No. 18-2118

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PORTLAND PIPE LINE CORPORATION; THE AMERICAN WATERWAYS OPERATORS,

Plaintiffs - Appellants,

v.

CITY OF SOUTH PORTLAND; MATTHEW LECONTE, IN HIS OFFICIAL CAPACITY AS CODE ENFORCEMENT DIRECTOR OF SOUTH PORTLAND,

Defendants - Appellees.

On Appeal from the United States District Court for The District of Maine

BRIEF OF APPELLEES CITY OF SOUTH PORTLAND AND MATTHEW LECONTE

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STATEMENT OF THE CASE

Although acknowledging that they appeal only legal determinations and do not challenge any of the District Court's factual findings, Appellants ignore the facts, both found after trial and undisputed at summary judgment. The overarching issue in this case is whether a municipality can exercise its traditional police powers to amend its zoning ordinance to prevent a new use (bulk loading of crude oil onto marine vessels) in a waterfront district where:

- The City had "sincere concerns" about the bulk oil loading project proposed by Portland Pipe Line Corporation ("PPLC"), including air emissions-related public health risks, odors, aesthetic and noise impacts, and interference with redevelopment opportunities. *Order and Judgment* (Aug. 24, 2018) ("J.__") at 79.[1]
- Unlike existing oil unloading, the loading proposed by PPLC would "cause adverse respiratory outcomes, including increased bronchoconstriction, airway hyperresponsiveness, lung function decrements, asthma severity or attacks, and hospital admissions and emergency department visits for asthma

[1] The Order and Judgment, ECF #255, is included in Appellants' Addendum at 3-1.

for City residents." *Order on Motions for Summary Judgment* (Dec. 29, 2017) ("SJ.__") at 104-05.[2]

- South Portland Ordinance No. 1-14/15 (the "Ordinance")[3] "does not discriminate against interstate or foreign commerce on its face, in effect, or on purpose." J.59.
- The decline in PPLC's business is driven by the lack of demand for its historical services and not by the Ordinance. Brief of Appellants ("App.Br.") at 5; J.29; SJ.91; Transcript of Hearing Volume I, ECF # 241, ("Tr.__") at 142:3-8.
- In recent years, including those since enactment of the ordinance, the number of oil terminals around the country has increased, not decreased, fully rebutting Appellants' aggregate impact argument. Tr.252:17-21.
- The Ordinance is not a safety standard. J.73 n.6.
- The Ordinance does not interfere with the federal government's ability to speak with one voice. J.86.

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[2] The Order is included in Appellants' Addendum at 4-1. The District Court's Order included citations to all of the undisputed facts and record evidence on which it relied.

[3] Appellants' Addendum ("Add.") at 5-1.

- Appellants failed to show "that the burdens on interstate or foreign commerce are excessive in relation to the asserted local benefits." J.86.

After ruling on cross-motions for summary judgment, the District Court held a trial on the purpose and effect of the Ordinance, ultimately ruling in the City's favor on all counts.

FACTS

A. The Amendments to the City's Zoning Ordinance.

The Ordinance, called the "Clear Skies Ordinance," amends the City's Zoning Ordinance to make the storing and handling of petroleum and/or petroleum products for the "bulk loading of crude oil onto any marine tank vessel" a prohibited use in certain zoning districts in the City. SJ.86, 89-90; J.26. Further, "there shall be no installation, construction, reconstruction, modification or alteration of new or existing facilities, structures, or equipment, including but not limited to those with the potential to emit air pollutants, for the purpose of bulk loading crude oil onto any marine tank vessel" in certain zoning districts. J.26-27.

B. For Unloading, PPLC Uses Oil Tanks and Other Structures in Densely Populated Neighborhoods, Close to Schools, Daycare Centers, and Other Sensitive Receptors, but Has Never Loaded Crude Oil.

PPLC has never loaded crude oil onto tankers in the City's harbor, and it lacks the infrastructure to do so. SJ.16, ECF # 90-6. PPLC has only operated a crude oil *unloading* business in the City. SJ.9; J.7. It maintains Pier 2, at which

crude oil is offloaded from marine tank vessels … and transported to storage tanks on the waterfront. J.7-8. PPLC pumps the crude oil from those tanks through three lines to its Main Tank Farm, 2.7 miles away. J.7-8. PPLC has 23 "above-ground floating roof oil storage tanks;" four are close to Pier 2 ("Waterfront Tanks"), abutting residential neighborhoods with 19 at the Main Tank Farm. SJ.14; J.9; Ex.D-229-230, 332.[4] PPLC's two pipelines begin at the Main Tank Farm and move crude oil northward to refineries in Montreal. SJ.9; J.8.

"Pier 2 abuts Bug Light Park, a public waterfront park on Casco Bay" and the City's scenic and psychological centerpiece. SJ.14; J.9. It contains the iconic Bug Light lighthouse and has open vistas of Casco Bay and "green space for dog walking, children's activities and "general waterfront recreation." SJ.14; J.9; Tr.534:19-538:15.

The Main Tank Farm tanks lack modern technology to control emissions of hazardous air pollutants such as benzene and formaldehyde. SJ.15, 102. The Main Tank Farm is "surrounded by residential neighborhoods, schools, day-care centers, athletic facilities, and churches ...." J.9. *See* SJ.104-05. "[T]he following are all adjacent to the Main Tank Farm:"

[4] Trial exhibits are cited as "Ex".

- "The Kaler Elementary School, which includes an outdoor playground area, is about 275 feet from the nearest tank," with an "asphalt play area and basketball hoop [that] are about 190 feet from the nearest tank."

- "The Community Center, which includes a recreational center, after-school activities, and a summer camp with 500 children, is about 525 feet from the nearest tank."

- "The High School building is about 775 feet from the nearest tank," while the school's "running track and football field are about 225 feet from the nearest tank."

- "The South Portland Church of the Nazarene, which houses a preschool, is about 400 feet from the nearest tank."

J.10; Ex.D-204-07, D-329-31.

C. PPLC's Project Would Have Required Substantial New On-Shore Construction, Including Two Seventy-Foot Smokestacks on the Waterfront and Re-filling 15 or More Empty Oil Tanks.

In adopting the Ordinance, the City Council addressed concerns raised by an earlier, since-abandoned, PPLC project. SJ.100-01; J.19-20. Around 2008, PPLC conceived a project to reverse the flow of its 18-inch pipeline to transport crude oil from Montreal to the City's harbor and load it onto tankers for shipment to refineries on the U.S. East and Gulf Coasts, in the Canadian Maritimes and Europe SJ.17, 22, ECF # 89 ¶ 135. In 2009, PPLC sought zoning approval from the City's Planning Board to construct the infrastructure required for oil loading, none of which is necessary for PPLC's historical unloading operations. SJ.24-25; J.13. This new construction included:

- **New Smokestacks**. Two 70-foot-by-12-foot vapor combustion units ("VCUs"), a/k/a vapor destruction units ("VDUs") or smokestacks on Pier 2

> "for the purpose of combusting volatiles contained in the vapor stream displaced from the holds of the marine tank vessels during the loading of crude oil."

- **New Pump Station**. "At the Main Tank Farm … a new building housing a … pump station, outdoor electrical switchyard and various related infrastructure for use as a 'ship loading system.'"
- **New Pilings and Concrete Decking**. The driving of "new pilings," "concrete desk extensions" and "other modifications" at Pier 2.

SJ.24-25; J.13; ECF # 90-6; D-13, D-147.

D. The City Council Conducted an Exhaustive Inquiry Before Enacting the Ordinance.

Following PPLC's termination of the 2008 project, SJ.38-39; J.33, and prior to adopting the Ordinance, the "City Council unanimously adopted a new Update to its Comprehensive Plan, which serves as the basis for the City's zoning regulations." J.38. The Comprehensive Plan includes several objectives, recited in the Ordinance's legislative findings, including:

> South Portland remains a WATERFRONT 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.

ECF # 90-45 at 4-2.

With regard to an area encompassing Pier 2, the Waterfront Tanks, and a Gulf Oil terminal and tanks, the Comprehensive Plan states:

> 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. 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 uses of these waterfront sites.

SJ.121; ECF # 90-45 at 6-20-21.

Against this backdrop, the City Council created a Draft Ordinance Committee ("DOC") and charged it with recommending ordinance amendments to:

> protect the public health and welfare from adverse or incompatible land uses, or adverse impacts to local air, water, aesthetic, recreational, natural or marine resources, that could result from modifications to existing storage, handling, or processing facilities or construction or installation of new facilities or equipment intended to allow the exportation of unrefined petroleum products, including the loading of unrefined petroleum products onto tank marine vessels docking in South Portland."

J.24; *see* SJ.48-49.

The DOC held 19 publicly recorded meetings totaling more than 60 hours; a recording of every meeting was posted on the City's website. J.26. In addition to drafting and recommending that the City Council adopt the Ordinance, the DOC "recommended the City designate the Main[] Tank Farm a non-conforming use within the adjacent residential[ly zoned] neighborhoods, and that the City Council work to install an ambient air quality monitoring network" in the City. J.26.

The DOC amassed a substantial body of evidence supplied by individuals, government agencies, industry, environmental and other groups such as the

American Lung Association. *See Defendants' Appendix of Legislative History Materials*, ECF #252-1-252-4. *See* D-142 (list of all records considered by DOC); *see also* Ex.J-7, D-97, D-114, D-119, D-120-21, D-138, D-147, D-175.

Based on this, the "City Council made a series of [45] legislative findings in the Ordinance," including:

- "Air pollutants associated with storage and bulk loading of crude oil onto marine tank vessels include particulate matter, sulfur dioxide, nitrogen oxides, carbon monoxide, hazardous air pollutants (also known as HAPs), and volatile organic compounds;"

- "HAPs include substances which are known to be, or may reasonably be anticipated to be, acutely or chronically toxic, carcinogenic, mutagenic, teratogenic, or neurotoxic; and through inhalation or other routes of exposure present, or may present, a threat of adverse environmental and ecological effects and serious human health effects, including cancer, reproductive dysfunction, or birth defects;"

- There would be negative air quality and health impacts from crude oil loading operations at PPLC's main tank farm, finding "new or expanded use of petroleum storage tank facilities for the purpose of bulk loading crude oil onto marine tank vessels would involve a new and significant increase in air pollution;"

- "[E]missions from the bulk loading of crude oil onto marine tank vessels are likely to cause an increase in airborne concentrations of volatile organic compounds and hazardous air pollutants in other areas of the city, including schools and residential areas already located adjacent to oil storage tank facilities and their associated air quality impacts;"

- "[T]he American Lung Association State of the Air 2014 report gives Cumberland County a 'C' grade for ozone air quality;"

- "[E]missions of hazardous air pollutants and impacts on waterfront scenic values associated with bulk loading of crude oil onto marine tank vessels

could continue for decades and impact several generations of South Portland residents, visitors, and tourists."

J.27-28; SJ.86-89.[5] The District Court confirmed the validity of the Ordinance's findings. J.34-36, 38-40, 69-70, 80-85.

E. The District Court Determined that the City Council Enacted the Ordinance Because of "Sincere Concerns" Supported by the Record About the Air Quality, Public Health, Odors, Aesthetic, Water Quality and Redevelopment Harms that Would be Caused by Crude Oil Loading.

Before the District Court were 60 DVDs encompassing every public meeting of the City Council, DOC and Planning Board at which the Ordinance, Waterfront Protection Ordiance ("WPO")[6] or crude oil loading were discussed, as well as a of every document received and considered by the DOC, the DOC's Final Report and Recommendations to the City Council, e-mails from the public to the City Council, internal City Council e-mails, media articles, and transcripts of meetings. Exhibit List, ECF #246; D-142. Based on this voluminous record, the District Court found that "[t]he public comments and official legislative history demonstrate air quality, aesthetics, and waterfront redevelopment goals pervaded the public and official

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[5] See Add. 5-1-5-6.

[6] The WPO, rejected by the voters, was a different citizen-initiated ordinance, that would have more severely curtailed industrial uses on the waterfront than the Ordinance. J.23.

considerations during the WPO, the Moratorium, the DOC proceedings and the Ordinance vote." J.80.

1. Crude Oil Loading Would Substantially Increase Hazardous Air Pollution in the City, Harming Vulnerable Residents.

The District Court concluded that the "City has demonstrated that PPLC's reversal project would be a significant source, of air pollutant emissions in the surrounding areas within the City relative to current levels", J38, and the Ordinance "provide[s] significant public health benefits to the City and its residents." SJ.105. *See also* Trial testimony of Dr. Helen Suh, Tr. 745:14-772:2; ECF # 93, 143-1.

For its unloading operations, PPLC holds an air emissions license from the Maine Department of Environmental Protection ("MaineDEP") for its storage tanks, "major stationary sources of emissions" under the Clean Air Act. SJ.102; Tr.573:15-23. Due to "fugitive emissions," J.34, "PPLC's oil storage tanks produce odors, which have resulted in complaints from City residents." SJ.102. In 2009, PPLC received another air emissions license ("2009 Air Permit"), since expired, permitting air emissions from two proposed VDUs. J.13; Ex.J-42. "Higher concentrations of SO_2, NO_x, and HAPs [Hazardous Air Pollutants] (e.g., benzene, toluene, hexane, etc.) emissions from vapor combustion would occur if PPLC constructed a crude oil loading operation in the City." SJ.103; Ex.J-42. Thus, without exceeding its permit, PPLC's proposed crude oil loading project

could cause a 21% percent increase in VOCs (including benzene, toluene, ethylbenzene, and other carcinogenic HAPs), a 49% increase in NO_x, a 106% increase in $PM_{2.5}$, and a 486% increase in SO_2 compared to the most recent actual reported total emissions in the City. SJ.102-03, J.37; ECF # 143-2 at Ex.1.

The increased emissions "caused by the VCUs that are required for loading crude oil, but not unloading[] will cause adverse respiratory outcomes, including increased bronchoconstriction, airway hyperresponsiveness, lung function decrements, asthma severity or attacks, and hospital admissions and emergency department visits for asthma for City residents." SJ.104-05; ECF # 93. "Higher concentrations of HAPs emissions caused by crude oil loading would also increase City residents' risks of developing cancer and other serious human health effects." J.35. Although PPLC would have to meet regulatory standards, "[f]or many of the regulated pollutants, increased public health risks result from increased emissions, even when the resulting ambient levels remain below" maximum limits. J.36.

