

THE NORTHWEST SEAPORT ALLIANCE
MEMORANDUM

MANAGING MEMBERS
ACTION ITEM

Item No.	8D
Date of Meeting	June 1, 2021

DATE: May 28, 2021

TO: Managing Members

FROM: John Wolfe, Chief Executive Officer

Sponsor: John Wolfe, Chief Executive Officer

Project Manager: Dana Henderson, General Counsel

SUBJECT: Authorization of Defense and Indemnification for Individual Employee

A. ACTION REQUESTED

It is requested that the Managing Members of the Northwest Seaport Alliance find that NWSA Deputy CEO Don Esterbrook was, at all times relevant to the matters at issue, acting in in good faith and within the course and scope of his employment by, and engaged in activities on behalf of, the Port of Tacoma and/or The Northwest Seaport Alliance, and further approve Mr. Esterbrook's costs of defense, attorney's fees, and any obligation for payment arising from the following lawsuits from the NWSA's funds: *Puget Soundkeeper Alliance v. APM Terminals Tacoma, LLC*, U.S. District Court for the W.D. of Washington, cause No. 3:17-cv-05016 and/or *APM Terminals Tacoma, LLC v. Esterbrook*, US District Court for W. D. of Washington, cause No. 3:21-cv-05392, all subject to and consistent with the terms of RCW 53.08.208 and RCW 53.57.020 (2)(c).

B. SYNOPSIS

In the *Puget Soundkeeper Alliance v. APM Terminals Tacoma, LLC* No. 3:17-cv-05016 lawsuit (*West Sitcum* litigation), upon Managing Members' authorization and direction, the NWSA/Port of Tacoma¹ filed a crossclaim suit against former tenant APMT for breach of its lease and damages stemming from APMT's refusal to install a stormwater treatment system at the West Sitcum Terminal. Relatedly, the Port exercised against the \$7.3M letter of credit APMT had submitted to secure its

¹ NWSA is funding the Port of Tacoma litigation expenses in the *West Sitcum* litigation because the case arises out of a licensed property and relates to a NWSA customer. Because only the Port of Tacoma is a named party in the *West Sitcum* litigation, references herein are made to the Port. During the time period at issue, the NWSA was still in a transition phase and Mr. Esterbrook was serving as the Deputy CEO for both the Port and the NWSA.

obligations under the Lease. The Port took this letter of credit to partially offset the Port's damages due to APMT's breach which well-exceeded the value of the letter of credit.

In late 2020, APMT counterclaimed against the Port for return of the \$7.3M letter of credit. In that counterclaim, APMT threatened suit personally against Deputy CEO Don Esterbrook because he signed the paperwork to take the letter of credit. APMT filed a motion to add Mr. Esterbrook as a party to the *West Sitcum* litigation, which the Port vigorously opposed. The Court has not yet ruled on APMT's motion to add a party. The Port and Mr. Esterbrook strongly dispute the allegations in APMT's counterclaim and the Port is defending these claims in the *West Sitcum* litigation to the fullest extent.

Instead of awaiting the court's ruling on its motion to add a party in the *West Sitcum* litigation, on March 24, 2021, APMT filed a second suit directly against Mr. Esterbrook alleging near identical facts and legal theories as in the *West Sitcum* counterclaim. This second suit is captioned *APM Terminals Tacoma, LLC v. Esterbrook*, US District Court for W. D. of Washington, Civil Action # 3:21-cv-05392. Like the *West Sitcum* counterclaim, the claims and allegations in this second suit are wholly without merit.

This request seeks the Managing Members' authorization of defense and indemnity for Mr. Esterbrook in both of these lawsuits. At all times relevant to these claims, he was employed by and acting on behalf of the Port/NWSA, in good faith, with authority, and in furtherance of the Port's interest in holding APMT responsible.

C. BACKGROUND

The Washington State Legislature has long recognized that elected officials, public employees and agents of public entities may, on occasion, be subject to lawsuits arising from actions (or inactions) taken during the course of their duties. For this reason, RCW 53.08.208 (*Actions against officer, employee, or agent — Defense and costs provided by port district — Exception*) provides that the public agency may lawfully cover defense costs for public officials when acting in good faith and as part of their official duties:

Whenever any action, claim, or proceeding is instituted against any person who is or was an officer, employee, or agent of a port district established under this title arising out of the performance or failure of performance of duties for, or employment with any such district, the commission of the district may grant a request by such person that the attorney of the district's choosing be authorized to defend said claim, suit or proceeding, and the costs of defense, attorney's fees, and any obligation for payment arising from such

action may be paid from the district's funds: PROVIDED, That costs of defense and/or judgment or settlement against such person shall not be paid in any case where the court has found that such person was not acting in good faith or within the scope of his or her employment with or duties for the district.

