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VIA EMAIL AND U.S. MAIL

July 18, 2013

Molly Butler Bailey, Chair
Planning Board
City of South Portland
25 Cottage Road
South Portland, ME 04106

RE: Proposed Citizen Initiated Waterfront Protection Ordinance

Dear Chair Bailey:

This firm represents Portland Pipe Line Corporation ("PPLC"), which has asked me to write to you on its behalf to request that the Planning Board (1) recommend that the South Portland City Council not adopt the proposed Waterfront Protection Ordinance ("WPO") because it is inconsistent with the South Portland Comprehensive Plan and otherwise illegal and bad policy, and (2) adopt a resolution urging the voters of South Portland to vote against the WPO. I am authorized to inform you that the following additional businesses and associations join PPLC in making this request: C.N. Brown Company, Global Companies LLC, Maine Energy Marketers Association, Sprague Energy, and Turners Island, LLC.

The reasons for this request are as follows.

First, it is important to understand that the WPO is about much more than tar sands oil. The WPO would apply to all petroleum and petroleum products. It would declare that all facilities that store or handle any petroleum products in the Shipyard District are not allowed uses, unless the petroleum products have been unloaded from ships docked in South Portland. WPO § 3(n). This would prohibit all other facilities used for handling petroleum, including marina and boat fueling operations. The WPO also would prohibit the "enlargement or expansion" of any facility used for storing and handling of any petroleum products in the Shipyard District or within the Shoreland Area of any Commercial District. See WPO § 4(a). "Expansion" would be broadly defined to include any alteration of any existing facility to change the function or capacity of such facility, as well as construction of any new equipment, structure, or machinery for transportation or storage of any petroleum.¹ See WPO § 4(c). This means that the WPO would prevent virtually any change

¹ The version of the WPO provided by the City Clerk to the City Council for its July 1, 2013 meeting contains a comma in Section 4(c) that suggests that the definition of "expansion" may be limited to new equipment, structures, or machinery used for loading of ships instead of unloading them. Because the comma was not included in the version of the WPO that was attached to the petitions, it may not be included in the version sent to the voters.

to existing operations and structures of any facility used for storing and handling of any petroleum or petroleum products in those locations, including even replacing existing equipment with new equipment or making upgrades mandated by state and federal regulations.

Thus, the WPO would have catastrophic consequences for South Portland's existing waterfront oil terminal operations, marinas, and any other facilities that handle petroleum products. It is clear from the face of the WPO that it seeks over the long term to shut down petroleum handling operations on the South Portland waterfront, by making them nonconforming uses and preventing normal repair and expansion. The shut down could be more immediate if facilities are unable to comply with near-term upgrades mandated by state and federal regulations.

Second, the WPO is inconsistent with the South Portland Comprehensive Plan. There are numerous provisions in the 2012 Comprehensive Plan that identify oil terminals and other petroleum storage and transfer operations in the Shipyard and Commercial districts as industrial marine uses to be maintained and protected. To do this, the Comprehensive Plan contemplates including the City's marine terminals and other petroleum transfer operations in a new Marine Industrial District that would protect the existing oil terminal operations, and allow for growth of those operations as needed.

The Comprehensive Plan includes relevant language at the following locations:

- *Section 5(D), page 5-7, marine resources, local objectives:* "To assure that portions of the waterfront that have deep water access or are otherwise appropriate for marine use remain available for marine uses."
- *Section 5(D), page 5-8, marine resources, policies:* "In those areas of the City's waterfront that are currently used for marine industrial purposes including the oil terminals, the City should support maintaining these areas as a working waterfront devoted primarily to marine business uses while creating opportunities for increased public access and a mix of uses (see Chapter 6 Land Use Goals and Policies for more details)." (Emphasis added.)
- *Section 6(A)(6), page 6-2, land use objectives:* "**Maintain the working waterfront while creating limited opportunities for increased public access and a mix of uses** – South Portland plays a major role as an oil port because of its all-season deep-water access. While the City should provide opportunities for additional mixed-use development, including expanded public access, in selected areas of the waterfront, the ability of marine-related businesses and activities to be located on the waterfront must be maintained." (Emphasis added.)
- *Section 6(B)(4), page 6-20, key land use policy areas, eastern waterfront, land use:* "**Marine Industrial Areas** – This includes the Gulf-Cumberland terminal and Portland Pipe Line terminals 1 and 2 including the developed tanks. In the short term, the City's marine terminals and related marine industrial areas are maintained and improved while minimizing their impact on adjacent residential neighborhoods. A variety of marine and marine-related uses are allowed. In the longer term, if demand

for these facilities declines or the type of activity needs to change and the owners of these facilities desire to explore other uses for these facilities, the City, in conjunction with the owners, should reevaluate the best use of these waterfront sites (see additional discussion in the Working Waterfront section)." (Emphasis added.)

