEMORANDUM

MANAGING MEMBERS
ACTION ITEM

Item No.	<u>6D</u>
Date of Meeting	<u>June 1, 2021</u>

DATE: May 25, 2021

TO: Managing Members

FROM: John Wolfe, CEO

Sponsor: Dana Henderson, General Counsel

Project Manager: Deanna Seaman, Environmental Senior Project Manager

SUBJECT: Increase Authorization for 2020 Industrial Stormwater General Permit Appeal for Expert, Outside Counsel and In-house Staff Services

A. ACTION REQUESTED

Request Managing Members of The Northwest Seaport Alliance (NWSA) authorization for the Chief Executive Officer or their delegate to increase the contract amount and spending authorization for support services for the 2020 Industrial Stormwater General Permit (ISGP) Appeal project.

- B.** The requested increase is for authorization for expert, outside counsel, and in-house staff services for the appeal of the 2020 ISGP by \$136,650 from a project total of \$471,240 to \$607,890. These are budgeted but not yet authorized funds within the total budget for this project in 2021.

C. SYNOPSIS

An additional \$136,650 in expert consulting charges, outside legal counsel fees, and staff time is needed to close out the remaining appeal issues in the 2020 ISGP appeal to the Pollution Control Hearings Board (PCHB). The PCHB's recent favorable partial summary judgment ruling in the ports' favor on the scope of the ISGP as exclusive of the wharf areas significantly narrowed the issues remaining in the appeal. However, a number of issues remain, a listing of which is attached hereto. The parties have commenced initial high-level discussions of the remaining issues, but if a settlement is not successful, staff will need to prepare for PCHB hearing set for November 2021. Staff will fully brief the Managing Members before any resolution is proposed for adoption.

D. BACKGROUND

On November 1, 2019, Managing Members authorized the NWSA, together with Port of Tacoma and Port of Seattle, to file an appeal of the 2020 ISGP. When this appeal was authorized, the Managing Members also authorized an initial budget of \$221,240 for pursuit of the appeal inclusive of expert fees through the Windward Environmental firm, outside legal fees, and internal staff time.

Now, though the key issue on appeal has been determined in the ports' favor, as the remaining issues have developed and discovery has progressed, it is apparent that additional funds for these services will be needed to carry our position through hearing.

Other appealing parties include SSA Marine, PMSA, BNSF Railroad, and Puget Soundkeeper Alliance. In 2020, the parties completed discovery in the appeal and NWSA completed briefing seeking summary judgment on the scope of the 2020 ISGP. The hearing on the appeal was initially set for January of 2021, but the PCHB delayed the hearing of the 2020 ISGP to November of 2021 to consider the impact of the decision from the federal court in the *APMT v. Port of Tacoma* ("West Sitcum litigation") case on the same legal issues in this appeal, and to allow for the late and voluminous production of records by Ecology. After requesting additional briefings from the parties as to the impact and importance of the West Sitcum litigation decision, the PCHB ruled in the Ports' favor on the scope of the permit. Since this ruling, staff and counsel have been working with the Department of Ecology to resolve the remaining appeal issues.

The Appealing Parties are meeting with Ecology June 17 or 18 to discuss the remaining issues. One important topic concerns ISGP deadlines for Level 3 Corrective Actions (see issues 27, 28, 29). If these deadlines are sustained, complex projects could be vulnerable to multiple iterations and delays in Engineering Report approval from Ecology staff, leaving those projects open to appeal and litigation if a permit modification is required for additional time to construct the approved system.

Another key item concerns "safe harbor" provisions (see issues 20, 21, 30) that are allowed for in the EPA Multi-sector General permit. These safe harbor provisions essentially give permittees assurance of compliance with the permit if they have turned in a Stormwater Pollution Prevention Plan and are actively conducting Best Management Practices at their business.

Preparing these issues for resolution or hearing requires additional consulting and legal support.

Category	Budgeted	Committed	Remaining Budget
Outside Counsel	\$484,000	\$410,000	\$74,000
Consulting/Expert fees	\$50,000	\$0.0	\$50,000
Internal Staff	\$73,890.50	\$60,737.50	\$13,153.00
Totals	\$607,890.50	\$505,956.2	\$137,153.00

Additional authorization of \$136,650 for expert fees, outside counsel services and staff time for a project total of \$607,890. These additional expenses are needed to address the remaining appeal items with the Department of Ecology.

E. FINANCIAL IMPLICATIONS

The current Capital Investment Plan allocates \$608,000 for this project, and the requested additional authorization is budgeted for this project in 2021.

Project costs will be expensed as incurred.

F. KEY POTENTIAL RISKS

After a favorable PCHB ruling, staff requires legal support to negotiate the final items remaining in the appeal with the Department of Ecology or to prepare those issue for hearing.

G. ATTACHMENTS TO THIS REQUEST

See 5 24 21 ISGP Remaining Issues List, incorporated at the end of this memorandum.

H. PREVIOUS ACTIONS OR BRIEFINGS

Date	2020 ISGP Appeal Action	Amount
November 27, 2019	Managing Member Authorization #1 – contract for outside counsel TMW inclusive of staff charges	\$221,240
December 7, 2020	Executive Authorization #2 – amendment to TMW contract	\$70,000
February 2, 2021	Managing Member Authorization #2	\$180,000
	Total previous authorizations	\$471,240
June 1, 2021	This Request	\$136,650
	Total Authorized Amount	\$607,890

I. NEXT STEPS

During Q-2: Continue conversations with Ecology; keep Managing Members apprised, Managing Members to approve any resolution.

During Q-3: If no resolution, prepare for November Hearing.

November 1-5, 2021: PCHB hearing.

5 24 21 Remaining Issues in ISGP of Relevance to NWSA / POT / POS

Issue 16: Is Condition S1.B of the ISGP unlawful or unreasonable because it allows Ecology to make a "significant contributor of pollutants" determination without a requirement that such determinations be made in an administrative order or permit decision allowing for public participation and that is reviewable by this Board?

Issue 20: Is Condition S3 unlawful or unreasonable by failing to include permit conditions that require Ecology to timely review and approve Stormwater Pollution Prevention Plans?

Issue 21: Is Condition S4.B.2 unlawful and unreasonable by failing to include permit conditions that require Ecology to review and approve sampling locations?

Issue 27: Are Conditions S8.C.4 and S8.D.5, which contain deadlines for Level 2 and Level 3 corrective actions, unreasonable and arbitrary because they fail to account for the size, complexity, and operational considerations of a facility or allow sufficient time for analysis, design, submission of required engineering reports or other documentation, permitting, construction, efficacy testing, and implementation of corrective actions?

Issue 28: Are Conditions S8.C.4 and S8.D.5 unreasonable and arbitrary because they fail to account for or provide a reasonable period of time for Ecology consideration and decisions on requests for waivers and extensions?

Issue 29: Are Conditions S8.C.4 and S8.D.5 unreasonable and arbitrary because they fail to account or provide for a reasonable period of time for Ecology to review and approve engineering reports?

Issue 30: Is Condition S10 unlawful and unreasonable by failing to include permit conditions that provide assurance that a facility will be in compliance with the Clean Water Act where the facility is in compliance with the ISGP and by failing to include permit conditions that timely and specifically identify measures required for ISGP compliance?

Issue 31: Are the ISGP's definitions of "discharger" and "operator" vague, unreasonable, unlawful, by failing to specify when an entity has a stormwater discharge associated with industrial activity?

Issue 32: Is the definition of significant contributor of pollutants unlawful or unreasonable on the grounds that its overly broad and vague under a NPDES permit?