Port districts are authorized to indemnify their officers, employees and agents by paying defense costs and even judgments in proper cases (see RCW 53.08.208; also RCW 4.96.041). The law generally requires a determination of good faith as a condition of indemnity (See *State v. Hermann*, 89 Wn.2d 349, 572 P.2d 713 (1977); AGO 61-62 No. 71; AGO 63-64 No. 118; AGO 63-64 No.124; also, letter from Deputy Attorney General Philip H. Austin to Senator Quigg, dated February 10, 1982). The NWSA is a port development authority organized under RCW 53.57. RCW 53.57.020(2)(c) provides a port development authority may “[p]erform any lawful public purpose or public function related to maritime activities of the port district or districts, including exercise any powers of the port district or districts that created the port development authority...” Because the homeports of Tacoma and Seattle have the authority to defend and indemnify an employee for claims arising out of the performance of their duties, so too does the NWSA under RCW 53.57.020(2)(c).

In the aforementioned lawsuits, Mr. Esterbrook has or may be named personally as a party for his good faith exercise of the letter of credit that secured APMT’s lease obligations at the West Sitcum terminal. At all times, Mr. Esterbrook was acting within the course and scope of his employment, squarely within his authority, and to further the Port’s legal interests. His actions were entirely legal and appropriate.

D. FINANCIAL IMPLICATIONS

The Port and the NWSA maintain liability insurance coverage subject to a self-insured retention. Defense costs will be covered by the insurance carrier once the self-insured retention is exhausted, subject to a reservation of rights on indemnity.

The action now requested of the Commission will not increase the Port’s cost of defense and is not expected to increase the NWSA’s indemnity exposure given that the facts giving rise to the claims against the Port and the individual employee are the same.

E. ALTERNATIVES CONSIDERED AND THEIR IMPLICATIONS

- **No Action Alternative:** The employee would not be protected by the NWSA/Port in either pending litigation.

- **Recommended Action:** The NWSA CEO and General Counsel jointly and strongly recommend the Managing Members grant defense and indemnification for the Deputy Chief Executive Officer for all claims asserted against him personally in the pending suits and make the findings and authorization as set forth below:

The Managing Members of the Northwest Seaport Alliance find that NWSA Deputy CEO Don Esterbrook was, at all times relevant to the matters at issue, acting in in good faith and within the course and scope of his employment by, and engaged in activities on behalf of, the Port of Tacoma and/or The Northwest Seaport Alliance, and further approve Mr. Esterbrook's costs of defense, attorney's fees, and any obligation for payment arising from the following lawsuits from the NWSA's funds: *Puget Soundkeeper Alliance v. APM Terminals Tacoma, LLC*, U.S. District Court for the W.D. of Washington, cause No. 3:17-cv-05016 and/or *APM Terminals Tacoma, LLC v. Esterbrook*, US District Court for W. D. of Washington, cause No. 3:21-cv-05392, all subject to and consistent with the terms of RCW 53.08.208 and RCW 53.57.020 (2)(c).



Item No 8D.:
Date of Meeting: June 1, 2021

Finding of Good Faith and Authorization of Defense and Indemnity for Employee

Presenters:
John Wolfe, CEO
Dana Henderson, General Counsel

Action Requested

Managing Members of the Northwest Seaport Alliance find that NWSA Deputy CEO Don Esterbrook was, at all times relevant to the matters at issue, acting in in good faith and within the course and scope of his employment by, and engaged in activities on behalf of, the Port of Tacoma and/or The Northwest Seaport Alliance, and further approve Mr. Esterbrook's costs of defense, attorney's fees, and any obligation for payment arising from the following lawsuits from the NWSA's funds: *Puget Soundkeeper Alliance v. APM Terminals Tacoma, LLC*, and/or *APM Terminals Tacoma, LLC v. Esterbrook*, both pending in the U.S. District Court for the Western District of Washington, all subject to and consistent with the terms of RCW 53.08.208 and RCW 53.57.020 (2)(c).