- *Section 6(B)(4), page 6-24, Figure 6.5, Land Use Designations, Eastern Waterfront, depicts the new Marine Industrial District.*
- *Section 6(B)(6)(B), page 6-34, The Working Waterfront, Land Use: "To assure the continued availability of these areas for future marine uses, the City land use regulations should designate the working waterfront areas that are currently zoned Commercial as **Marine Industrial** areas in which a variety of marine and marine-related uses are allowed but residential uses and nonresidential uses that do not need a waterfront location are not permitted (see Figure 6.8). This should include the Portland Pipe Line tank farm off Hill Street. In the longer term, if demand for these facilities declines or the type of activity needs to change and the owners of these facilities desire to explore other uses for these facilities, the City, in conjunction with the owners, should reevaluate the best use of these waterfront sites."*
- *Section 6(B)(6), page 6-35, Figure 6.8, Land Use Designations, The Working Waterfront, depicts the new Marine Industrial District.*
- *Section 6(D)(2)(C), page 6-51, FLUP, Land Use Designations, includes Marine Industrial Areas as Growth Areas.*
- *Section 6(D)(6), page 6-53, Figure 6.10, FLUP, depicts Marine Industrial Areas designated as a Growth Area.*
- *Section 8(C), page 8-6, Implementation Strategy, identifies rezoning of eastern waterfront and rezoning for marine industrial uses, pursuant to Sections D.1, D.2, and the FLUP, as short term activities (within 2-3 years).*

In short, the Comprehensive Plan identifies oil terminals and other petroleum storage and transfer operations in the Shipyard and Commercial districts as industrial marine uses to be maintained and protected, and the WPO's contrary treatment of those operations would be inconsistent with the Plan.

Third, the WPO would fail to withstand legal challenge, for several reasons, including the following:

- *Inconsistency with the Comprehensive Plan.* Maine law requires zoning ordinances to be consistent with the Comprehensive Plan. 30-A M.R.S. § 4352(2).
- *Inconsistency with the Maine Oil Discharge Law.* The Maine Oil Discharge Law provides that municipal ordinances may not conflict with any order issued by the Maine DEP pursuant to that law. 38 M.R.S. § 556. DEP Oil Terminal Facility permits provide that oil terminal facilities may load petroleum products onto ships. Because the WPO would prohibit such loading operations, it directly conflicts with the Oil

Discharge Law and is thus invalid.

- *Violation of the Commerce Clause of the U.S. Constitution.* The Commerce Clause (Article I, Section 8, Clause 3) prohibits state and local governments from discriminating against or burdening the flow of interstate or foreign commerce. The WPO would discriminate against interstate and foreign commerce because it favors the import of oil that will be used in Maine over the import of oil that will be used outside of Maine.
- *Inconsistency with federal pipeline safety laws.* Federal pipeline safety laws, 49 U.S.C. § 60101 *et seq.*, provide the federal government with exclusive authority over the "safety" of pipeline facilities, including associated storage facilities and terminals that are incidental to the transportation of oil.

Fourth, it would be bad policy to adopt an ordinance that would be such a significant departure from the City's past practice, as developed in the Comprehensive Plan, and thus would so clearly be illegal and which would drive businesses to closure. The City spent a great deal of time over the past few years carefully crafting a Comprehensive Plan that recognizes the rights of existing businesses as an integral part of the City's economic base and that ensures that businesses and residents can co-exist. The City's approach was to engage varied groups of stakeholders to shape the Comprehensive Plan. The WPO, on the other hand, does not allow for collaboration at any level and, if adopted, it would result in legal challenges and send a clear message to businesses that South Portland is no longer a good place to locate a business.

Fifth, PPLC and the other oil terminal operations in South Portland are good citizens and contribute to the City by supporting many jobs on the waterfront, as recognized in the Comprehensive Plan. Those operations should not be handcuffed by the WPO, and should be trusted to be able to handle petroleum products in an environmentally safe manner, given their strong environmental record and their already stringent regulation by federal, state, and local agencies.

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Thank you for your consideration of this letter. I look forward to discussing these issues with you at the hearing next Tuesday, July 23, 2013. Please let me know if you have questions or need additional information.

Sincerely,



Matthew D. Manahan

cc: Tex Haeuser
Larry Wilson, PPLC
Ken Cannell, C.N. Brown
Dana Fraktman, Global

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Jamie Py, MEMA
James Therriault, Sprague Energy
Roger Hale, Turners Island