

RECOMMENDATION APPROVED;
RESOLUTION 24-10374 ADOPTED AND
ORDER 24-7371 (Permit 999) APPROVED
BY THE BOARD OF HARBOR COMMISSIONERS

June 27, 2024
AM Klesges
Amber M. Klesges
Board Secretary



Executive Director's
Report to the
Board of Harbor Commissioners

DATE: JUNE 18, 2024

FROM: CARGO AND INDUSTRIAL REAL ESTATE AND
ENVIRONMENTAL MANAGEMENT

SUBJECT: RESOLUTION NO. 24-10374 AND ORDER NO. 24-7371 - SET
ASIDE 2019 FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT
REPORT FOR BERTHS 97-109 (CHINA SHIPPING) CONTAINER
TERMINAL PROJECT AND RELATED PROJECT APPROVALS;
REMOVE CONDITIONS TO PREVIOUS APPROVALS OF THE FIFTH
AMENDMENT AND ORDER RESETTING COMPENSATION; APPROVE
THE SIXTH AMENDMENT TO PERMIT NO. 999 WITH CHINA SHIPPING
(NORTH AMERICA) HOLDING COMPANY, LTD.; AND DIRECT STAFF
TO PREPARE A NEW ENVIRONMENTAL DOCUMENT PURSUANT TO
WRIT OF MANDATE ISSUED BY SAN DIEGO SUPERIOR COURT

SUMMARY:

Staff requests that the Board of Harbor Commissioners (Board) adopt a proposed Set-Aside Order (Order) that sets aside certification of 2019 Final Supplemental Environmental Impact Report for Berths 97-109 (China Shipping) Container Terminal Project ("2019 SEIR"), as well as related project approval and specified actions and approvals as set forth in Resolution No. 19-9548 – Final Supplemental Environmental Impact Report for the Berths 97-109 (China Shipping) Container Terminal Project (App No. 150224-504; SCH No. 2003061153), adopted on October 8, 2019.

This Order is mandated by a court order that requires the City to set aside specified actions, resolutions and orders including the 2019 SEIR CEQA certification and related project approvals.

Staff requests that the Board remove conditions contained in Resolution No. 24-10336, wherein it conditionally approved the Fifth Amendment to Permit No. 999, as amended (Permit 999) with China Shipping (North America) Holding Company, Ltd. (China Shipping) ("Fifth Amendment"), and Order Resetting Compensation for the period of June 28, 2020, through June 27, 2025, ("Order Resetting Compensation"), to make both such approvals unconditional. Both the Fifth Amendment and the Order Resetting Compensation were conditionally approved by the Board on March 28, 2024, and the City Council on April 9, 2024.

Staff also requests approval of the Sixth Amendment to Permit No. 999 with China Shipping, contractually binding China Shipping to implement certain mitigation and lease measures in the 2008 EIR and the 2019 SEIR, as modified by the trial court ruling and the appellate court opinion.

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Finally, staff requests direction to prepare a new environmental document for Berths 97-109 (China Shipping) Container Terminal Project as directed by the Writ of Mandate to comply with the California Environmental Quality Act (CEQA).

The proposed actions will comply with a Writ of Mandate issued to the Port by the San Diego Superior Court on May 24, 2024, by contractually binding China Shipping through a Sixth Amendment to Permit 999 to implement those CEQA mitigation and lease measures determined to be feasible by court proceedings to date through a permit amendment, set aside the 2019 SEIR and related project approvals, and prepare a new environmental document under CEQA. The proposed actions will also unconditionally implement a commercial agreement between the parties in the Fifth Amendment to Permit 999 to reflect agreement on the resolution of commercial matters concerning a \$15,500,000 equipment credit, a \$1,446,379.57 resolution of a pending claim concerning China Shipping's 2019 compensation obligations, and via the Order Resetting Compensation, the resetting of Minimum Annual Guarantee (MAG) and Twenty-Foot Equivalent Unit (TEU) rates for the period of June 28, 2020, through June 27, 2025, which will leave them unchanged from what was in place as of June 27, 2020, subject to any increase in the Tariff N.O.S. rate occurring during any compensation year in accordance with the terms of the Permit.

