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**VIA FEDEX AND EMAIL**

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

Re: Proposed Watershed Protection Ordinance

Dear Chairperson Bailey:

The American Petroleum Institute (“API”) objects to the proposed Watershed Protection Ordinance (“WPO”) for the City of South Portland and requests that the Planning Board (1) recommend that the South Portland City Council not adopt the proposed WPO and (2) adopt a resolution urging the residents of South Portland to vote against it. API is a trade association representing over 500 companies involved in all aspects of the oil and natural gas industry, including the development of oil sands as a future energy supply for the United States. Many API members would be directly impacted by the proposed WPO, including members that operate and rely on facilities within the Shipyard District.

The proponents of the WPO assert that the purpose of the WPO is to prohibit the shipment of oil sands bitumen through South Portland. There is no justification for such a ban. The development of oil sands promotes North American energy independence and brings substantial economic benefits to Maine and the entire nation. By contrast, the WPO, if enacted, would have a devastating impact on petroleum-related businesses within the Shipyard District and the Shoreland Area and the many persons and businesses that rely on them. Furthermore, fears that shipping, handling, and storing oil sands bitumen will pose greater environmental or safety risks than handling petroleum products from other sources are unfounded. Any facilities that are developed to transport oil sands bitumen through South Portland will have to meet all existing federal and state environmental and safety requirements.

The proposed WPO is an attempted end run around federal and state policy, and cannot be adopted because it is contrary to state law, is preempted by federal and state law, and violates the U.S. Constitution. The WPO is fundamentally and fatally flawed for the following reasons:

*First*, the WPO would do much more than prohibit the shipment of oil sands bitumen through South Portland. The WPO would amend Section 27-922(g) and (n) to prohibit all facilities for storing, pumping, handling, or distributing petroleum other than those for “unloading of petroleum products



from ships docking in South Portland.” This language would sharply limit the operations of existing oil terminals and facilities and would prohibit a broad range of current and future petroleum-related facilities, including marinas and boat fueling operations. The proposed new Section 97-922.5 would prohibit the “enlargement or expansion of existing” petroleum-related facilities, and defines “expansion” so broadly that it would prohibit, among other things, future alterations required to comply with changing commercial requirements and safety and environmental standards. Section 97-922.5 also contains a blanket prohibition on any “new or expanded facility” of any kind “constructed on an existing pier” in the Shipyard District. This prohibition on expansion, alteration, and new facilities would rapidly render the Shipyard District facilities obsolete and would destroy the working waterfront. The proposed WPO should be rejected for these reasons alone.

*Second*, the WPO is inconsistent with South Portland’s Comprehensive Plan, and thus contrary to state law. The WPO incorrectly asserts that the Plan limits industrial development to “light industrial development,” and that construction of equipment or facilities to load oil on tanker ships “is not a light industrial use.” This is simply wrong. The Plan confirms that “oil terminals, repair facilities, and marinas *remain key elements of the waterfront*,” that “the City’s *marine terminals and related marine industrial areas are maintained and improved*,” and that “the City’s development regulations should *continue to allow existing marine and oil facilities to upgrade or expand on parcels that are already used for this purpose*.” (Emphasis added.) The plan endorses the continuation of the “working waterfront,” because “South Portland developed around its waterfront and that waterfront continues to be a major feature in the City both from an economic perspective and a scenic/recreational perspective.” The critical “water-dependent” uses that the Plan intends to protect and preserve “include the Portland Pipe Line facilities on the waterfront and the other oil terminals” and “the Portland Pipe Line tank farm off Hill Street.” Contrary to the Plan, the proposed WPO arbitrarily limits permissible petroleum-related operations, prohibits efforts to improve, upgrade, or expand existing oil terminals and other petroleum-related facilities, and would make it impossible to maintain such facilities over time. It is also inconsistent with the Plan’s intent to preserve and protect the working waterfront and its designation of the Shipyard District as a growth area. If the WPO were enacted, it would be subject to legal challenge and would ultimately be struck down under Maine Law because it is inconsistent with the Comprehensive Plan. 30-A M.R.S. § 4352(2).

*Third*, the WPO is also invalid because it is preempted by state law and regulations related to the transfer and transportation of oil and petroleum products. State law prohibits municipalities from enacting ordinances that conflict with the Maine Oil Discharge Law or any rule or order issued under that law. 38 M.R.S. § 556. Among other things, the WPO attempts to regulate and prohibit activities and facilities that are authorized under permits and orders issued under the law by the Maine Department of Environmental Protection, and is thus contrary to and preempted by the Maine Oil Discharge Law.

*Fourth*, the WPO is invalid because it is preempted by federal law. The Pipeline Safety Act preempts state authorities, including municipalities, from regulating in the area of interstate pipeline safety. 49 U.S.C. §60104(c). According to its proponents, the WPO is intended to address purported safety concerns related to the transport of oil sands bitumen by banning the shipment of oil sands bitumen into South Portland. The WPO states that its purpose is “to protect and ensure the welfare of the people of the City of South Portland.” The WPO is, at its core, an attempted pipeline safety regulation that seeks to countermand federal law. If enacted, it would be challenged and struck down as preempted by the Pipeline Safety Act.



*Fifth*, the WPO violates the Commerce Clause of the U.S. Constitution, which prohibits states and municipalities from discriminating against or unduly burdening interstate commerce. By its terms, the WPO discriminates against out-of-state interests by allowing the handling of oil that is unloaded from ships and brought into Maine through South Portland, while excluding entities from utilizing the port of South Portland to export petroleum brought from outside Maine via pipeline or other means. Its underlying intent is to unduly burden interstate commerce by banning the shipment of oil sands bitumen through the State of Maine. There is no basis for this discriminatory and arbitrary restriction. Any valid, local environmental safety concerns that are not preempted by federal or state law and regulations should be addressed by applying the same standards to facilities and activities related to oil sands bitumen that apply to all other petroleum-related facilities and activities, rather than banning the shipment of oil sands bitumen through South Portland.

*Finally*, there are numerous other aspects of the WPO that would not survive a legal challenge. For example, the WPO unlawfully attempts to circumvent the enforcement authority of the City and the judicial authority of the courts by requiring the City to seek injunctive relief and impose penalties of at least \$1,000 per day for any repeat or continuing violation, and by requiring “any court of competent jurisdiction” to grant such injunctive relief and penalties. The WPO also includes language attempting to preserve the remainder of the Ordinance if any portion of it is found invalid. This is not the test for severability, which is a question of fact and law to be ultimately applied by the courts.

In sum, the WPO is ill-advised and discriminates against the rights and interests of API’s members. If enacted, the WPO would face strong legal challenges and would be found invalid under state and federal law. Rejection of the WPO also may deter other exclusionary local measures that individually and collectively will jeopardize domestic energy security. For these reasons, the Planning Board should recommend against adoption of the WPO and adopt a resolution urging the residents of South Portland not to adopt it.

Please do not hesitate to contact me or Erik Baptist of my staff (202-682-8250) if you have any questions.

Sincerely yours,

A handwritten signature in black ink that reads "Harry M. Ng". The signature is written in a cursive style with a long horizontal stroke extending to the right.

Harry M. Ng  
Vice President, General Counsel  
& Corporate Secretary  
American Petroleum Institute

cc: Tex Haeuser, City Planner  
James Gailey, City Manager  
Patricia Doucette, Code Enforcement Director  
Sally Daggett, Esq., City Attorney