UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

PORTLAND PIPE LINE CORPORATION and THE AMERICAN WATERWAYS OPERATORS, Plaintiffs, v. CITY OF SOUTH PORTLAND and PATRICIA DOUCETTE, Defendants	)	Civil Action No. 2:15-cv-00054-JAW

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PURSUANT TO RULE 12(b)(1)

Plaintiffs' claims are not ripe for resolution. Plaintiffs challenge amendments to the City of South Portland (the "City") zoning ordinance (the "Ordinance") but their Complaint demonstrates that Plaintiff Portland Pipe Line Corporation ("PPLC") has "no current plans" to construct the on-shore facilities necessary for the bulk loading of crude oil project they claim would be prohibited by the Ordinance. As the Complaint makes clear, Plaintiff PPLC has no intent to transport crude oil via its pipeline and load it onto tankers in the City, which explains why Plaintiffs do not allege that they have any concrete proposals, notices of intent, or applications for the myriad regulatory approvals that would be required long before PPLC could undertake any bulk loading of crude oil in the City. Thus, Plaintiffs request an advisory opinion on the propriety of the Ordinance's hypothetical future enforcement against potential and unspecified plans – plans that may never even come to pass. The U.S. Constitution forbids such an exercise of this Court's limited jurisdiction until there is a ripe controversy and an allegation of a present, non-speculative injury, especially where, as here, Plaintiffs seek to invoke the protections of the Constitution. As the First Circuit has admonished, "[c]ourts should strive to

avoid gratuitous journeys through forbidding constitutional terrain." *Ernst & Young v. Depositors Economic Protection Corp.*, 45 F.3d 530, 538 (1st Cir. 1995). Therefore, under Rule 12(b)(1), the Complaint must be dismissed in its entirety for lack of subject matter jurisdiction.

Although the Plaintiffs have artfully drafted their Complaint to mischaracterize the Ordinance as a rogue infringement on rights declared under treaties, international maritime law, and various federal statutes, in reality the Ordinance is a traditional exercise of the City's police power to protect the health and welfare of its residents and visitors and traditional land use authority to promote future development consistent with the Comprehensive Plan. *See* Compl. Ex. A, § 1 (City Council findings) & § 2 (purpose of ordinance). The exercise of local police powers is contemplated not only by long-established principles of federalism, but also by the express savings clauses of the interrelated treaties and federal and state laws governing the many discrete aspects of PPLC's pipeline and port operations, as well as its on-shore tanks and structures in the City.[1]

In addition to the City's established role in the regulatory framework governing PPLC's on-shore operations in the City, Plaintiffs submitted materials with their Complaint evidencing that PPLC has no current plans to initiate any of those local (or any other state and federal) processes that might conceivably give rise to enforcement of the Ordinance. Moreover, even if

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[1] *See, e.g.*, United States-Canada Transit Pipeline Agreement, U.S.-Can., art. IV(1)(b), Jan. 28, 1977, 28 U.S.T. 7449 ("[This Agreement] shall be subject to regulations by the appropriate governmental authorities having jurisdiction . . . with respect to . . . environmental protection ."); 33 U.S.C. § 1911 (2012) (codifying the International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, 34 U.S.T. 3407, 1340 U.N.T.S. 184 and providing that "[a]uthorities, requirements, and remedies of this chapter supplement and neither amend nor repeal any other authorities, requirements, or remedies conferred by any other provision of law. Nothing in this chapter shall limit, deny, amend, modify, or repeal any other authority, requirement, or remedy available to the United States, or any person, except as expressly provided in this chapter"); Ports & Waterways Safety Act, 33 U.S.C. § 1225(b) (2012) ("Nothing contained in this section, with respect to structures, prohibits a State or political subdivision thereof from prescribing higher safety equipment requirements or safety standards than those which may be prescribed by regulations hereunder."); *Texas Midstream Gas Servs. LLC v. City of Grand Prairie*, 608 F.3d 200, 211 (5th Cir. 2010) ("[T]he [Pipeline Safety Act] itself only preempts **safety** standards.") (emphasis in original).

PPLC had plans to construct the facilities necessary to bulk load crude oil in the City, implementation of those plans would be contingent on a gauntlet of approvals from – at the very least – the U.S. Department of State ("State Department"), the U.S. Coast Guard, the U.S. Department of Transportation, the Maine Department of Environmental Protection ("Maine DEP"), and the South Portland Planning Board and Building Inspector. PPLC has not applied for or received these requisite approvals, and it has not alleged that it has any actual intent to do so. All PPLC seeks is the future ability to "respond to market conditions." Compl. ¶ 24. As such, if this case were to proceed, this Court would not even be able to develop the evidentiary record necessary to intelligently evaluate Plaintiffs' claims on the merits, especially where such fact-intensive claims of conflict preemption and the Commerce Clause are at issue.