RECOMMENDATION:

It is recommended that the Board of Harbor Commissioners:

1. Find that the Director of Environmental Management has determined that the proposed action of adopting the Order is administratively exempt from the California Environmental Quality Act (CEQA) in accordance with Article II, Section 2 (b)(f) and (h) of the Los Angeles City CEQA Guidelines;
2. Find that the Director of Environmental Management has determined that the proposed actions of approving the permit amendments have been previously evaluated pursuant to the requirements of the California Environmental Quality Act (CEQA) under Article II Section 2(i) of the Los Angeles City CEQA Guidelines, and further that the proposed actions are ordered by the San Diego Superior Court as authorized by CEQA, and therefore is administratively exempt from the California Environmental Quality Act (CEQA) in accordance with Article II, Section 2 (b)(f) and (h) of the Los Angeles City CEQA Guidelines;
3. Set aside certification of the 2019 Final Supplemental Environmental Impact Report for Berths 97-109 (China Shipping) Container Terminal Project, adopted on October 8, 2019;
4. Set aside Resolution No 19-9548 – Final Supplemental Environmental Impact Report for the Berths 97-109 (China Shipping) Container Terminal Project (App No. 150224-504; SCH No. 2003061153), dated October 8, 2019;

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5. Approve Order No. 24-7371.
6. Approve removal of conditions contained in Resolution No. 24-10336 regarding approval of the Fifth Amendment to Permit No. 999 with China Shipping Holding Company, Ltd., and Order Resetting Compensation, which were conditionally approved by the Board on March 28, 2024, and the City Council on April 9, 2024, thereby making the previous conditional approvals of the Fifth Amendment and Order Resetting Compensation unconditional;
7. Approve the Sixth Amendment to Permit No. 999 with China Shipping Holding Company, Ltd., thus implementing and making contractually enforceable against China Shipping the 2008 EIR mitigation and lease measures and the 2019 SEIR mitigation and lease measures, as modified by the trial court ruling issued on June 27, 2022, and the Court of Appeal opinion issued on December 29, 2023. The Board's approval for the Sixth Amendment is based upon, and incorporates by reference, the Board's December 12, 2008, Findings of Fact and Statement of Overriding Considerations for the 2008 EIR for the Berths 97-109 China Shipping Terminal, and is directed by the Writ of Mandate to comply with CEQA;
8. Direct the Board Secretary to transmit the Sixth Amendment to Permit No. 999 to the City Council for approval pursuant to Charter 607(a), requiring a 2/3 vote of the City Council;
9. Authorize the Executive Director to execute and the Board Secretary to attest to the Sixth Amendment to Permit No. 999 upon approval by the City Council;
10. Authorize the Board Secretary to attest to and certify the adoption of Order No. _ by the Board of Harbor Commissioners of the City of Los Angeles and to cause a copy of the same to be presented to the City Council and request that the City Council, pursuant to court order, set aside all City Council's 2019 SEIR approvals, including the Los Angeles City Council's August 12, 2020, adoption of a (1) Motion by Councilmembers Joe Buscaino and Mitch O'Farrell (Council File No. 19-1263) to Deny all appeals and Certify the Final Supplemental Environmental Impact Report and Adopt the recommendations of the Board of Harbor Commissioners from its special meeting held October 8, 2019 relative to the China Shipping Container Terminal Project; and (2) Official Action of the Los Angeles City Council – Adopting motion of Buscaino and O'Farrell;
11. Direct staff to prepare, consistent with the procedures and substantive requirements set forth in CEQA, a new environmental document for the operation of the China Shipping Terminal that supplements and/or revises the analysis in the 2019 SEIR in accordance with the Opinion and Ruling and as directed by the Writ of Mandate;

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12. Adopt Order No. 24-1371 and Resolution No. 24-10374; and

13. Direct the Board Secretary to transmit this Resolution No. 24-10374 to the City Council to approve removal of conditions contained in Resolution No. 24-10336 regarding approval of the Fifth Amendment to Permit No. 999 with China Shipping Holding Company, Ltd., which was conditionally approved by City Council on April 9, 2024, thereby making the previous conditional approval of the Fifth Amendment unconditional, for approval pursuant to Charter 607(a), requiring a 2/3 vote of the City Council.

