City Council Workshop | Agenda Item #3

November 23, 2015 | Financial Assurance

In 2014, the Draft Ordinance Committee brought forth a four part series of recommendations for City Council consideration. As the City Council is aware, Part 1 was the Blue Skies Ordinance, which prohibited the bulk loading of crude oil onto marine tank vessels and associated improvements infrastructure needed to do so in South Portland. The three other parts of the Committee's recommendations included: Part 2 was amending ordinances and the Comprehensive Plan, Part 3 was post-closure financial assurance for terminal operators and Part 4 was air quality monitoring.

This workshop item is an introduction to Part 3 of the Committee's recommendations. Currently the Maine Oil Discharge Prevention and Control Regulation, in particular Chapter 600, requires marine terminal facilities with storage capacity of greater than 63,000 gallons to document the facilities have at minimum $2,000,000 worth of financial assurance to pay for post-closure costs per oil storage terminal. It is understood that at the time of enacting the $2,000,000 threshold there was much talk around how much financial assurance should be required as part of a facility's permit. Ultimately the regulation mirrored that of what the State required for post-closure of landfills.

The attach documents will provide greater in-depth explanation of the financial assurance regulation and the gap that exists. I would like to share what has been done to-date in petitioning the Maine Department of Environmental Protection (MDEP). In March of 2015, the MDEP conditioned the Sprague Energy Marine Terminal License requiring Sprague Energy to provide MDEP for its review and approval, an engineering assessment of probable closure costs to determine the adequacy of financial responsibility. This assessment needs to be submitted to MDEP by December 31, 2015. A more recent facility license was issued to the Portland Pipe Line; again MDEP was willing to accept public input on the license, ultimately conditioning the permit very similar to the Sprague Energy permit. Portland Pipe Line is required to provide its post-closure engineering assessment by January 30, 2017. Both permits were conditioned based on petitions to MDEP from the public during the permit's public comment period.

As the City Council is aware, in September, I submitted a letter asking for a similar condition be included as part of CITGO's Marine Terminal License. Last week I received confirmation from MDEP that the City's requested condition will be part of the draft license. To-date, three out of six terminal licenses has been petitioned. Over the next five months the remaining three licenses come due. The desired process to handle this situation at MDEP would be for a State Statute change requiring a higher threshold for financial assurance. The current environment in Augusta may not lend itself to being the right time for this type of action to occur. As MDEP has been amenable to work with and willing to accept petitions during license's comment period; I ask the City Council for acceptance to continue the process of petitioning MDEP requesting a similar condition be added to the

remaining three terminal licenses. Through requiring this information, I believe these engineering reports will show the imbalance between required and actual financial assurance thresholds.

If the Council is willing to continue this petitioning process, I ask the Council to place on the next agenda an Order authorizing staff to submit petitions to MDEP on behalf of the City of South Portland asking MDEP for similar conditions in the remaining three facility licenses.

City Manager

CITY OF SOUTH PORTLAND

P. O. Box 9422
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South Portland, ME 04116-9422

James H. Gailey
City Manager

EXECUTIVE
DEPARTMENT

September 18, 2015

Richard Kaselis
Maine Department of Environmental Protection
Division of Oil and Hazardous Waste Facilities Regulation
Bureau of Remediation and Waste Management
State House Station # 17
Augusta, Maine 04333-0017

Dear Mr. Kaselis:

I understand Citgo's Marine Terminal License, here in South Portland, expired on August 22, 2015. I am writing to request the Department of Environmental Protection include a permit condition requiring an engineering assessment of probable closure costs within the Citgo's Marine Terminal License renewal.

South Portland has a total of six marine terminals. The Department has already directed Sprague and Portland Pipe Line to prepare "an engineering assessment of probable closure costs to determine the adequacy of financial responsibility" as conditions of their marine terminal licenses. Those assessments will be submitted by December 31, 2015, and January 30, 2017, respectively.

Requiring an engineering assessment will treat each terminal in a consistent way and provide information needed by both the City and the State as we make decisions regarding future growth and development in our community.

Thank you for your consideration of this request.

Sincerely,

James H. Gailey
City Manager

cc. Avery Day, Acting Commissioner
Maine Department of Environmental Protection
State House Station #17
Augusta, Maine 04333-0017

CITY OF SOUTH PORTLAND - DRAFT ORDINANCE COMMITTEE (DOC)

RECOMMENDATIONS

PART 3 – FURTHER RECOMMENDATIONS – FINANCIAL ASSURANCE MECHANISMS FOR TERMINAL OPERATORS

JUNE 19, 2014

Maine's Financial Assurance Rule

The Maine Oil Discharge Prevention and Pollution Control Regulation (06-096 CMR Chapter 600) requires marine terminal facilities with storage capacity greater than 63,000 gallons to document that operators have at least $2 million worth of financial assurance to pay for proper closure of the oil storage terminals.

The financial assurance requirement of Chapter 600 states at Section 9 (C) (5):

> *Financial Responsibility Requirements. The Commissioner requires* ***evidence of financial responsibility in the amount of $2 million per facility*** *[Emphasis added] as a condition of an operating license to ensure proper closure of facilities. Financial responsibility may be established, subject to the approval of the Commissioner, by any one, or by any combination, of the following: insurance, guarantee, surety bond, letter of credit, trust fund or qualification as self-insurer. In determining the adequacy of evidence of financial responsibility, the Commissioner shall consider the criteria in 40 CFR, Sections 280.95 through 280.99 and 280.102 through 280.103(revised as of July 1, 1998). Any bond filed must be issued by a bonding company authorized to do business in the United States.* ***The Commissioner may change the amount of financial responsibility required if an engineering assessment of probable closure costs indicates such a change in the requirement would be appropriate. [Emphasis added]***

Financial Assurance Rule Applicability

Several oil companies own and operate oil facilities in South Portland. Each facility has total capacity greater than 63,000 gallons. For example, the combined capacity of the Portland Pipe Line Corporation's three oil tank storage facilities (located on Hill Street, Preble Street, and Front Street) is approximately 160 million gallons. Therefore, all companies are subject to DEP's financial responsibility requirement.

