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**RECOMMENDATION APPROVED;
RESOLUTION 24-10336 (PERMIT 999) ADOPTED AND
ORDER 24-7363 APPROVED
BY THE BOARD OF HARBOR COMMISSIONERS
*AS AMENDED**

**March 28, 2024
AM Klesges
Amber M. Klesges
Board Secretary**



DATE: MARCH 26, 2024

FROM: CARGO AND INDUSTRIAL REAL ESTATE

SUBJECT: RESOLUTION NO. 24-10336 – FIFTH AMENDMENT TO PERMIT NO. 999 WITH CHINA SHIPPING HOLDING COMPANY, LTD. AND ORDER RESETTING COMPENSATION FOR THE PERIOD OF JUNE 28, 2020 THROUGH JUNE 27, 2025

SUMMARY:

Staff requests approval of a Fifth Amendment to Permit No. 999, as amended (Permit 999) with China Shipping (North America) Holding Company, Ltd. (China Shipping) and an Order Resetting Compensation for the period of June 28, 2020 through June 27, 2025 (Order), the effectiveness of which is expressly contingent depending on further actions of the trial court with jurisdiction over pending litigation involving the China Shipping terminal, as discussed below.

The proposed actions implement a commercial agreement between the parties to contractually bind China Shipping through a Fifth Amendment to Permit 999 to implement those CEQA mitigation measures determined to be feasible by court proceedings to date, and 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, 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 that 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 (Board):

1. Find that the Director of Environmental Management has determined that the proposed action has 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 that further CEQA compliance will be required in the pending trial court remedy, as discussed herein;
2. Approve the Fifth Amendment to Permit No. 999 with China Shipping Holding Company, Ltd., which approval is expressly contingent upon CEQA compliance as directed in the remedy ultimately ordered by the trial court with jurisdiction, which is currently set for a hearing on May 24, 2024, thus implementing and making contractually enforceable against China Shipping the 2008 mitigation measures as modified by the 2019 Supplemental Environmental Impact Report ("2019 SEIR"),

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the trial court ruling issued on June 27, 2022 and the Court of Appeal opinion issued on December 29, 2023. The Board's contingent approval for the Fifth 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;

3. Direct the Board Secretary to transmit the Fifth Amendment to Permit No. 999 to the City Council for approval pursuant to ~~Section 606 of the City Charter, and, if *applicable~~ Charter 607(a) requiring a 2/3 vote of the City Council;
4. Authorize the Executive Director to execute and the Board Secretary to attest to the Fifth Amendment to Permit No. 999 upon approval by the City Council;
5. Approve the Order resetting compensation under Permit No. 999 with China Shipping (North America) Holding Company, Ltd.;
6. Authorize the Board Secretary to attest to the Order resetting compensation under Permit No. 999; and
7. Adopt Resolution No. 24-10336 and Order No. 24-7363

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 to challenge the City of Los Angeles Harbor Department's (Harbor Department) approval of Permit 999 under CEQA. Pursuant to a 2004 Amended Stipulated Judgment settling that litigation, China Shipping was allowed to continue to operate the terminal under Permit 999. Consistent with the 2004 Amended Stipulated Judgment, Permit 999 was to be amended to include mitigation measures required by a new project-specific EIR (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.

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 Harbor Department and China Shipping challenging the terminal's ongoing ability to operate, based on the arguments that the Harbor Department's CEQA analysis was flawed and that China Shipping has no contractual obligation to implement mitigation measures, 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. After a subsequent

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appeal that was decided in December of 2023, the Court of Appeal has remanded the case back to the trial court to determine the remedy.

On March 6, 2024, the trial court in San Diego issued an Order to Show Cause (OSC) to all parties, including the Harbor Department and China Shipping, (Transmittal 2) that is set for hearing on May 24, 2024. The OSC requires the parties to "show cause, if any there be, why 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." The OSC identifies 11 action items that will be addressed at the court hearing on April 26 2024, including the number and types of workers that would lose employment if the terminal is shut down, whether other facilities in the Port of Los Angeles or on the west coast could absorb China Shipping throughput if the terminal is shut down, the status of the City's efforts to enforce the "comply with all laws" provision in China Shipping's lease document, and the status of China Shipping's compliance efforts.

