

CITY OF PORTLAND, MAINE

DEC 20 2012

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December 18, 2012

Thomas Dobbins, Chairman  
Portland Harbor Commission  
2 Portland Fish Pier  
Marine Trade Center, Suite 105  
Portland, Maine 04101

CC: Council  
Jeff Keane  
Graig Mitchell  
Anita / Bob Deeman  
File: ons

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Re: New Yard LLC, Proposed New Facility, Portland Harbor, Maine

Dear Chairman Dobbins:

This firm represents McAllister Towing and Transportation Co., Inc. ("McAllister"), the parent company of Portland Tugboat, LLC ("Portland Tugboat"). It has come to McAllister's attention that Mr. Sprague, the principal of New Yard, LLC, which currently has an application pending before the Board of Harbor Commissioners for the Port of Portland, (the "Commission" or the "Board") for a proposed new facility up-river of the Casco Bay Bridge on the Portland side of the Fore River (the "Proposed Facility"), recently sent an e-mail string to the Commission relating to his earlier attempts to interest McAllister in renting space for Portland Tugboat's tugs at the Proposed Facility. To be clear, contrary to Mr. Sprague's baseless assertions, McAllister did not proceed with the negotiations proposed by Mr. Sprague because McAllister does not believe that the location is appropriate, either for berthing tugboats or for berthing vessels in general. This is due to the tanker traffic that moves up and down the Fore River in close proximity to the Proposed Facility. That concern was communicated to Mr. Sprague, and it is certainly incongruous for him to now try and make it appear that McAllister is objecting to the New Yard proposal because Mr. Sprague would not sell the property to McAllister, which is not accurate. It is surprising that Mr. Sprague would take this approach with regard to this matter.

Now that Mr. Sprague has involved McAllister in this matter, please note that McAllister is in full agreement with the position taken by Portland Docking Pilots, Inc. that the Proposed Facility creates a dangerous situation for the tankers and assisting tugboats transiting the Fore River. Due to the angle of the opening in the Casco Bay Bridge, tankers must move in close proximity to the Portland side of the channel, either in lining-up to move down river through the draw, or in correcting their course to port after passing through the draw as they proceed up-river. In either instance, the ability to maneuver tankers of up to 600' with up to a 105' beam, fully laden with limited under-keel clearance, or light with more windage exposure, is certainly quite limited. Thus, Portland Tugboat provides required escort tugs to assist the tankers as they maneuver toward the draw of the bridge, and in docking and un-docking. At times, the tugs must change position vis-à-vis the tanker with little notice, and must push at times to bring the tanker into alignment. In each instance, the tugs create considerable prop-wash and wake that

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could have a negative impact on either a nearby floating dock, or a nearby vessel berthed alongside such a dock.

In addition to the prop-wash and wake from one of the tugs, the tankers being escorted themselves displace significant amounts of water as they pass by the site of the Proposed Facility. That water, in and of itself, creates the potential for damage not only to the floating docks, but also to any vessels berthed at such docks.

In reviewing the plans for the floating docks at the Proposed Facility, it is clear that although the docks themselves may be just inside the Harbor Commissioners' line, any vessel berthed alongside the docks would be outside the lines and, thus, in the channel.

In his e-mail messages, Mr. Sprague argues that the area adjacent to the proposed facility is a "no-wake" zone. One can only presume that Mr. Sprague believes that the tankers and escorting tugboats would have to forego creating any wake, or moving any water, that might cause damage either to the floating docks or to the vessels tied to them at the Proposed Facility. While McAllister does not dispute that Portland's Inner Harbor is, in fact, a no-wake zone, see Rule 15.2(g) of the Harbor Commission's rules, it is clear that the rules specifically acknowledge that **safe navigation** is the touchstone, and, thus, it is specifically held to be an "affirmative defense" to any claim of damage arising out of an alleged violation of the speed and wake regulations. See Rule 15.3(a) of the Harbor Commission's rule. The real question then is why the Board would sanction a condition that almost guarantees claims that will be defended on the grounds of navigational safety. The burden should not be on the vessels creating commerce in the Port of Portland to show that they have complied with navigational safety criteria. Rather, the burden should be on any facility encroaching on the adjacent waterways to show that it will not restrict safe navigation in any way. New Yard LLC's Proposed Facility fails that test.


New Yard LLC's current proposal creates a situation in which the tugs, and, thus, Portland Tugboat, will be put at risk as a result of their carrying out the duties assigned to them during the movement of vessels up and down the Fore River. There can be no doubt that Portland Tugboat and its clients, the owners/operators of the tankers and the tankers themselves, would all be targets for claims asserted both by New Yard LLC, and any owner of a boat berthed at its facility, for damage suffered as a result of the tug prop-wash or displaced water of a passing tug or tanker. This is not to mention the possibility of the suspension of a docking pilot's license pursuant to the Commission's own rules and regulations, should a vessel under the command of a licensed docking pilot sustain damage of more than \$25,000, a fairly low number given the value of the vessels which New Yard LLC seeks to bring to its Proposed Facility. See Rule 18.15, Rules of the Portland Harbor Commission.

New Yard LLC's Proposed Facility, at least as it pertains to the number and location of the floating docks and dry-dock, creates a danger to the safety and commerce of Portland Harbor. As noted on the Commission's own website, "The Board's primary responsibilities are to ensure navigational safety within the harbor." It is hard to believe that the Commission could find that the proposed floating docks and dry-dock would not "substantially or unreasonably interfere with navigation or injure rights of others." See Maine Private and Special Laws 1981, chapter 98, Section 5, the enabling legislation creating the Commission.

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Now that New Yard LLC has involved McAllister and Portland Tugboat in this matter, McAllister and Portland Tugboat would appreciate the Board's consideration of the serious issues set forth in this letter. If either McAllister or Portland Tugboat can provide any further information or answer any questions that the Board may have, please do not hesitate to let me know.

Sincerely,



Jonathan Shapiro  
Regional Managing Partner  
For FISHER & PHILLIPS LLP

cc: New Yard LLC  
Capt. Brian S. Gilda, USCG  
US Army Corps of Engineers  
Capt. Brian Fournier  
Maine Bureau of Parks and Lands, Submerged Lands Program  
Capt. Richard Goddard, Irving Oil  
Mr. William Sousa, Citgo  
Honorable Michael F. Brennan, Mayor, City of Portland  
Mark Rees, City Manager, City of Portland ✓