PPLC proposed filling 15 of its 23 currently empty storage tanks with oil from a reversed pipeline. Tr. 142:3-8; J.29. Empty tanks do not emit air toxics and other pollutants, while the re-filled tanks would. J.34; SJ.104-05. Thus, "[a] reversal project would create increased VOCs and HAPs fugitive emissions from renewed usage of the Main Tank Farm and Waterfront Tanks over the level of emissions in recent years." J.34. "Due to the population density in the City[,]

extreme proximity of PPLC's emissions sources to schools, neighborhoods, and parks, adverse health conditions will be most acutely experienced by populations such as children, low-income and elderly residents" and "would result in increased hospital admissions and emergency department visits for City residents for asthma and upper airway inflammation." SJ. 104-05.

2. Loading of Crude Oil Would Impede the City's Development Goals.

Several vacant parcels are close to Pier 2 and the Waterfront Tanks. SJ.120; J.39; D330. "The City is actively supporting development of [these parcels], through its planning policies and meetings with potential developers." SJ.121-22; ECF # 92. The parcels have received attention in the City's Comprehensive Plan (noting they have "significant potential to expand the City's tax base and create broad economic benefits for the community at large" (J.39; SJ.120)), and from developers looking to build modern mixed-used projects. J.40; SJ.122 (discussing proposals for at least two developments, including a marina, waterfront hotel, residential space, office, aquarium, and light industrial use). ECF # 92. If, however, PPLC were to construct two 70-foot smokestacks and increase the number of tanker landings at Pier 2, it would obstruct the views and render development of the parcels unlikely. Tr. 538:12-25; Tr. 539:4-9; ECF # 92. Accordingly, the District Court found that "[t]he Ordinance promotes economic redevelopment of the City's waterfront, while the VCUs and intensification of

industrial effects that would be occasioned by crude oil loading under PPLC's previous plans would inhibit the Comprehensive Plan's goal of transforming the Shipyard zoning district into a 'robust waterfront center for office complexes, commercial uses, traditional marine uses, residential development, integrated light industrial and tourist activity.'" SJ. 122-23. *See also* Tr. 516:1-574:24.

SUMMARY OF THE ARGUMENT

The District Court's thoroughly reasoned and detailed summary judgment and post-trial decisions should be affirmed because the court did not misinterpret or misapply the law. The Pipeline Safety Act ("PSA") is inapplicable because the Ordinance is not a "safety standard" and, as other circuit courts have held, does not preempt local zoning ordinances. Moreover, the Ordinance does not stand as an obstacle to the PSA's purpose to promote pipeline safety. Likewise, the Ordinance is not preempted under either the Constitution's foreign affairs doctrine or commerce clause. There is no "direct conflict between the Ordinance and specific federal laws or consistent policies." J.89. In fact, both the Executive Branch and Congress, in the form of Presidential Permits and the Transit Pipeline Agreement, have made clear that municipalities may enact zoning requirements governing pipelines and attendant facilities. *Appellees' Addendum* ("D.Add.") 1 at Art.4; D.Add.2 at Art.IV. Moreover, the local benefits of the Ordinance – preventing significant adverse health effects from toxic and carcinogenic air emissions and

preventing expansion of an oil terminal from interfering with desired redevelopment of the City's waterfront – clearly outweigh any actual harm to interstate commerce from PPLC's desire to attempt to transport an unknown quantity of oil for unknown customers. Finally, the Ordinance does not violate the Maine Oil Discharge and Pollution Prevention Act because it does not conflict with any order by the State of Maine.

STANDARD OF REVIEW

Following a bench trial, the appellate court reviews the district court's legal determinations *de novo*. *Smith v. F.W. Morse & Co.*, 76 F.3d 413, 420 (1st Cir. 1996). "In contrast, the appellate court accepts the court's factual findings, including reasonable inferences drawn from raw facts, unless those findings are clearly erroneous." *Calandro v. Sedgwick Claims Mgmt. Servs.*, _ F.3d _, 2019 U.S. App. LEXIS 7913. *8-*9 (1st Cir. 2019). The district court's findings of fact must be honored unless, "after careful evaluation of the evidence, the appellate court is left with an abiding conviction that those determinations and findings are simply wrong." *State Police Ass'n of Mass. v. Comm'r of Internal Revenue*, 125 F.3d 1, 5 (1st Cir. 1997); *see* Fed. R. Civ. P. 52(a). This standard applies to the rulings on the Commerce Clause claims as well as those based on the PSA and foreign affairs doctrine. *See* App.Br.19 n.5 (this Court should "review the trial record … in its review of the PSA."), 32 n.12 (foreign affairs doctrine and

commerce clause claims "so entwined it is difficult to separate them for review on appeal"). The District Court incorporated into its Trial Order factual findings on both the PSA and foreign affairs claims.[7] *See* J.73 & n.6, 80 & n.8, 87-88.

ARGUMENT

Appellants and their oil industry *amici* essentially argue that any land use restriction prohibiting the pollution, noise, and industrial infrastructure associated with crude oil loading from a pipeline to a ship is a preempted pipeline "safety standard" and such a burden on foreign or domestic commerce that the Commerce Clause must trump a state's inherent police power to enact zoning and health and welfare legislation. They are wrong as a matter of fact and law, as neither the PSA nor the Commerce Clause creates a license for pipeline companies to locate their tanks, towers, and toxins anywhere they choose.

There is no merit to Appellants' assertion that the Ordinance sets the "amount of oil that may be transported through a pipeline at zero." App.Br.25. The Ordinance does no such thing. Rather, it classifies the "bulk loading of crude oil onto marine tank vessels" as a prohibited use in waterfront zoning districts, just as the City has long prohibited other hazardous activities, such as oil refineries, blast furnaces, asphalt and cement plants, and "any other … use that is injurious,

[7] The state law claim appealed presents a pure question of law.

noxious, or offensive to a neighborhood by reason of emissions…." Add. at 5-11-12. The Ordinance is indistinguishable from a typical "grandfathering" ordinance. It made oil loading a prohibited use and grandfathered PPLC's unloading operations as a pre-existing, non-conforming use. J.75-76. "The Ordinance is a lesser restriction than an outright pipeline siting ban; limiting only what companies can do with the crude oil after it comes out of one end of the pipeline." SJ.172, J.56-57, 90.

There is also nothing radical about the Ordinance. Innumerable "coastal localities devote their waterfronts to uses they deem inconsistent with petroleum handling, forcing companies to pursue those uses in other localities where the local government permits them…." J.56-57, 90. The Ordinance is an un-preempted and Constitutional exercise of the City's traditional police power, regularly employed by communities across the country.

I. The District Court Correctly Determined that the Ordinance is Not a Preempted "Safety Standard."

A. Preemption Principles.

"Preemption is strong medicine, not casually to be dispensed." *Grant's Dairy v. Comm'r of Maine Dep't of Agric., Food, and Rural Res.*, 232 F.3d 8, 18 (1st Cir. 2000). Preemption may be express, and there are also two variants of implied preemption, known as "field" and "conflict" preemption. "Field preemption occurs when '[t]he intent to displace state law altogether can be

inferred from a framework of regulation so pervasive … that Congress left no room for the States to supplement it ….'" *Oulette v. Mills*, 91 F. Supp. 3d 1,7 (D. Me. 2015) (internal citations and quotations omitted).

Appellants pursue a theory of implied conflict preemption called "obstacle preemption," which occurs where "state law interposes an obstacle to the achievement of Congress's discernible objectives…." *Grant's Dairy*, 232 F.3d at 15. When a preemption challenge involves zoning power, the Court must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947).

B. The Pipeline Safety Act's Limited Preemptive Scope.

The PSA's purpose "is to provide adequate protection against risks to life and property posed by pipeline transportation and pipeline facilities by improving the regulatory and enforcement authority of the Secretary of Transportation." 49 U.S.C. § 60102(a)(1). The PSA directs the U.S. Department of Transportation ("DOT") to set "minimum safety standards for pipeline transportation and for pipeline facilities." 49 U.S.C. § 60102(a)(2). The PSA also contains an express preemption provision that displaces any state laws that are "safety standards for interstate pipeline facilities or interstate pipeline transportation…." 49 U.S.C § 60104(c). The District Court observed that "the preemptive scope of the PSA, as

expressed in § 60104(c), is explicitly limited by § 60104(e),” which provides: “This chapter does not authorize the Secretary of Transportation to prescribe the location or routing of a pipeline facility.” SJ.168.

The DOT has promulgated very specific pipeline safety-related standards, such as engineering measures that account for “design temperature, variations in pressure, internal design pressure, external pressure, and external loads” and specifications of “valves, fittings, closures, flange connections, and fabricated assemblies.” 49 C.F.R. § 195.101-134. The regulations also provide detailed procedures for hydrostatic testing and corrosion control measures. 49 C.F.R. §§ 195.300-310, 551-591.

C. The PSA Does Not Preempt State and Local “Location” or “Siting” Laws, such as the Ordinance’s Zoning Restriction for PPLC’s Proposed Smokestacks and other Crude Oil Loading Facilities.

The District Court concluded that there are several reasons that the PSA does not preempt the Ordinance, any one of which is sufficient to affirm summary judgment in favor of the City on the count alleging PSA preemption.

The District Court correctly determined that the Ordinance is outside the “preemptive scope” of the PSA because the PSA excludes from any preemptive effect all “state and local authority ‘to prescribe the location or routing of a pipeline facility.’” SJ.172 (*quoting* 49 U.S.C. § 60104(e)). Simply put, the PSA preempts municipal laws that specify *how* a pipeline may safely carry hazardous

liquids; not *whether* the municipality *must locate* them in their boundaries. As the court stated, § 60104(e) expressly allows municipalities "[u]nder their police power … [to] retain their ability to prohibit pipelines altogether in certain locations," and "[t]hese state and local powers are only to be displaced by clear congressional intent, and here there is explicit intent to allow them." SJ.172.

The District Court also reasoned that Appellants' argument proves too much. By enumerating prohibited "uses," municipalities allocate the "location" of permissible construction and activity within their boundaries. McQuillin, LAW OF MUNICIPAL CORPORATIONS § 25:1 at 10 (3d ed. 2010) (zoning is the determination of "the appropriateness of any possible use on or of lands or buildings" and "all occupations and activities of persons occurring upon land or within buildings"). If a use "prohibition" were a preempted safety "standard" rather than a "location" regulation, the PSA would preempt the use prohibition on oil loading, handling, storage, refining, and drilling in practically every residential, commercial and light industrial zoning district in the nation. Appellants' interpretation of the PSA would create a nationwide exemption from zoning for any on-shore construction necessary to transfer the contents of a pipeline. There is no "clear congressional intent" in the PSA for such a result.

The District Court's interpretation squares with decisions by the Fourth and Fifth Circuits holding "local zoning prohibitions are not preempted by pipeline

safety regulations." SJ.173. *See Washington Gas Light Co. v. Prince George's Cnty. Council*, 711 F.3d 412 (4th Cir. 2013) ("*Washington Gas*"); *Texas Midstream Gas Servs., LLC v. City of Grand Prairie*, 608 F.3d 200 (5th Cir. 2010) ("*Texas Midstream*"). In *Washington Gas*, a local zoning ordinance prohibited the "addition of a liquefied natural gas ('LNG') storage tank" to an existing substation. 711 F.3d at 414. The Fourth Circuit concluded that land use classifications that prohibit new industrial uses were not "safety" regulations within the PSA's preemptive scope, even if they curtail desired development of new pipeline facilities. *Id*. at 420-21. The court reasoned that "the PSA expressly circumscribes the Secretary of Transportation's role in this area." *Id.* at 422. (citing 49 U.S.C. § 60104(e)). *Texas Midstream* also involved a preemption challenge to a zoning regulation, which established a 300-foot setback from pipeline facilities. 608 F.3d at 210-11. The Fifth Circuit held that this zoning regulation was not a preempted "safety standard" but, like all zoning regulations, allocated use restrictions based on *location* to "ensure[] that bulky, unsightly, noisy compressor stations do not mar neighborhood aesthetics." *Id*. at 211.

As in *Washington Gas* and *Texas Midstream*, the District Court correctly rejected Appellants' argument that the Ordinance was a "safety regulation in disguise" for two reasons. First, the District Court determined that the primary purposes animating passage of the Ordinance were land-use and public health

purposes, not singularly or even predominately fear of oil spills. J. 79-80. Second, the motive of the enacting body is irrelevant to a preemption analysis; it is only the intent of Congress or the effect of the Ordinance that a court evaluates. SJ.174-78; J.73 & n.6, 80 & n.8. *See Philip Morris Inc. v. Harshbarger*, 122 F.3d 58, 76-77 (1st Cir. 1997).

1. The Purpose of the Ordinance is Irrelevant to a Preemption Inquiry.

Appellants' mischaracterization of the actual purposes of the Ordinance notwithstanding, the motives behind the Ordinance are irrelevant in evaluating the preemptive effect of the PSA. *See Philip Morris*, 122 F.3d at 76-77 (the "relevant inquiry" in preemption analysis focuses "not upon … the motivation behind a state law, but upon the law itself and any connection it might have with [the preempted] activities"). In other words, it is only the intent of the allegedly preempting law (or the effect of that law) that controls the inquiries into, respectively, field or obstruction preemption. The District Court's summary of this well-founded legal principle needs no further gloss: "the Supreme Court instructs that it 'obscure[s] more than aid[s]' the preemption analysis to suggest 'that the coexistence of federal and state regulatory legislation should depend upon whether the purposes of the two laws are parallel or divergent.'" *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141-142 (1963). J.73 & n.6; SJ.176-78. Therefore, as the District Court correctly held,

> with the exception of certain narrow areas of law—such as nuclear power siting, where there are indications that the federal statute 'defined the pre-empted field, in part, by reference to the motivation behind the state law,' *see English v. Gen. Elec. Co.*, 496 U.S. 72, 84-85, 110 (1990), *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 212 (1983)—federal preemption is a matter of the consistency or inconsistency of the state statute's effects with the preemptive scope of the federal statute, not the consistency or inconsistency of the state and federal statutory purposes.

J.73 & n.6 (*citing Phillip Morris*, 122 F.3d at 76-77).

Quoting this Court, the District Court reasoned "the mere suggestion that state lawmakers sought passage of the [act] in part because of their discontent with federal regulatory efforts does not affect our preemption analysis." J.73. While Appellants' conclusory incantation of the City's supposed oil spill motive is exaggerated and omits the City's primary purposes of promoting public health, aesthetics and sound land use planning, it is irrelevant to the legal question of preemption.

