

August 7, 2013

BY EMAIL AND HAND DELIVERY

City of South Portland Planning Board
c/o Department of Planning & Development
496 Ocean Street
South Portland, ME 04106

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—

JOHN A. CIRALDO
1956 - 2010

Re: Citizen Initiated Waterfront Protection Ordinance

Dear Chair and Members of the Planning Board:

This Firm represents Irving Oil Terminals Inc. (“Irving”). As we have noted previously, Irving owns and utilizes substantial interests in two marine terminals in South Portland: the Irving/Citgo terminal located at 102 Mechanic Street and the Irving/Buckeye terminal located at 168 Lincoln Street (the “Irving Terminals”). Substantial portions of each of the Irving Terminals are located in the Shoreland Overlay area of the Commercial (C) District.

Our previous comments regarding the Waterfront Protection Ordinance’s (“WPO’s”) inconsistency with the City’s Comprehensive Plan and the land use implications of the WPO are summarized in written and oral statements submitted to the Planning Board at the July 23 public hearing. We will not repeat those written comments and oral statements, as Corporation Counsel has advised the Planning Board and the public that the record of the July 23, 2013 public hearing will be part of the August 13, 2013 proceeding and has asked that only new information be submitted at the August 13, 2013 public hearing. Therefore, the matters discussed in this letter are limited to new information regarding issues raised and statements made during the July 23, 2013 public hearing, to which we could not respond, and to information that the Planning Board requested regarding specific impacts upon the marine terminals. This letter is presented in two parts, consistent with the scope of the Planning Board’s authority in this matter – part one addresses the proposed WPO’s consistency with the City’s Comprehensive Plan and part two addresses the land use implications of the WPO.

I. The Proposed WPO’s Inconsistency with the City’s Comprehensive Plan.

1. There is No “Different Test” of Consistency for Citizen-Initiated Zoning Amendments.

Counsel for the Concerned Citizens of South Portland, Natalie West, Esq., admitted that the WPO is inconsistent with the City’s Comprehensive Plan with respect to at

least one parcel and suggested that there is a different test for a citizen initiated zoning ordinance amendment – that it need only be consistent with the “vision or intent” behind the Comprehensive Plan.

Contrary to Attorney West’s assertion, there is no “different test” for citizen initiatives; Maine law does not differentiate between City–initiated and citizen-initiated zoning amendments. Both must be consistent with the underlying comprehensive plan. State statute requires that “[a] zoning ordinance must be pursuant to and consistent with a comprehensive plan adopted by the municipal legislative body” 30-A M.R.S. § 4352(2). There are no reported cases in Maine applying a “different test” of consistency with a comprehensive plan to citizen initiated zoning amendments. In fact, Maine courts have consistently applied 30-A M.R.S. § 4532(2) to both City-initiated and citizen-initiated zoning amendments. *See City of Portland v. Fisherman’s Wharf Ass’n II*, 1991 Me. Super. LEXIS 15 (Me. Super. Ct. Jan. 10, 1991) (ruling that a citizen-initiated zoning amendment must be consistent with the City’s Comprehensive Plan).

2. The WPO is Inconsistent with the City’s Comprehensive Plan.

Moreover, even if, as Attorney West suggests, the Planning Board need only to look to the “vision or intent” of the Comprehensive Plan, we believe you will still find that the WPO is inconsistent with the Comprehensive Plan. The “vision or intent” that you are required to look at is the written expression of the nineteen members of the Comprehensive Plan Update Committee who drafted the Plan, the Planning Board, the City Council and the South Portland residents who attended and participated in numerous public meetings during the two-year long Comprehensive Plan update process, which culminated in City Council adoption of the Comprehensive Plan Update on October 15, 2012. As the City’s Planning Director and those who spoke against the proposed WPO observed, that Comprehensive Plan Update envisions and intends that the marine terminals located in the “Working Waterfront” area in the Commercial District may continue and expand. Indeed, the Comprehensive Plan Update envisions an entirely new Marine Industrial zone dedicated to assuring continued availability of marine uses and designates this new zone as a growth area. The near absolute restrictions in Section 4 of the WPO on growth of the petroleum industry directly contradict the Comprehensive Plan Update. Marine terminals that cannot be enlarged and expanded to meet demands of the market and customers they serve, and the regulatory mandates of federal and state laws, would result in a zoning ordinance directly counter to the vision of encouraging a vital working waterfront. Relegating an entire industry essentially to a non-conforming status violates any fair reading of the Comprehensive Plan Update.

