



**PORT OF OLYMPIA COMMISSION
MINUTES OF REGULAR MEETING**

December 8, 2008

CALL TO ORDER

President McGregor called the meeting of December 8, 2008, to order at 5:30 p.m. at the LOTT Board Room in Olympia. Commissioners Barner and Telford were also in attendance.

President McGregor announced that the Commission would hold a work session on December 10, 2008 at 1:30 p.m. at the Port Administrative Offices for a briefing on the Capitol Lake Adaptive Management Plan.

Staff in attendance were: Executive Director Ed Galligan, Program Assistant Lorie Watson, Airport Director Rudy Rudolph, Harbor Director Bruce Marshall, Marine Terminal Director Jim Amador, Engineering Director Jeff Lincoln, Cascade Pole Site Manager Don Bache, and Program Assistant Conley Booth. Bob Goodstein and Carolyn Lake, Port's Legal Counsel, were also in attendance.

Public in attendance were as follows: Harold Clark, Bill Pilkey, Keith Bausch, Sharron Coontz, Arthur West, Richard Wolf, and Jason Hite.

APPROVAL OF AGENDA

The agenda was approved as presented.

COMMISSIONERS REPORTS

Commissioner Telford reported that he attended the Tumwater Chamber Board Meeting and also dropped in on the Grand Mound Chamber Meeting.

Commissioner Barner indicated that he was planning to attend a community forum on dispute resolution immediately following tonight's Commission meeting. He also reported that he attended the Solid Waste Advisory Committee meeting on Thursday. The discussion was on budget reductions and program changes. He reported that there was no CLAMP meeting but the Port Commission will receive a briefing on CLAMP at their Work Session this Wednesday. He also reported that he attended the weekend session of a workshop titled Charting the Course, Preparing Our Communities for Carbon Regulation. He commented that the discussions were very interesting and included subjects such as reducing our collective carbon footprint, building more energy efficient buildings, using alternative energy resources, and transit oriented communities.

Commissioner Barner also commented that CTED has engaged Energy Efficient Finance Corporation to present a workshop on January 24, 2009 at Evergreen State College, titled Moving from Policies to Projects, a workshop on clean energy finance opportunities for local governments. He indicated that he is planning to attend.

President McGregor reported that he also attended the workshop on "Preparing our Communities for Carbon Regulation." He commented that it was a good seminar and estimated approximately 60 individuals attended. The session he attended was titled Action and Tools, which discussed necessary actions we can take away now. He commented that we are doing some things at the Port now, but he doesn't know if we are doing them in a coordinated effort. He indicated that he would plan to talk with Mr. Galligan to discuss how we can set up a whole plan to contribute to the environment by reducing our carbon footprint.

President McGregor read a letter the Commission received November 25th from a Marina Tenant, Sharon Buelt, complimenting Marina staff member Jay Hall and how he handled a recent boat fire incident at the Marina.

EXECUTIVE DIRECTOR REPORT

Mr. Ed Galligan reported that four Port employees had attended the first of the three community forums on dispute resolution that Commissioner Barner had earlier mentioned. He indicated that

the employees had commented that they thought the first forum was very constructive, the framework is a good one, and they are looking forward to attending the next two sessions.

Mr. Galligan also reported that there is currently around five million board feet of wood in the cargo yard. He noted that a ship will load approximately six million board feet, and added that the wood is expected to ship out near the end of this year.

Mr. Galligan indicated that we held a preliminary site tour of the East Bay development area last week and nine interested parties participated. He added that the RFQ was issued and responses are due December 23rd.

Mr. Galligan also reported that we have finished, at the staff level, the EDC work plan. He indicated that he would send it to the Commission for comment before sending it out. He noted that the Economic Forecast is scheduled for this week on Thursday, December 11th and commented that it will be interesting to hear the regional and Pacific Northwest forecasts.

LEGAL COUNSEL REPORT

Ms. Carolyn Lake provided the Commission with an update on the status of legal activity since the November 24, 2008 Commission meeting. She reported that today, December 8, 2008, the Shoreline Hearings Board (SHB) dismissed Mr. West's appeal to the SHB of the City of Olympia's approval of the Port's Modified East Bay shoreline permit. Hearing had been set for December 15, 2008. Ms. Lake indicated that back in October 2008 the Port filed a Motion to Dismiss for lack of Board jurisdiction. Also in October 2008 the City filed a motion to dismiss the appeal. Ms. Lake reported that Mr. West failed to respond to the Motions, and the deadline to do so has passed. The Board's ruling granting the Motion to Dismiss terminates the case prior to hearing. Mr. West has thirty days to appeal. A copy of the Board's ruling was sent to the Commission.

