

To: Members of the Planning Board

From: Natalie E. West, Attorney for Concerned Citizens of South Portland

Re: Waterfront Protection Ordinance, proposed Initiative Ordinance.

Date: July 18, 2013; For the Planning Board Meeting of Tuesday, July 23, 2013

More than 400 people attended a City Council workshop in March to express concern about extraction of tar sands oil and the possibility that tar sands oil would be piped to our community, stored near our schools, and loaded on tankers near our park and community college. There are environmental issues of global significance concerning the extraction of tar sands oil, but the City of South Portland does not have jurisdiction over issues beyond its boundaries. It has limited legal authority over oil transport and pipelines within city limits. After the March meeting, "Concerned Citizens of South Portland" determined to use the power that we do have, over local land use in our community, to address local impacts of any proposal to convert an oil importing facility into an oil exporting facility for tar sands oil. They prepared and sponsored a citizen's initiative, collecting 3,793 signatures in 11 days. That initiative is the Waterfront Protection Ordinance.

On August 5, the City Council will decide either to place the Waterfront Protection Ordinance ("WPO") on the November 5, 2013 election ballot or to adopt the Ordinance. They have asked for your review.

A copy of the WPO is attached as Exhibit A, 3 pages. In addition, the Community Vision, from the Comprehensive Plan Update adopted October 15, 2012, is attached as Exhibit B, 2 pages.

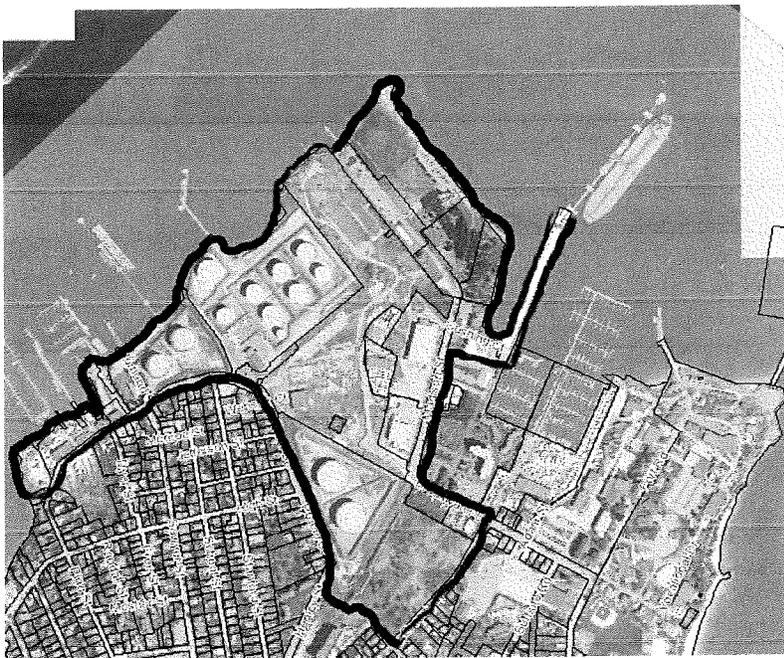
South Portland is fortunate because we have a recreational and historical waterfront with light houses, parks, yacht club, marinas and our greenbelt trail; and an industrial waterfront that is intensively developed for industrial use and provides jobs, tax base, and important resources for our region. The former is our "Shipyard" zone, and petroleum uses along the industrial waterfront are designated as "Commercial" zone. The Waterfront Protection Ordinance ("WPO") recognizes and protects both these waterfronts. It is an ordinance of general applicability that will provide a framework for future petroleum industrial operations in our community. There are no pending applications or existing permits that will be affected by this Ordinance.

I look forward to meeting with you on July 23 to review the ordinance. In the meantime, here is a brief summary of its terms:

1. The WPO contains extensive findings that support its regulatory sections. All findings can be verified by information that is public record or readily available.

2. The WPO applies only to petroleum businesses and facilities. It does not apply to traditional Marine Uses which are defined in our code and protected in the Shipyard Zone. The WPO does not restrict or limit any existing petroleum business activity or apply to any other type of business in our City.

