

THE NORTHWEST SEAPORT ALLIANCE
MEMORANDUM

MANAGING MEMBERS
BRIEFING IN ADVANCE
OF ACTION MEMO

Item No.: 5C

Date of Meeting: June 4, 2019

DATE: May 23, 2019

TO: Managing Members

FROM: **Sponsor:** John Wolfe, CEO

Presenters: Carolyn Lake & Tom Tanaka, NWSA Legal Counsels

SUBJECT: Northwest Seaport Alliance Charter Amendments – Briefing in advance of Action

A. BRIEFING FOR ACTION TO BE REQUESTED

This briefing provides an overview of amendments to the Northwest Seaport Alliance (“NWSA”) Charter as proposed and described below. Staff will request adoption of the amendments at the July Managing Member Meeting. Based on the first several complete years of operations, Staff has identified several changes which correct, clarify and or modify various sections to align with the preferred structure of operations. The modifications fall into three principle categories: Environmental, Finance, and Litigation Management. Details are provided below.

The proposed changes have been reviewed by Bond Counsel and by Legal Counsels for Ports of Seattle, Tacoma, and the NWSA. The NWSA Charter was created by August 4, 2015 Resolutions of the Commissions of the two Homeports. Once created by the Homeport, future amendments are carried out by the Managing Members, and the amendments are authorized to be made by Motion.

After Managing Member adoption, the NWSA is required to file the Second Amended Charter with the Federal Maritime Commission (FMC) for their oversight, because, in addition to the authorizing state law provisions, the creation of the NWSA was authorized by the FMC. The FMC has 45 days after the changes are filed to review the Agreements and act. If the FMC fails to act within the 45 days, the Third Amended Charter is deemed approved. If the FMC or a third-party objects, there is a quasi-judicial process for the parties to the Charter to justify why the intended amendments would not negatively affect rates or the market.

B. BACKGROUND

The NWSA was created and authorized pursuant to several layers of law:

- The United States Congress grants authority for ports and marine terminal operators in certain circumstances and if approved by the Federal Maritime Commission, to “discuss, fix or regulate rate or other conditions of service; or engage in exclusive, preferential, or cooperative working arrangements, to the extent that such agreements involve ocean transportation in the foreign commerce of the United States”. Federal law 46 USC Section 40301(b)(1-2). As part of the Shipping Act of 1984 (later

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- amended), a process was created to allow parties in the shipping trade to file agreements with the Federal Maritime Commission (FMC)
- Filing with the FMC gives the filing parties protection against federal anti-trust liability that would normally prohibit such discussions to prevent collusion and negative effects on the markets. The FMC then acts as an oversight body to review the Agreements to determine whether the discussions would or would not have a negative effect on competition.
 - The Ports of Seattle and Tacoma obtained FMC authorization for the ports to enter into FMC Agreement 201228.
 - At the state level, under Washington State law, Chapter 53.08 RCW, ports are allowed to exercise any of their powers jointly by mutual agreement and allows the Commissions of two Port districts to form a port development authority.
 - The state Interlocal Cooperation Act also allows ports to act jointly (including the formation of a separate legal entity for such joint cooperative action).

Accordingly, on August 4, 2015, the Managing Members adopted various founding documents to create the NWSA to carry out the unified management and operation of the Marine Cargo operations of the two ports. The Charter is the NWSA's principle foundational governing document.

On January 19th, 2016, Managing Members adopted the first revision to the Charter along with changes to the NWSA By-laws and Master Policy Delegation of Authority. The first round of amendments to the Charter addressed (1) Bond Counsel recommended changes (2) Schedule 2, Amendments to the description of Port of Tacoma Licensed Properties to provide more clarity¹ and (3) revised 3.2.(g)iii and added a new 3.2.(g)iv to state that where a PDA Project development triggers a requirement for mitigation, then all costs associated with that mitigation shall be the responsibility of the PDA.

C. SCOPE OF WORK

The proposed amendments are summarized:

- Environmental:
 - Section 1.1(n) Definition of Legacy Contamination (new definition)
 - Section 3.2, "Allocation of Environmental Costs" (at subsections a, b, c, e, f and g).
- Finance:
 - Bond Counsel recommended amendments to:
 - Section 1.1(h) Definition of "Distributable Cash"
 - Section 3.7, "Working Capital"
 - Section 3.8, "Working Capital Reserve Policy,"
 - Section 3.9, "No Additional Contributions Without Managing Member Vote"
 - Section 3.12, "Capital Construction"
 - Section 4.2(b), "Bond Income Calculations"
 - Section 4.2 (c) "Rate Coverage Management" (changed and moved to new section)

¹ The actual properties licensed to the Alliance did not change, nor was the valuation of Port of Tacoma's contribution to the Alliance affected.