II. The Proposed WPO’s Land Use Implications.

1. The WPO Would Prohibit or Limit the Terminals’ Ability to Make the Types of Changes, Repairs and Improvements They Have Undertaken in the Past.

At the July 23 public hearing, Board Members noted that WPO proponents said that the WPO would have no negative impacts on the marine terminals, while WPO opponents said that the

WPO would have many negative impacts on the marine terminals. To obtain additional information on this question, the Planning Board requested specific examples from terminal operators and asked the City's Code Enforcement Officer to attend the next public hearing to provide her interpretation of the WPO and to discuss its likely effects.

Attorney West attempted to provide a methodology to measure potential impact of the WPO when she stated in answer to Board questions that she had reviewed City land use permits applied for and issued to Sprague Energy over the last ten years and believed the WPO would not have prevented issuance of any of these permits.¹ The methodology suggested by Attorney West, however, is fundamentally flawed. The WPO is not a limitation on the issuance of permits. Rather, it is a land use limitation. This means that if a proposed activity is listed as prohibited under the WPO, it is prohibited even if no land use permit is required. Furthermore, much tank and dock upgrade work which may be deemed an expansion, such as new tank liners, piping, dock and dolphin expansions do not require City permits, but would, however, be prohibited land uses under the WPO due to the overbroad definition of "expansion" in Section 4.

Moreover, even if you do adopt Attorney West's permit review methodology, it appears that multiple permits do exist in City files that demonstrate that the WPO would have prevented a number of repairs and improvements to marine terminals from being performed in recent years. We have reviewed City permitting files for several of the refined product marine terminals, and attached as Exhibit A is a description of the permit and the work performed and the likely effect of the WPO on that work. Exhibit A illustrates in concrete terms the likely negative land use implications of the WPO upon the marine terminals.

2. The "relief" available under the proposed WPO does not exist.

Attorney West stated that another reason that the proposed WPO does not affect existing petroleum businesses is that Section 4(d) allows for "waiver or variance" as "necessary to comply with the Americans with Disabilities Act ("ADA"), fire codes, or pollution control regulations imposed on existing facilities with respect to their existing use."

These exceptions, however, are illusory and provide no relief to the marine terminals, as the exceptions are too limited in scope and there is no applicable "waiver or variance" process under the City of South Portland Code of Ordinances ("City Code").

Many of the improvements, upgrades, replacements and new facilities that the Irving Terminals and the other marine terminals undertake are required by laws that mandate a wide array of

¹ Even here, Attorney West was mistaken in her position. For example, a February 16, 2007 building permit was issued to Sprague Energy Corp. for "replacement of 4 piers & upgrade of pier & dolphin system for Sprague Energy," the stated purpose of which was to "allow larger barges to safely load and offload liquid bulk cargo while larger vessels are moored along the outboard side of the pier." See Attachment 1 to Exhibit A. It is hard to envision circumstances where such normal expansion activities would not have violated Section 4 of the WPO. See also Exhibit A.

different grades and types of fuels, Homeland Security compliance, and Occupational Safety & Health Administration (“OSHA”) requirements; or are the result of international oil and shipping standards, industry best-practices and changes in the consumer market. The ADA exception is largely irrelevant to the terminals’ operation. The fire code exception is too limited to address international shipping standards, petroleum industry best-practices and OSHA mandates that require constant upgrades. There is no exception at all for Homeland Security upgrades. The exception for “pollution control regulations” is an undefined and ambiguous term that appears to apply to controls required for the operation of the terminals and not for changes necessary to provide petroleum products that are compliant with regulation of emissions and air quality or bio-fuel mandates such as ethanol.

Moreover, the City Code does not provide any real process to give effect to the exceptions the WPO purports to offer. The WPO states that the relief is available by “waiver or variance.” However, the City Code contains no zoning waiver provision that would be applicable here. Section 27-1426 of the City Code, the site plan review standards, provides limited authority to waive street design and general construction standards, but this waiver authority does not apply generally.