2. The District Court Found, Based on Review of an Extensive Legislative Record, that Concern About Oil Spills Were Subordinate Compared to the Council's "Pervasive" Purposes of Promoting Safer Air, Seaside Aesthetics, and Modern Redevelopment.

In the face of numerous factual findings from the District Court to the contrary, and a massive record, Appellants continue to argue that the primary purpose of the Ordinance was "protection of the environment from spills." App.Br.23. The District Court expressly found that oil spills were a secondary

concern, after "air quality, aesthetics, and waterfront redevelopment goals" – the primary motives that it found "pervaded the public and official considerations" of the Ordinance. J.80. *See also* J.79-80. The record amply supports that conclusion. *See Defendants' Appendix of Legislative History Materials*, ECF #252-1.

3. The Ordinance Prohibits New Smokestacks, Renovation of PPLC's Pier and Structures that Do Not Meet the PSA's Definition of "Pipeline Facilities."

Lastly, the Ordinance is outside the preemptive scope of the PSA for an additional reason: it predominately prohibits use and construction of structures that do not meet the PSA's definition of "pipeline" or "pipeline facilities." The PSA regulations expressly exclude from these definitions "facilities located on the grounds of a materials transportation terminal if the facilities are used exclusively to transfer [crude oil] between non-pipeline modes of transportation or between a non-pipeline mode and a pipeline." 49 C.F.R. § 195.1(9)(ii). First, the smokestacks are not pipeline facilities because they convey vapors from the holds of tanker ships prior to loading. J.74-75. Second, Pier 2 (on which the VDUs were to be located), is used to unload oil (or as once proposed by PPLC, load) from marine tank vessels, "a non-pipeline mode of transportation." *See* 49 C.F.R. § 195.1(9)(ii). Thus, two of the primary objects of the Ordinance's land use prohibition, the VCUs and Pier 2, are not "pipeline facilities" subject to PSA preemption. It is self-evident that Congress did not intend the PSA to preempt

zoning of crude oil loading structures that, themselves, are not even subject to the statute. *See English*, 496 U.S. at 78-79 ("Pre-emption fundamentally is a question of congressional intent and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one.") (internal citation omitted).

D. The Ordinance is Not Preempted Because it is Not a "Safety Standard" for Pipelines or Pipeline Facilities.

The District Court correctly concluded that the Ordinance is not preempted because it is not a "safety standard" for pipeline facilities and "it does not regulate the operations of those facilities within the meaning of the statute." J.73 & n.6; SJ.170. *See also* 49 U.S.C § 60104(c). The District Court first relied on plain language, noting that "'[s]tandard' means '[a] criterion for measuring acceptability, quality, or accuracy,' or 'something set up and established by authority as a rule for the measure of quantity, weight, extent, value, or quality.'" SJ.170 (*quoting* Blacks and Merriam Webster). The PSA preempts the *how* of pipeline facility *operation*, not the *whether* of pipeline facility *location*. The DOT regulations further elucidate this distinction. The regulations all address technical specifications, such as hydrostatic testing, anti-corrosion materials, and pressurization. The District Court reasoned, correctly, that federal "fuel economy standards on cars … expressly preempt state or local law" but do not preempt a municipality's ability to regulate where roads or parking lots must be located, or

whether cars are allowed at all. SJ.170. In rejecting a similar challenge, the Fourth Circuit noted, "Logically, the power to impose a zoning requirement includes the power to preclude any proposed usage of the zoned area that cannot comply with such requirement." *Washington Gas,* 711 F.3d at 421.

E. The Ordinance Does Not Stand as an Obstacle to the Purpose of the PSA Because Congress Sought to Standardize Protections for Life and Property, Not to Promote Additional Pipeline Use.

The stated objective of the PSA is to "provide adequate protection against risks to life and property…." 49 U.S.C. § 60102(a)(1). The PSA is not, as Appellants frame it, a congressional directive to exempt all oil transportation from municipal zoning. As the District Court concluded:

> Statutes that preempt state safety standards for certain activities and facilities do not generally remove local control over whether those activities and facilities are permitted in each locality. Congress knows how to preempt local bans and siting authority since it has done so for nuclear power, liquefied natural gas terminals, and electric transmission lines. It has not done so for pipeline facilities, and instead chose a more narrowly preemptive scope.

J.73-74 & n.6. *See Cipollone v. Liggett Grp., Inc*., 505 U.S. 504, 517 (1992) ("Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.").

The District Court's comparison to other statutes is apt. Congress is well aware of the interplay between federal and state law and certainly knows how to preempt local zoning, as it has done expressly in the very similar context of LNG

terminals and electric transmission. *See* 15 U.S.C. § 717f(c)(1)(A) (granting exclusive authority to locate pipelines to FERC); 16 U.S.C. §§ 824p(b), 824p(b)(1)(C)(i) (granting FERC authority to suspend local permitting authority for corridors of "national interest"). That Congress has been clear and manifest in preempting local zoning in comparable circumstances compels the conclusion that Congress did not intend the PSA to preempt local zoning. Accordingly, the District Court correctly concluded that the Ordinance does not stand as an obstacle to the "clearly discernible objectives" of the PSA because "[a] ban on one form of subsequent transportation at the end of the pipeline is not in conflict with the goal of promoting the safety of pipelines and preventing spills." SJ.171. This is so, the District Court held, because – contrary to the unsubstantiated assertions of Appellants – there is no indication in the text of the PSA or its legislative history that Congress sought through the PSA "to proliferate pipelines," but rather its objective was to "impos[e] national standards to improve pipeline safety." *Id.* While Appellants provide no citation for the assertion that "uniformity" is a goal of the statute, the District Court held that there is no obstacle to any national standard because the Ordinance "does not set competing levels, quantities, or technical

specifications that make complying with both the PSA and the Ordinance more difficult."[8] *Id.*

II. The District Court Correctly Determined that the Ordinance Does Not Violate the Constitution's Commerce or Foreign Affairs Clauses.

A. Appellants Misstate the Legal Standard; A Hypothetical and Counterfactual Inquiry Into The "Aggregate Impact" of Other Municipalities Adopting Similar Ordinances is Not a Recognized Test.

Appellants go to great lengths to present a misleading parade of horribles about what might happen if every coastal community in the country banned oil loading. Of course, the District Court appropriately rejected this inquiry as not part of the analysis. While this inquiry is unrecognized under applicable precedent, it would be particularly inappropriate here where (1) there was no evidence in the record before the District Court that other municipalities are considering such zoning changes, (*see* Tr. 87:18-88:5), and (2) crude oil loading terminals have multiplied by the "dozens, if not hundreds" (Tr. 252:17-21) since PPLC first considered the idea of changing its use in the City.

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[8] Every case cited by Appellants' footnote 8 concerned a competing *safety specification*, not a traditional zoning or other location regulation, while *Algonquin LNG v. Loqa*, 79 F. Supp. 2d 49, 51 (D.R.I. 2000), concerned a claim for preemption under a different statute, the "Natural Gas Pipeline Safety Act," which unlike the PSA, authorizes the Secretary of Transportation to "prescribe minimum safety standards for deciding on the *location* of a new liquefied natural gas pipeline facility." *See* SJ.172-73.

In order to argue for this novel test, Appellants resort to using out-of-context quotations. The kernel of an origin of this concept appears to be found in a list of several *disjunctive* criteria a court may consider in determining whether a state is extraterritorially extending a regulation "wholly" beyond its boundaries. *See Healy v. Beer Inst.*, 491 U.S. 324, 336-41 (1989) (asking, among other criteria, "what effect would arise if not one, but many or every, State adopted similar legislation"). *See* J.54-59. The District Court already held that the Ordinance does not regulate conduct wholly beyond South Portland's boundaries, a determination Appellants do not challenge. J.56; *see* App.Br.29-55.

Regardless, the hypothetical test Appellants invite is not applicable to a local zoning ordinance because the zoning does not project price control into other states and markets. *See* J.54-59. In *Healy*, for instance, the Supreme Court examined a state law prohibiting brewers from offering discounts in other states after affirming posted prices in Connecticut. 491 U.S. at 339. This law had the practical effect of Connecticut projecting its own price control rule in other states with no similar price restrictions and inviting other states to create similar price affirmation schemes that would create "price gridlock." *Pharm. Research & Mfrs of Am. v. Concannon*, 249 F.3d 66, 82-84 (1st Cir. 2001) ("*PhRMA*") ("statutes similar to the Maine Act, if enacted" would not result in "inconsistent obligations to states, or in creating a 'price gridlock' linking prices in some states to the prices in other

states"). The District Court held that the Ordinance does not regulate conduct wholly beyond South Portland's boundaries. J.56 ("In the modern age of highly interconnected commerce, there would be virtually no room for local historic police powers if this sort of extra-territorial effect were enough to invalidate an ordinance under the dormant Commerce Clause."). Appellants do not challenge that holding, amounting to waiver. *See* App.Br.29-55; *In re Gosselin*, 276 F.3d 70, 72 (1st Cir. 2002) (arguments not raised in primary brief are waived).

None of the cases cited by Appellants suggest that courts should perform the "straw man" hypothetical proposed by Appellants.[9] *Wyoming v. Oklahoma*, 502 U.S. 437, 453 (1992) (fear of multiplicity of similar resource-hoarding laws gives Wyoming, a major coal producer, *standing* to invoke Court's original jurisdiction, but not discussing principle in Commerce Clause analysis); *Philadelphia v. New Jersey*, 437 U.S. 617, 629 (1978) (finding statute discriminatory on its face and opining in *dicta* that a *facially discriminatory* resource-hoarding law could harm New Jersey in the future as it helps it today).

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[9] The briefs of Appellants' oil industry *amici* focus on this misplaced standard, too. *See, e.g.*, American Petroleum Institute, et al. Brief at 13. Note that the City does not address the arguments of *amici* that the Ordinance is discriminatory in purpose or effect or regulates "wholly" beyond the boundaries of the City because Appellants did not challenge those rulings of the District Court in favor of the Defendants-Appellees. *Compare*, Chamber Brief at 5-10 with App.Br.19.

Even if the Court were to indulge this concept, there is no multiplicity issue sufficient to trigger a Commerce Clause issue. Unlike any case cited by Appellants, here the federal government has affirmatively determined that PPLC should be subject to the exact multiplicity of local regulation of which it complains. The District Court found the same, concluding that "[i]f other municipalities enacted similar ordinances … [t]hat situation would be indistinguishable from the current state of affairs, where some coastal localities devote their waterfronts to uses they deem inconsistent with petroleum handling, forcing companies to pursue those uses in other localities where the local government permits them." J.56-57 (*citing* Portland and Cape Elizabeth use prohibitions on crude oil handing). *See also* Vancouver (Washington) Municipal Code § 20.150-040A, 20-440-030-1 (prohibiting "bulk crude oil storage and handling facilities"); Hoquiam (Washington) Municipal Code §§ 10.09.030(17), 10.03.116 (same).

Moreover, contrary to the predicted implosion of the crude oil loading market, Appellants own evidence confirms that interstate commerce in crude oil exportation has not been harmed, even in the face of a vast number of local zoning prohibitions on crude oil handling. Appellants admit that "dozens if not hundreds of [crude oil loading] terminals" have been built in just the past eight years, Tr. 87:18-88:5, while business is surging for the waterways operators that service

these terminals. Tr. 49:7-19, 52:5-12, 82:16-83:18, 84:6-10 (representative of Appellant AWO testifying that AWO members have benefited from this infrastructure expansion and that if PPLC could not resurrect its business, AWO members would need to redeploy just one Portland-based tug to one of 17 other ports where it would immediately be placed into service).

B. The District Court Correctly Determined that the Ordinance Does Not Violate the "One Voice" Test Embodied in the Foreign Affairs Supremacy Clause or Dormant Foreign Commerce Clause.

The District Court did not err in holding that the Ordinance is not preempted by federal foreign affairs powers and does not violate the scarcely applied prong of the dormant foreign commerce clause that examines whether a local law impairs the federal government's ability to "speak with one voice when regulating commercial relations with foreign governments." J.86-87. The District Court, Appellants, and Appellees all agree that in this case, the inquiry under the Foreign Affairs Supremacy Clause or Commerce Clause is the same; the District Court addressed both issues in its Order and Judgment following the bench trial. J.87-88; App.Br.32 & n.12. *See Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 59 (1st Cir. 1999), *aff'd sub nom.*, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) ("*Natsios*").

It bears emphasis that both doctrines are articulations of the *dormant* foreign affairs powers of the federal government, inapplicable here where the federal

government's position is not dormant. As discussed below, Congress and the executive branch have both affirmatively declared in the relevant permits, laws, and treaties that PPLC's oil transport operations yield to the historic importance of state and local police power. Fatal to Appellants' argument, the federal "Presidential Permits" authorizing operation of PPLC's pipelines required the company to obtain all state and local approvals. SJ.23, J.12; D.Add.1. Where the federal government invites multiple voices to approve or deny PPLC's land uses, as is typical in our federalist system, no "one voice" claim can lie. J.89; SJ.194-200.

1. The Foreign Affairs Preemption and "One Voice" Test.

Foreign affairs preemption requires a "likelihood that state legislation will produce something more than incidental effect in conflict with express foreign policy of the National Government …." *Am. Ins. Assoc. v. Garamendi*, 539 U.S. 396, 413, 420 (2003). The District Court observed that in *Natsios*, this Court struck down a Massachusetts law that facially targeted Burma by "'restrict[ing] the ability of Massachusetts and its agencies to purchase goods or services from companies that do business with Burma.'" SJ.192 (*quoting* 181 F.3d at 45). There, this Court held that the anti-Burma law exceeded "'a threshold level of involvement in and impact on foreign affairs which the states may not exceed.'" *Id.* (*quoting Natsios*, 181 F.3d at 52).

After *Natsios*, the U.S. Supreme Court struck down a California law that required insurers to disclose information about life insurance policies sold during the Nazi era. The District Court found "a clear conflict" with the specific insurance-related "federal foreign policy 'expressed unmistakably in the executive agreements signed by the President' and 'consistently supported in the high levels of the Executive Branch.'" SJ.193 (*quoting Garamendi*, 539 U.S. at 421-22). The *Garamendi* Court instructed that in assessing whether a "clear conflict" exists, a court must weigh the strength or weakness "of the State's interest, against the backdrop of traditional state legislative subject matter." SJ.193-94 (*quoting Garamendi*, 593 U.S. at 426). Even more recently, this Court, citing *Garamendi*, explained that courts must distinguish the "'traditional state prerogative, of enacting 'generally applicable' laws, and those laws which single out particular foreign countries." *Museum of Fine Arts, Boston v. Seger-Thomschitz*, 623 F.3d 1, 13 (1st Cir. 2010). "[I]t is appropriate to 'consider the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted." *Id*. (*quoting Garamendi*, 539 U.S. at 420).