DISCUSSION:

Permit 999 grants China Shipping nonexclusive use of approximately 131 acres at Berths 100-102 (Transmittal 1) for container terminal operations, for a term of 25 years, from June 28, 2005, to June 27, 2030, with three five-year extension options, exercisable by China Shipping.

Litigation was filed in 2001 to challenge the City of Los Angeles Harbor Department's (Harbor Department or Port) approval of Permit 999 under CEQA. Pursuant to a 2004 Amended Stipulated Judgment (ASJ) settling that litigation, China Shipping was allowed to continue to operate the terminal under Permit 999. Consistent with the ASJ, Permit 999 was to be amended to include mitigation measures required by a new project-specific Environmental Impact Report (2008 EIR). That requirement subsequently resulted in a long-running dispute regarding whether the mitigation measures were feasible and China Shipping's contractual obligation to implement mitigation measures. The Harbor Department decided to revise some of the 2008 EIR's mitigation measures to address feasibility issues, and certified a 2019 Supplemental EIR for the Berths 97-109 [China Shipping] Container Terminal Project (2019 SEIR).

As a result, in 2019, the Natural Resources Defense Council, the South Coast Air Quality Management District, and intervenors California Air Resources Board and the California Attorney General (collectively, Petitioners) filed a lawsuit against the Harbor Department and China Shipping challenging the terminal's ongoing ability to operate, based on the arguments that the Harbor Department's CEQA analysis in the 2019 SEIR was flawed and that the Harbor Department did not contractually impose mitigation measures on China Shipping, thus violating CEQA. These actions were consolidated, and venue transferred to San Diego Superior Court. Following many months of trial court proceedings, the trial court ordered the 2019 SEIR to be set aside and required additional analysis under CEQA (Ruling). After a subsequent appeal that was decided in December of 2023, the Court of Appeal remanded the case back to the trial court to determine the remedy (Opinion).

On March 6, 2024, the trial court in San Diego issued an Order to Show Cause (OSC) requiring the Harbor Department and China Shipping to "show cause, if any there be, why

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shipping activities at the China Shipping Terminal should not be suspended pending the setting by the court of a strict timeline for the Harbor Department's adoption of a new SEIR and the enforcement of the Lease to ensure compliance with mitigation measures."

On March 25, 2024, China Shipping executed the Fifth Amendment to Permit 999, which required China Shipping to comply with all the mitigation and lease measures that are the responsibility of the tenant in the 2008 EIR, as modified by the 2019 SEIR, the Ruling and the Opinion, and also addressed the resolution of three commercial issues that had been pending between the parties for several years. On March 28, 2024, a special meeting of the Board was held, and the Board approved the Fifth Amendment as well as an accompanying Order Resetting Compensation, contingent on further actions of the court on remedy. On April 9, 2024, the City Council also conditionally approved the Fifth Amendment and the Order Resetting Compensation, with the same conditions as the Board (Transmittal 2). The Port's approval of these documents was conditional because the trial court had not yet issued a final remedy against the Harbor Department and China Shipping to ensure CEQA compliance, and therefore the Board conditionally approved the Fifth Amendment until the ruling was issued by the trial court.

Petitioners objected to the Fifth Amendment on the grounds that it did not include lease measure LM GHG-1 or the entire suite of mitigation measures and lease measures included in the 2008 EIR Mitigation Monitoring and Reporting Program (MMRP) and the 2019 SEIR MMRP. The Fifth Amendment did not include LM GHG-1 because that measure had been set aside by the Court of Appeal in the Opinion. The Fifth Amendment did not include the entire 2008 EIR MMRP and 2019 SEIR MMRP because the remaining obligations in those documents were Port obligations, not tenant obligations of China Shipping.