Further, the City Code grants very limited variance authority to the Board of Appeals. Section 27-152(b) 1) states:

Variations may be granted by the Board only of height, area and size of structures, size of yards and lots and length of frontage. . . . Further, in the shoreland area only, variations also may be granted by the Board from water setback requirements and for substantial expansions of nonconforming buildings.

Section 27-152(b) 3) permits variations for dwellings used or occupied by persons with disabilities.

The Board of Appeals’ variance authority, however, does not include the ability to grant variations under Section 4 of the WPO. While Section 27-152(b) 2) specifically authorizes variations from dimensional standards – setback, lot area, building height and frontage – upon a showing of “practical difficulty,” Section 27-152(b) 4) permits “other” variations (except disability variations) and variations for property located in a shoreland area *only* upon a showing of “undue hardship.” As attorneys who practice municipal law in Maine are aware, the “undue hardship” standard is one that is extremely difficult to meet and which requires the denial of virtually all variance applications. See *Maine Townsman*, “Zoning Variations Should Be the Exception, Not the Rule” (December, 1996, “A request that zoning board of appeals must deal with fairly regularly but which normally can’t be granted legally is a landowner’s request for a zoning variance. . . . [V]ariations should not be easily or lightly granted and a variance should be the exception not the rule.”).

In sum, the alleged exceptions to the broad restrictions against expansions under the proposed WPO are illusory – Section 4(d) cites exceptions that largely are irrelevant to the needs of the

affected businesses and references processes to obtain relief that do not exist under the City Code, or if they do exist, are extraordinarily difficult to satisfy.

3. The City's Shoreland Area Provisions Do Not Require a 250-foot Buffer or Water Setbacks at the Marine Terminal Properties.

Finally, Attorney West stated that creating a 250-foot buffer along the water with no expansion or enlargement of existing operations would bring the City Code's Shoreland Area provisions, which permit a "zero" setback, into conformity with State law. This position, however, is a fundamental misreading of both State law and local ordinance.

The only zoning required of municipalities by State law is within shoreland areas, including the areas within 250 feet from the normal high-water line of rivers and salt water bodies. The purpose of the State Mandatory Shoreland Zoning Act is to protect these waters, but the Act also recognizes the balance that must be struck in order to allow water dependent uses to continue to operate. Therefore, State law and the State's Chapter 1000 Guidelines for Municipal Shoreland Zoning Ordinances permit municipalities to enact shoreland zoning provisions that zone appropriate shoreland areas for general development, commercial and maritime activities and permit a "zero" setback from the normal high-water line for functionally water-dependent uses:

4. Setback requirements. Notwithstanding any provision in a local ordinance to the contrary, all new principal and accessory structures and substantial expansions of such structures within the shoreland zone as established by section 435 must meet the water setback requirements approved by the board, **except functionally water-dependent uses**. 38 M.R.S. § 439-A(4) (emphasis added).

The State definition of "functionally water dependent uses" includes "those uses that require, for their primary purpose, location on submerged lands or that require direct access to, or location in, coastal or inland waters and that cannot be located away from these waters. These uses include . . . waterfront dock and port facilities" and "industrial uses dependent upon water-borne transportation." 38 M.R.S. § 436-A(6).

South Portland initially adopted its shoreland zoning provisions in 1974-1975, as required by State law, and it has further amended those provisions in response to changes in Maine law. Throughout this time, the City has attempted to ensure that the amended provisions and district standards would permit existing functionally water-dependent business and uses to continue to operate with no water setback: Section 27-1305 of the City Code contains a definition of "functionally water-dependent use" that is identical to the State law definition; Section 27-1322 A.2.(b) establishes a "zero" water setback for the Shoreland Area overlay over several underlying districts, including the Commercial district; Section 27-1322 B (1) contains a definition of "functionally water-dependent use" that is identical to the State law definition; and Section 27-1322 B (1) specifically exempts functionally water dependent uses from having to comply with any water setback requirements in the district in which they are located. Thus, the

marine terminals, which by definition are functionally water-dependent uses, are lawful both in their operation within the 250-foot Shoreland Area and in their “zero” water setback. The WPO’s proposal to change the zero water setback to what essentially would be a 250-foot setback is in conflict with the Shoreland Area provisions of the City Code and State law protections for functionally-water dependent uses.

Conclusion.