The proposed Fifth 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 mitigation measures that proceedings to date in the trial court and appellate court have determined to be feasible, specifically the mitigation measures in the 2008 EIR as modified by the 2019 Supplemental Environmental Impact Report ("2019 SEIR"), the trial court ruling issued on June 27, 2022 and the Court of Appeal opinion issued on December 29, 2023. Those mitigation measures are identified in Exhibit M-1 of the Fifth Amendment.

The Fifth Amendment, together with the Order Resetting Compensation for the 2020-2025 Compensation Period (Transmittal 3) , also address and resolve three commercial matters that have been pending between China Shipping and the Harbor Department for some time now. Specifically:

- The Fifth Amendment provides to China Shipping a credit of \$15,500,000 against compensation obligations under the Permit for its previous implementation at the premises of equipment to comply with mitigation measures;
- The Fifth Amendment provides to China Shipping an additional credit of \$1,446,379.57 against compensation obligations under the Permit to resolve Claim No. C21-03132 related to China Shipping's compensation payment obligations for the 2019 Compensation Year, in exchange for a full release of all claims;
- The Order Resetting Compensation for the 5-Year period beginning on June 28, 2020 and ending on June 27, 2025 (Order) sets the MAG at \$161,267 per acre (130.56 acres) per year, plus any increase in the Tariff N.O.S. rate (i.e. General Rate Increase or GRI) occurring during any compensation year will continue to be applied in accordance with Section 3(e)(7) of the Permit. Additionally, for the five

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year period beginning on June 28, 2020 and ending on June 27, 2025, the Order provides that TEU rates that were applicable for the five (5) year period beginning on June 28, 2015 and ending on June 27, 2020 will remain applicable, plus any increase in the N.O.S. rate occurring during any compensation year will continue to be applied in accordance with Section 3(d)(4) of the Permit.

To the extent that the Fifth Amendment and the Order 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 approved to consummate the full contemplated transaction.

Because the trial court has not yet issued a final remedy against the Harbor Department and China Shipping to ensure CEQA compliance, the Board's approval of the Fifth Amendment is expressly contingent upon the ruling by the trial court. That is, the Fifth Amendment will only become effective once the trial court rules that the Harbor Department is authorized to proceed with the amendment. The trial court's remedy will address whether the SEIR is set aside and the terms of the Harbor Department's further CEQA compliance.

ENVIRONMENTAL ASSESSMENT:

The proposed action is approval of the Fifth 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"), and the Berths 97-109 [China Shipping] Container Terminal Project Supplemental Environmental Impact Report (SCH# 2003061153), which was certified by the Board on October 8, 2019 ("2019 SEIR"). The trial court initially ordered that the Port set aside the 2019 SEIR. Following a decision by the Court of Appeal remanding the case to the trial court for further proceedings on remedy, the trial court is holding a hearing on the CEQA remedy on May 24, 2024. Therefore, the Director of Environmental Management has determined that the proposed action has been previously evaluated pursuant to the requirements of CEQA under Article II Section 2(i) of the Los Angeles City CEQA Guidelines, and that further CEQA compliance will be required in the pending trial court remedy, as discussed herein.

FINANCIAL IMPACT:

Approval of the proposed Order 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.

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Additionally, approval of the proposed 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% 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%, pending resolution of the five-year compensation reset covering June 28, 2020 through June 27, 2030.

Given that the MAG and TEU rates under the proposed Order are less than those collected since the 25% 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% 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.

CITY ATTORNEY:

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

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TRANSMITTALS:

1. Site Map
2. Order to Show Cause
3. Fifth Amendment and Order

FIS Approval: MB
CA Approval: SO

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APPROVED:

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