3. In the Shipyard Zone, the WPO amends the zoning ordinance to match existing uses. Section 27-922 lists the permitted uses in the Shipyard Zone. As currently written, paragraphs 27-922(g) and (n) allow all sorts of petroleum uses, even though such uses are inconsistent with the general purposes of the Shipyard Zone and differ from the activities that take place now. The WPO amends those paragraphs to specify that the permitted petroleum use is unloading petroleum – the petroleum use that has existed in the Shipyard Zone since World War II. Loading petroleum on ships, along with related storage, handling and pumping of petroleum products to be loaded on ships and exported from the Shipyard Zone is a change of use that would not be allowed. (Any use that is not specifically authorized is not permitted, (§27-924).) The WPO also limits the enlargement or expansion of petroleum storage tanks and petroleum vapor recovery systems, combustion units and associated stacks in the Shipyard Zone.



**Shipyard Zone area**

Since its intensive development during World War II for the construction of Liberty ships, the Shipyard Zone has undergone many changes. In recent years, substantial amounts of public and private work and money have been devoted to making it an attractive and economically important site for recreational waterfront activity while preserving existing long-term industrial operations. Allowing unfettered intensification of heavy industrial activity that would continue for generations, such as the proposed tar sands oil export operations, would be highly damaging both to these investments and the public, and undermine important principles in the Comprehensive Plan.

4. In the 250 foot Shoreland Area Overlay District (SOD) of the Commercial District, (the industrial areas of the waterfront where both loading and unloading petroleum activities currently take place), the WPO does not change those permitted uses. (§27-780(f) remains unchanged.) Petroleum businesses may continue to load ships and unload ships. They can commence and/or expand these operations in the future. They can maintain, repair and replace their existing petroleum equipment in the Shoreland Area.



**Area of Shoreland Overlay where there are existing Petroleum Businesses**

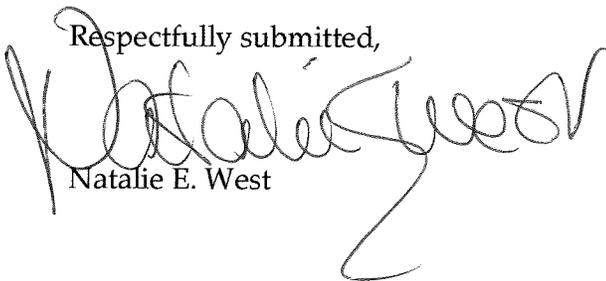
In addition, the WPO does not apply to any petroleum activity that is landward of the 250 foot Shoreland Area. Businesses may expand their operations with new and enlarged

equipment for exporting petroleum, storing or handling petroleum as long as any enlarged equipment or change of function is located beyond the 250 foot Shoreland Area. These areas of our city along the Fore River are already intensively developed for petroleum uses. Because the area is fully developed, effect of the ordinance will be negligible. But in the future, this section would prevent a company from building facilities or changing the function of existing facilities in the 250 foot Shoreland Area to export tar sands oil from the Fore River industrial section of the City.

In addition to the findings set forth in the ordinance, there are other reasonable land use reasons that support the limitation on expansion and change of function of petroleum facilities in the 250 foot industrial shoreland band, including avoiding development in flood plain areas, the potential impact of sea level rise over time, and reducing urban runoff into the Fore River.

In summary, the Waterfront Protection Ordinance is carefully drafted as a legally sustainable means of accomplishing the Community's goals. Concerned Citizens supports clean air and clean water for all. The WPO will help us reach that goal.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Natalie E. West". The signature is fluid and cursive, with a long, sweeping tail that extends downwards and to the right.