Ms. Lake indicated that in May 2008 Mr. West and Mr. Dierker appealed the original SHB permit, upon which this Modification was based. The City of Olympia's approval of the shoreline substantial development permit allows infrastructure improvements to support the East Bay short plat to the Shoreline Hearings Board. The SHB previously dismissed Mr. West's appeal after he finished his hearing Board presentation.

Ms. Lake also reported that Mr. West filed an appeal of the Department of Ecology Industrial Stormwater Permit in late November. Parties named are the Department of Ecology, Weyerhaeuser Company and the Port of Olympia. Ms. Lake indicated that this matter was filed with the PCHB in November 2008. The Board set December 8, 2008 as the first pre-hearing conference and parties were required to file their initial pleadings (witness, issue and exhibit lists) by December 5, 2008. Ms. Lake reported that Mr. West failed to timely file his required pleading on December 5 and failed to appear for the pre-hearing conference of December 8. Ms. Lake indicated the Board issued a ruling re-setting the pre-hearing conference but also stated that if Mr. West fails to appear again without good cause, the Board will consider an Order of Default ending the case, or other appropriate action.

Ms. Lake provided the Commission with a summary of litigation status and costs from 2006 to 2008. She reported that in 2006 to 2008, the Port of Olympia defended against thirty-eight environmental/SEPA appeals and/or legal actions, three consolidated public records cases, and one Petition for Recall action in which the Port's Weyerhaeuser lease was named as a principle issue. Ms. Lake indicated that the applicable Court or administrative Hearings Board has ruled in favor of the Port in twenty-nine of the thirty-eight actions, and there continues to be no adverse rulings against the Port in environmental cases where the Port was the permitting party or permit applicant. She also reported that in every case except one where the Port prevailed in the initial ruling, the opposing party(s) pursued reconsideration or appeal at least once and more often multiple times. Despite numerous appeals, no initial decision favorable to the Port has ever been disturbed on appeal. Ms. Lake noted that there are six cases for which no initial ruling has yet been made, which are on going.

Ms. Lake provided a summary of litigation fees and costs as follows:

Year	Fees	Costs
2006	\$170,892.50	\$8,189.15
2007	\$199,842.33	\$15,227.05
2008	\$223,502.02	\$16,886.42
TOTAL	\$594,236.85	\$40,302.62

Ms. Lake reported that thirty-eight legal cases filed against the Port with activity in 2006-2008 were brought by one or more of a total of thirteen persons. Four of those thirteen persons listed as opposing parties are involved in four or more actions, as follows: Arthur West - 25 actions, Jerry Dierker - 13, Jan Witt – 5, and Jerry Parker – 4. Ms. Lake indicated that besides the Port, there are twenty-two other entities that have also been opposed by appellants in the above litigation.

Commissioner Telford commented that the most recent suit not yet included in Ms. Lake's report adds a number of additional entities to the list. Commissioner Telford also expressed appreciation to Carolyn Lake for her successful work in defending the suits against the Port.

PUBLIC COMMENT

Bill Pilkey commented on budget concerns he had previously expressed. He also commented on a contract that Mr. West had given the Commission a copy of. Mr. Pilkey expressed concern that the ship estimates used to prepare the 2009 budget were high and based on guesses. He also followed up on his earlier requests to have a cost benefit analysis done on the Marine Terminal.

Sharron Coontz commented on the Comprehensive Scheme of Harbor Improvements. She asked why the changes were necessary and if the Port was out of compliance until those changes were made. She also commented on contract change orders and asked if there was a way to find out how many had been done and the reasons for them.

Commissioner Telford responded to Ms. Coontz indicating that the introduction page of the Comprehensive Scheme attempts to explain where we've been and where we're going. He also commented that a couple of judges had determined that the Port's original Comprehensive Plan met the requirements of a Comprehensive Scheme, and this is more about changing some wording and simplifying it.