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- Schedule 1 - to clarify the initial contribution from each Managing Member is “Working” Capital Contribution
 - Schedule 2, amends Port of Tacoma Licensed Properties to provide more clarity concerning the South Intermodal Yard. The valuation of Port of Tacoma’s contribution does not change.
- Litigation Management:
- This amendment adds a new Section 6.6 to formalize a structured process for CEO and Homeport Executive Directors(s) to consult and determine the appropriate entity to assume lead responsibility when the NWSA or a Homeport receives a claim, potential claim and/or litigation matter

D. TEXT CHANGES:

Charter Text Amendments: Additions to Charter language are shown by double underlined, deletions are shown in ~~strike through text~~. Following each of the fifteen proposed text changes, a brief explanation for the change is provided. To maintain consistency within the Charter, the NWSA is referenced as the “PDA” (“Port Development Authority”). Statutory references were updated, where appropriate.

E. ENVIORNMENTAL CHANGES:

1. **Reason for Change:** Definition 1.1(h) added a new definition for ease of reference:

1.1(h) Definition (new): Legacy Contamination” means contamination on Licensed Properties that occurred before the Effective Date.

2. **Reason for changes:** Changes to below Charter Sections 3.2 (a) (b) and (c) allocates environmental costs of as follows:

- Legacy Contamination – In general, Homeports by default retain the responsibility for the costs of Legacy Contamination for properties licensed to the PDA by the Homeport, regardless of whether cleanup is undertaken pursuant to any regulatory order or administrative process. However, The NWSA is allocated responsibility if the contaminates are unearthed or disturbed as a result of PDA operations.
- Dredging sediments – Allocates maintenance dredging costs to the NWSA, where that activity is associated with NWSA operations. The Homeport will bear any incremental additional costs if the dredge sediment is contaminated. (Example: landfill rather than open water disposal).

3.2 Allocation of Environmental Costs. Environmental cleanup costs shall be allocated by and between the Homeports and the PDA as follows:

(a) General Intent. Environmental investigation, remediation, ~~costs~~ and ~~project~~-mitigation costs associated with Licensed Properties and PDA business activities shall be allocated between the PDA and Homeports as described herein. Investigation and remediation costs associated with contamination on Licensed Properties that occurred before the Effective Date (**“Legacy Contamination”**) shall remain the responsibility of the Homeport in which the Licensed Property is located and as described below, ~~provided that any remediation~~

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~~costs necessary to support PDA operations shall be the responsibility of the PDA, even if the contamination actually occurred before the Effective Date. For any Post-Formation Improvement not owned by either Homeport prior to PDA formation, remediation costs shall be the responsibility of the PDA. The allocation of environmental remediation and project mediation costs described in this Section 3.2(a) are subject to Sections 3.2(b) to 3.3(g) below. Notwithstanding this Section 3.12, the foregoing, all such cost allocations may be revised on a project-specific basis by vote of the Managing Members.~~

(b) Remediation of Legacy Pre-Effective Date Contamination. ~~Regulatory Costs of investigation and remediation (whether required by an EPA or Washington State Department of Ecology order or pursuant to a voluntary cleanup program) of Legacy Contamination (that occurred on a Licensed Property before the Effective Date shall be the responsibility of the Homeport that owns such Licensed Property, , unless remediation is driven PDA development operations. If Legacy Contamination is discovered during planning or construction of a PDA project on a Licensed Property, any legally required investigation or cleanup of such Legacy Contamination shall be the responsibility of the Homeport. Where soil or other materials are disturbed or removed as part of a PDA project, the PDA shall be responsible for all associated costs, except that the Homeport shall be responsible for the incremental cost of disposal (i.e., the additional cost to dispose of contaminated materials above the cost to dispose of clean materials).~~

(c) Maintenance and Cleanup Dredging. ~~Costs of routine maintenance dredging (dredging required due to sediment deposition) required for PDA operation of Licensed Properties including disposal costs of dredged sediments that include Legacy Contamination shall be the responsibility of the PDA, except that the Homeport which owns the Licensed Property shall be responsible for the incremental cost of disposal of Legacy Contamination in dredged sediments (i.e., the additional cost to dispose of contaminated materials above the cost to dispose of clean materials). Costs of dredging required by a U.S. Environmental Protection Agency or Washington Department of Ecology order for cleanup of Legacy Contamination shall be the responsibility of the Homeport that owns such Licensed Property, however, that if there are incremental costs associated with contamination from such maintenance dredging, such costs shall be addressed under Section 3.2.(e) below.~~

3. **Reason for changes**: Changes to below Charter Sections (d) (e) and (f): Section (d) has no changes, Section (e) is deleted as redundant with the current language changes. Section (f) adds the clarifies that the cost of investigation as well as remediation associated with cleanup of Post PDA formation of property is borne by the PDA.