To adjudicate Plaintiffs' claims, this Court would have to settle questions of constitutional interpretation arising under several complex statutory regimes and international agreements that could have sweeping precedential impact. Yet that same decision would be incapable of redressing any current or impending injury to PPLC, rendering this Court's ultimate ruling merely advisory in contravention of Article III of the Constitution. Indeed, in the proper legal context, Plaintiffs' claims here are not merely unripe; the seeds have not even been sown. The Court lacks jurisdiction to hear such contingent and speculative claims of injury.

I. FACTUAL BACKGROUND

A. PPLC's Current Operations in the City.

PPLC operates a network of on-shore structures within the City – on at least four distinct parcels of land in two separate zoning districts. These structures support the unloading (also referred to as "offloading") of crude oil from tanker vessels through related infrastructure and

petroleum storage tanks, and ultimately into one of PPLC's pipelines that originate in the City.[2] Compl. ¶¶ 11-12; Ex. A, at 5; Compl. Ex. D*; see* Mot. Ex. 1, PPLC Air Emissions License A-197-77-2-M (Oct. 24, 2013); Mot. Ex. 2, PPLC Air Emissions License A-197-70-E-R (Feb. 3, 2015), Mot. Ex. 3, PPLC Air Emissions License A-197-77-1-A (Aug. 26, 2009).[3] At issue here is PPLC's 18-inch pipeline (the "pipeline"), which currently is idle but is permitted to transport crude oil from South Portland to Montreal, Canada. Compl. ¶¶ 11, 21, 23; Mot. Ex. 1. To bulk load crude oil in the City, PPLC would be required to reverse the flow of this pipeline, so crude oil travelled from north-to-south, terminating in the City.

B. Legal Restrictions on Changing Operations.

While the Complaint makes clear that PPLC has no current or specific plans capable of evaluation (Compl. Ex. D, at 1 ("no current plans"); Mot. Ex. 1, at 2 ("no plans")), as a general matter, PPLC would be restricted from reversing the flow of the pipeline to bulk load crude oil in the City without first acquiring an assortment of government approvals under the terms of its existing permits and a variety of federal, state and local laws regulating its operations. For instance, the pipeline is the subject of a Presidential Permit; thus, PPLC must obtain State

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[2] PPLC operates a marine terminal pier and related infrastructure within the City's Shipyard and Shoreland Area Overlay zoning districts. Compl. ¶¶ 11-12, Compl. Ex. A, at 3-5. At a distance of approximately three miles southwest from the marine terminal pier, PPLC operates a 19-tank petroleum storage farm with related structures and infrastructure on Hill Street within the City's Commercial zoning district. Compl. Ex. A, at 1-9. Within the Shipyard zoning district, PPLC operates a 2-tank petroleum storage facility on a parcel along Front Street and another 2-tank petroleum storage facility on a Preble Street parcel. Compl. Ex. A, at 3-5.

[3] The City attaches to this Motion to Dismiss three Air Emissions Licenses issued to PPLC by the Maine DEP. The attachment of these documents does not fall within the general rule that a court "may not consider any documents that are outside of the complaint, or not expressly incorporated therein, unless the motion is converted into one for summary judgment." *Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 33 (1st Cir. 2001); *cf. McInnis-Misenor v. Maine Medical Center*, 211 F. Supp. 2d 256, 257 (D. Me. 2002), *aff'd* 319 F.3d 63 (1st Cir. 2003) (considering report of investigator for Maine Human Rights investigator not incorporated in complaint). The Air Emissions Licenses fall into the exception for "documents the authenticity of which are not disputed by the parties; for official public records; for documents central to plaintiffs' claim; or for documents sufficiently referred to in the complaint." *Alternative Energy*, 267 F.3d at 33 (citation and internal quotation marks omitted). The Air Emissions Licenses attached to this motion are official records, the authenticity of which cannot be disputed and are referred to in the Complaint. *See generally* Compl. Exs. A, F.

Department approval before making any meaningful change in operations. Compl. Ex. B, at 2 (art. 2). The Presidential Permit provides: "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."[4] *Id*. The State Department has recently emphasized to PPLC that it understands PPLC has "no current plans to change the operation" of the pipeline, but if PPLC adopted any future plans to change the operation of the pipeline, the State Department would first require a rigorous review of the proposal. *See* Compl. Ex. D, at 1-2.