2. The City has a "Historically Important" State Interest in Allocating Future Land Uses and Protecting the Health of its Residents from Major Sources of Air Pollution.

The District Court correctly distinguished the Ordinance from the laws in *Natsios* (state action to punish repressive regime in Burma) and *Garamendi* (state action to punish insurers that acquiesced in Holocaust) where the traditional state interest in punishing human rights violators abroad was weak. SJ.200. Not surprisingly given the broad use of zoning powers by municipalities around the country, the District Court found, "the City has a historically important and legitimate interest in restricting new uses within its zoning districts, and in prohibiting new structures associated with those uses." *Id.* (*citing Seger-Thomschitz*, 623 F.3d at 13). This "historically important" police power interest requires that much more "serious a conflict must be shown before declaring the state law preempted." *Seger-Thomschitz*, 623 F.3d at 13. Stated differently, preemption of a state's core police powers cannot be accomplished by implication, innuendo, or the fervor of a commercial litigant's beliefs about the significance of its private assets. Here, there is no conflict, and certainly no conflict sufficiently "serious" to terminate centuries of federal/state co-existence that treat as sacrosanct a municipality's right to allocate land uses within its borders and to protect the health and general welfare of the public.

3. The District Court Correctly Determined that the Ordinance is a "Generally Applicable" Regulation that Does Not Target Any Foreign Nation; It Applies Equally to U.S. and Canadian Sources of Oil.

Appellants do not challenge two significant aspects of the District Court's factual findings: (1) the Ordinance's use prohibition applies only within the boundaries of the City and only affects the foreign trade of oil insofar as it prohibits *new* industrial structures and hundreds of tons of *new* hazardous air pollution; and (2) the Ordinance does not facially, in purpose or in effect, discriminate against Canada, or foreign or interstate commerce. *See* J.59-76. As a result, they cannot be heard to argue that the Ordinance is invalid because it targets trade with Canada. It does not.

The District Court appropriately distinguished "the Anti-Burma law struck down in *Natsios*," observing it made "a facial distinction about a particular foreign country, whereas the Ordinance prohibits loading crude oil and new structures for loading crude oil, regardless of either the source or ultimate destination." J.88-89. *See also* SJ.200 ("The Ordinance is a law of 'general applicability; within the traditional realm of state and local police power—local land use restrictions for on-shore port facilities."). In response to Appellants' argument that the Ordinance targeted Canadian oil extraction policies rather than the adverse local impacts of crude oil loading, the District Court found both that "[t]he Ordinance does not target commerce with Canada", J.88, and "[t]here is far a greater volume of more

salient evidence that the Ordinance was intended to address concerns about the air quality, water quality, aesthetics, and redevelopment risks of crude oil loading in general, and the loading of crude oil derived from tar sands in particular, regardless of the source location or destination of that crude oil." J.69. Appellants do not argue that either of these was clear error, nor could they as the record amply supports the findings.

Moreover, as the District Court found, the Ordinance also is generally applicable – both textually and in effect – because it is agnostic to the source or destination of the oil to be loaded. Indeed, PPLC's most recent plan for crude oil loading did not involve pipeline transport from Canada at all. As recently as 2015, PPLC explored a plan to transport by rail only U.S. sourced crude into the City for loading onto marine tank vessels. J.18; SJ.35. The Ordinance generally applies to that project, wholly bereft as it is of Canadian oil or transportation through or in Canada.

Moreover, as the District Court found, the Ordinance "applies equally to crude oil flowing ... into PPLC's Montreal terminus from North Dakota as it does to crude oil from Alberta." J.64. Indeed, Enbridge Line 9, "the only pipeline currently constructed that could feed PPLC's pipeline reversal project," J.29, currently carries an equal mix of U.S. and Canadian crude oil. J.29; Tr. 438:10-440:8, 483:2-23; Ex.D-202. The Ordinance would thus affect U.S. and Canadian

oil equally. Likewise, the Ordinance applies equally to "oil headed to Philadelphia as it does to crude oil destined for Europe," or Canada, all refinery markets in which PPLC solicited shipper interest during its failed crude oil loading efforts. SJ.195.

Notably, Appellants' statement (made without citation) that the Ordinance "flatly prohibits oil export" is false. App.Br.34. The District Court found that "under historic northbound flow operations, domestic and foreign sourced crude oil was imported to South Portland and immediately exported." J.74. Significantly, a "major source" of exports from PPLC's existing unloading operation is Hibernia crude from the Canadian Maritimes. The Ordinance "does nothing to inhibit" PPLC from continuing these Canadian exports through the City. *Id.* at J65. Moreover, the District Court found that "refined oil products from Canada" are exported from South Portland today, "which the Ordinance also does not block." *Id.*

4. The District Court Correctly Determined that the Ordinance Does Not Conflict with the Unmistakable Directive of the President that PPLC's Facilities Must Receive Local Approvals.

The District Court held that the Ordinance does not conflict with any federal foreign policy "expressed unmistakably in the executive agreements" and "consistently supported in the high levels of the Executive Branch." *See Garamendi*, 539 U.S. at 421-22.

The District Court dispensed with Appellants' conflation of general, anodyne statements about the strategic importance of oil or Canada as a trade partner with the particular executive policies providing rules for PPLC's infrastructure (all of which subject PPLC to local permitting). While there is no dispute that Canada is a reliable trade partner, "foreign affairs cases require a greater conflict with a more consistent federal policy." SJ.197. The Constitution does "not authorize preemption of local restrictions whenever an industry as a whole is economically powerful enough to affect this Country's national and by extension international interests." *Id.*

Next, the only "unmistakable" and "consistent" policy of the federal government that applies to PPLC's pipelines is found in PPLC's Presidential Permits. *See* SJ.197-99. The Presidential Permit for PPLC's 18-inch pipeline expressly requires that PPLC obtain all local zoning permits and approvals:

> Permittee shall comply with all applicable Federal and State laws and regulations regarding the construction, operation, and maintenance of the United States facilities and applicable industrial codes. The permittee shall obtain requisite permits from Canadian authorities, as well as the relevant state and local governmental entities and relevant federal agencies.

SJ.23; J.12; D.Add.1.

As the District Court found, these "expressly require[] PPLC to comply with additional requirements and restrictions under state law" and be able to "satisfy local restrictions and avoid local prohibitions if they wish to operate successfully."

SJ.199; J.89. In other words, the Ordinance is expressly allowed by PPLC's Presidential Permits. If that were not enough, the Transit Pipeline Agreement, a 1977 treaty between Canada and the United States, has a savings clause confirming that localities may regulate pipelines for zoning or environmental reasons provided that the local law applies equally to international and interstate pipelines. SJ.198-99 (quoting Transit Pipelines, Canada-U.S., Oct. 1, 1977, 28 U.S.T. 7449 at art. IV § 1) (international "Transit Pipeline[s] shall be subject to regulations by the appropriate governmental authorities"). D.Add.2 at art.IV. Appellants selectively omit this clause. App.Br.37-38.

Based on these statements, the District Court correctly concluded that the federal policy here "indicates an additional requirement of federal approval for pipelines, not an intent to displace state and local authority over their ports and oil transfer facilities." SJ.199. Citing PPLC's federal permits and the absence of federal laws or treaties with provisions preempting local police powers, the District Court held that "[t]he policy of the federal government appears to favor local control over whether pipelines can exist or operate within each locality's borders." J.89 (also noting "Congress has declined to prevent states and municipalities from exercising siting authority over pipelines and transfer facilities, unlike with nuclear power plants, liquefied natural gas terminals, and electric transmission lines").

5. There is No Potential for International Retaliation or a Need for Federal Uniformity Where the Executive Branch and

Congress Both Invite and Allow Municipal Zoning of Crude Oil Loading Terminals.

The District Court correctly concluded that there is no compelling national need for a "uniform" judicial rule enjoining local zoning of crude oil handling terminals and found that the Ordinance will not provoke international retaliation. SJ.199-200; J.88-92. With no "direct conflict between the Ordinance and specific federal laws or consistent policies," the District Court held "there is no potential for embarrassment to the United States Government." J.89.

Unlike the Anti-Burma law in *Natsios,* which invoked official protests from the federal government, Japan, the European Union, and the Association of Southeast Nations (*Natsios*, 181 F.3d at 47) here there is "no evidence of any objection to the Ordinance from either the United States Government, or the Canadian Government." SJ.200.[10] This silence speaks volumes. As the District Court held, "[o]n the contrary, a Canadian locality, Dunham, Quebec, imposed local restrictions that would have interfered with PPLC's ability to complete its 2008-2009 proposal, suggesting that other states and Canada expect infrastructure

[10] While Appellants claim a "Canadian representative" spoke before the City Council in opposition to the Ordinance, App.Br.35, the speaker was a consular representative of the province of Alberta, not the federal government of Canada. SJ.78.

projects like pipelines to satisfy local restrictions and avoid local prohibitions if they wish to operate successfully." J.88-89.

Next, the District Court similarly rejected the inference invited by Appellants that the Ordinance "was designed to create an 'asymmetry' between the direction of flow, or between the ability of shippers to import crude oil to South Portland for northbound flow, and the ability of shippers to export crude oil after southbound flow.'" J.74. The District Court again noted that under *both* northbound and proposed southbound conditions, PPLC would import and export crude oil from a mix of numerous countries, including *both* the U.S. and Canada, in *both* directions. *Id.* More importantly, the District Court held that the City's disparate treatment of unloading and loading is a valid local response to the fact that "the alternative modes of operations [unloading compared to loading] here are *meaningfully different from one another*." J.74-75 ("Crude oil unloading at the Eastern Waterfront does not expel air that is saturated with hydrocarbon vapors, so it does not contribute to local air pollution at the Harbor and there is no need to construct vapor control devices. But crude oil loading at the Harbor does create those local harms and does require those structures."); *see also* J.75-76 (accurately describing the Ordinance as a typical "grandfathering" measure).

In addition, the District Court correctly reasoned that Appellants' counterfactual fear of a multiplicity of similar zoning prohibitions "is not the type

of 'asymmetry' or lack of uniformity that concerned the Supreme Court in *Japan Line*." J.89-90. "Even if enacted in many other jurisdictions, there will be no inconsistent burdens requiring pipeline operators to choose between complying with one state or local command or another ... the nightmare scenario PPLC presents is not perplexing disuniformity, it is simply unfavorable uniformity." *Id.* PPLC's argument is not one for "uniformity," as in conflicting state standards for truck length or mud guards,[11] but an extraordinary "uniform federal rule [that] apparently must prohibit localities from banning certain petroleum handling activities like crude oil loading within their borders." *Id.* The District Court easily unmasked the remedy Appellants and their oil industry *amici* were truly after: judicial lawmaking requiring "all coastal jurisdictions to allow crude oil loading at their shores." *Id.* That, the District Court rightly noted, would terminate not only "South Portland's longstanding prohibitions on other industrial activities," but the zoning prohibitions on oil handling in Portland and Cape Elizabeth, or similar prohibitions in countless municipalities across the nation. *Id.* The Supreme Court,

[11] In footnote 17, Appellants cite *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662 (1981) in support of the proposition that the Ordinance disrupts the need for uniformity (*i.e.*, terminating the power of municipalities) over infrastructure associated with cross-border pipelines. In *Kassel*, unlike here, the plurality determined that the statute's asserted purpose was illegitimate. *Id.* at 670-71. The same is true for *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959).

too, has been clear: fear of multiple states subjecting an interstate actor to local regulation is not what the "uniformity" prong of the Commerce Clause addresses; it is rather when interstate economic activity is subject to multiple, irreconcilable legal commands. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 128 (1978) ("The evil that appellants perceive in this litigation is not that the several States will enact differing regulations, but rather that they will all conclude that [the City's chosen course is] warranted.").

Appellants misstate the law when they argue "a state law is preempted when it purports to ban federally licensed maritime activity." App.Br.138. To begin, the loading of crude oil is not a "federally licensed maritime activity," nor is there a federal prohibition on local zoning laws that disrupt on-shore land uses inconsistent with heavy industrial cargo transport. A coastwise endorsement under Title 46, Chapter 121 of the U.S. Code (*see* App.Br.46) is a threshold authorization for a vessel to engage in trade between U.S. ports. 46 U.S.C. §§ 12101, 12112; 46 C.F.R. §§ 67.15, 67.19. The requirements for a vessel to acquire a coastwise endorsement largely concern the origin and ownership of the vessel, and not the type of cargo the vessel will carry. *See id.* As the Supreme Court has held, "the mere fact that a vessel has been inspected and found to comply with the Secretary's vessel safety regulations does not prevent a State or city from enforcing local laws having other purposes, such as a local smoke abatement law." *Cf. Douglas v.*

Seacoast Prods., Inc., 431 US 265, 278 (1977) ("The mere possession of a federal license ... does not immunize a ship from the operation of the normal incidents of local police power."). For instance, vessels are licensed to engage in coastwise trade to carry livestock. No court has ever held that a municipality must locate a stockyard on its shores or else have impermissibly banned licensed trade. As the District Court also noted, Appellants "point to no case ... striking down a local restriction on the loading or unloading of a particular good, or prohibiting new on-shore structures." SJ.2014-05. *Cf. Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 390-91 (1987) (upholding prohibition on "bulk product transfer facilities in Delaware's coastal zone" against a foreign commerce clause challenge from coal exporters); *Wood Marine Serv., Inc. v. City of Harahan*, 858 F.2d 1061, 1064-65 (5th Cir. 1988) (upholding zoning prohibition of the unloading of construction materials in a port on the Mississippi River against Commerce Clause challenge).

Perhaps most importantly, as the District Court summarized, "[t]he federal interest in uniformity is weak here:"

> The Ordinance restricts on-shore facilities and conduct, and therefore, only incidentally affects a tanker during the narrow window of time in which it is docked in the Harbor. The Ordinance does not regulate the activity of tankers and sailors at sea. There is no indication that the federal government has sought to remove local control over the siting of onshore structures like docks and transfer facilities. Numerous coastal localities restrict or entirely prohibit these structures for environmental, health, or aesthetic reasons … Any ban on goods or conduct within a coastal jurisdiction will affect maritime vessels by prohibiting them from unloading or loading that good or participating

> in that conduct while docked. But this broad an interpretation of maritime preemption under *Jensen* would "push the line shoreward" and "engulf everything" historically left to coastal jurisdictions.