Natalie E. West

INITIATED ORDINANCE

# Waterfront Protection Ordinance

The People of South Portland do ordain and enact the following ordinance which shall be incorporated in the municipal code as follows:

**Section 1: Findings:**

Whereas, South Portland is a waterfront community that borders on Portland Harbor and Casco Bay; and

Whereas, the City has adopted a Comprehensive Plan to guide the City's future growth and development; and

Whereas, a portion of the City's waterfront is designated in the zoning ordinance as an industrial district named Shipyard District (S), which has as its purpose "to promote the Shipyard area in South Portland as a robust waterfront center for office complexes, commercial uses, marine uses, and light industrial activities"; and

Whereas, the adopted Comprehensive Plan identifies the Shipyard area as an area where, in the short term, the impacts of industrial uses on adjacent residential areas should be minimized, and envisions a transition to more of a mixed-use area preserving the opportunity for traditional marine uses while accommodating recreational, business, and even residential uses; and

Whereas, the City has established a Shoreland Area Overlay District, applicable to the first 250 feet from upland edge of a coastal wetland, in order to prohibit development that would adversely affect water quality, biological ecosystems or scenic and natural values; and

Whereas, there are residential uses including a high rise condominium development and a 123 unit senior citizen facility, as well as recreational and scenic resources, adjacent to land designated as Shipyard District (S); and

Whereas, there are currently four marinas and a yacht club located in and adjacent to the Shipyard District and recreational uses of the waterfront area continue to expand; and

Whereas, fifty nine cruise ships carrying over 95,000 passengers and crew visited Portland Harbor in 2012, and many of those passengers visited South Portland, providing significant economic benefits to the area; and

Whereas, shoreland areas in the Shipyard District border Casco Bay, which has been designated as an "Estuary of National Significance," by the U.S. Environmental Protection Agency, supporting some 850 species of marine life; from microscopic plants to migrating pilot whales, and 150 species of waterbirds; and

Whereas, South Portland is a gateway to and from the Gulf of Maine, an area described by the Gulf of Maine Research Institute as a "global treasure," rich with aquatic life, remarkable natural beauty, and deeply rooted maritime traditions that has extraordinary combination of miles of scenic shoreline, abundant recreational opportunities and world-premier fishing grounds; and

Whereas, Bug Light and Spring Point Light, two of the City's most important historical landmarks and tourist attractions, are located in and near the Shipyard District; and

Whereas, the South Portland Campus of Southern Maine Community College is located on a campus the college describes as "one of the most picturesque points on the Maine coast"; a few hundred feet from the Shipyard District; and

Whereas, the City is committed to create a sustainable South Portland that includes economic development and job creation through energy conservation and sustainable technologies, has passed a landmark sustainability resolution, No.1-10/11 and signed the U.S.Mayors' Climate Protection Agreement; and

Whereas, the City's Comprehensive Plan incorporates the Ferry Village Neighborhood Plan and the Willard Neighborhood Plan, development plans for neighborhoods proximate to the Shipyard District, which plans call for "development in the Shipyard District S to be compatible with the neighborhood"; and

Whereas, the City desires to encourage traditional marine uses and to prevent the intensification or expansion of existing incompatible industrial uses in the Shipyard District; and

Whereas, industrial development in the Shipyard District is limited to light industrial development and construction of equipment or facilities to load oil on tanker ships is not a light industrial use.

**Section 2: Purpose:**

This Ordinance is enacted to protect and ensure the welfare of the people of the City of South Portland, including protection of property rights, aesthetic values, and economic interests, to promote scenic views and scenic vistas on the waterfront; to protect the environment; and to promote comprehensive land use planning and compatible land uses in and near the Shipyard District and portions of the Commercial District.

**Section 3: Amendment to Existing Section (new language is underlined):**

Section 27-922(g) and (n) of Chapter 27 are hereby amended as follows:

Permitted Uses. The following uses are permitted in the Shipyard District S....

(g) Petroleum storage tank farms and accessory piers, pumping and distribution facilities for the unloading of petroleum products from ships docking in South Portland, as governed by all applicable sections of the Code....

(n) Facilities for storing and handling of petroleum and/or petroleum products that have been unloaded from ships docking in South Portland, subject to the provisions of Ord. Section 27-1517, excluding automobile filling stations.

**Section 4: Section Added to Code:**

Section 27-922.5 is hereby added to the Municipal Code to read:

- (a) Notwithstanding any other provision of this Code, there shall be no enlargement or expansion of existing petroleum storage tank farms and accessory piers, pumping and distribution facilities, or facilities for the storing and handling of petroleum and/or petroleum products in the Shipyard District or within the Shoreland Area of any Commercial District(C).
- (b) No new or expanded facility shall be constructed on an existing pier located in or extending seaward of the Shipyard District.
- (c) "Expansion" as used in this section includes, but is not limited to, construction, reconstruction or alteration of any existing facility to change the function or capacity of such facilities; construction of any new combustion units, stacks, vapor recovery systems, equipment, structure, or machinery for

transportation or storage of petroleum, including any pumping, distribution or other facility, for loading tankers or other ships instead of unloading ships.