Likewise, PPLC's current Air Emissions License issued by the Maine DEP under Title V of the Clean Air Act (*see* 40 C.F.R. pt. 70 (2014)) permits emissions associated with the existing oil storage tanks, boilers and generators that support PPLC's current crude oil offloading operations. Mot. Ex. 2. To reverse the flow of the pipeline, PPLC has in a past proposal, the approval of which has since lapsed (*see infra* § 1.C), acknowledged that it would need to construct large new vapor combustion units (with two 70-foot high smokestacks) within view of City parks, neighborhoods and schools. Compl. Ex. A, at 3; Mot. Ex. 1. PPLC also has acknowledged that operation of the vapor combustion units would, at minimum, require approval of an amendment to the existing air emissions license from the Maine DEP under the Clean Air Act's New Source Review standards for major sources of criteria pollutants. Compl. Ex. A at 3; Mot. Exs. 1-3.

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[4] Similarly, the Presidential Permit provides that "[t]he operation and maintenance of the facilities will be in all material respects as described in permittee's application filed in March of 1999 . . ." and that PPLC's operations are "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." *Id*. at 2-3.

In turn, to construct the vapor combustion units (with the two 70-foot high combustion stacks), pump buildings, new petroleum storage tanks, if necessary, and any other on-shore structures on PPLC parcels within the City's relevant zoning districts, PPLC has acknowledged that it would require site plan approval from the City's Planning Board and building permits from the City's Building Inspector. Compl. Ex. A, at 3.

In addition (and again with the limitation that it is impossible to assess with certainty given the utter lack of any present plans or proposals), PPLC acknowledges that reversal of the flow of the pipeline and construction of the related on-shore structures would require a host of studies, applications, submissions, and permits likely requiring prior approval by the U.S. Department of Homeland Security, U.S. Department of Transportation, the State Department, the U.S. Coast Guard, the U.S. Environmental Protection Agency ("EPA"), and/or the South Portland Harbor Commission. Compl. ¶¶ 64-71 (discussing Pipeline Safety Act); ¶¶ 72-83 (discussing the MARPOL Convention and other international agreements); ¶¶ 84-95 (discussing Titles I and II of the Ports and Waterways Safety Act, 33 C.F.R. Subch. L, Subch. O Pts. 151, 154-157 and 46 C.F.R. Subch. D, Subch. O Pt. 153).[5]

C. Lapsed Plans - Expiration, Revocation or Voluntary Surrender of Approvals.

In 2008-09, PPLC took limited preliminary steps to obtain three of the numerous regulatory approvals necessary to reverse the flow of the pipeline and commence loading of crude oil onto tankers in the City. Compl. ¶¶ 21-22; Mot. Ex. 3. However, each of these

[5] By way of just a few examples, and depending on what plans PPLC might in the future propose, PPLC might need to be issued a certificate of compliance by the Secretary of the Department of Homeland Security after consultation with the EPA under 33 U.S.C. §§ 1905(a), 1905(c) (2012); submit for approval a Letter of Intent and Operations Manual to the Commander of the U.S. Coast Guard pursuant to 33 C.F.R. §§ 154.110(a), 154.110(c), 154.300(a) (2014); and draft a new oil spill response plan pursuant to 33 C.F.R. § 154.1025(d)(2) (2014).

preliminary approvals has since expired, been revoked by the permitting authority, or been voluntarily surrendered by PPLC.

1. State Department Presidential Permit – Change in Operations Subject to Additional Review.

In 2008, PPLC requested approval from the State Department to reverse the flow of the pipeline, which was granted insofar as PPLC would not need to acquire a new Presidential Permit for the plan as proposed.[6] Compl. Ex. C, at 1. However, that approval has now effectively been revoked, and any PPLC plans must again be subjected to formal review by the State Department. Compl. Ex. D, at 1. In 2013, the State Department wrote to PPLC explaining that "[i]t is the Department's understanding that [PPLC] has no current plans to change the operation of either pipeline." Given the lack of plans, the Department instructed PPLC:

> [B]efore [it] executes any plans to change the operation of either pipeline in any manner different than its current use and operation, to provide information to the Department for its review and consideration in advance . . . irrespective of whether, in your assessment or consistent with existing interpretations and the Department's 2008 determination, a change in operations would involve a substantial change from the scope of authorization set forth in the applicable Presidential Permits, and irrespective of whether a change in operations would involve new construction.

Id. at 1-2.

2. Site Plan Approval by City Planning Board – Expired.

In 2009, PPLC applied for and received conditional site plan approval from the City's Planning Board to substantially modify its on-shore structures on its parcels in certain of the City's zoning districts. Mot. Ex. 4, City of South Portland Planning Board Findings of Fact and

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[6] On July 18, 2008, the State Department had offered a preliminary determination that if PPLC reversed the flow of the pipeline, PPLC would not be required "to seek a new or amended Presidential permit . . . ." Compl. Ex. C, at 1. The State Department explained that it reserved the right to rescind this initial determination "should PPLC deviate significantly from the scope and manner of work outlined in [PPLC's 2008 request]." *Id*. The preliminary determination has subsequently been rescinded. Compl. Ex. D.

