

THE NORTHWEST SEAPORT ALLIANCE
MEMORANDUM

MANAGING MEMBERS
ACTION ITEM

Item No.	<u>3C</u>
Date of Meeting	<u>February 2, 2021</u>

DATE: January 20, 2021

TO: Managing Members

FROM: Dana Henderson, General Counsel
Sponsor: Dana Henderson, General Counsel

Project Manager: Deanna Seaman, Environmental Senior Project Manager

SUBJECT: Increase Authorization for 2020 Industrial Stormwater General Permit Appeal and the West Sicum Litigation Legal 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 two legal contracts.

ISGP Appeal (MID 201093.01): Request increased authorization for legal services for the appeal of the 2020 Industrial Stormwater General Permit (ISGP) by \$180,000 from \$291,771 to \$471,771. This increase is purely for legal support, the previous authorization includes staff time (\$74,000) and outside experts Windward Environmental (\$50,000).

West Sicum Litigation (MID 201046.01): Request increased authorization for outside legal services for the *West Sicum* litigation matter by \$359,523 from \$1,052,230 to \$1,411,753. The overall number is inclusive of staff time (\$120,000); this increase is purely for outside legal support.

B. SYNOPSIS

ISGP Appeal: An additional \$180,000 in legal fees and cost is likely needed to fully prepare for the Pollution Control Hearing Board (PCHB) hearing on the appeal of the 2020 ISGP. This hearing is now set for November 2021. In 2020, most discovery was completed, and the NWSA filed a motion for summary judgment with the PCHB on the scope of the ISGP as exclusive of the wharf areas. We await the PCHB's ruling on that motion for summary judgment which would narrow the issues remaining for adjudication or resolution between the parties as well as bring down any associated legal costs. The request for additional legal expense authority is to prepare as needed if NWSA is not successful on summary judgment.

West Sicum Litigation and possible appeal: After two summary judgment motions were granted in the Port/NWSA's favor, the risk remains that those rulings will be appealed. Additionally, at the trial court level, the remaining issues are both NWSA's cross claims against

former tenant APMT and APMT's recently filed counter claim against NWSA for recovery of funds taken pursuant to a letter of credit as security for APMT's lease. These claims against APMT were previously stayed pending other decisions in the lawsuit. Now that the main issues in the W. Sitcum litigation have been resolved by summary judgment, the stay has been lifted, and the claims will proceed between the Port/NWSA and APMT. The additional requested funds will be needed both to handle any appeal of the summary judgment motions, and to work through the APMT cross and counterclaims.

C. BACKGROUND

ISGP Appeal. 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 outside legal expenses, staff time, and subject matter expert firm Windward Environmental. Now, as the issues have developed and discovery has progressed, it is apparent that additional funds for legal 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 due to a recent, favorable 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 late and voluminous production of records by Ecology, the PCHB has delayed the hearing of the 2020 ISGP to November of 2021.

The PCHB requested additional briefings from the parties as to the impact and importance of the West Sitcum litigation decision, which has been provided. Parties await ruling from the PCHB on summary judgment on the Permit's scope.

The ISGP appeal project is out of authorization for additional legal work. Discovery was more involved than anticipated, and the cost of outside legal work for the appeal was generally underbudgeted. Additional authorization of \$180,000 for a total of \$471,240 is requested to carry forward the ports' position through the November 2021 hearing date if needed.

West Sitcum Litigation. In 2020, the Federal court handed down two favorable summary judgment decisions for the Port/NWSA. The first was that the 2010 and 2015 permit scope had not been expanded to cover the wharf area of a terminal. The second was an order dismissing the Port of Tacoma from the case, finding no violation of permit terms. However, there remains a possibility of appeal of these decisions, and additional funds for legal services will be needed to prepare a defense to any such appeal.