(d) This prohibition is not subject to waiver or variance under any provision of this Code unless necessary to comply with the Americans for Disabilities Act (ADA), fire codes, or pollution control regulations imposed on existing facilities with respect to their existing use as provided in Section 27-302(e)(1).

**Section 5: Applicability:**

The regulations applicable to the Commercial District (C), the Shipyard District (S), and the Shoreland Area within said zoning districts established hereby shall apply to the areas within said zoning districts as they existed on May 1, 2013, and shall not be affected by any change in district or designation thereafter unless approved by the voters of the City as an amendment to this Ordinance.

**Section 6: Violations:**

Violation of this Ordinance shall be subject to a minimum penalty of \$1,000 per day for each violation, or such greater amount as may be authorized from time to time for the enforcement of land use ordinances under state statute. The City's remedies by penalty are declared not to be plain, complete, or adequate in the case of continuing or repeated violation of this Ordinance. The City shall seek, and any court of competent jurisdiction shall grant injunctive relief as well as applicable penalties, costs and reasonable attorneys' fees to the City in the event of any repeat or continuing violation.

**Section 7: Retroactivity:**

Notwithstanding 1 M.R.S.A. §302, this Ordinance shall apply to any proceeding pending at the time of its enactment, unless such proceeding was commenced before May 1, 2013. Any permit or approval issued or rendered by the City after May 1, 2013 purporting to authorize any use or structure prohibited or regulated hereby shall be rendered null and void upon enactment of this Ordinance.

**Section 8: Inconsistent Ordinances:**

Pursuant to Charter Article XI, and notwithstanding Zoning Ordinance Sec. 27-115, or any other ordinance of the City of South Portland, this Ordinance is not required to be reviewed by the South Portland Planning board prior to enactment, and shall control over any other procedural or substantive provisions of any conflicting ordinance of the City of South Portland.

**Section 9: Consistency with Comprehensive Plan:**

This ordinance amends the Shipyard District Zone S in the South Portland zoning ordinance to be consistent with the Comprehensive Plan of the City of South Portland, as adopted October 15, 2012.

**Section 10: Severability**

The provisions of this Ordinance are severable. If any provision of this Ordinance is found to be invalid for any reason whatsoever by any court of competent jurisdiction such invalidity shall not affect any other provision of this Ordinance.

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## Chapter Four: Community Vision

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### Our Vision for the Future of South Portland

South Portland has changed over the past twenty-five years. Many of the places and things we now identify as being special about the community did not exist or were very different twenty-five years ago. And South Portland will continue to change over the next twenty-five years. This Community Vision describes how we want South Portland to be in 2035.

South Portland is a community where people want to live, to raise a family, to retire. It is a community where people want to have a business, to shop, to be entertained. South Portland is also a place that is a destination – a place where people want to visit to enjoy the waterfront or to be involved in recreational or athletic activities that utilize the City's outstanding facilities. South Portland is a **DESIRABLE COMMUNITY** – it is a **DESTINATION!**

South Portland offers its residents a variety of lifestyles in livable, walkable neighborhoods. While each neighborhood has its own character, strong identity, and sense of place, all neighborhoods are safe, walkable, and provide convenient access to services and community facilities. The various neighborhoods provide a diversity of housing that is affordable to households with a wide range of incomes. These neighborhoods accommodate older households as well as being attractive to younger people including families with children - anyone who wants a good place to live. South Portland is a City of **LIVABLE, WALKABLE NEIGHBORHOODS**.

South Portland provides its children with quality education for the 21<sup>st</sup> Century in up-to-date facilities utilizing the latest technology. South Portland students are prepared to succeed in the community and in the world. But the community's educational focus is also on creating a City of lifelong learners through ongoing adult education and collaboration with Southern Maine Community College. We are an **EDUCATION COMMUNITY**.