SJ.205. In sum, "[t]here is no indication in the caselaw that the "one voice" test requires all coastal jurisdictions to permit all activities that might contribute to a significant international market." J.90. That simply is not the law. Otherwise, "dormant" constitutional principles would subsume all local police powers.

C. The District Court Correctly Found that the Ordinance Does Not Impose Burdens on Foreign and Interstate Commerce that Are Clearly Excessive to the Putative Local Benefits.

Under the familiar *Pike* balancing test, courts "will uphold a nondiscriminatory statute like [the Ordinance] 'unless the burden imposed on commerce is clearly excessive in relation to the putative local benefits.'" *United Haulers Assn., Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 346 (2007) (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)). Because the *Pike* test applies only to nondiscriminatory laws, such challenges involve a lower level of scrutiny than that of discriminatory laws, *Oregon Waste Sys., Inc.* v. *Dep't of Envtl. Quality of Ore.*, 511 U. S. 93, 99 (1994), and more deferential appellate review, the result being that "[s]tate laws frequently survive this *Pike* scrutiny…." *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 339 (2008) (collecting cases). States and municipalities are afforded this deference because their elected bodies are best equipped to make policy decisions affecting the lives

of their constituents: "What is most significant about these cost-benefit questions is not even the difficulty of answering them or the inevitable uncertainty of the predictions that might be made in trying to come up with answers, but the unsuitability of the judicial process and judicial forums for making whatever predictions and reaching whatever answers are possible at all." *Davis*, 553 U.S. at 355. That is why the Supreme Court has cautioned that lower courts may not "rigorously scrutinize economic legislation passed under the auspices of the police power." *United Haulers*, 550 U.S. at 347.

1. In its Pike Inquiry, the District Court Properly Balanced the Relevant Factors; the Ordinance's Safety, Aesthetic, and Redevelopment Benefits Outweigh any Asserted Burden on Commerce.

The District Court applied the *Pike* factors and properly held that "[t]he City had real interests in reducing the visual, auditory, and olfactory externalities of heavy industrial activities within its borders and encouraging recreational and lower-impact development on the waterfront." J.83. More specifically, the Court found that "the Ordinance creates ample and weighty benefits":

> The record demonstrates that the City Council and an engaged and sizable portion of South Portland's residents had sincere concerns about (1) increased air emissions-related public health risk resulting from the proposed VDUs; (2) increased air emissions-related public health risk resulting from the renewed utilization of the Main Tank Farm adjacent to sensitive locations, such as schools; (3) increased odors resulting from renewed utilization of the Main Tank Farm at adjacent sensitive locations like schools; (4) aesthetic and noise impacts at recreational locations like Bug Light Park from the VDUs

> and renewed tanker traffic; (5) reduced likelihood of redevelopment opportunities for vacant and underutilized properties from renewed heavy industrial activity; and (6) increased risk to the local land and coastal environment and elevated public health risks from pipeline accidents or spills of crude derived from tar sands.

J.79.

With respect to the Ordinance's public health benefits, the City's environmental epidemiology expert, Dr. Helen Suh, provided "unrebutted" testimony about "the health risks of VOC and HAP emissions from the Main Tank Farm and SO_x and NO_x emissions from the proposed VDUs" and about "the public health benefits of reducing emissions from loading operations and renewed tank farm use, even when a locality is in compliance with federal and state air quality standards." J.82. Dr. Suh's testimony was consistent with a "C" air quality grade that the American Lung Association gave Cumberland County because it "has some of the highest rates of respiratory ailments and lung disease in the state." J.84. And, "[m]ore importantly, PPLC did not rebut Dr. Suh's testimony that there is no safe level of exposure to many of the air pollutants that would be emitted from renewed use of PPLC's tanks and the proposed VDUs from crude oil loading operations." J.84-85.

PPLC similarly failed to "rebut the City's evidence about aesthetic and recreational benefits to deindustrializing the waterfront." J.85. The City's vision for its waterfront, as embodied in its Comprehensive Plan, foresees a "a marine,

mixed-use area that capitalizes on the access to the waterfront and spectacular views of the harbor and inner Casco Bay." J.39. The City presented evidence of "preliminary proposals for at least two large mixed-use projects on vacant parcels that abut the Waterfront Tanks." J.40. And the City also "demonstrated a pattern of opposition to heavy industrial projects in recent years, indicating that the touted local safety, aesthetic, and redevelopment concerns of the public and City officials were bona fide." J.83.

The District Court rightly rejected PPLC's claim that the "local air quality, aesthetics, and waterfront redevelopment benefits were pretextual, illegitimate, or illusory." J.80. The Court delved into the vast record of the proceedings that led to the Ordinance's enactment and confirmed that "air quality, aesthetics, and waterfront redevelopment goals pervaded the public and official considerations …." J.80.

2. Appellants Misstate the Legal Standard Under Pike and Ignore The District Court's Findings Regarding the Ordinance's Public Health and Redevelopment Benefits.

The question whether the Ordinance impermissibly discriminates against interstate or foreign commerce, thereby triggering heightened scrutiny, was vigorously contested at trial. After hearing extensive evidence on this issue, the Court ruled that the Ordinance does not discriminate against interstate or foreign commerce on its face, in effect, or in purpose, J.59-76, and, consequently, it "d[id]

not apply heightened scrutiny and instead examined the Ordinance under the *Pike* balancing test." J.76.

Appellants do not challenge the ruling that the Ordinance does not discriminate against interstate or foreign commerce, waiving that argument and any contention that heightened scrutiny applies to the Ordinance. *In re Gosselin*, 276 F.3d at 72.

In their appeal ruling, however, Appellants try to inject a discrimination argument into through a side door, arguing that the Ordinance is not "evenhanded." App.Br.48-50. This is improper because only laws that are evenhanded, *i.e.*, nondiscriminatory, are subject to the *Pike* balancing test in the first place. *See, e.g.*, *United Haulers*, 550 U.S. at 346; *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 472 (1981) ("Since the statute does not discriminate between interstate and intrastate commerce, the controlling question is whether the incidental burden imposed on interstate commerce by the Minnesota Act is 'clearly excessive in relation to the putative local benefits.'"). If a law is discriminatory, then *Pike* is inapplicable. *See, e.g.*, *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) ("As we find that the ordinance discriminates against interstate commerce, we need not resort to the *Pike* test."). Because Appellants did not appeal the District Court's decision that the Ordinance does not discriminate, they are precluded from arguing that it is not evenhanded.

Consistent with their misapplication of the law, Appellants cite inapposite cases where heightened scrutiny was applied to strike down facially protectionist laws. App.Br.48-49. *See C&A Carbone*, 511 U.S. at 391 (ruling that "flow control ordinance discriminates, for it allows only the favored operator to process waste that is within the limits of the town"); *Sporhase v. Nebraska*, 458 U.S. 941, 958 (1982) (law banning export of water to states that prohibited the export of their own water "does not survive the 'strictest scrutiny' reserved for facially discriminatory legislation"); *Philadelphia v. New Jersey*, 437 U.S. at 628-29 (law barring importation of out-of-state waste was discriminatory because it "impose[d] on out-of-state commercial interests the full burden of conserving the State's remaining landfill space" and "freeze[d] the flow of commerce for protectionist reasons"); *Walgreen Co. v. Rulian*, 405 F.3d 50, 55 (1st Cir. 2005) (holding law "discriminates against interstate commerce by permitting [agency] to block a new pharmacy from locating in its desired location simply because of the adverse competitive effects that the new pharmacy will have on existing pharmacies"). These cases are irrelevant to the constitutionality of the Ordinance under *Pike* because, as Appellants concede, the Ordinance does "not fall[] into the type of economic protectionism routinely condemned under the Commerce Clause." App.Br.48.

Appellants assert that the City has "hoarded" its harbor, comparing the Ordinance to the outright ban almost forty years ago on all commercial shipping in the Port of Rochester, which was deemed to be "patent economic protectionism." *Pittston Warehouse Corp. v. City of Rochester*, 528 F. Supp. 653, 660 (W.D.N.Y. 1981). This inapt comparison aside, the City has not hoarded its harbor. The Ordinance does not prevent tankers from entering the harbor and unloading oil on Pier 2 for shipment to Canada. J.65. And as Appellants note, the City "crafted the Ordinance to avoid adverse impact on [other] oil-related local businesses." App.Br. 48. The Ordinance bans only construction of a deleterious new use, the loading of crude oil, which has never before been conducted in the Harbor.

Appellants proclaim that the Ordinance imposes a "sever[e] burden on foreign commerce" and that "its disastrous aggregate impact is inescapable." App.Br.50. The District Court correctly rejected this alarmism. It found that the "burden of the Ordinance falls the hardest on one particular firm, PPLC" and also identified potential lost docking fees to Maine-based tugboat companies. J.77-78; J.86 ("The Court also notes that this is a case where the heaviest burdens fall on local, in-state entities."). But "'the fact that a law may have devastating economic consequences on a particular interstate firm is not sufficient to rise to a Commerce Clause burden.'" *PhRMA*, 249 F.3d at 84 (quoting *Instructional Sys., Inc. v. Comput. Curriculum Corp.*, 35 F.3d 813, 827 (3d Cir. 1994)).

In again asking the Court to conduct a counterfactual inquiry into the effect if other municipalities passed similar ordinances, Appellants do not even argue that this particular Ordinance causes substantial burdens on commerce. Nor could they. It was undisputed that PPLC has no current project to load crude oil with any defined volumes of oil. SJ.101, J.18, 33. In fact, PPLC could conceive of a future project with as little as 10,000 barrels a day of oil – a tiny fraction of its failed 2008-2009 proposal and an even more miniscule fraction of its peak of unloading operations.[12] Tr. 217:18-20 (company President testifying "I'll take 10, 20, 30, 50 [thousand barrels per day]"). With such uncertainty whether PPLC would load only *de minimis* amounts, the company failed to meet its burden of proving any impacts on commerce.[13]

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[12] The potential prohibition on 10,000 barrels a day of crude oil loading would have an imperceptible impact. In 2017, global oil production was about 79.4 million bpd, with U.S. production at 9.32 million bpd and Canadian production at 4.199 million bpd. Ex.D-223K.

[13] The *Amici* arguments on the subject need not be credited. They attempt to introduce numerous unattributed facts and hearsay assertions that conflate the Ordinance (which does not prohibit PPLC's existing operations) with PPLC's failure to sustain its business. *See* Portland Pilots, et al. Brief at 8-14 (*e.g.*, statistics on tanker visits without citation). As *amici* acknowledge, macroeconomic conditions and the closure of five refineries in Montreal, *id.* at 9-10, have caused a decrease in tanker traffic to PPLC's terminal – not the Ordinance. Since PPLC is permitted to (and does) continue its unloading business today and future loading operations could produce only a fraction of the number of ship assists associated with historic unloading, it is wrong for the *Amici* to conflate the Ordinance and the decline in their ship assists. SJ.91.

The Court further determined that "the Ordinance will have little impact on global oil prices," J.78, and it "has no impact on several major sources of Canadian oil entering South Portland," specifically oil from "the Hibernia oil field off the southeast coast of Newfoundland, in Eastern Canada" and "refined oil products from Canada." J.65. PPLC presented no contrary evidence and failed to show that the Ordinance impedes the flow of Canadian oil in any way.

Appellants again ignore the trial record and the applicable legal standard when they claim that "the benefit side of the Ordinance as written is nonexistent." App.Br.51. The District Court's uncontested findings prove that "the Ordinance creates ample and weighty local benefits." J.79. *Pike*, moreover, requires that a law's asserted burdens clearly outweigh its "*putative* local benefits." *Pike*, 397 U.S. at 142 (emphasis added). Here, the Ordinance's benefits arise "'in the field of safety where the propriety of local regulation has long been recognized.'" *Id.* at 143; *see also United Haulers*, 550 U.S. at 346-47 (upholding recycling ordinances under *Pike* that confer "significant health and environmental benefits upon the

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Moreover, the "evidence" the Chamber attempts to introduce is deceptive because it analyzes the effect of a total shutdown of the port's oil operations. U.S. Chamber of Commerce Br. at 18-19. The District Court properly rejected the Chamber's effort to introduce an expert report. *See* Order on Motions to File Briefs as Amici Curiae, ECF # 135 at 14. *See also Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970) ("an amicus who argues facts should rarely be welcomed").

citizens of the Counties"); *Clover Leaf Creamery*, 449 U.S. at 473 (noting "substantial state interest"). The health of the City's citizens and the potential economic benefits from a redeveloped waterfront are indisputably legitimate local benefits.

Finally, Appellants complain that in lieu of enacting the Ordinance, the City could have "issued air emission regulations" or re-zoned its land uses to "focus[] on new structures." App.Br.52. Even if that were true, it is irrelevant under *Pike*. As the Supreme Court stated in upholding a statute banning plastic milk jugs, "a legislature need not strike at all evils at the same time or in the same way, and that is legislature may implement its program step by step, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations." *Clover Leaf Creamery*, 449 U.S. at 466 (internal quotations, modifications, and citations omitted).

For these reasons, Appellants failed to carry their burden of proof that the Ordinance's alleged economic burdens clearly outweigh its local benefits.

D. The Maine Oil Discharge Prevention Law Does Not Preempt the Ordinance.

Maine Oil Discharge Prevention Law (also known as the "CCA"), 38 M.R.S. § 541 *et seq*., bans oil discharges into waters, *id.* § 543, requires licenses for transfer facilities, *id.* § 545, imposes strict liability for accidents, *id*. § 552, and empowers MaineDEP to inspect and permit oil transfer facilities to ensure their

equipment and policies adequately protect against spills. The CCA's savings clause permits municipalities to "exercis[e] police powers … unless in direct conflict with this subchapter or any rule or order" of MaineDEP. *Id.* at § 556. Appellants, almost as an afterthought, contend that MaineDEP's 2010 License to PPLC, *see* D.Add.3, was an "order" that it load crude oil onto vessels that preempts the Ordinance. The District Court correctly found – despite the fact that the 2010 License interchangeably refers to itself as a License and an "order" *to renew* PPLC's Oil Terminal Facility Licenses – that the CCA denominates this a "License," not an "order." D.Add.3 (referring to document as "RENEWAL LICENSE" and LICENSE #'S O-000305-91-F-R, O-00306-91-F-R). "There is no indication in the statute that the State intended to remove local home rule authority over facility siting and use prohibitions through these DEP licenses certifying compliance with the safety procedures and inspection requirements." SJ.225-26 ("If the licenses had the preemptive effect PPLC claims, there is virtually no room for local regulation in this realm at all, since every single transfer facility must have a license."). In Maine, it takes far more than an agency calling a grant of an application to renew a license both a "license" and "order" in the body of a license document to preempt a municipality's home rule authority to exercise police powers. *Id.* The License merely "certifies that PPLC's transfer equipment complies with the state requirements on transfer operations, either to unload or

load oil products." SJ.226. *See* D.Add.3. Moreover, the 2010 License by its terms, is issued only "to carry out the purpose of the oil terminal licensing provisions of" the CCA. With such a proviso, MaineDEP can hardly be said to have issued a blanket "order" to PPLC to load crude oil.