Maine's Chapter 600 financial assurance rule *does not* apply to PPLC's transmission pipeline, mainline valves and other discrete elements located in South Portland.

All the oil companies operating in South Portland meet DEP's criteria to demonstrate that they have the liquidity to meet the so-called "balance sheet tangible net worth" test. The tangible net worth test calls for the terminal operator to prove (for each facility) that it has:

- Tangible net worth of a minimum of $10 million; and either:
    a. Tangible net worth at least 10 times greater than the regulatory financial responsibility amount; or
    b. Net working capital at least 6 times greater than the financial responsibility requirement.

The term "proper closure" is defined in Section 12 (D) of the Chapter 600 rule. This section describes general requirements for closure design, reporting and regulatory approvals. More specifically, this section stipulates that "all regulated substances have been removed or cleaned up to the satisfaction of the Department."

Other Chapter 600 Requirements

DEP treats the subject of risk management separately from closure financial assurance. The Chapter 600 rule does not directly address the need for insurance or self-insurance to cover the risks of unforeseen accidents, such as a tank or pipeline spill.

Section 9 (C) (5) of the Chapter 600 rule references the federal regulations at 40 CFR 280.95-99, which address liability coverage requirements for "underground tanks", not aboveground tanks. DEP's financial assurance forms – which borrow from the federal scheme – include a line item stipulating that storage terminal operators subject to the Chapter 600 rule must demonstrate they have at least $2 million in general liability coverage for accidents or third party liability. The $2 million amount has not changed since the mid-1990s. Assuming it was a conservative number then, it probably does not represent a realistic amount to manage the risks associated with a marine terminal accident today.

DOC Information Request to Maine DEP

On April 30, 2014, the DOC sent an information request to Melanie Loyzim, Maine DEP, asking the following questions about DEP's financial assurance requirements:

1. How does DEP (or the legislature) know that $2 million is sufficient to close, demolish, clean up, and monitor facility site conditions ("proper closure")?

2. Where did the $2 million number originally come from?

3. Why did DEP (or the legislature) not opt to be consistent with the State's solid waste program financial assurance requirements, which require an engineering estimate of clean-up and post-closure care costs?

4. How does DEP itself classify the pipeline segment between the Hill Street tank farm and the loading pier? Is the pipeline considered part of the terminal facilities, and therefore subject to State financial assurance requirements?

5. What or who would trigger the engineering assessment called for in the Chapter 600 rule?

6. If DEP's terminal permit is not an "Enforceable by State only" provision, could a private citizen or municipality call for an engineering assessment?

7. Does State law or regulation prevent a municipality from requiring financial assurance in addition to or in excess of the State's requirements as stated in Chapter 600?

As of June 19, 2014, the DOC has not received any response from DEP.

The DOC recommends City Council should evaluate financial assurance mechanisms for proper closure of marine terminals

South Portland officials cannot independently verify privately held corporations' representation that they have the capability to pay $2 million for proper closure, much less the *actual* costs of proper closure based on an

independent engineering assessment of decommissioning, demolition, clean up and post-clean up monitoring once operations have been discontinued. This point cannot be overstated – it is not a question of if, but when proper closure will occur. These facilities will not be here forever.

South Portland residents have only to look a few hours north to the Lac-Megantic/Montreal, Maine and Atlantic Railway tragedy to understand what could happen to a community if a petroleum-related tragedy struck. These are very real risks to life and property. The railroad did not have giant multi-national corporations as shareholders. The accident forced the railroad into bankruptcy. Virtually all damages and clean-up costs fells on the shoulders of Provincial and Canadian taxpayers. South Portland must ask whether they should trust private owners or corporate shareholders to step up in the event of an accident and pay 100% of the damage costs.

Regardless of how City Council and South Portland citizens address DOC's proposed ordinance changes, the financial assurance issue is of critical importance to the City. Not only is the proper closure financial assurance issue critical to the public health of our citizens, but the current inadequate financial assurance mechanism could condemn significant areas of the City to grim "brownfield" status, leaving South Portland to depend upon taxpayer-funded programs (which today fund only site assessments and not clean-ups).

Assuming DEP eventually responds to DOC's questions, City Council and municipal staff should use that information to address this important issue on behalf of all South Portland residents. DOC recommends that City Council consider the following important public health matters:

1. Maine's financial assurance rule should be predicated on ***realistic*** costs for proper closure of marine terminal facilities, not the arbitrary $2 million amount currently set forth in the Chapter 600 rule. If the state won't take the steps needed to make its rules reflect reality, then South Portland should act to protect the public health of its citizens.

2. Each oil storage tank facility constitutes a separate facility under the DEP's Marine Oil Storage Rule, and should be treated as such for financial assurance purposes.

3. South Portland residents are justifiably proud of the emergency response capabilities of its Fire Department. However, we must also have concrete assurances that oil companies have insurance and financial resources to respond adequately to realistic worst case scenarios involving a marine terminal accident. This capability needs to be independent of any obligation to establish adequate financial assurance mechanisms to properly close facilities within the City.

4. South Portland should establish financial assurance mechanisms which ensure its residents (and all Maine taxpayers) do not incur closure and clean-up costs even if an oil company eventually ceases operations.