South Portland is a **GREEN CITY**. Trees, parks, and open spaces bring nature into the community and make it readily accessible to all residents, including those with disabilities. It is also a community that is focused on minimizing its impact on the environment. The City actively encourages the use of green building techniques. The community collectively works to reduce its carbon footprint. It promotes the use and

development of alternative energy sources as well as energy efficiency and conservation, especially for older buildings. It encourages a compact, higher-density, mixed-use pattern of development. It encourages transportation alternatives by providing facilities so that people can walk or bike safely and conveniently throughout the City as well as an efficient transit system that allows people to not have to drive everywhere.

All people are comfortable living in South Portland. The City has a diverse population and a wide range of housing and embraces that diversity. Our different neighborhoods are home to older residents as well as younger households and children. The cultural diversity of the community is a strength and people with different cultures and lifestyles are valuable members of the City's family. The City is a DIVERSE COMMUNITY.

South Portland remains a WATERFRONT COMMUNITY. The waterfront is the reason the City developed as it did and remains an important element of the community. While much of the shoreline remains a working waterfront, the public's access to the water expands. As older industrial and transportation uses of the waterfront become obsolete or are relocated or upgraded, the shoreline evolves as more of a mixed-use area preserving the opportunity for traditional marine uses while accommodating recreational, business, and even residential uses. The City and its residents continue to be connected to the waterfront.

South Portland continues to be an ECONOMICALLY DIVERSE community that adjusts to evolving business opportunities and realities. In addition to being home to the largest retail shopping center in the State, the City also provides community and neighborhood shopping and services in attractive, viable commercial areas. The City's economic base continues to grow and includes a wide range of businesses, from small, locally owned sole-proprietor, "Main Street"-type businesses to major manufacturers and international office headquarters. The City strives to ensure that all businesses have access to low-cost energy or are meeting their own energy needs. The City works to otherwise foster and support economic development and its business community.

# Memorandum

To: Tex Haeuser AICP, Planning Director

From: Natalie West 

Date: 6/20/2013

Re: SoPo Municipal Code 27-1322.D.5 & 7 as applied to Portland Pipeline

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## ISSUE

Do existing South Portland Municipal Code §§ 27-1322.D.5&7 apply to Portland Pipeline's Pier 2, and prohibit the construction of stacks and vapor transfer arms exceeding 20'?

## CONCLUSION

Based on my review of the zoning ordinance, it appears that the existing South Portland zoning ordinance prohibits Portland Pipeline from constructing structures and stacks such as those requested in its 2009 submission.

## APPLICABLE FACTS

In 2009, Portland Pipeline applied for a Site Plan for flow reversal of 18" pipeline. The company's site plan application included various equipment and structures to be located on Pier 2. That application was granted but the permit expired in 2012. Many people in the community anticipate that Portland Pipeline will submit a similar application in the future.

## ANALYSIS

Portland Pipeline's Pier 2 is located in the Shoreland Area Overlay District, as that District is defined in SPMC§27-1311. "The provisions of this Article also apply to any and all buildings or structures built on, over or abutting a dock, wharf or pier...." (page XIII-6, Exhibit 1)

The word "structure" is defined to mean "Anything that is built or constructed by a person or persons." (SPMC§27-201, page II-26, Exhibit 2.) The 2 breasting dolphins, 24 pilings, 2 new above pier vapor transfer arms, and 2 vapor combustion units are "structures" as defined in the zoning ordinance.

Land uses in the Shoreland Area Overlay District must comply with performance standards set forth in SPMC§27-1322. (page XIII-11, Exhibit 3.) Paragraph D of that section sets forth performance standards for "[p]iers, docks, wharves... and other

June 20, 2013

structures and uses extending over or beyond the normal high-water line of a water body” (Page XIII-18-19, Exhibit 4.). Pier 2 is such a pier.

There are two paragraphs in this section that seem particularly relevant. Paragraph 27-1322.D.7 prohibits any structure higher than 20 feet on the wharf. This paragraph appears to prohibit the vapor transfer arms and vapor recovery units that were included in the 2009 application.