Decision re: Time Extension (July 26, 2011).[7] PPLC never began construction and after receiving one extension from the City the 2009, the site plan approval expired on August 25, 2012. Mot. Ex. 4.

3. Air Emissions License – Voluntarily Surrendered by PPLC.

On August 26, 2009, the Maine DEP approved PPLC's application, related to its intent to reverse the direction of oil flow, for an amendment to its existing air emissions license under the Clean Air Act's New Source Review standards for major sources of criteria pollutants. Mot. Ex. 3. However, on October 24, 2013, PPLC voluntarily surrendered the amendment to its air emissions license that would have allowed pollution associated with crude oil bulk loading and received Maine DEP's permission to "void all provisions contained therein." Mot. Ex. 1.

4. The Ordinance.

On July 21, 2014, after the expiration of PPLC's site plan approval (as well as the State Department's reversal of its initial determination about the pipeline reversal and PPLC's surrender of its Maine DEP air emissions license), the City Council passed the Ordinance to limit future construction of crude oil bulk loading facilities in certain zoning districts within the City.[8] The Ordinance provides that it was:

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[7] The new development would have included, at a minimum, new construction of: (i) on-shore vapor recovery structures consisting of at least two (2) new vapor combustion units that will require smokestacks at least 12-feet in diameter and 70-feet in height; (ii) two (2) breasting dolphins supported by sixteen (16) new pilings; (iii) two (2) above-pier vapor transfer arms; (iv) eight (8) additional pilings; and (v) a pump building to house two (2) new vertical pumps at PPLC's Hill Street tank farm. Compl. Ex. A, at 3; *see* Mot. Ex. 3. *See* discussion *supra* at p. 4, n.3 regarding why the Planning Board Finding of Facts and Decision also fall within the exception for official public records.

[8] Though the Complaint offers considerable description of a failed 2013 citizen initiative that would have regulated crude oil loading, that failed initiative is irrelevant. *See* Compl. ¶¶ 37-59; Compl. Ex. F. Since the 2013 citizen initiative was never enacted and bears little resemblance to the Ordinance at issue, perhaps Plaintiffs seek to distract this Court's attention from the threshold jurisdictional defects or other issues by placing such undue emphasis on the irrelevant initiative that never passed and garnered no official City involvement.

> . . . enacted, consistent with the City's traditional land use authority, to protect the health and welfare of its residents and visitors and to promote future development consistent with the City's Comprehensive Plan by prohibiting . . . construction or installation of [facilities related to bulk loading of crude oil] that would create significant new sources of air pollution, adversely impact or obstruct ocean views and scenic view-sheds, and impede or adversely impact the City's land use and planning goals.

Compl. Ex. A, at 6.

II. ARGUMENT

Without identifying any plans to engage in a development that falls within the scope of the Ordinance or to seek the myriad federal, state and local regulatory approvals necessary for such a project, Plaintiffs filed suit seeking this Court's advisory opinion on the propriety of the Ordinance. Under well-established law, the claims are not ripe for adjudication, and Plaintiffs lack standing to bring them.

A. Legal Standard.

The party invoking federal jurisdiction bears the burden of establishing both ripeness and standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (standing); *Rhode Island Ass'n of Realtors v. Whitehouse*, 199 F.3d 26, 33 (1st Cir. 1999) (ripeness). While the Court must "accept as true all material allegations in the complaint and construe them in plaintiffs' favor", *Blum v. Holder*, 744 F.3d 790, 795 (1st Cir. 2014), "this tenet does not apply to 'statements in the complaint that merely offer legal conclusions couched as facts or are threadbare or conclusory . . . .'" *Id.* (quoting *Air Sunshine, Inc. v. Carl*, 663 F.3d 27, 33 (1st Cir. 2011)). Nor does this tenet apply to "allegations so speculative that they fail to cross the line between the conclusory and the factual." *Id.* (quoting *Penalbert-Rosa v. Fortuno-Burset*, 631 F.3d 592, 595 (1st Cir. 2011)).

B. Plaintiffs' Claims are Not Ripe.

In light of the Complaint's acknowledgment that PPLC has "no current plans" to engage in the activity purportedly proscribed by the Ordinance and that a series of applications to federal, state and local agencies would first be required, these claims are a paradigmatic example of a matter not sufficiently ripe to present a justiciable case or controversy. U.S. Const. art. III, § 2; *City of Fall River v. FERC*, 507 F.3d 1, 6 (1st Cir. 2007); *W.R. Grace & Co. v. EPA*, 959 F.2d 360, 366 (1st Cir. 1992)*; see Warth v. Seldin*, 422 U.S. 490, 516-17 (1975). "The ripeness doctrine is designed to prevent courts from 'entangling themselves in abstract disagreements over administrative policies' and from improperly interfering in the administrative decision-making process." *City of Fall River*, 507 F.3d at 6 (*quoting Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967). In determining whether a case is ripe for review, courts engage in a two-tiered inquiry to "examine 'both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Id*. (quoting *Abbott Labs*, 387 U.S. at 149).