(d) Environmental Monitoring for Past Environmental Cleanup Operations.

Environmental monitoring of a Licensed Property required after any environmental cleanup operation conducted by a Homeport as to any of its Licensed Properties shall be the responsibility of such Homeport.

~~**(e) Post PDA Redevelopment:** Any contamination that occurred before the Effective Date but is discovered during planning or construction of a PDA project on a Licensed that requires entering into an EPA or Washington State Department of Ecology Order for investigation and cleanup shall be the responsibility of the Homeport that owns such~~

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~~Licensed Property, provided however, the Managing Members may choose to approve by vote to contribute to the cost of such cleanup if it would be advantageous for the PDA.~~

(f) Environmental Remediation Associated with Homeport Real Property Acquisition for PDA Development. If a Homeport acquires real property for PDA business, and that real property has or is later found to have contamination requiring a cleanup under federal or state law, then environmental investigation and remediation associated with that real property shall be the responsibility of the PDA.

4. **Reason for changes:** Changes to below Charter Section (g)(i) adds the word “bank” to habitat mitigation credit options and includes Public Access within the type of mitigation covered by this section.

(g) Habitat Mitigation Cost Allocation

(i) Post-Formation Habitat and Public Access Mitigation. The Homeports expect to develop advanced and/or mitigation banking credits that could be potentially ~~used~~ or used by the respective Homeport(s) and/or sold to the PDA depending on where the development activity impacts occur. These ~~advance/bank~~ mitigation projects will be managed and paid for by the Homeports in which the ~~advance/bank~~ mitigation projects are located.

5. **Reason for changes:** The changes to below Charter Section (f)(ii) and (iii) clarify that the PDA is responsible for replacement of existing habitat and or public access mitigation sites if required as a result of PDA redevelopment/expansion needs, that the Homeport is to develop an all-in cost for sale of mitigation credits and any long term operational and maintenance costs would need to be included in per acre credit price, and that that Homeport sale of advance credits is discretionary and not mandatory.

(ii) Existing Habitat, Wetland and Public Access Mitigation Sites. To the extent feasible, ongoing operations and maintenance costs to maintain existing habitat, wetland, and public access mitigation sites which were created to support a Licensed Property shall be the responsibility of the PDA, including replacement of existing habitat and or public access mitigation sites required as a result of PDA redevelopment/expansion needs.

(iii) Future Mitigation Sites. As each Homeport creates advanced bank habitat mitigation sites, each will develop a market rate price per square foot or per acre credit fee associated with the total cost-of-ownership, which will include land value, design, permitting, construction, monitoring, adaptive management and long-term operations and maintenance costs. Each Homeport shall may offer the PDA the option to purchase at market rate or as otherwise agreed to advanced bank habitat mitigation credits from such Homeport as needed to mitigate PDA development as these credits are available, and if purchased, the PDA also shall be responsible for ~~the future associated ongoing operations and maintenance costs.~~

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(iv) **PDA Project Mitigation.** In all cases, where a PDA Project development triggers a requirement for habitat and/or public access mitigation, then all costs associated with that mitigation shall be the responsibility of the PDA.

F. FINANCE CHANGES

6. **Reason for change:** This below amendment to Section 1.1 changes the definition of distributable cash. Currently, cash received from grants and from interest earned on the NWSA's (PDA's) cash are not automatically distributed per the Charter, but instead requires a vote of the Managing Members to distribute. Since the Managing Members or the CEO through delegated authority will have already authorized the receipt of grants, a second Managing Member vote to distribute the grant cash is redundant. Additionally, any cash interest earned from the NWSA operating reserve is based on contributions to the reserve from the two Homeports. Over time, the balance of interest has accumulated and has effectively increased the size of the reserve. Depending on the financial market conditions, and the market-to-market valuation of the investments in the reserve, the NWSA Treasurer should be authorized to redistribute the cash interest earned to the two Homeports for their use.