CONCLUSION

For the above reasons, the Court should affirm the judgments of the District Court in all respects.

CITY OF SOURTH PORTLAND
And MATTHEW LECONTE

By their attorneys,

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Dated: April 5, 2019

CERTIFICATE OF COMPLIANCE WITH RULE 32

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), as it contains 12,985 words, excluding the parts of the brief exempted by Fed. R. App. 32(f).

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DATED: April 5, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2019, I electronically filed the foregoing Brief of Appellees City of South Portland and Matthew LeConte with the Clerk of Court using the CM/ECF system which will send notification to all counsel of record.

DATED: April 5, 2019

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ADDENDUM

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United States Department of State

Washington, D.C. 20520

PERMIT

AUTHORIZING PORTLAND PIPE LINE CORPORATION
TO CONVERT AN EXISTING PIPELINE CROSSING THE INTERNATIONAL
BOUNDARY LINE BETWEEN THE UNITED STATES AND CANADA
FROM NATURAL GAS SERVICE TO CRUDE OIL SERVICE

By the authority vested in me as Under Secretary of State for Economic, Business and Agricultural Affairs of the United States (pursuant to Executive Order 11423 of August 16, 1968, as amended by Executive Order 12847 of May 17, 1993 (hereinafter "the Order") and Department of State Delegation of Authority No. 118-1 of April 11, 1973) and subject to the conditions, provisions, and requirements hereinafter set forth, permission is hereby granted to Portland Pipe Line Corporation, a corporation formed under the laws of the State of Maine, with its principal place of business in South Portland, Maine (hereinafter "the permittee") to convert an existing pipeline crossing the international boundary at a point near North Troy, Vermont from natural gas service to crude oil service, and operate and maintain said pipeline for the transport of crude oil between the United States and Canada. This permit shall be issued subject to the notification and consultation requirements of sections 1(b),(c),(d) and (f) of the Order.

The term "facilities" as used in this permit means the pipeline and any land, structures, installations or equipment appurtenant thereto.

The term "United States facilities" as used in this permit means those parts of the facilities located in the United States.

As stated in permittee's application of March 12, 1999, for a permit pursuant to Executive Order 11423, as amended by Executive Order 12847, the United States facilities of the pipeline project will consist of the following major components:

- The pipeline is an 18-inch pipeline which runs between South Portland, Maine and the international boundary at a point near North Troy, Vermont. This pipeline was operated in crude oil transportation from 1951 to 1986. Since 1987, the pipeline was operated in interstate natural gas transmission under a lease from the applicant. That lease expired on April 30, 1999. The 18-inch pipeline runs parallel to an existing 24-inch line used for the transportation of crude oil.

- The permittee shall maintain measurement facilities as are required by the Commissioner of Customs to be installed and operated in accordance with American Petroleum Institute standards and shall be subject to the approval of the Commissioner of Customs. The conditions of such measurement shall be as directed by the Commissioner of Customs.

This permit is subject to the following conditions:

Article 1. The United States facilities and operations herein described shall be subject to all the conditions, provisions, and requirements of this permit and any amendment thereof. This permit may be terminated at the will of the Secretary of State of the United States or the Secretary's delegate or may be amended by the Secretary of State of the United States or the Secretary's delegate at will or upon proper application therefor. The permittee shall make no substantial change in the location of the United States facilities or in the operation authorized by this permit until such changes have been approved by the Secretary of State of the United States or the Secretary's delegate.

Article 2. The operation and maintenance of the facilities shall be in all material respects as described in permittee's application filed in March of 1999, which was supplemented in June of 1999, for a permit pursuant to Executive Order 11423, as amended by Executive Order 12847.

Article 3. The construction, connection, operation, and maintenance of the United States facilities shall be subject to inspection and approval by the representatives of any Federal or State agency concerned. The permittee shall allow duly authorized officers and employees of such agencies free and unrestricted access to said facilities in the performance of their official duties.

Article 4. Permittee shall comply with all applicable Federal and State laws and regulations regarding the construction, operation, and maintenance of the United States facilities and with all applicable industrial codes. The permittee shall obtain requisite permits from Canadian authorities, as well as the relevant state and local governmental entities and relevant federal agencies.

Article 5. Upon the termination, revocation, or surrender of this permit, the United States facilities in the immediate vicinity of the international boundary line shall be removed by, and at the expense of, the permittee within such time as the Secretary of State of the United States or the Secretary's delegate may specify; and upon the failure of the permittee to remove this portion of the United States facilities as ordered, the Secretary of State of the United States or the Secretary's delegate may direct that possession of such facilities be taken and that they be removed at the expense of the permittee; and the permittee shall have no claim for damages by reason of such possession or removal.

Article 6. If, in the future, it should appear to the Secretary of Transportation that any facilities or operations permitted hereunder cause unreasonable obstructions to the free navigation of any of the navigable waters of the United States, the permittee may be required, upon notice from the Secretary of Transportation, to remove or alter such of the facilities as are owned by it so as to render navigation through such waters free and unobstructed.

Article 7. This permit is subject to the limitations, terms, and conditions contained in any orders issued by any competent agency of the United States Government or of the States of Maine, New Hampshire, and Vermont with respect to the United States facilities. This permit shall continue in force and effect only so long as the permittee shall continue the operations hereby authorized in accordance with such limitations, terms, and conditions.

Article 8. When, in the opinion of the President of the United States, the national security of the United States demands it, due notice being given by the Secretary of State of the United States or the Secretary's delegate, the United States shall have the right to enter upon and take possession of any of the United States facilities or parts thereof; to retain possession, management, and control thereof for such length of time as may appear to the President to be necessary to accomplish said purposes; and thereafter to restore possession and control to the permittee. In the event that the United States shall exercise such right, it shall pay to the permittee just and fair compensation for the use of such United States facilities upon the basis of a reasonable profit in normal conditions, and the cost of restoring said facilities to as good conditions as existed at the time of entering and taking over the same, less the reasonable value of any improvements that may have been made by the United States.

Article 9. In the event of transfer of ownership of the United States facilities or any part thereof, this permit shall continue in effect temporarily for a reasonable time pending submission of a proper identification by the transferee for a new and permanent permit, provided that notice of such transfer is given promptly in writing to the Department of State accompanied by a statement by the transferee under oath that the United States facilities and the operation and maintenance thereof authorized by this permit will remain substantially the same as before the transfer pending issuance to the transferee of a new and permanent permit.

Article 10. (1) The permittee shall maintain the United States facilities and every part thereof in a condition of good repair for their safe operation.

(2) The permittee shall save harmless and indemnify the United States from any and all claims or adjudged liability arising out of the construction, operation, or maintenance of the facilities, including but not limited to environmental contamination from the release or threatened release or discharge of hazardous substances and hazardous waste.

Article 11. The permittee shall acquire such right-of-way grants, easements, permits, and other authorizations as may become necessary and appropriate.

Article 12. The permittee shall file with the appropriate agencies of the Government of the United States such statements or reports under oath with respect to the United States facilities, and/or permittee's activities and operations in connection therewith, as are now or as may hereafter be required under any laws or regulations of the Government of the United States or its agencies.

Article 13. The permittee shall take all appropriate measures to prevent or mitigate adverse environmental impacts or disruption of significant archeological resources in connection with the construction, operation and maintenance of the United States facilities.

Article 14. The permittee shall notify the Department of State and the Maine Historical Preservation Commission, the New Hampshire Department of Cultural Resources, and the Vermont Department of Housing and Community Affairs if before or during construction historic or archeological properties are located and, if construction has already started, will cease construction immediately. The permittee acknowledges that historic and archeological properties are protected under 49 U.S.C., Section 303 (formerly 4(f)) and the permittee shall prepare a Section 4(f) statement if the United States facilities will have an effect on any historic or archeological properties.

Article 15. The permittee shall comply with all agreed actions and obligations undertaken to be performed by it in the Application and Environmental Assessment dated March 1999. Construction of the facilities shall be performed in conformity with the proposal contained in the Application and Environmental Assessment dated March 1999.

Article 16. The permittee shall send notice to the Department of State of the United States at such time as the conversion authorized by this permit is made at the international boundary line between the United States facilities and the facilities located in Canada.

IN WITNESS WHEREOF, I, Thomas Pickering, Under Secretary of State for political Affairs of the United States, have hereunto set my hand this 29th day of July, 1999 in the City of Washington, District of Columbia.

1977 U.S.T. LEXIS 146

Reporter
1977 U.S.T. LEXIS 146 *; 28 U.S.T. 7449

Treaty Number: TIAS 8720

Date Signed: January 28, 1977

Date In Force: October 1, 1977

CANADA

Status:
[*1] Agreement signed at Washington January 28, 1977;

Ratification advised by the Senate of the United States of America August 3, 1977;

Ratified by the President of the United States of America September 15, 1977;

Ratified by Canada August 29, 1977;

Ratifications exchanged at Ottawa September 19, 1977;

Proclaimed by the President of the United States of America September 30, 1977;

Entered into force October 1, 1977.

CANADA, Transit Pipelines; [NO LONG-TITLE IN ORIGINAL]

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

CONSIDERING THAT:

The Agreement between the Government of the United States of America and the Government of Canada Concerning Transit Pipelines was signed at Washington on January 28, 1977, the text of which Agreement, in the English and French languages, is hereto annexed;

The Senate of the United States of America by its resolution of August 3, 1977, two-thirds of the Senators present concurring therein, gave its advice and consent to ratification of the Agreement.

The Agreement was ratified by the President of the United States of America on September 15, 1977, in pursuance of the advice and consent of the Senate, and was duly ratified on the part of Canada;

It is provided in Article **[*2]** X of the Agreement that the Agreement shall enter into force on the first day of the month following the month in which the instruments of ratification are exchanged;

The instruments of ratification of the Agreement were exchanged at Ottawa on September 19, 1977; and accordingly the Agreement entered into force on October 1, 1977;

Jesse Alderman

NOW, THEREFORE, I, Jimmy Carter, President of the United States of America, proclaim and make public the Agreement, to the end that it shall be observed and fulfilled with good faith on and after October 1, 1977, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof.

IN TESTIMONY WHEREOF, I have signed this proclamation and caused the Seal of the United States of America to be affixed.

DONE at the city of Washington this thirtieth day of September in [SEAL] the year of our Lord one thousand nine hundred seventyseven and of the Independence of the United States of America the two hundred second.

AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF CANADA CONCERNING TRANSIT PIPELINES

The Government of the United States of America and the **[*3]** Government of Canada,

Believing that pipelines can be an efficient, economical and safe means of transporting hydrocarbons from producing areas to consumers, in both the United States and Canada;

Noting the number of hydrocarbon pipelines which now connect the United States and Canada and the important service which they render in transporting hydrocarbons to consumers in both countries; and

Convinced that measures to ensure the uninterrupted transmission by pipeline through the territory of one Party of hydrocarbons not originating in the territory of that Party, for delivery to the territory of the other Party, are the proper subject of an agreement between the two Governments;

Have agreed as follows:

ARTICLE I

For the purpose of this Agreement:

(a) "Transit Pipeline" means a pipeline or any part thereof, including pipe, valves and other appurtenances attached to pipe, compressor or pumping units, metering stations, regulator stations, delivery stations, loading and unloading facilities, storage facilities, tanks, fabricated assemblies, reservoirs, racks, and all real and personal property and works connected therewith, used for the transmission of hydrocarbons in transit. "Transit **[*4]** Pipeline" shall not include any portion of a pipeline system not used for the transmission of hydrocarbons in transit.

(b) "Hydrocarbons" means any chemical compounds composed primarily of carbon and hydrogen which are recovered from a natural reservoir in a solid, semi-solid, liquid or gaseous state, including crude oil, natural gas, natural gas liquids and bitumen, and their derivative products resulting from their production, processing or refining. In addition, "hydrocarbons" includes coal and feedstocks derived from crude oil, natural gas, natural gas liquids or coal used for the production of petro-chemicals.

(c) "Hydrocarbons in transit" means hydrocarbons transmitted in a "Transit Pipeline" located within the territory of one Party, which hydrocarbons do not originate in the territory of that Party, for delivery to, or for storage before delivery to, the territory of the other Party.

ARTICLE II

1. No public authority in the territory of either Party shall institute any measures, other than those provided for in Article V, which are intended to, or which would have the effect of, impeding, diverting, redirecting or interfering with in any way the transmission of hydrocarbons **[*5]** in transit.
2. The provisions of paragraph 1 of this Article apply:
(a) In the case of Transit Pipelines carrying exclusively hydrocarbons in transit, to such volumes as may be transmitted to the Party of destination in the Transit Pipeline;
(b) In the case of Transit Pipelines in operation at the time of entry into force of this Agreement not carrying exclusively hydrocarbons in transit, to the average daily volume of hydrocarbons in transit transmitted to the Party of destination during the 12 month period immediately prior to the imposition of any measures described in paragraph 1;

(c) In the case of Transit Pipelines which come into operation subsequent to the entry into force of this Agreement not carrying exclusively hydrocarbons in transit, to such volumes of hydrocarbons in transit as may be authorized by the appropriate regulatory bodies; or
(d) To such other volumes of hydrocarbons in transit as may be agreed upon subsequently by the Parties.

3. Each Party undertakes to facilitate the expeditious issuance of such permits, licenses, or other authorizations as may be required from time to time for the import into, or export from, its territory through a Transit Pipeline of **[*6]** hydrocarbons in transit.