Based upon the information provided at the July 23, 2013 public hearing, in this letter, and in the letters and statements provided to the Planning Board in connection with the August 13, 2013 public hearing, Irving respectfully requests that the Planning Board find:

- 1) that the WPO is inconsistent with the City’s Comprehensive Plan and would have negative implications for existing land uses and activities at the refined petroleum products marine terminals in the Commercial (C) District, and
- 2) recommend that the City Council remove Section 4 from the WPO.

Thank you for your consideration.

Sincerely,



James N. Katsiaficas

JNK/ems

cc: Tex Haeuser
Steven Puleo
Michael Thompson
Greg Poitras, Esq.

Exhibit A

Review of City Permitting Records for the Marine Terminals

The following was compiled based on an in-person review of the City permitting files for South Portland refined product marine terminals to identify obvious examples of the impact the Waterfront Protection Ordinance (“WPO”) would have had on previous terminal expansion and other upgrade activities. This is not an exhaustive list; it is merely a selection of representative examples.

Description of Permitted Work	Likely Effect of the WPO
Permit to construct an addition on to an existing pier in order to move the berthing area of large ships seaward to avoid grounding of ships.	LIKELY PROHIBITED as an “expansion” of an existing accessory pier. The definition of “expansion” includes “construction, reconstruction or alteration of any existing facility to change the function or capacity of such facilities” as well as “construction of any new equipment, structure or machinery for transportation or storage of petroleum.”
Permit to convert storage tank from storage of distillate to gasoline to allow for more flexible storage capacity.	LIKELY PROHIBITED as an “expansion” of a marine terminal. The definition of “expansion” includes any “alteration of an existing facility to change the function . . . of such facilities.” Conversion of tank may be considered a change of function.
Permit to construct a new 2,400 sq. ft. building in the Shipyard District.	LIKELY PROHIBITED as an “expansion” of an existing marine terminal. The definition of “expansion” includes “construction of any new . . . structure” in the Shipyard District.
Permit to place terminal back into service after outage.	LIKELY PROHIBITED as an “expansion” of an existing marine terminal. Placing terminal back into service after being out of service likely considered a prohibited “alteration” of any existing facility to “change the function.”
Permit for a new oil storage tank in the Shoreland Area.	LIKELY PROHIBITED as an “expansion” of an existing marine terminal. The definition of “expansion” includes construction of any new equipment, structures or machinery for transportation or storage of petroleum” in the Shoreland Area.
Permit for new Vapor Combustion Unit in Shoreland Area.	LIKELY PROHIBITED as an “expansion” of an existing marine terminal. The definition of “expansion” includes “construction of any new combustion units, stacks [or] vapor recovery systems” in the Shoreland Area.
Permit to construct two new berthing dolphins to assist the berthing of larger tankers at the terminal.	LIKELY PROHIBITED as an “expansion” of an existing accessory pier. The definition of “expansion” includes “construction, reconstruction or alteration of any existing facility to change the function or capacity of such facilities” as well as “construction of any new equipment, structure or machinery for transportation or storage of petroleum.”

Description of Permitted Work	Likely Effect of the WPO
<p>Permit to remove an existing pile and timber pier and replace it with a similar but reconfigured pile and timber pier.</p>	<p>LIKELY PROHIBITED as an “expansion” of an existing accessory pier. The definition of “expansion” includes “construction, reconstruction or alteration of any existing facility to change the function or capacity of such facilities” as well as “construction of any new equipment, structure or machinery for transportation or storage of petroleum.”</p>
<p>Permit to replace 4 piers and upgrade pier and dolphin system, including construction of 4 new dolphins and replacement of existing timber fender system, to allow larger barges to safely load and offload liquid bulk cargo while larger vessels are moored along the outboard side of the pier.</p>	<p>LIKELY PROHIBITED as an “expansion” of an existing accessory pier. The definition of “expansion” includes “construction, reconstruction or alteration of any existing facility to change the function or capacity of such facilities” as well as “construction of any new equipment, structure or machinery for transportation or storage of petroleum.”</p>
<p>Permit related to installation of new thermal oxidizer and vapor combustion unit.</p>	<p>LIKELY PROHIBITED as an “expansion” of an existing marine terminal. The definition of “expansion” includes “construction of any new combustion units, stacks [or] vapor recovery systems” in the Shoreland Area.</p>
<p>Permit for excavation and installation of new tank foundation, liner, leak detention ports and sand to existing oil storage tank, which is located in the Shoreland Area.</p>	<p>LIKELY PROHIBITED as an “expansion” of an existing marine terminal. The definition of “expansion” includes construction of any new “equipment, structure or machinery for transportation or storage of petroleum” in the Shoreland Area.</p>