1.1 (h) "**Distributable Cash**" means (1) an amount equivalent to cash flow provided from operations as calculated pursuant to GAAP for a Calculation Period, plus (2) grants received in arrears for a Calculation Period and may also include (3) interest earned in the prior year for which the PDA Treasurer is authorized, at the Treasurer's discretion, to distribute once annually.

7. **Reason for change:** The below amendment to Section 3.7 clarifies actual use of working capital reserve and actual flow of funds.

3.7 Working Capital. Effective as of January 1, 2016, the Managing Members shall make initial cash capital contributions to the PDA as set forth on **Schedule 1** (collectively, "**Working Capital**"). The purpose of Working Capital is to provide the PDA with money required for operations and liquidity. The initial contributions of each Managing Member to Working Capital shall be the aggregate estimated amount of the working capital as established by the Managing Members, which each Managing Member shall contribute based on the percentage of each Managing Members' respective Membership Interest. PDA operating cash flow (cash revenue less cash expenses) shall be a component of Working Capital and be distributed on a periodic basis not less than quarterly to each Managing Member as more particularly described in Article IV. Other than for providing short term liquidity (less than 60 days) pending reimbursement per Section 3.12, Working Capital shall not be diverted for capital projects to Capital Construction.

8. **Reason for Change:** The below amendment to Section 3.8 is intended to clarify that the Working Capital Reserve Policy allows the Working Capital Reserve amount to be less than the targeted amount to allow for liquidity needed due to the reimbursement processes among the NWSA and the Homeports.

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3.8 “Working Capital Reserve Policy. The Managing Members shall develop a reserve policy establishing a minimum target fund level for Working Capital. The CEO is directed to notify the Managing Members if Working Capital drops below such targeted minimum level for more than 60 days and shall seek Managing Members' approval by vote to replenish Working Capital accordingly. The Reserve is allowed to drop below the targeted minimum level only to provide liquidity associated with pending reimbursements to the Homeports per Section 3.7 and 3.12. The Managing Members may consider other requests for additional contributions to the PDA, the affirmative approval of which will require a vote by each Managing Member.”

9. **Reason for change:** The amendment to below Section 3.9 allows funding of projects that fall within the limits of the CEO's delegation of authority without an additional vote of the Managing Members. This creates consistency between the Charter and the Managing Members' approved Master Policy, Delegation of Authority. If a Managing Member vote is required to fund projects delegated to the CEO, this is counter to and essentially eliminates the delegation.

3.9 No Additional Contributions Without Managing Member Vote. Beyond the initial contribution to Working Capital and the initial contribution for Capital Construction as provided in Sections 3.7 and 3.12, no Managing Member shall be required to make any additional contributions to the PDA without the vote of each Managing Member, which vote may be taken as part of a Capital Construction project approval or vote to fund Capital Construction provided however, any projects approved by the CEO in accordance with the Managing Member-approved Delegation of Authority Master Policy shall be funded by the Homeports without need for additional Managing Member approval or vote, subject to the requirement that the total expected capital spending will not exceed the capitalized project amount in the first year of the Five Year Capital Investment Plan Budget (as adjusted by any projects subsequently approved by the Managing Members during the budget year). If any such additional contribution is so approved but is not made by a Managing Member, such failure to make such contribution is acknowledged to be a material breach under clause (i) of the definition of “Dispute.” In addition, without a vote of the Managing Members, no Managing Member shall be permitted to make any additional contributions to the PDA.

10. **Reason for change:** The below amendments to Charter at Section 3.12 allow funding of delegated projects without a vote of the Managing Members, where such funding falls within the threshold dollar amount delegated to the CEO by the Managing Members Master Policy Delegation of Authority Resolution. Requiring a vote to fund projects delegated to the CEO essentially eliminates the delegation. Additionally, the amendment clarifies the actual use of working capital reserve and actual flow of funds.

3.12 Capital Construction. Separate from Working Capital, the PDA shall provide for the funding of capital expenditures (“Capital Construction”) to be funded by a pro rata initial contribution from each Managing Member based on their respective Membership Interests. Managing Members may approve by vote contributions to Capital Construction in amounts other than based on each Managing Members' pro rata respective Membership Interests on a project-specific basis. Requests for funding Capital Construction shall be based either on the CEO's periodic projection of PDA capital project cash flow needs or based on project

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authorizations to the CEO in accordance with the Managing Member's Delegation of Authority Master Policy Resolution. Managing Members may consider requests for additional contributions to the PDA, the affirmative approval of which will require a vote by each Managing Member. Capital Construction shall be funded by each Managing Member separately and not from Working Capital except to provide short term liquidity per Section 3.7. Distributions of Capital Construction funds will be made expressly subject to either (1) Managing Member approval of capital projects or (2) CEO approval of capital expenditure, where such expenditure is within the levels set in the Delegation of Authority Master Policy.