Commissioner Barner spoke to Mr. Pilkey's comments and suggested discussing at a work session the cost of hiring a consultant to do an analysis of the Marine Terminal. He also commented that Ms. Coontz's question about the number of change orders is a good one. He indicated he would like to know how many of our contracts have been modified based on change orders and what the bases of the change orders were.

Commissioner Telford added that it might be a useful exercise, but what we'll see is that there aren't that many changes to the contracts bid and awarded for real work; most is for consulting and engineering contracts.

President McGregor also commented on the need for change orders, citing the East Bay development as an example, where change orders were necessary because of the requirements by the Department of Ecology for more and different testing. He indicated that staff makes sure we are within the letter of law and they are doing a good job of keeping the Commission apprised of contracts. He added that a list showing contracts, change orders, and final results would be ok, though and asked Mr. Galligan to look into doing a report.

President McGregor then responded to Mr. Pilkey's comment about Mr. West having given the Commission a copy of a contract between Weyerhaeuser and the Port of Tacoma. He clarified that Mr. West only provided them two pages of a contract with no signatures. He added that we don't have, nor want, privity to contracts other Ports have with Weyerhaeuser. President McGregor also responded to Mr. Pilkey's comment about the budget being prepared using guesses on the number of ships we anticipate. He indicated that the budget document is prepared using information at hand with estimates for both revenue and expenses. If ships don't come then expenses go down as well. He added that you make the best estimates you can when preparing budgets.

In response to Commissioner Barner's suggestion about discussing doing an analysis of the Marine Terminal, Commissioner Telford commented that he believes we are scheduled to do an Economic Impact Study this year and one component of that will be on the Marine Terminal. He added that he would not propose we do anything separate.

Mr. Galligan commented that we have budgeted for an Economic Impact Study to be done in 2009 and will engage the Commission and citizens in that process.

CONSENT CALENDAR

Minutes. The minutes from the November 10, 2008 Commission Meeting, November 18, 2008 Work Session, and the November 24, 2008 Commission Meeting were unanimously approved.

The Commission requested a minor wording change in the minutes of the November 24, 2008 meeting.

ACTION CALENDAR

Expanded Scope for Intermodal Infrastructure Enhancement Project

Mr. Jeff Lincoln presented a request for authorization to expand the scope of an existing Architect and Engineering Contract No. 2007-1030 with David Evans and Associates for engineering services associated with the Intermodal Infrastructure Enhancement Project, Capital Project TER013.

Mr. Lincoln indicated that the original contract scope was engineering design, permitting and grant preparation for the intermodal enhancement project. He noted that on April 28, 2008, the Commission authorized an increase to the contract to provide additional engineering services to include preparation of the final bid documents, support during the bidding process, and construction support services. He indicated that this project is being administered by the Washington Department of Transportation, which will result in delays that we cannot project or predict, and so costs will increase.

Mr. Lincoln included that since April, the Executive Director authorized increases to the Contract for a total amount of \$10,400, to revise the utility plan and technical specifications to remove relocation of the sanitary sewer, water main, and power pole, and add a plan view of utility protection slab for waterline protection. This increase was less than 10% of the last Commission authorization, and therefore in compliance with Master Policy Resolution 2008-17. He noted that since it is now more than 10% of the contract, it comes back to the Commission for review and approval.

Mr. Lincoln indicated that the expanded scope will provide engineering design work to revise the existing utility plan to relocate the waterline, per City of Olympia requirements. The scope will also include preparation of specifications and updated engineer’s estimates for construction costs. A significant cost item will be necessary easements so the City will have access to that waterline.

Mr. Lincoln provided the following contract cost summary:

Previously authorized through Amendment 3	\$91,140.00
Commission authorized increase (4-28-08)	\$40,500.00
Executive Director authorized increases (7.9% of Commission authorization)	\$10,400.00
This increase request	\$10,000.00
Revised total authorization:	\$152,040.00

Commissioner Barner moved the Executive Director be authorized to expand the scope of work for Contract No. 2007-1030 with David Evans and Associates in an amount not to exceed \$10,000.00 for a total authorization of \$152,040.00. Commissioner Telford seconded the motion. The motion passed unanimously.

Commissioner Barner asked what the time length of the process is. Mr. Lincoln responded that the construction contract was awarded approximately seven weeks ago, and while some materials have been delivered, they are waiting for additional materials to come in.