ATTACHMENT 1



BUILDING PERMIT CITY OF SOUTH PORTLAND

Date Issued: 02/16/07
 Application: 20070060
 Owner: SPRAGUE ENERGY CORP.
 Location: 59 MAIN ST
 Contractor: FORE RIVER DOCK & DREDGE, INC. Phone: 772-5354 RHALE JR
 Type of Work: BUILDING PERMIT 1

Permit No: B20070147

REPLACEMENT OF PIER & UPGRADE OF RIER & DOLPHIN SYSTEM FOR SPRAGUE ENERGY.
 FORE RIVER DOCK & DREDGE CONTACT IS ROGER HALE, JR - 772-5354

NOTICE

THIS CARD MUST BE DISPLAYED IN A CONSPICUOUS PLACE ON THE PREMISES, MAINTAINED IN GOOD CONDITION, AND MUST NOT BE REMOVED UNTIL ALL WORK HAS BEEN APPROVED. ALLOW 48 HOURS NOTICE FOR INSPECTIONS.



NO WORK AUTHORIZED BY THIS PERMIT SHALL BE COVERED OR OTHERWISE CONCEALED PRIOR TO APPLICABLE INSPECTION(S).

Telephone 207-767-7603 Before Excavating Call Dig Safe 1-888-344-7233

Richard Stellan

Building Inspector

APPLICATION # 20070060



Department of Planning and Development
City of South Portland
PO Box 9422
South Portland, ME 04116-9422
Office Location: 62 E Street
Phone: 207-767-7603 Fax: 207-767-2197

PERMIT # <u>B 20070147</u>	
Type of work	<input type="checkbox"/> New Structure <input checked="" type="checkbox"/> Alterations <input type="checkbox"/> Change of Occupancy <input type="checkbox"/> Installation <input type="checkbox"/> Change of Land Use <input type="checkbox"/> Demolition
APPLICATION DATE	<u>2/6/07</u>
FEE <u>5310.-</u>	MAP <u>31</u> LOT <u>28A</u>
DATE ISSUED	<u>2-15-07</u>

PROJECT ADDRESS 5911 Main St
 OWNER NAME Apiaque Energy
 OWNER ADDRESS 5911 Main St
 OWNER PHONE/CONTACT _____
 CONTRACTOR NAME Fore River Dock & Dredge
 CONTRACTOR ADDRESS 40 Mechanic St
 CONTRACTOR PHONE/CONTACT SP
Roger Haley - 772-5357
 TENANT NAME/UNIT Call to Pick up
 PROJECT PHONE/CONTACT Roger or Melody
 Type of Occupancy: Commercial
 Dwelling (single) Dwelling (Multi)

FOOTINGS:
Type _____
Size _____
 FOUNDATION WALLS:
Type _____ Size _____
 CARRYING ORDERS:
Material _____
Size _____
 FLOOR TIMBERS:
Size _____ Span _____
 FLOORING:
Sub _____
Finish see plans
 EXTERIOR WALLS:
Framing see plans
Sheathing _____
 PARTITIONS:
Stud Size _____ Material _____
Wall Finish _____
 CEILING TIMBERS:
Material Harbor Master
Size _____
Span DEP approval
 ROOF RAFTERS:
Material to be provided
Size _____ Span _____
Pitch _____

BRIEF DETAIL OF PROPOSED WORK:
Replacement of
4 piers - adding
upgrade of pier
and dolphin system
Will provide these approvals

ESTIMATED COST OF WORK 354,000
 PRESENT USE OF LAND AND BUILDINGS: _____
 PROPOSED USE OF LAND AND BUILDINGS: _____

PARKING SPACES:
 Present Number _____ Proposed Number _____
 Shoreland Y N
 Floodplain Y N Zoning District C
 Sewer Impact Fee: \$ N/A
 Plans Presented: _____
 Site Plan Approved: _____
 Survey presented: _____
 ADDITIONAL CONTRACTOR INFO (if known):
 ELECTRICAL _____
 PLUMBING _____
 MECH/HEAT _____
 SPRINKLER _____ SIGNS _____

No building hereafter erected shall be occupied or used, in whole or in part, until a Certificate of Occupancy shall have been issued by the Building Inspector certifying that such building conforms to the provisions of this ordinance. I hereby acknowledge that I have read this application and state that the above is correct and agree to comply with all City ordinances and State laws regulating building construction. Work will not begin until the building permit card is posted.
 Attention: Building foundation and framing systems are required to be inspected before covering. It is the responsibility of the owner or contractor to contact the Building Inspector to schedule the required inspections.