Under the first prong of this test, a matter is not ripe for judicial review where "it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 (1985). A matter is not ripe where it "involves uncertain events which may not happen at all." *City of Fall River*, 507 F.3d at 6; *McInnis-Misenor,* 319 F.3d at 70 (In fitness inquiry "prudential concerns focus on the policy of judicial restraint from unnecessary decisions"). The essential element of a ripeness inquiry is whether there is "hypothetical" or "speculative" injury at issue. *McInnis-Misenor,* 319 F.3d at 72.

The greater the "chain of contingencies lying between the plaintiffs' current state and their complained-of future injury," the more likely a claim is not ripe. *Id*.; *Ernst & Young*, 45 F.3d at 536 (calling inquiry into contingency of injury the "critical question" of ripeness). The

First Circuit has explained that "'premature review not only can involve judges in deciding issues in a context not sufficiently concrete to allow for focus[ed] and intelligent analysis, but it also can involve them in deciding issues unnecessarily, wasting time and effort.'" *W.R. Grace*, 959 F.2d at 366 (quoting *Roosevelt Campobello Int'l Park Comm'n v. EPA*, 1982 U.S. App. LEXIS 16697 at *19 (1st Cir. Aug. 10, 1982)). Judicial reluctance to prematurely review claims is most acute where the claims involve constitutional questions. *Ernst & Young*, 45 F.3d at 538 (where ripeness is in question, "[c]ourts should strive to avoid gratuitous journeys through forbidding constitutional terrain"). It is of no consequence that a plaintiff's claim might be "predominantly legal in character." *McInnis-Misenor*, 319 F.3d at 72 (quoting *Ernst & Young*, 45 F.3d at 537). If it "depends on future events that may never come to pass, or that may not occur in the form forecasted, then the claim is unripe." *Id.*

Under the second prong of the ripeness inquiry, "'[i]f the court's interest tends toward postponement, [the court] must then weigh this consideration against the immediate impact of the actions on the challengers, and whether that impact is so harmful that present consideration is warranted.'" *City of Fall River*, 507 F.3d at 6 (quoting *Midwestern Gas Transmission Co. v. Fed. Energy Reg. Comm'n*, 589 F.2d 603, 618 (D.C. Cir. 1978)).

1. Plaintiffs' claims are not fit for judicial review because they rest on a chain of contingencies, including whether PPLC ever decides to bulk load crude oil in the City and whether it initiates a process for federal, state and local approvals that may conflict with the Ordinance.

It is well-established in the permitting and local zoning context, that where "in the absence of a decision on a permit application or at least some preliminary step toward that end," a plaintiff's challenge to a regulation or ordinance is not ripe. *Metropolitan Baptist Church v. Dist. of Columbia Dep't of Consumer & Regulatory Affairs*, 718 A.2d 119, 132 (D.C. 1998). *See Warth v. Seldin*, 422 U.S. at 516 (where plaintiffs made "no averment that any member has

applied . . . for a building permit or a variance," challenge to zoning ordinance not ripe); *Cassidy v. City of Brewer*, 2012 U.S. Dist. LEXIS 165723, *1, *37 (D. Me. Sept. 12, 2012) (holding case not ripe where applicant for expansion of church space in building, in apparent violation of local zoning ordinance, "abandoned" its plans). *Cf. Diamond Shamrock Corp. v. Costle*, 580 F.2d 670, 672-73 (D.C. Cir. 1978) (industry challenge to new EPA regulations "would not be ripe until the regulations were applied in a permit proceeding" notwithstanding plaintiffs' claims that regulations "now operate to control [their] business affairs" and present "acute dilemma").

There is an unbroken string of cases in the permitting context holding that challenges to incomplete, conditional or unfinished permitting decisions are too contingent to be ripe for judicial review. For example, in *City of Fall River*, 507 F.3d at 6-8, opponents challenged the Federal Energy Regulatory Commission's ("FERC's") issuance of a conditional permit to a company that had submitted an application to construct a liquefied natural gas ("LNG") terminal. FERC issued the conditional permit subject to certain additional approvals required by the U.S. Coast Guard ("USCG") and the Department of the Interior ("DOI"). *Id*. Notwithstanding this comparatively advanced stage of permitting, the First Circuit held that the opponents' claim that FERC's review of the project was insufficient was not ripe. The First Circuit determined that the "proposed LNG project may well never go forward because FERC's approval of the project is expressly conditioned on approval by the USCG and the DOI [and] neither agency has yet given its final recommendation." *Id*. at 7.