After extensive briefing by the parties, on May 24, 2024, the trial court held an OSC hearing at which it agreed with Petitioners and issued a Writ of Mandate commanding the Port to take multiple actions over a multi-year period (Transmittal 4). The first requirement commands Respondents to, within 45 days after service of the Writ of Mandate, file and serve an initial return with the court showing that the Respondents have entered into and adopted an amendment (Permit Amendment) to Permit 999 (the Permit) for the Berths 97-109 China Shipping Terminal (China Shipping Terminal) in the manner required by the City of Los Angeles Charter. The Permit Amendment shall implement and make fully enforceable against China Shipping the mitigation measures in the 2008 EIR and the 2019 SEIR, as modified by the Ruling and the Opinion. Respondents must also show that they have set aside certification of the 2019 SEIR, as well as the related project approvals. The Writ of Mandate was personally served on the Port on May 31, 2024, which makes the deadline for the City and Port to file a return to the Writ taking the actions discussed above by July 15, 2024.

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PROPOSED SET-ASIDE ORDER:

The proposed actions will constitute the Port's partial compliance with the Writ. The Port requests that the Board and Council set aside certification of the 2019 SEIR, as well as the related project approvals, as required by the Writ. As required by court order, the proposed Order (Transmittal 5) in this action effectuates the following:

- (1) Sets aside the following actions, resolutions, and orders:
 - The Los Angeles Board of Harbor Commissioners' October 8, 2019, adoption of Resolution No. 19-9548, which certified the Final Supplemental Environmental Impact Report for the Berths 97-109 (China Shipping) Container Terminal Project (App No. 150224-504; SCH No. 2003061153), in compliance with the California Environmental Quality Act (CEQA), and adopted related documents and findings, including Findings of Fact, Statement of Overriding Considerations and a Supplemental Mitigation Monitoring and Reporting Program.
- (2) Directs the Board Secretary to submit the proposed Order to the City Council and request that the City Council, pursuant to court order, set aside the following actions, resolutions, and orders:
 - The Los Angeles City Council's August 12, 2020, adoption of a (1) Motion by Councilmembers Joe Buscaino and Mitch O'Farrell to deny all appeals and Certify the Final Supplemental Environmental Impact Report and Adopt the recommendations of the Board of Harbor Commissioners; and (2) Official Action of the Los Angeles City Council – Adopting motion of Buscaino and O'Farrell.

PERMIT AMENDMENTS AND ORDER RESETTING COMPENSATION:

Removing all conditions contained in Resolution No. 24-10336 (Transmittal 3) regarding approval of the Fifth Amendment and Order Resetting Compensation, which were already conditionally approved by the Board and City Council, will preserve the commercial terms in the Fifth Amendment. The Sixth Amendment to Permit 999 (Transmittal 6) will implement and make fully enforceable against China Shipping the mitigation and lease measures in the 2008 EIR MMRP and the 2019 SEIR MMRP, as modified by the Ruling and the Opinion. The Sixth Amendment will include the two things found missing by the trial court in the Fifth Amendment—LM GHG-1 and the entire suite of mitigation measures and lease measures included in the 2008 EIR MMRP and the 2019 SEIR MMRP. It includes no changes to the Fifth Amendment and Order Resetting Compensation conditionally approved by the City Council on April 9, 2024. The Court's Writ of Mandate gives the Port the authority to approve these permit amendments under CEQA even with the setting aside of the 2019 SEIR.

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To the extent that the Fifth Amendment and the Order Resetting Compensation together set forth the terms under which China Shipping and the Harbor Department have agreed to resolve multiple issues, they each contain a provision making the effectiveness of one document contingent on the effectiveness of the other document, meaning that both documents need to be fully and unconditionally approved to consummate the full contemplated transaction. The Writ of Mandate did not invalidate the Fifth Amendment, thereby allowing this Resolution to confirm the Fifth Amendment and Order Resetting Compensation to be unconditional. The Writ does require a permit amendment to modify the mitigation and lease measures, as these are implemented in the proposed Sixth Amendment.

The proposed Sixth Amendment remedies the deficiency that has existed since Permit 999 was issued in 2001 and that has repeatedly served as a basis for litigation against the Harbor Department and China Shipping by contractually binding China Shipping to implement those measures that proceedings to date in the trial court and appellate court have determined to be feasible, specifically the mitigation and lease measures in the 2008 EIR and the 2019 SEIR, as modified by the Ruling and the Opinion. Those mitigation and lease measures are identified in Exhibits N-1 and N-2 of the Sixth Amendment. The Sixth Amendment also addresses Petitioners' objections that certain measures were omitted from the Fifth Amendment.