11. **Reason for change:** The below amendments to Charter at Section 4.2(b) clarifies that the bond income calculation applies to the bonds outstanding on August 4, 2015 when the NWSA was formed and clarifies that the bond income is based on the rules of the bond indentures for each Managing Member. Additionally, create a new section 4.2(c) by separating this from section 4.2(b). The changes also clarify that in the case of the Port of Seattle, the Bond Income Calculation excludes bonds issued to fund Airport Facilities.

4.2(b) Bond Income Calculation. Managing Members shall establish and maintain a requirement for the PDA to calculate and establish a minimum level of net income available to pay revenue bond debt service for each Managing Member from the PDA equal to the amount currently required for the Homeports to meet their current bond rate covenants for bond issues outstanding at the time of the formation of the PDA. (“**Bond Income Calculation**”). In the case of the Port of Seattle, the Bond Income Calculation excludes bonds issued to fund Airport Facilities. The Managing Members shall require the Bond Income Calculation to be reviewed annually as part of the PDA budget process and the Managing Members may adjust the Bond Income Calculation so long as it does not cause any Managing Member to fail to comply with its rate covenant. The PDA may not take any action that reasonably would reduce PDA income below the minimum level established by the Bond Income Calculation unless each Homeport separately votes to approve that action. Such a vote by each Homeport must occur even if the action is within the CEO’s authority under the Delegation of Authority Master Policy

12. **Reason for change:** This amendment creates a **new** section 4.2(c) by separating this from section 4.2(b). This clarifies that this is a separate stand-alone requirement different from the Bond Income Calculation.

4.2(c) Rate Coverage Management. If net income ~~before depreciation~~ available to pay revenue bond debt service for each Managing Member of the PDA is not sufficient for either Homeport to be in compliance with a rate covenant (as currently described in each Homeport’s Master Bond Resolutions in effect as of the Effective Date), then:.....

. Subsequent sub-paragraphs are renumbered accordingly with no content changes.

13. **Update Schedule 1** to clarify the initial contribution from each Managing Member to Working Capital. No amounts were changed. The footnote to the table is updated to include “This is also called Working Capital” for clarity.
 - i. Current Title: “Capital Contribution and Membership Interest”
 - ii. Proposed Title: “Working Capital Contribution and Membership Interest”.

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14. **Update Schedule 2 Licensed Properties and Maps:** Clarify that the business located at the SIM is included in the NWSA, but that the property is not. The SIM real estate is owned by the City of Tacoma, and all improvements revert back to the City if the lease is ever cancelled.

G. LITIGATION MANAGEMENT CHANGES:

15. **Reason for Change.** The amendment adds a new Section 6.6 to formalize a structured process for NWSA CEO and Homeport Executive Directors(s) to consult and determine the appropriate entity to assume lead responsibility when the NWSA or a Homeport receives a claim, potential claim and/or litigation matter. The process defines that the Executives of the involved entities shall confer and determine which entity shall assume lead responsibility in responding and defending the claim, potential claim or litigation. If the Executives do not agree, then the managing Members shall make that determination. Thereafter the litigation shall be managed using the requirements the Delegation of Authority Master Policy Resolution of the NWSA or Homeport which assumes lead responsibility.

(new) 6.6 Litigation Management Involving PDA and or Homeports. When the PDA or a Homeport is sued or notified of a claim or 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 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. If the Executives cannot reach agreement, the matter shall be referred to the Managing Members. Thereafter, litigation shall be managed in accordance with the requirements the Delegation of Authority Master Policy Resolution of the entity assuming lead responsibility.

FINANCIAL IMPLICATIONS

There are no financial impacts associated with the proposed changes.

H. NEXT STEPS

Staff will incorporate any changes which may result from this briefing and will bring the Charter amendments back for approval in July. The NWSA was formed under the authority and oversight of the Federal Maritime Commission ("FMC"), FMC Agreement 201228. Because these are amendments to one of the NWSA founding documents, they shall be filed with the FMC, as an amendment to FMC Agreement 201228. NWSA staff and legal counsel will continue to monitor and advise if/when future revisions may be required.

Reference: First Amended Charter – Clean current version, as amended on January 19, 2016 (In MM Binders)

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Attachments: Proposed Second Amended Charter - Redlined Charter Updated with Proposed Changes