ARTICLE III

1. No public authority in the territory of either Party shall impose any fee, duty, tax or other monetary charge, either directly or indirectly, on or for the use of any Transit Pipeline unless such fee, duty, tax or other monetary charge would also be applicable to or for the use of similar pipelines located within the jurisdiction of that public authority.
2. No public authority in the territory of either Party shall impose upon hydrocarbons in transit any import, export or transit fee, duty, tax or other monetary charge. This paragraph shall not preclude the inclusion of hydrocarbon throughput as a factor in the calculation of taxes referred to in paragraph 1.

ARTICLE IV

1. Notwithstanding the provisions of Article II and paragraph 2 of Article III, a Transit Pipeline and the transmission of hydrocarbons through a Transit Pipeline shall be subject to regulations by the appropriate governmental authorities having jurisdiction over such Transit Pipeline in the same manner as for any other pipelines or the transmission of hydrocarbons by pipeline subject to the authority of such governmental authorities with respect to such matters as the **[*7]** following:

a. Pipeline safety and technical pipeline construction and operation standards;

b. environmental protection;

c. rates, tolls, tariffs and financial regulations relating to pipelines;

d. reporting requirements, statistical and financial information concerning pipeline operations and information concerning valuation of pipeline properties.

2. All regulations, requirements, terms and conditions imposed under paragraph 1 shall be just and reasonable, and shall always, under substantially similar circumstances with respect to all hydrocarbons transmitted in similar pipelines, other than intra-provincial and intra-state pipelines, be applied equally to all persons and in the same manner.

ARTICLE V

1. In the event of an actual or threatened natural disaster, an operating emergency, or other demonstrable need temporarily to reduce or stop for safety or technical reasons the normal operation of a Transit Pipeline, the flow of hydrocarbons through such Transit Pipeline may be temporarily reduced or stopped in the interest of sound pipeline management and operational efficiency by or with the approval of the appropriate regulatory authorities of the Party in whose territory **[*8]** such disaster, emergency or other demonstrable need occurs.
2. Whenever a temporary reduction of the flow of hydrocarbons through a Transit Pipeline occurs as provided in paragraph 1:

(a) In the case of a Transit Pipeline carrying exclusively hydrocarbons in transit, the Party for whose territory such hydrocarbons are intended shall be entitled to receive the total amount of the reduced flow of hydrocarbons,

(b) In the case of a Transit Pipeline not carrying exclusively hydrocarbons in transit, each Party shall be entitled to receive downstream of the point of interruption a proportion of the reduced flow of hydrocarbons equal to the proportion of its net inputs to the total inputs to the Transit Pipeline made upstream of the point of interruption. If the two Parties are able collectively to make inputs to the Transit Pipeline upstream of the point of interruption, for delivery downstream of the point of interruption, of a volume of hydrocarbons which exceeds the temporarily reduced capacity of such Transit Pipeline, each Party shall be entitled to transmit through such Transit Pipeline a proportion of the total reduced capacity equal to its authorized share of the flow of hydrocarbons **[*9]** through such Transit Pipeline prior to the reduction. If no share has been authorized, specified or agreed upon pursuant to Article II, paragraph 2, the share of the Parties in the reduced flow of hydrocarbons shall be in

proportion to the share of each Party's net inputs to the total flow of hydrocarbons through such Transit Pipeline during the 30 day period immediately preceding the reduction.

3. The Party in whose territory the disaster, emergency or other demonstrable need occurs resulting in a temporary reduction or stoppage of the flow of hydrocarbons shall not unnecessarily delay or cause delay in the expeditious restoration of normal pipeline operations.

ARTICLE VI

Nothing in this Agreement shall be considered as waiving the right of either Party to withhold consent, or to grant consent subject to such terms and conditions as it may establish consistent with the principles of uninterrupted transmission and of non-discrimination reflected in this Agreement, for the construction and operation on its territory of any Transit Pipeline construction of which commences subsequent to the entry into force of this Agreement, or to determine the route within its territory of such **[*10]** a Transit Pipeline.

ARTICLE VII

The Parties may, by mutual agreement, conclude a protocol or protocols to this Agreement concerning the application of this Agreement to a specific pipeline or pipelines.

ARTICLE VIII

The Parties may, by mutual agreement, amend this Agreement at any time.

ARTICLE IX

1. Any dispute between the Parties regarding the interpretation, application or operation of this Agreement shall, so far as possible, be settled by negotiation between them.

2. Any such dispute which is not settled by negotiation shall be submitted to arbitration at the request of either Party. Unless the Parties agree on a different procedure within a period of sixty days from the date of receipt by either Party from the other of a notice through diplomatic channels requesting arbitration of the dispute, the arbitration shall take place in accordance with the following provisions. Each Party shall nominate an arbitrator within a further period of sixty days. The two arbitrators nominated by the Parties shall within a further period of sixty days appoint a third arbitrator. If either Party fails to nominate an arbitrator within the period specified, or if the third arbitrator **[*11]** is not appointed within the period specified, either Party may request the President of the International Court of Justice (or, if the President is a national of either Party, the member of the Court ranking next in order of precedence who is not a national of either Party) to appoint such arbitrator. The third arbitrator shall not be a national of either Party, shall act as Chairman and shall determine where the arbitration shall be held.

3. The arbitrators appointed under the preceding paragraph shall decide any dispute, including appropriate remedies, by majority. Their decision shall be binding on the Parties.

4. The costs of any arbitration shall be shared equally between the Parties.

ARTICLE X

1. This Agreement is subject to ratification. Instruments of Ratification shall be exchanged at Ottawa.

2. This Agreement shall enter into force on the first day of the month following the month in which Instruments of Ratification are exchanged. [1]

3. This Agreement shall remain in force for an initial **[*12]** period of thirty-five years. It may be terminated at the end of the initial thirty-five year period by either Party giving written notice to the other Party, not less than ten years prior to the end of such initial period, of its intention to terminate this Agreement. If neither Party has given such notice of termination, this Agreement will thereafter continue in force automatically until ten years after either Party has given written notice to the other Party of its intention to terminate the Agreement.

---

[1] Oct. 1, 1977.

Jesse Alderman

IN WITNESS WHEREOF the undersigned representatives, duly authorized by their respective Governments, have signed this Agreement.

DONE in duplicate at Washington in the English and French languages, both versions being equally authentic, this twenty-eighth day of January 1977.

ACCORD ENTRE LE GOUVERNEMENT DES ETATS-UNIS D'AMERIQUE ET LE GOUVERNEMENT DU CANADA CONCERNANT LES PIPE-LINES DE TRANSIT

Le Gouvernement des Etats-Unis d'Amerique et le Gouvernement du Canada;

Estimant que les pipe-lines peuvent etre un moyen efficace, economique et sur de transport des hydrocarbures a partir des regions de production jusqu'aux consommateurs, tant aux Etats-Unis qu'au Canada;

Constatant le nombre **[*13]** de pipe-lines a hydrocarbures qui relient presentement les Etats-Unis et le Canada ainsi que l'importance du service qu'ils rendent en transportant des hydrocarbures jusqu'aux consommateurs des deux pays;

Convaincus que des mesures visant a assurer l'acheminement ininterrompu au moyen de pipe-lines, par le territoire d'une Partie, d'hydrocarbures ne provenant pas du territoire de ladite Partie et destines au territoire de l'autre Partie, sont de nature a faire l'objet d'un accord entre les deux Gouvernements;

Sont convenus de ce qui suit:

ARTICLE I

Aux fins du present Accord,

(a) "Pipe-line de transit" signifie un pipe-line ou toute partie de celui-ci, y compris la canalisation, les valves et autres accessoires rattaches a la canalisation, les stations de pompage ou de compression, les stations de comptage, de regulation et de livraison, les installations de chargement, de dechargement et de stockage, les citernes, les montages usines, les reservoirs, les rampes de chargement, ainsi que les biens meubles et immeubles et les ouvrages connexes servant a l'acheminement d'hydrocarbures en transit. "Pipe-line de transit" ne s'applique a aucune partie d'un pipe-line qui ne sert pas **[*14]** a l'acheminement d'hydrocarbures en transit.

(b) "Hydrocarbures" signifie tout compose chimique, contenant principalement du carbone et de l'hydrogene, que l'on recupere d'un reservoir naturel a l'etat solide, semisolide, liquide ou gazeux, notamment le petrole brut, le gaz naturel, les produits liquides extraits du gaz naturel et le bitume, ainsi que les produits derives resultant de la production, du traitement ou du raffinage de ceux-ci. Le terme "hydrocarbures" s'applique en outre au charbon et aux stocks d'alimentation derives du petrole brut, du gaz naturel, des produits liquides extraits du gaz naturel ou du charbon servant a produire des produits petrochimiques.

(c) "Hydrocarbures en transit" signifie les hydrocarbures qui sont achemines au moyen d'un "pipe-line de transit" situe sur le territoire d'une des Parties, qui ne proviennent pas de son territoire et qui sont destines a etre livres, ou a etre stockes avant livraison, dans le territoire de l'autre Partie.

ARTICLE II

1. Aucune autorite publique du territoire de l'une ou l'autre des Parties n'adoptera de mesures, autres que celles prevues a l'Article V, qui ont pour but, ou qui auraient pour effet, d'empecher, de **[*15]** devier, de reorienter ou d'entraver de quelque maniere que ce soit l'acheminement d'hydrocarbures en transit.
2. Les dispositions du paragraphe 1 du present Article s'appliquent:
a) dans le cas des pipe-lines de transit servant exclusivement a l'acheminement d'hydrocarbures en transit, aux volumes qui peuvent etre achemines vers la Partie de destination au moyen du pipe-line de transit;
b) dans le cas des pipe-lines de transit en service a la date de l'entree en vigueur du present Accord et qui ne servent pas exclusivement a l'acheminement d'hydrocarbures en transit, aux volumes quotidiens moyens d'hydrocarbures en transit achemines vers la Partie de destination au cours des 12 mois precedant immediatement l'imposition de toute mesure decrite au paragraphe 1;

Jesse Alderman

c) dans le cas des pipe-lines de transit mis en service apres l'entree en vigueur du present Accord et qui ne servent pas exclusivement a l'acheminement d'hydrocarbures en transit, aux volumes d'hydrocarbures en transit qui peuvent etre autorises par les organismes de reglementation appropries; ou
d) a tous autres volumes d'hydrocarbures en transit dont les deux Parties peuvent convenir par la suite.

3. Chacune des Parties s'engage **[*16]** a faciliter la prompte delivrance des permis, licences ou autres autorisations qui peuvent etre necessaires, de temps en temps, pour importer dans son territoire ou exporter hors de son territoire, au moyen d'une pipe-line de transit, des hydrocarbures en transit.

ARTICLE III

1. Aucune autorite publique du territoire de l'une ou l'autre des Parties n'imposera, directement ou indirectement de contributions, [ILLEGIBLE WORDS] impots ou autres charges monetaires sur un pipe-line de

It ou aux fins de l'utilisation d'un pipe-line de transit, autres que les contributions, taxes, impots ou autres charges monetaires qui s'appliqueraient egalement a des pipe-lines semblables ou aux fins de l'utilisation de pipe-lines semblables relevant de la juridiction de ladite autorite publique.

2. Aucune autorite publique du territoire de l'une ou l'autre des Parties n'imposera, sur les hydrocarbures en transit, de contributions, taxes, impots ou autres charges monetaires a l'importation, a l'exportation ou au transit. Le present paragraphe n'empechera pas de tenir compte du debit des hydrocarbures comme facteur dans le calcul des taxes visees au paragraphe 1.

ARTICLE IV

1. Nonobstant les dispositions **[*17]** de l'Article II et du paragraphe 2 de l'Article III, un pipe-line de transit et l'acheminement d'hydrocarbures au moyen d'un pipe-line de transit seront soumis a la reglementation des autorites gouvernementales appropriees de la juridiction desquelles un tel pipe-line de transit releve, de la meme maniere que tout autre pipe-line ou l'acheminement d'hydrocarbures au moyen de pipe-lines relevant de la juridiction desdites autorites gouvernementales en ce qui a trait a des matieres telles que celles-ci:

a. securite des pipe-lines et normes techniques de construction et d'exploitation des pipe-lines;

b. protection de l'environnement;

c. taux, droits, tarifs et reglements financiers ayant trait aux pipe-lines;

d. rapports exiges, renseignements statistiques et financiers concernant les operations des pipe-lines ainsi que renseignements relatifs a l'evaluation des biens afferents aux pipe-lines.

2. Tous les reglements, exigences, conditions et modalites imposes en vertu du paragraphe 1 doivent etre justes et raisonnables et ils doivent toujours, dans des circonstances fondamentalement semblables en ce qui a trait a tous les hydrocarbures achemines au moyen de pipe-lines semblables, **[*18]** autres que des pipe-lines limites a une province ou a un Etat, etre appliques egalement et uniformement a toutes les personnes.

ARTICLE V

1. Advenant un desastre naturel, l'eventualite d'un desastre naturel, une situation d'urgence dans l'exploitation ou toute autre situation qui, pour des raisons techniques ou de securite, necessite manifestement la reduction ou l'interruption temporaire de l'exploitation normale d'un pipe-line de transit, le debit des hydrocarbures achemines au moyen d'un tel pipe-line de transit peut etre temporairement reduit ou arrete dans l'interet d'une saine gestion et de l'efficacite operationnelle du pipe-line, par decision ou moyennant l'approbation des autorites de reglementation appropriees de la Partie sur le territoire de laquelle survient le desastre, la situation d'urgence ou toute autre situation qui necessite manifestement une action en ce sens.
2. Chaque fois que survient une reduction temporaire du debit des hydrocarbures achemines au moyen d'un pipe-line de transit, tel que prevu au paragraphe 1.

a) dans le cas d'un pipe-line de transit qui transporte exclusivement des hydrocarbures en transit, la Partie au territoire de laquelle les hydrocarbures **[*19]** sont destines aura droit de recevoir la totalite du debit reduit des hydrocarbures;

b) dans le cas d'un pipe-line de transit qui ne transporte pas exclusivement des hydrocarbures en transit, chacune des Parties aura droit de recevoir en aval du point d'interruption une proportion du debit reduit des hydrocarbures egales a la proportion de

ses apports totaux fournis au pipe-line de transit en amont du point d'interruption. Si les deux Parties sont en mesure de fournir collectivement au pipe-line de transit en amont du point d'interruption, aux fins de livraison en aval du point d'interruption, un volume d'hydrocarbures superieur a la capacite temporairement reduite du pipe-line de transit, chacune des Parties aura droit d'acheminer au moyen dudit pipe-line de transit une proportion de la capacite reduite totale egale a la part du debit d'hydrocarbures qu'elle a ete autorisee a acheminer, avant la reduction, au moyen du pipe-line de transit, Si aucun partage du debit n'a ete autorise, etabli ou convenu conformement au paragraphe 2 de l'Article II, la part du debit reduit d'hydrocarbures qui reviendra a chacune des Parties sera proportionnelle a la part que representent les apports nets **[*20]** de chacune des Parties par rapport au debit total d'hydrocarbures du pipe-line de transit au cours de la periode de 30 jours precedant immediatement la reduction.