[Signature]
 Signature: Owner or Agent
[Signature]
 Building Inspector

NOTE: Separate permits are required for plumbing, electrical, heating and mechanical systems.



STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
STATE HOUSE STATION 17 AUGUSTA, MAINE 04333

RECEIVED
JAN 29 2007
OCEAN & COAST

DEPARTMENT ORDER

IN THE MATTER OF

SPRAGUE ENERGY CORPORATION) NATURAL RESOURCES PROTECTION
South Portland, Cumberland County) COASTAL WETLAND AND
MOORING DOLPHINS) SIGNIFICANT WILDLIFE HABITAT
L-22633-4E-B-N (approval)) WATER QUALITY CERTIFICATION
) FINDINGS OF FACT AND ORDER

Pursuant to the provisions of 38 M.R.S.A. Sections 480-A *et seq.* and Section 401 of the Federal Water Pollution Control Act, the Department of Environmental Protection has considered the application of SPRAGUE ENERGY CORPORATION with the supportive data, agency review comments, and other related materials on file and FINDS THE FOLLOWING FACTS:

1. PROJECT DESCRIPTION:

A. History of Project: Department Order #L-22633-4E-A-N, dated January 24, 2006, approved the repair of two existing dolphins at the applicant's marine terminal in South Portland.

B. Summary: The applicant proposes to construct four new pile-supported mooring/berthing structures known as dolphins on the inboard side of an existing 560-foot long pile-supported pier at its marine terminal in South Portland. The project also includes the replacement of an existing timber fender system along the inboard side of the pier. A total of 32 new steel and timber piles will support the four dolphins resulting in approximately 30 square feet of impact at the mudline. The dolphins will be constructed using a barge-mounted crane. The new dolphins will allow larger barges to safely load and offload liquid bulk cargo while larger vessels are moored along the outboard side of the pier. The project is shown on a set of plans, the first of which is entitled "Proposed Construction of Inboard Barge Berth Structure in Fore River," prepared by Ocean and Coastal Consultants, Inc., with a last revision date of August 31, 2006. The lot is identified as Lot 012/A, Map 028 of the City of South Portland

C. Current Use of the Site: The applicant operates a marine terminal on the Fore River in South Portland where barges and vessels load and unload a variety of liquid and dry bulk products. The 5.73 acre lot includes tanks for liquid storage and warehouses for bulk storage.

2. EXISTING SCENIC, AESTHETIC, RECREATIONAL OR NAVIGATIONAL USES:

In accordance with Chapter 315, Assessing and Mitigating Impacts to Scenic and Aesthetic Uses, the applicant submitted a copy of the Department's Visual Evaluation Field Survey Checklist as Appendix A to the application along with a description of the property and the proposed project. The applicant also submitted several photographs of the proposed project site including an aerial photograph of the project site.

The proposed project is located on the Fore River, which is a public natural resource visited by the general public, in part, for the use, observation, enjoyment and appreciation of its natural and cultural

visual qualities. The site of the proposed project and the surrounding area is developed with marine terminals and petroleum tank farms in an area of the city zoned for industrial use. The proposed dolphins are located on the inboard side of a 560-foot long pile-supported pier limiting their visibility when viewed from the river by the public.

Based on the existing marine terminal operation along a developed section of shoreline, the presence of numerous existing dolphins at the facility, and the location of the new dolphins, the Department finds that the proposed project will not unreasonably interfere with existing scenic and aesthetic uses. The Department did not identify any issues involving existing recreational and navigational uses.

The Department finds that the proposed activity will not unreasonably interfere with existing scenic, aesthetic, recreational or navigational uses of the protected natural resource.

3. HABITAT CONSIDERATIONS:

The Department of Marine Resources (DMR) reviewed the proposed project and stated that it should not cause any significant adverse impact to marine resources, navigation or recreation.