Another example is *Roosevelt*, where the First Circuit held that a challenge to the EPA's grant of an air emissions license was not ripe where the permittee still required an additional so-called "begin construction" approval from the EPA before it could commence building a proposed oil refinery. 1982 U.S. App. LEXIS 16697 at *19-20. Likewise, in *W.R. Grace*, the

First Circuit held a company's challenge to EPA's grant of a permit was unripe where the permit (i) required further approval of the company's remediation plans; and (ii) contained a reservation of rights. 959 F.2d at 364. The First Circuit determined that since the company had not yet submitted any plans to EPA for approval and EPA had not rejected or revised those plans, the challenge "depend[ed] entirely upon 'uncertain and contingent events that may not occur as anticipated, or indeed may not occur at all,'" and, as such, were unripe. *Id.* at 365 (quoting *Lincoln House, Inc. v. Dupre*, 903 F.2d 845, 847 (1st Cir. 1990)).

Here any enforcement of the Ordinance on a future PPLC project would first depend on PPLC choosing to undertake that project. Then it would be contingent upon additional and critical agency approvals at the federal and state levels. Plaintiffs' claims are based on plans that do not yet exist, and thus are more inchoate than the claims held unripe in *City of Fall River*, *Roosevelt*, and *W.R. Grace* because this Court does not have before it any plans, designs, or proposals to intelligently guide a fact-specific review of the constitutionality of the Ordinance as applied to PPLC. Without a concrete plan to review, there can be no focused factual analysis of the merits of Plaintiffs' claims, especially where such fact-intensive claims of conflict preemption and the Commerce Clause are at issue. *Midwestern Gas Transmission Co.*, 589 F.2d at 620 (holding that FERC's conditional authorization of import contracts while its final certification of overall gas transmission projects were pending was not ripe because "[e]xhaustion of [the entire] administrative process will refine and focus the factual basis upon which both the public interest determination and the overall authorization rest, and will avoid a multiplicity of suits challenging conditional, tentative [agency] decisions.").

PPLC has neither submitted any proposals to the State Department for the review the Department required in its 2013 letter to PPLC, nor initiated filings with the USCG, U.S.

Department of Transportation or the other agencies with jurisdiction over its pipeline. Starkly illustrating PPLC's lack of any present or impending intent to construct the infrastructure projects purportedly at issue, Plaintiffs once held some of the approvals required from both the City and Maine DEP. Rather than move forward, PPLC let its site plan approval lapse and voluntarily surrendered its air emissions license. Mot. Exs. 1, 4. As such, what Plaintiffs ask this Court to do is to ignore all of the contingencies that lie between it and any conflict with the Ordinance, and instead issue an advisory opinion. However, the federal courts do not deal trump cards for a private company to hold in its pocket should it ever decide to initiate future plans. Plaintiffs, in fact, acknowledge in the Complaint that the relief they seek is very generally the "ability to respond to market conditions." Compl. ¶ 24. A complaint that alleges an injury that rests upon "contingent future events that may not occur as anticipated, or indeed may not occur at all" is no injury at all, and is not constitutionally ripe. *Texas v. U.S.*, 523 U.S. at 300.

2. The Ordinance has had no present effect on Plaintiffs, other than a threadbare claim of an economic uncertainty that is inherent in any matter requiring complex permitting, and thus they have suffered no hardship.

Plaintiffs cannot be said to have suffered any hardship where there has been no interruption or adverse impact to their current operations and they have expressed no desire to change those operations such that the Ordinance may be implicated. Tellingly, in *City of Fall River*, the First Circuit held that the permit applicant suffered no meaningful hardship even though the lead agency had conditionally approved the application. 507 F.3d at 7. Where necessary approvals had yet been solicited and evaluated, the First Circuit reasoned, "[c]oncerns about hardship to the parties are further lessened by the fact that FERC's decision will have no immediate impact . . . [because the company] may not proceed with the LNG project until it obtains approval from the USCG and the DOI, no one will experience the effects of FERC's

decision unless and until the agencies authorize the project." *Id*. Here, not only has PPLC not expressed any intent to "proceed" with changes to its operations in the City, it could not do so until initiating a lengthy application process with several federal, state and local agencies. *See id.* Even though the permit applicant in *Fall River* included concrete plans and had the blessing of the lead review agency, the matter was still not ripe where two other agencies had expressed reservations. *Id.* at 6-7. PPLC is many months and many steps from even that unripe stage in the permitting process.