Commissioner Telford asked if we would see a change order for construction because of the water line change that’s needed. Mr. Lincoln indicated he anticipates a change order would be less than \$2,000, which would be smaller than what is required for Commission approval.

Comprehensive Scheme of Harbor Improvements-Adoption

Mr. Jeff Lincoln presented a staff recommendation that the Commission adopt the final draft dated December 8, 2008 as the Port’s Comprehensive Scheme of Harbor Improvements.

Mr. Lincoln provided a brief background, indicating that Port staff has been working with the Commission and the Port Advisory Committee (PAC) since fall, 2006 to update the Port’s Plans. He noted that throughout 2007 the PAC considered changes to the Port’s Development Guidelines, which were eventually adopted in 2008, and Port’s counsel recommended an improved format in 2008. He also indicated that public hearings were held on the adoption of the Comprehensive Scheme of Harbor Improvements on November 10 and 24, 2008.

Commissioner Barner asked about the joint Port maintenance facility at NorthPoint that is mentioned in the document language. Mr. Lincoln responded that the last estimate for a joint maintenance facility is over \$4M dollars, so it is not in the current Port plan to build it. He noted that we are using a small space in the Simon Johnson building near the Marina and have very poor facilities in poor condition at the pump and treat station. He indicated that given the prioritization of reinvesting and moving the Port forward, recommendation has been made not to proceed with the joint maintenance facility at this time.

Commissioner Barner asked if staff would be putting together a list of deferred projects. Mr. Galligan responded that we do have a list and would be happy to make it available. Commissioner Barner also asked what staff is contemplating for development of the sites at NorthPoint. Mr. Lincoln responded that staff understands the need of having a thoroughly vetted and considered project and would come back to the Commission to get their consideration of what they want out there before anything happens.

President McGregor noted that based on public comment, two projects, the half-acre paving and the terminal fencing project, were removed since the last public hearing.

At the request of Commissioner Barner, Mr. Lincoln provided additional background on the reason for the creation of the Comprehensive Scheme of Harbor Improvements. He added that the Comprehensive Scheme of Harbor Improvements is a document that tells the public what our intent is and links it to the capital budget. It is streamlined to projects we intend to accomplish. He indicated that projects would come back to the Commission for review and approval. He also noted that the Commission has the ability to amend the Comprehensive Scheme whenever they so desire. It is very flexible and allows the Commission to seize opportunities to adjust if an opportunity comes forward.

Commissioner Telford moved to adopt the December 8, 2008 draft as the approved Port Comprehensive Scheme of Harbor Improvements. Commissioner Barner seconded the motion. The motion passed unanimously.

President McGregor thanked Mr. Lincoln, the staff and Ms. Lake for their efforts in getting the Comprehensive Scheme of Harbor Improvements to this point.

ACTION/OTHER CALENDAR

Settlement of Litigation

Mr. Jeff Lincoln indicated that the Port received a 60-day notice letter under the Clean Water Act (CWA) from the Olympians for Public Accountability (OPA), informing the Port of possible storm water permit violations. Pursuant to the citizen's suit provision of the CWA, citizens may bring an action for injunctive relief to halt the violation of any provision of the CWA, including permit violations. Mr. Lincoln reported that rather than filing suit, OPA and the Port have negotiated a tentative agreement under which the Port will perform certain inspections and additional testing of storm water in the vicinity of the Marine Terminal and the Cascade Pole Remediation Site. The tentative agreement also contains provisions to pay certain legal and service costs associated with this agreement.

Mr. Bob Goodstein, Port's legal counsel, provided additional background on the issue and presented the terms of the settlement. He indicated that a settlement of claim notice was provided to the Port on October 31, 2007. The Port holds an NPDES permit, which requires those who have assets that generate stormwater off flow into water bodies be subject to the permit. Mr. Goodstein indicated that OPA delivered a notice of intent to sue for violations of the CWA. The Port reviewed its activities under the permit and engaged OPA about their concerns. Mr. Goodstein noted that one concern of OPA was that there are other entities besides the Port contributing to the storm water discharge system and there were concerns about pipes, turbidity of discharge, and contaminate loads from off-port sources. Mr. Goodstein indicated that if a lawsuit is filed, it goes to a federal court, which makes a determination if there are violations of the act, and if violations are found, the permit holder is subject to a per diem penalty in excess of \$20,000 day. Mr. Goodstein commented that financial penalties and the cost of defending them are extreme. He also explained that the settlement agreement memorializes what our efforts are going to be going forward. He indicated that in the agreement, we would share the results of our efforts with OPA and cover the OPA legal costs and professional costs of approximately \$37,000.