The GIS wildlife habitat map for South Portland shows that this section of the Fore River is classified as tidal waterfowl and wading bird habitat. Based on the existing development and operations at this active marine terminal and the deep water estuarine habitat at the project site, the Department finds that the project will not unreasonably harm significant wildlife habitat.

The Department finds that the activity will not unreasonably harm significant wildlife habitat, freshwater wetland plant habitat, threatened or endangered plant habitat, aquatic or adjacent upland habitat, travel corridor, freshwater, estuarine or marine fisheries or other aquatic life.

4. WATER QUALITY CONSIDERATIONS:

The applicant proposes to use lumber treated with chromate copper arsenate (CCA) to construct the pier. To protect water quality, all CCA treated lumber must be cured on dry land in a manner that exposes all surfaces to the air for 21 days prior to the start of construction. Provided the CCA treated lumber is cured as described above, the Department finds that the proposed project will not violate any state water quality law.

The Department does not anticipate that the proposed project will violate any state water quality law, including those governing the classification of the State's waters.

5. WETLANDS AND WATERBODIES PROTECTION RULES:

The applicant proposes to alter 30 square feet of coastal wetland to construct four pile-supported mooring and berthing dolphins.

The Department's Wetlands and Waterbodies Protection Rules, Chapter 310, require that the applicant meet the following standards:

A. Avoidance. No activity may be permitted if there is a practicable alternative to the project that would be less damaging to the environment. The applicant submitted an alternatives analysis for the proposed project completed by Ocean and Coastal Consultants, Inc. and dated September 13, 2006. This analysis considered utilizing the outboard side of the main pier to berth barges but stated that this area was designed to accommodate large vessels not barges. The analysis demonstrated that the inboard berth with the new dolphins is the best location to safely berth larger barges at the terminal.

B. Minimal Alteration. The amount of wetland to be altered must be kept to the minimum amount necessary for meeting the overall purpose of the project. The applicant considered several alternative designs including using all timber piles, but selected a dolphin design that included both steel and timber piles to minimize the size and number of piles resulting in a minimum impact to the coastal wetland.

C. Compensation. In accordance with Chapter 310, Section 5(C)(6)(b), compensation is not required to achieve the goal of no net loss of wetland functions and values.

The Department finds that the applicant has avoided and minimized wetland impacts to the greatest extent practicable, and that the proposed project represents the least environmentally damaging alternative that meets the overall purpose of the project.

6. OTHER CONSIDERATIONS:

The Department did not identify any other issues involving soil erosion, the natural transfer of soil, natural flow of water, or flooding.

BASED on the above findings of fact, and subject to the conditions listed below, the Department makes the following conclusions pursuant to 38 M.R.S.A. Sections 480-A *et seq.* and Section 401 of the Federal Water Pollution Control Act:

- A. The proposed activity will not unreasonably interfere with existing scenic, aesthetic, recreational, or navigational uses.
 - B. The proposed activity will not cause unreasonable erosion of soil or sediment.
 - C. The proposed activity will not unreasonably inhibit the natural transfer of soil from the terrestrial to the marine or freshwater environment.
 - D. The proposed activity will not unreasonably harm any significant wildlife habitat, freshwater wetland plant habitat, threatened or endangered plant habitat, aquatic habitat, travel corridor, freshwater, estuarine, or marine fisheries or other aquatic life.
 - E. The proposed activity will not unreasonably interfere with the natural flow of any surface or subsurface waters.
 - F. The proposed activity will not violate any state water quality law including those governing the classifications of the State's waters provided that all CCA treated lumber is cured on dry land in a manner that exposes all surfaces to the air for 21 days prior to the start of construction.
-

- G. The proposed activity will not unreasonably cause or increase the flooding of the alteration area or adjacent properties.
- H. The proposed activity is not on or adjacent to a sand dune.
- I. The proposed activity is not on an outstanding river segment as noted in Title 38 M.R.S.A. Section 480-P.