Equally applicable in these circumstances is the Supreme Court's holding in *Warth*, 422 U.S. at 516-17. As is true here, the plaintiffs in that case challenged a municipal zoning ordinance without first initiating actual plans or submitting actual applications alleged to conflict with the law. *Id.* The homebuilders association and housing council that challenged the municipal ordinance that they alleged barred new construction of low-income housing argued that their claims were ripe because members of their organizations suffered economic loss in the form of lost employment opportunities. *Id*. The Supreme Court was not persuaded. Its analysis is as apt in this case as it was there:

> There is no averment that any member has applied to respondents for a building permit or a variance with respect to any current project. Indeed, there is no indication that respondents have delayed or thwarted any project currently proposed by Home Builders' members, or that any of its members has taken advantage of the remedial processes available under the ordinance. In short, insofar as the complaint seeks prospective relief, Home Builders has failed to show the existence of any injury to its members of sufficient immediacy and ripeness to warrant judicial intervention.

Id. at 516.

The plaintiffs' claims were unripe because no projects were planned or applications tendered that would collide with the municipal zoning ordinances. The same is true here. The Supreme Court did not hesitate to discount the plaintiffs' threadbare and conclusory claim of

general economic injury as insufficiently concrete to present a ripe issue for review – as a constitutional matter or as a countervailing prudential concern. *Id.*

To the extent that Plaintiffs argue they have suffered the same variety of unsubstantiated economic injury here, the case law is clear that it must be disregarded. *Id.*; *City of Fall River*, 507 F.3d at 6; *Ernst & Young*, 45 F.3d at 536. Permit applications – especially for large, complex multi-jurisdictional projects – are rife with delay and uncertainty. Even had PPLC sought certain approvals – which it has not – there is no present hardship. Should PPLC develop concrete plans for the bulk loading of crude oil and initiate permit applications, it may come to the City for a variance or seek timely relief in the courts at such time.

Until then, however, the City would suffer tremendous hardship. The City cannot be expected to forgo redevelopment of the scenic waterfront for increased residential, recreational, educational and commercial uses while it waits in limbo for PPLC to – perhaps – take future action to intensify its current industrial uses. *See* Compl. Ex. A, at 1-6. The City must be attentive to neighborhood revitalization, aesthetics of its waterfront, expansion plans for the nearby community college campus and, more generally, its future. *Id*. That is the essence of local zoning. The hardship to the City if the Court were to entertain this unripe claim would be immense, giving a private landowner an effective future veto over a City's redevelopment efforts. There is no prudential reason for the Court to exercise jurisdiction over this unripe case until, and if ever, there is a present conflict between PPLC's plans and the Ordinance. *See Warth*, 422 U.S at 516-17.

C. Plaintiffs have not alleged an actual and imminent injury sufficient to demonstrate Article III standing where they have no plans to engage in any conduct implicated by the Ordinance.

Related to ripeness is the constitutional prerequisite that a plaintiff must demonstrate Article III standing. The "standing question . . . bears close affinity to questions of ripeness – whether the harm asserted has matured sufficiently to warrant judicial intervention . . . ." *Warth*, 422 U.S. at 499 n.10. "In general, standing and ripeness inquiries overlap. . . . The overlap is most apparent in cases that deny standing because an anticipated injury is too remote . . . ." *McInnis-Misenor*, 319 F.3d at 69 (citing 13A C.A. Wright et al., *Federal Practice and Procedure* § 3531.12, at 51 (2d ed. 1984)). To demonstrate standing, a plaintiff "must show an injury that is 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" *Blum v. Holder*, 744 F.3d 790, 796 (1st Cir. 2014) (quoting *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013)) (internal alterations omitted). The First Circuit has "repeatedly reiterated that a 'threatened injury must be certainly impending to constitute injury in fact,' and that '[a]llegations of possible future injury' are not sufficient." *Blum*, 744 F.3d at 796 (quoting *Clapper*, 133 S. Ct. at 1147). The Supreme Court cautioned that courts must be reluctant to "endorse standing theories that rest on speculation about the decisions of independent actors." *Clapper*, 133 S. Ct. at 1150.

It is well-settled that a plaintiff does not have standing to bring a pre-enforcement challenge based on a future intention to engage in conduct implicated by a law or ordinance. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1991). "Such some day intentions – without any description of concrete plans, or indeed even any specification of **when** the some day will be – do not support a finding of the actual or imminent injury that our cases require." *Id.* (emphasis in original). For instance, in *Lujan*, the Supreme Court held that conservationists who had a desire, but no present plans, to view wildlife in foreign countries lacked standing to challenge

habitat funding decisions made by U.S. agencies. *Id*. at 564-55; *see also Clapper*, 133 S. Ct. at 1150 (human rights organization lacked standing even though it alleged it incurred costs in protecting communications from reasonably likely government surveillance because the alleged injury was grounded in "fears of hypothetical future harm that is not certainly impending").