NEW ENVIRONMENTAL REVIEW:

Finally, the proposed action directs staff to prepare, consistent with the procedures and substantive requirements set forth in CEQA, a new environmental document for the operation of the China Shipping Terminal that supplements and/or revises the analysis in the 2019 SEIR in accordance with the Opinion and Ruling in compliance with the directive in the Writ of Mandate.

ENVIRONMENTAL ASSESSMENT:

The proposed action is approval of an Order that sets aside the China Shipping 2019 SEIR and related project approvals. As setting aside project approvals is a ministerial, administrative activity in response to a court order, the Director of Environmental Management has determined that the proposed action is administratively exempt from CEQA in accordance with Article II, Section 2(b)(f) and (h) of the Los Angeles City CEQA Guidelines.

The proposed action is also removal of all conditions contained in Resolution No. 24-10336 regarding approval of the Fifth Amendment and approval of the Sixth Amendment to Permit 999, which is an activity for which the underlying project has been previously assessed in the Berths 97-109 [China Shipping] Container Terminal Environmental Impact Report (SCH# 2003061153), which was certified by the Board on December 18, 2008 (2008 EIR). The Court's Writ of Mandate gives the Port the authority to approve

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these permit amendments under CEQA even with the setting aside of the 2019 SEIR. Therefore, the Director of Environmental Management has determined that these proposed actions have been previously evaluated pursuant to the requirements of CEQA under Article II Section 2(i) of the Los Angeles City CEQA Guidelines, and that these actions are authorized under CEQA by the Court's Writ of Mandate, as discussed herein. To the extent the adoption of the permit amendments is ordered by the court, the Director of Environmental Management has determined that the proposed action is administratively exempt from CEQA in accordance with Article II, Section 2(b)(f) and (h) of the Los Angeles City CEQA Guidelines.

FINANCIAL IMPACT:

Unconditional approval of the Order Resetting Compensation will reset compensation terms associated with China Shipping's MAG and TEU rates for the five-year period covering June 28, 2020 through June 27, 2025. Any increase in the N.O.S. rate will continue to be applied in accordance with Section 3 of Permit 999.

Additionally, unconditional approval of the Fifth Amendment will result in the Harbor Department issuing the following credits to China Shipping:

Credit	Total
Equipment Credit	\$15,500,000.00
2019 MAG Deficiency	\$1,446,379.57
Total	\$16,946,379.57

Details of the proposed credits are as follows:

- 1) A \$15,500,000 equipment credit to be applied evenly in seven installments from the effective date of the Amendment in 2024 through June 27, 2030, or \$2,214,285.71 per year; and
- 2) A \$1,446,379.57 credit related to a contested deficiency in the minimum annual guarantee collected for the 2019 compensation year.

Additionally, pursuant to the terms of the Permit, the Harbor Department may increase the MAG and TEU rates by 25 percent until the completion of the compensation reset process. When the new compensation is less than such increase ordered by the Harbor Department, China Shipping is entitled to a credit against future monies owed to the Harbor Department under the Permit.

Effective June 1, 2021, China Shipping's MAG and TEU rates were increased by 25 percent, pending resolution of the five-year compensation reset covering June 28, 2020, through June 27, 2025.

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Given that the MAG and TEU rates under the Order Resetting Compensation are less than those collected since the 25 percent increase was applied on June 1, 2021, as per Section 3(g) of Permit 999, the excess monies will be returned to China Shipping in the form of a credit.

Details of the approved credits owed per the terms of Permit 999 are as follows:

- 1) An approximate \$31,375,550.80 million credit related to the 25 percent increase to MAG and TEU rates at China Shipping (\$28.4 million for calendar year 2021-23 and approximately \$3.0 million for calendar year 2024).

The \$31,375,550.80 in compensation credits noted above may slightly change pending verification and final reconciliation procedures with China Shipping.

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CITY ATTORNEY:

The Office of the City Attorney has prepared and approved the Order and Sixth Amendment as to form and legality.

TRANSMITTALS:

1. Site Map
2. Fifth Amendment
3. Resolution No. 24-10336
4. Writ of Mandate
5. Set-Aside Order
6. Sixth Amendment

FIS Approval: JS

CA Approval: SO

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