THEREFORE, the Department APPROVES the above noted application of SPRAGUE ENERGY CORPORATION to construct mooring dolphins and replace a fender system, SUBJECT TO THE ATTACHED CONDITIONS, and all applicable standards and regulations:

- 1. Standard Conditions of Approval, a copy attached.
- 2. Severability. The invalidity or unenforceability of any provision, or part thereof, of this License shall not affect the remainder of the provision or any other provisions. This License shall be construed and enforced in all respects as if such invalid or unenforceable provision or part thereof had been omitted.
- 3. All CCA treated lumber shall be cured on dry land in a manner that exposes all surfaces to the air for 21 days prior to the start of construction.

THIS APPROVAL DOES NOT CONSTITUTE OR SUBSTITUTE FOR ANY OTHER REQUIRED STATE, FEDERAL OR LOCAL APPROVALS NOR DOES IT VERIFY COMPLIANCE WITH ANY APPLICABLE SHORELAND ZONING ORDINANCES.

DONE AND DATED AT AUGUSTA, MAINE, THIS 25th DAY OF JANUARY, 2007.

DEPARTMENT OF ENVIRONMENTAL PROTECTION

By:

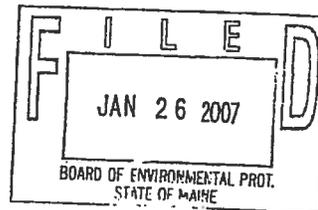

DAVID P. LITTELL, COMMISSIONER

PLEASE NOTE THE ATTACHED SHEET FOR GUIDANCE ON APPEAL PROCEDURES

Date of initial receipt of application: September 18, 2006
Date of application acceptance: October 2, 2006

Date filed with Board of Environmental Protection

DBB/ATS60747/L22633AN



BOARD OF HARBOR COMMISSIONERS PORT OF PORTLAND PERMIT-A

TO BE POSTED IN A CONSPICUOUS PLACE AT THE CONSTRUCTION SITE

To.....Sprague Energy Corp., 59 Main Street, South Portland, Maine 04106.....
The undersigned Board of Harbor Commissioners for the Harbor of Portland, has carefully considered your application.
Dated the 13th day of September 2006, for a permit authorizing
..... The installation of 4 new mooring / berthing structures and to replace a deteriorated
timber fender system.....

Having given public notice of this pending application, as required by law, and therein designated the 9th day
Of November 2006, at 5:00 o'clock in the afternoon prevailing time as the time when they would meet
At the Portland City Council Chambers to examine this issue and here all interested parties, and having met at the
time and place mentioned and examined the location of this proposed construction project.....
And having heard all interested parties, the Board of Harbor Commissioners for the Port of Portland hereby issues this
permit which authorizes you to proceed under all applicable local and federal regulations hereinafter stated, and to
maintain within the limits mentioned in the permit application.....

In addition, the construction project described above must be surrounded by a containment boom unless the
Board of Harbor Commissioners for the Port of Portland has waived this requirement in writing, either as part of the
above-listed conditions, or in a separate statement.

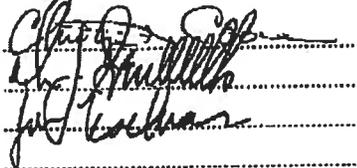
This permit is limited authorization, which contains a stated set of conditions with which the permit holder
must comply. If a contractor performs the work for you, both you and the contractor are responsible for assuring that
the work is done in conformance with the conditions and limitations of this authorization. Please be sure that the
person who will be performing the work has read and understands these conditions.

Performing any work not specifically authorized by this permit, or that fails to comply with its conditions,
may subject you to the enforcement provisions of Harbor Commission regulations. If any change in plans or
construction methods is found necessary, please contact the Harbor Commission immediately to discuss modifications
to your authorization. Any changes must be approved by the Harbor Commission before it is undertaken.

Nothing in this permit shall be construed to justify or authorize any invasion to the private rights of others.
Moreover, nothing in this permit shall limit or modify the authority of the Board of Harbor Commissioners for the
Harbor of Portland with its applicable statute. Attested copies will be submitted to the U. S. Army Corps of Engineers,
the Department of Environmental Protection, the City of Portland, and the City of South Portland.

In Witness Whereof, the members of the Board of Harbor Commissioners for the Harbor of Portland
hereunto set their hands and affix their corporate seal on this 9th day of November 2006.

The work authorized to this permit must be completed on
or before the 9th day of November 2007.



Board of Harbor Commissioners for the Port of Portland

From: Sprague Energy - S. Portland 20776769318 02/09/2007 12:19
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P.C.P. #203 P.001/001