Here, Plaintiffs have made no allegation that enforcement of the Ordinance is "certainly impending" as required to assert standing. The Complaint evidences that PPLC has "no current plans" to reverse the flow of the pipeline or construct the structures to support bulk crude oil loading. Plaintiffs present this Court with nothing more than an alleged injury based on what at best can be characterized as a future intention. It is a bedrock of constitutional jurisprudence that plaintiffs must allege more than a bare expression of future intent to assert standing. What Plaintiffs want is precisely what the Constitution forbids: an advisory ruling to hold in its quiver for some future date should it ever decide to press for the necessary slate of approvals to change operations in the City. The Court should not countenance Plaintiffs' invitation to assert jurisdiction over a claim that is not "impending" and is beyond what the Constitution permits.

D. Plaintiffs seek an unconstitutional advisory opinion.

Some courts have looked at the related issues of ripeness and standing through the lens of the U.S. Constitution's ban on advisory opinions; a claim presented to a federal court "must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937). Here, Plaintiffs' allegation of generalized and potential future harm does not constitute a sufficiently live controversy. For instance, in *Poe v. Ullman*, the Supreme Court held that without a showing of a plan or intent to use or advise the use of contraceptives, the plaintiff's challenge to Connecticut's prohibition against them was not justiciable. 367 U.S. 497, 501 (1981). The Supreme Court

held that "'[t]he party who invokes the power [to annul legislation on grounds of its unconstitutionality] must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement . . . .'" *Id*. at 504-05 (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923)) (second alteration in original). As it often does, the Supreme Court advised that ruling on constitutional questions is a "last resort" reserved for a "real, earnest and vital controversy between individuals." *Id*. at 505-06.

Here, a ruling on the merits of the Complaint would not redress any tangible harm. PPLC has not made application to bulk load crude oil in the City, and PPLC has not even presented to this Court evidence of a plan, design, or proposal for new operations that would fall within the scope of the Ordinance. Obviously, the Ordinance has not been enforced against PPLC. Thus, any ruling from this Court would not provide any relief of a "conclusive character" and as such, would constitute an unconstitutional advisory opinion. *See Aetna*, 300 U.S. at 241.

E. Plaintiffs' claims based on rights conferred by international treaties are not justiciable.

To the extent this Court allows any counts of the Complaint to advance, it should dismiss any claims based on rights PPLC alleges are conferred by international treaties. *See* Compl. ¶¶ 17-20, 27-34, 72-83. It is a general rule that courts will not interpret international treaties in suits brought by private parties. *Medellin v. Texas*, 552 U.S. 491, 506 & n.3 (2008). The "background presumption is that 'international agreements, even those directly benefitting private persons, generally do not create rights or provide for a private cause of action in domestic courts.'" *Id.* at 506 n.3 (quoting 2 Restatement (Third) of Foreign Relations Law of the United States § 907 cmt. a, at 395 (1986)). The First Circuit too has uniformly held that "treaties do not generally create rights that are privately enforceable in the federal courts." *United States v.*

Moloney (In re Price), 685 F.3d 1, 12 (1st Cir. 2012); *see United States v. Li*, 206 F.3d 56, 60 (1st Cir. 2000); *see also Mora v. New York*, 524 F.3d 183, 201 & n.25 (2d Cir. 2008) (collecting cases from ten circuits holding that treaties do not create privately enforceable rights).

F. If the Court dismisses Plaintiffs' federal claims, it would have no further jurisdiction to hear the pendant state law claims.

Should this Court dismiss the federal claims (Counts I-VII) for want of jurisdiction, there would be no occasion to maintain jurisdiction over Plaintiffs' two pendant state law claims (Counts VIII-IX). Courts rarely depart from a "general practice of declining to exercise supplemental jurisdiction over a pendent state claim when a plaintiff's foundational federal claims are dismissed before trial." *McInnis-Misenor v. Me. Med. Ctr.*, 211 F. Supp. 2d 256, 263 (D. Me. 2002), *aff'd* 319 F.3d 63 (1st Cir. 2003); *see United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966) ("Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well."); *Camelio v. American Fed'n*, 137 F.3d 666, 672 (1st Cir. 1998).

For the foregoing reasons, the Court should dismiss the Complaint in its entirety.

Respectfully Submitted,

Dated: March 31, 2015

THE CITY OF SOUTH PORTLAND
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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of March, 2015, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following: Matthew D. Manahan, Esq.; Catherine R. Connors, Esq.; Eric J. Wycoff, Esq.; and Nolan L. Reichl, Esq.

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