Mr. Lincoln then reviewed the Settlement Agreement tasks, which include:

- Remote inspection of Marine Terminal storm drain lines;
- Additional storm water sampling at the storm water monitoring points;

- Sampling of sediments inside storm drain system structures;
- Update, comply and complete noted deficiencies under existing/future storm water permit;
- For 3 years, provide OPA updates/results of all activities completed under the Agreement.

Mr. Lincoln indicated that the major issue was our failure to take action when exceedences were noted, and indicated that the following remedial actions would be taken:

- Storm water compliance assistance has been added to the existing contract with Cascade Pole contractor (Landau);
- Working with tenant's consultants (CH2M-Hill) to improve our processes and procedures;
- More staff efforts (staff time), more consultants, and more resources.

Mr. Lincoln indicated that the estimated cost of the identified tasks is \$94,000 in additional testing over the next three years. This does not include legal fees. He also indicated that the payment due upon signing of the Agreement is \$37,596.37, including legal costs and the cost of the consultant for OPA.

Mr. Goodstein noted that there has been no actual filing of a lawsuit; this is a contractual settlement that eliminates the possibility of legal action. He indicated that there is no admission or denial of claims, and this is a proactive step.

Commissioner Barner asked what our solutions would be and Mr. Lincoln responded that we would work with consultants to determine solutions. He also commented that staff member Don Bache is working directly with the OPA consultant. Commissioner Barner asked for regular reports to the Commission describing what we are doing to comply with the requirements of the agreement and changes we are making.

Commissioner Telford asked if this is budgeted for 2009 and Mr. Lincoln responded that it is in their operating budget. Commissioner Telford also commented that what we need is a report that gives us some visibility on what this is, what exceedences have been, where problems are and what the current facilities will do. He expressed his frustration that he doesn't understand what we were supposed to be doing and why we weren't doing it, and why it took \$37,000 in legal fees. Mr. Goodstein clarified that the fees were both legal costs and the cost of OPA's consultant.

President McGregor asked if there would be one designated contact person on staff. Mr. Lincoln indicated that Don Bache is the point of contact for OPA and he (Mr. Lincoln) will be taking an interest in the process as well.

Commissioner Telford asked if we are having exceedences and what we need to do about it if so. Mr. Lincoln responded that this would be identified as part of the settlement agreement with OPA. Mr. Bache also indicated he would get back to the Commission after reviewing the reports. Commissioner Telford also asked when we would know the potential total costs of this project. Mr. Bache responded that this is a three year period of testing and he and our consultant have been working to determine what is going on, what's going out, and needed changes in actions or potential treatment.

Mr. Goodstein also responded indicating that some testing is not directly related to NPDES discharge exceedences, but rather is designed to respond to the question of what other sources of pollution may or may not be coming into our system. If exceedences do exist, then the first step is to identify to the Department of Ecology that they exist, then use the best available technology standards.

Commissioner Barner moved to authorize the Executive Director to enter into a settlement agreement with Olympians for Public Accountability. Commissioner Telford seconded the motion.

Public Comment

Arthur West thanked the Commission for taking a step forward on this matter. He indicated he is not a member of OPA, and questioned whether payment of their legal fees is a legitimate cost for the Port. He added that the Port is not the only agency responsible for toxic contamination of the Sound.

The motion passed unanimously.

Commissioner Barner thanked staff and Mr. Goodstein for their good work on this settlement agreement.

ANNOUNCEMENTS

President McGregor announced that the December 22, 2008 Commission Meeting is cancelled. He also announced that the Commission would hold a work session on December 10, 2008 at 1:30 p.m. at the Port Administrative Offices for a briefing on the Capitol Lake Adaptive Management Plan.

ADJOURNMENT

President McGregor adjourned the meeting of December 8, 2008 at 7:30 p.m.

PORT OF OLYMPIA COMMISSION

President

Vice President

Secretary-Treasurer