Additionally, at the trial court level, the Port/NWSA's cross claims for breach of contract and indemnity against former tenant APMT have not been resolved and had been stayed for two years pending the outcome of the underlying scope issues. With the rulings on permit scope and violation, the court lifted the stay of these pending claims. APMT has now lodged a counterclaim for recovery of the funds taken by APMT's letter of credit to secure against the Port/NWSA's damages stemming from APMT's breach of its lease. The work to defend these

claims includes discovery, legal motions, and trial if settlement discussions are ultimately not successful. Though previously-authorized funding remains on this project, staff anticipates that additional funding of \$359,523 for outside legal expenses will be needed in 2021 to handle any appeal and to complete the remaining work at the trial court level for a total of \$1,411,753.

D. FINANCIAL IMPLICATIONS

The current Capital Investment Plan and the 2021 budget allocates:

ISGP Appeal: \$180,000 for the ISGP Appeal (MID 201093.01) and

West Sitcum Litigation: \$360,000 for the West Sitcum Litigation (MID 201046.01).

Project costs associated with the appeal and the litigation will be expensed as incurred.

E. KEY POTENTIAL RISKS

ISGP Appeal: There is a risk that the PCHB may not rule in our favor or that if the permit is remanded to Ecology, they may write provisions that do not meet the Port's needs. This may trigger another round of appeals. If additional funds are not allocated for legal support of this appeal, we will lose the assistance of our outside counsel on this matter. In-house counsel at NWSA does not have the environmental expertise to handle this matter without outside legal assistance and would seek additional engagement from environmental counsel at the Port of Seattle.

West Sitcum Litigation: If appealed, the issues involved could potentially change how Ports manage tenant obligations to the stormwater permit in the future. If additional funding is not allocated for legal support for an appeal and the remaining issues involving former tenant APMT, NWSA will only have very limited funds to utilize outside environmental counsel to defend an appeal and handle the claims with APMT. In-house counsel at NWSA does not have the environmental expertise to handle this matter without outside legal assistance.

F. ATTACHMENTS TO THIS REQUEST

None

G. 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
	Total previous authorizations	\$291,240
February 2, 2021	This Request	\$180,000
	Total Authorized Amount	\$471,240

Date	West Sircum Litigation Action	Amount
February 7, 2018	Executive Authorization	\$120,000
July 23, 2018	Managing Member Authorization	\$297,230
November 26, 2018	Managing Member Authorization	\$285,000
May 15, 2019	Managing Member Authorization	\$350,000
	Total previous authorizations	\$1,052,230
	This Request	\$359,523
	Total Authorized Amount	\$1,411,753



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Date of Meeting: February 2, 2021

Increase Authorization for 2020 ISGP Appeal and West Sitcum Legal Services

Presenter: Dana Henderson
NWSA Legal Counsel

Action Requested

- Authorization for the Chief Executive Officer or their delegate to:
 - increase the contract amount and spending authorization for outside counsel for the appeal of the 2020 Industrial Stormwater General Permit (ISGP) from \$217,771 to \$471,771; and
 - to increase the contract amount and spending authorization for the West Sitcum Litigation matter from \$1,052,2230 to \$1,411,753.

Background

- **ISGP Appeal**: An additional \$180,000 in legal fees and cost is likely needed to fully prepare for the Pollution Control Hearing Board (PCHB) hearing on the appeal of the 2020 ISGP. This hearing is now set for November 2021. In 2020, most discovery was completed and the NWSA filed a motion for summary judgment with the PCHB on the scope of the ISGP as exclusive of the wharf areas. PCHB's ruling on that motion for summary judgment could narrow the issues remaining for adjudication or resolution between the parties.
- **West Sitcum Litigation**: Remaining issues are the claims related to APMT's tenancy. These claims were stayed pending other decisions in the lawsuit. This stay has been lifted and these matters are in active litigation.

Previous Authorization Summary

Date	2020 ISGP Appeal Action	Amount
November 27, 2019	Managing Member Authorization #1 – contract for outside counsel TMW including \$74,000 in staff charges	\$221,240
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	Total previous authorizations	\$291,240
February 2, 2021	This Request	\$180,000
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	Total Authorized Amount	\$1,411,753



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 - to increase the contract amount and spending authorization for the West Sitcum Litigation matter from \$1,052,2230 to \$1,411,753.