3. La Partie sur le territoire de laquelle survient le desastre, la situation d'urgence ou toute autre situation qui necessite manifestement une reduction ou une interruption temporaire du debit d'hydrocarbures, ne retardera pas ou ne fera pas en sorte que soit retardee sans necessite la reprise rapide de l'exploitation normale du pipe-line.

ARTICLE VI

Aucune disposition du present Accord ne doit etre interpretee dans le sens ou elle enleverait a l'une ou l'autre des Parties le droit de refuser son assentiment, ou de donner son assentiment selon les conditions et les modalites qu'elle peut determiner en respectant les principes de l'acheminement ininterrompu et de la non-discrimination exposes dans le present Accord, a la construction et a l'exploitation sur son territoire d'un pipe-line de transit dont la construction debute apres l'entree en vigueur du present Accord, ou le droit de determiner le trace d'un tel pipe-line de transit sur son territoire.

ARTICLE VII

Les Parties peuvent, d'un commun accord, conclure **[*21]** un ou des protocoles au present Accord concernant l'application de ce dernier a un ou des pipe-lines particuliers.

ARTICLE VIII

Les Parties peuvent, d'un commun accord, modifier a n'importe quel moment le present Accord.

ARTICLE IX

1. Si un differend survient entre les Parties relativement a l'interpretation, a l'application ou a la mise en oeuvre du present Accord, elles s'efforceront, dans la mesure du possible, de le regler par voie de negociations.

2. Si les Parties ne parviennent pas a un reglement par voie de negociations, le differend sera, a la demande de l'une ou l'autre des Parties, soumis a l'arbitrage. A moins que les Parties ne conviennent d'une procedure differente dans un delai de soixante jours a compter de la date a laquelle l'une d'elles aura recu de l'autre Partie, par voie diplomatique, un avis demandant l'arbitrage du differend, l'arbitrage aura lieu conformement aux modalites suivantes. Chacune des Parties nommera un arbitre dans un delai supplementaire de soixante jours. Les deux arbitres nommes par les Parties designeront un troisieme arbitre dans un nouveau delai de soixante jours. Si l'une ou l'autre des Parties ne nomme pas d'arbitre dans le delai **[*22]** prescrit ou si le troisieme arbitre n'est pas designe dans le delai prevu, le president de la Cour internationale de justice (ou, si le president est un ressortissant de l'une ou l'autre des Parties, le premier membre de la Cour qui, par ordre de preseance, n'est pas un ressortissant de l'une ou l'autre des Parties) peut etre invite par l'une ou l'autre des Parties a designer cet arbitre. Le troisieme arbitre ne sera pas un ressortissant de l'une ou l'autre des Parties; il agira en qualite de president et determinera l'endroit ou aura lieu l'arbitrage.

3. Les arbitres designes en vertu du paragraphe precedent trancheront le differend et decideront de la reparation appropriee a la majorite des voix. Les Parties devront se conformer a leurs decisions.

4. Les frais d'arbitrage seront partages egalement entre les Parties.

ARTICLE X

1. Le present Accord doit etre ratifie. Les instruments de ratification seront echanges a Ottawa.

2. Le present Accord entrera en vigueur le premier jour du mois suivant le mois au cours duquel les instruments de ratification auront ete echanges.

Jesse Alderman

3. Le present Accord demeurera en vigueur pendant une premiere periode de trente-cinq ans. L'une ou l'autre **[*23]** des Parties pourra y mettre fin, au terme de ladite periode de trente-cinq ans, en avisant par ecrit l'autre Partie, au moins dix ans avant l'expiration de cette premiere periode, de son intention de mettre fin au present Accord. Si aucune des Parties ne donne un tel preavis, le present Accord continuera d'etre en vigueur automatiquement jusqu'a ce que l'une ou l'autre des Parties avise par ecrit l'autre Partie de son intention de mettre fin au present Accord, auquel cas celui-ci prendra fin au terme des dix annees subsequentes.

EN FOI DE QUOI, les representants soussignes, dument autorises par leur Gouvernement respectif, ont signe le present Accord.

FAIT en double exemplaire a Washington en francais et en anglais, chaque version faisant egalement foi, ce 28ieme jour de Janvier 1977.

Signatories:

JIMMY CARTER

By the President:

WARREN CHRISTOPHER

Acting Secretary of State

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA:

Julius L. Katz

FOR THE GOVERNMENT OF CANADA:

J. H. Warren

POUR LE GOUVERNEMENT DES ETATS-UNIS D'AMERIQUE

POUR LE GOUVERNEMENT DU CANADA

U.S. Treaties on LEXIS

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Jesse Alderman

Applicant Copy
Attn. Tom Hardison

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

DEPARTMENT ORDER

IN THE MATTER OF

PORTLAND PIPE LINE CORPORATION	)	OIL DISCHARGE
SO. PORTLAND, CUMBERLAND COUNTRY, MAINE	)	PREVENTION AND
OIL TERMINAL FACILITY	)	POLLUTION CONTROL ACT
	)	
LICENSE #'S O-000305-91-F-R, O-000306-91-F-R	)	RENEWAL LICENSE

Pursuant to the provisions of 38 M.R.S.A. Section 545 et. seq., and 06-096 CMR, Chapter 600, Oil Discharge Prevention and Pollution Control Regulations (March 24, 2001), the Department of Environmental Protection (hereafter called " the Department") has considered the application of PORTLAND PIPE LINE CORPORATION (hereinafter "PPLC"), with its supportive data, agency review comments, and other related materials on file and FINDS THE FOLLOWING FACTS:

1. APPLICATION SUMMARY

A. Application: PPLC applied for the renewal of its existing oil terminal facility license on June 1, 2010. PPLC's existing license expires on August 10, 2010.

B. History: This location has been licensed by the Department as a marine oil terminal since July 11, 1979 for the storage and transport via pipe line of crude oil.

C. Summary of Proposal: PPLC is proposing to renew its oil terminal facility license, which consists of twenty three (23) above ground storage tanks and two (2) marine terminal piers (piers 1 & 2). The facility has a total oil storage capacity of three million, eight hundred and twenty eight thousand (3,828,000) barrels, which is equal to one hundred and sixty million, seven hundred seventy six thousand (160, 776, 000) gallons of oil. PPLC transfers oil between its marine terminal piers in South Portland and holds oil in storage in the above ground tanks located in South Portland pending transport via underground pipe lines to its terminal located in Montreal Canada.

PPLC is proposing a change in its operations in the renewal application. PPLC is proposing to reverse one of its underground pipe lines to transport oil from its terminal in Montreal Canada to its terminal in South Portland, Maine. The oil would be stored in the above ground tanks prior to being loaded on vessels at the

PORTLAND PIPE LINE CORPORATION SO. PORTLAND, CUMBERLAND COUNTRY, MAINE OIL TERMINAL FACILITY LICENSE #'S O-000305-91-F-R, O-000306-91-F-R	2 OIL DISCHARGE) PREVENTION AND) POLLUTION CONTROL ACT)) RENEWAL LICENSE

South Portland pier for transport to refineries and terminals outside the state of Maine.

The marine oil terminal piers, tank storage areas, and ancillary facilities are located on separate parcels of property in South Portland. Pier 1 and tanks #1 and # 2 are located off Portland Street; Pier 2 is located off Cushing Court and Marina Drive; Tanks 27 and 28 are located off Preble Street; and PPLCs' General Office and tank farm are located at 30 Hill Street. See Exhibits 13 a-1 and 13 b-1 for facility locations.

2. STATUTORY CRITERIA

The Department finds the following facts under the statutory criteria of 38 M.R.S.A., 545 Section (1) and (2) which provide for the findings in relevant part.

A. A License shall be issued subject to such terms and conditions as the Department may determine to be necessary to carry out the purpose of the oil terminal licensing provisions of the statutes, and

B. As a condition, precedent to the issuance or renewal of a license, the Department shall require satisfactory evidence that the applicant has or is in the process of implementing state and federal plans and regulations for control of pollution related to oil, and the abatement thereof when a discharge occurs.

3. REGULATORY CRITERIA

The Department finds that according to Maine's Oil Discharge Prevention and Pollution Control Rules for Marine Oil Terminals, Transportation Pipelines and Vessels, 06-096 CMR 600, Section 12, no oil terminal facility may transfer or cause to be transferred or consent to the transfer of any oil unless that oil terminal facility holds a valid license issued by the Commissioner pursuant to 38 M.R.S.A. Sections 544 and 545 and Chapter 600, and the facility is abiding by all the conditions listed on that license.

4. INSPECTION RESULTS

On September 9, 2010 PPLC was inspected by Department staff. During the inspection the Department found:

A. PPLC was in the process of finishing work on tank# 23 and 24. The tanks were taken out of service for repair and alterations with a plan for being back in service

PORTLAND PIPE LINE CORPORATION SO. PORTLAND, CUMBERLAND COUNTRY, MAINE OIL TERMINAL FACILITY	)	OIL DISCHARGE PREVENTION AND POLLUTION CONTROL ACT
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during 2010. The tanks had been inspected and hydrostatically tested in accordance with American Petroleum Institute Standard 653 and were found to be fit for their intended purpose.

B. PPLC conducts a reconciliation of facility inventories once per month. The process includes the investigation and reporting of any loss that exceeds 0.5% of the monthly through put as required by 06-096 CMR 600, Section 9C(1)(b) Mandatory Loss Reporting. Inventory records are maintained at the facility.

C. PPLC conducts daily and monthly facility inspections and maintains a log of the inspection results at the facility office as required by 06-096 CMR 600, Section 9C(2).

D. PPLC conducts annual cathodic protection surveys as required by 06-096 CMR 600, Section 8B (3). PPLC operates impressed current cathodic protection systems on all its tanks and below ground pipe lines. PPLC personnel inspect the rectifiers associated with the cathodic protection system weekly insuring proper operation. Records of these inspections and of the annual survey are maintained on file at the maintenance office on the main tank farm. The cathodic protection system was operating properly at the time of the inspection.

E. PPLC has kept the containment dikes in good condition and the containment capacities were verified to be sufficient during 2010. The dike containment meets the requirements of 06-096 CMR 600, Section 7 D (1) (b).

F. PPLC's Integrated Contingency Plan was last revised and signed by management on August 28, 2009.

G. Soil was found at certain locations along the tank base along with rodent burrows under the tank floors at tank 27 and 28.

5. OTHER FINDINGS

A. PPLC submitted financial assurance documentation (insurance policy) coverage in compliance with Chapter 600, Section 9 C (5).

B. Fifty percent (50%) of the above ground oil storage tanks at the PPLC facility are equipped with release prevention barriers and interstitial leak detection as required by 06-096 CMR 600, Section 8B(6).

PORTLAND PIPE LINE CORPORATION SO. PORTLAND, CUMBERLAND COUNTRY, MAINE OIL TERMINAL FACILITY LICENSE #'S O-000305-91-F-R, O-000306-91-F-R	)	OIL DISCHARGE PREVENTION AND POLLUTION CONTROL ACT RENEWAL LICENSE

C. PPLC filed public notice of its oil terminal license renewal application in the Portland Press Herald on May 20, 2010. PPLC also notified abutting property owners with a letter dated May 18, 2010. No public comments were received by PPLC or the Department.

D. PPLC pressure tested its loading arms and associated piping to 300 psi on June 21-22 2010. No leaks were detected.

E. PPLC presently holds a waste water discharge license, permit # ME0021440, which was issued by the Department in 2009.

F. PPLC is a business corporation in good standing with the Secretary of State and doing business in the State of Maine.

BASED on the above Findings of Fact and subject to the conditions listed below, the Department makes the following CONCLUSIONS:

1. PPLC was in compliance with the Department's Oil Discharge Prevention and Pollution Control Regulations 06-096CMR Chapter 600, at the time of the inspection on June 10, 2010.

2. During 2009-2010 PPLC has installed release prevention barriers with leak detection in tanks 23 and 24. The tanks were inspected and hydrostatically tested in accordance with API 653 Standards. The tanks were found fit for their intended service.

3. PPLC has met the Department's public notice requirements.

4. PPLC's ICP was updated and certified on August 28, 2009.

5. PPLC submitted sufficient financial assurance documentation for $ 2000,000.00.

6. Dike containment capacities were verified pursuant to 06-096 CMR 600, Section 7 D.

7. Soil and rodent burrows were observed at the base of some tanks.

PORTLAND PIPE LINE CORPORATION SO. PORTLAND, CUMBERLAND COUNTRY, MAINE OIL TERMINAL FACILITY	) OIL DISCHARGE) PREVENTION AND) POLLUTION CONTROL ACT)
LICENSE #'S O-000305-91-F-R, O-000306-91-F-R	) RENEWAL LICENSE

THEREFORE, the Department APPROVES the noted license of PORTLAND PIPE LINE CORPORATION SUBJECT TO THE ATTACHED CONDITIONS and all applicable standards and regulations.

1 This license expires on August 10, 2015.

2. PPLC shall fill rodent burrows and remove soil from the base of the tanks as was identified during the Department inspection. In the future PPLC shall perform these actions within ten (10) business days when they are observed during PPLC inspections.

3. The invalidity or unenforceability of any provision, or part thereof, of this license shall not affect the remainder of the provisions. This license shall be construed and enforced in all aspects as if such invalid or unenforceable provision or part thereof had been omitted.

DONE AND DATED AT AUGUSTA, MAINE THIS 20TH DAY OF DECEMBER 2010.

DEPARTMENT OF ENVIRONMENTAL PROTECTION

BY: _____ FOR
Beth A. Nagusky, Acting Commissioner

PLEASE NOTE ATTACHED SHEET FOR GUIDANCE ON APPEAL PROCEDURES.

Date of initial receipt of application: June 1, 2010

Date of acceptance: June 7, 2010

Date filed with Board of Environmental Protection:

FILED
DEC 21 2010
BOARD OF ENVIRONMENTAL PROT.
STATE OF MAINE

Xrk72055, 72056