Paragraph 27-1322.D.5 is also relevant. That paragraph sets forth a limited exemption for expansion of “non-water dependent structures existing as of 2/27/01 and located in the Shipyard District S... are permitted to expand up to a size that is less than 30% of the floor area or volume, as those terms are defined in Section 27-1306 (*sic*) during the life time of the building.”

If the sentence applies, it would be necessary to determine whether the proposed structures are less than 30% of the floor area or volume of the existing structure. While one might argue about what constituted the “existing structure” it seems clear that the vapor recovery arms and vapor recovery units exceeded 30% of the volume of any existing structure. Moreover, the exemption does not apply the structure existed on 2/27/01. In that regard, Portland Pipeline’s Pier 2 was upgraded in 2002, so it is not clear that any proposed structure actually existed in 2001.

If the proposed structures are not covered by the 30% exemption, they are prohibited “unless the structure requires direct access to the water body as an operational necessity.” Whether or not the a vapor recovery unit or vapor transfer arm requires direct access to the water body may be a question of fact, but it seems apparent that there vapor recovery systems are not inherently water related so that direct access to the water is an “operational necessity.”

For these reasons, it seems apparent that Portland Pipeline’s project does not comply with South Portland’s existing ordinance, both paragraphs 5 and 7 of section 27-1322.D, irrespective of whether the Waterfront Protection Ordinance is approved by the voters.

**PLEASE REVIEW THIS MEMORANDUM AND CALL ME AT YOUR EARLIEST CONVENIENCE TO DISCUSS.**

We would like to clarify the issues raised in this memo as soon as possible. You can reach me at 207-400-1782.

It is very important for us to know how the City interprets and applies its current ordinance before we meeting with local officials and community groups.

Thank you.

CITY OF SOUTH PORTLAND



DEPARTMENT OF  
PLANNING & DEVELOPMENT

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Telephone (207) 767-7603 x2  
pdoucette@southportland.org

PATRICIA DOUCETTE  
Code Enforcement Director  
Deputy Director of  
Planning & Development

July 12, 2013

Natalie West  
P. O. Box 2352  
South Portland, Maine 04106

Re: Applicability of Sec. 27-1322(D)(5) & (7) as Applied to Portland Pipe Line Corp.

Dear Ms. West:

Thank you for your memo of June 20, 2013. In it you ask whether South Portland's Code of Ordinances Sections 27-1322(D)(5) and (D)(7) apply to Portland Pipe Line's Pier #2 and prohibit the construction of stacks and vapor transfer arms exceeding 20 feet in height. You conclude that "it appears that the existing South Portland zoning ordinance prohibits Portland Pipeline from constructing structures and stacks such as those requested in its 2009 submission."

In regard to Sec. 27-1322(D)(5), the vapor recovery units and transfer arms in the 2009 Portland Pipe Line (PPL) submission did in fact require direct access to the water and therefore were exempt—to the extent applicable—from this section's restrictions.

Relative to Sec. 27-1322(D)(7), my interpretation of this provision was that the vapor recovery units and transfer arms were pieces of equipment and not structures that would have been built on the pier. While larger in scale, a vapor recovery unit or transfer arm is like an HVAC unit installed on the roof of an office building. It is a piece of equipment that is purchased from a manufacturer and is not built on-site. This interpretation is bolstered by the fact that the PPL application to the City dated June 19, 2009 included a DEP Natural Resources Protection Act approval that in its Findings acknowledges the project's transfer arms and combustion units.

That was my interpretation in 2009 and continues to be my interpretation now. However, no formal decision on these issues will be made until an application is reviewed by the City.

As you know, the City's site plan approval of Portland Pipe Line's 2009 application has lapsed. Similar to the above, no formal Planning Board decision will be made until an application is reviewed by the City.

If you have any additional questions, please feel free to contact me.

Sincerely,

A handwritten signature in cursive script that reads "Patricia Doucette".

Patricia Doucette

Assistant Planning & Development Director and Code Enforcement Officer

Cc: James H. Gailey, City Manager  
Tex Haeuser, Planning & Development Director  
Steve Puleo, Community Planner  
Sally Daggett, Esq  
David Cyr, Portland Pipe Line