GROUND WATER OIL CLEAN-UP FUND

A Report on the Use of the Fund for Cleanup of Voluntary Response Action Sites and Tank Overfills

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I. About this report

This report follows the Legislature's consideration last year of LD 1332—*An Act to Continue Coverage of Oil Clean-up Costs and Improve Administration of the Ground Water Oil Clean-up Fund* (124th Legis., 1st Regular Session, 2008). The bill was put forward by the Department of Environmental Protection (herein "DEP" or "department") in concert with our administrative efforts to address a revenue shortfall in the Ground Water Oil Clean-up Fund (fund), the main source of money for cleanup of leaking oil storage tanks.

In late 2007, the balance in the fund had dropped to about $1 million against estimated liabilities of over $30 million. The gap was attributed to a combination of factors, including:

- An increase in the number of oil discharges reported to us;
- An increase in the number of significantly contaminated sites requiring cleanup;
- Increased cleanup costs; and
- Expansion of the universe of tanks eligible for coverage under the Fund Insurance Program (described in section II of this report).

The department since has taken a number of steps to keep the fund solvent and help ensure the availability of money for cleanup of spill sites that pose the greatest risk to human health and the environment. These steps include the revision of the DEP cleanup guidelines to improve the cost effectiveness of fund-covered work,[1] closer technical oversight of cleanup work, and a revised budgeting system based on cleanup priorities.[2]

LD 1332 was put forward to complement these administrative steps. It offered a number of statutory changes designed to put the fund on sounder fiscal footing by better calibrating revenues to expenditures. Among the proposed changes were two provisions that are the subject of this report: 1) a proposal to make costs incurred by private parties to implement a DEP-approved voluntary cleanup plan ineligible for fund coverage;[3] and 2) a proposal that would have authorized the department to bill oil delivery companies for the fund-covered costs of discharges that occur during the delivery of oil to a storage tank.[4]

These two provisions subsequently were removed from the bill and replaced in the enacted version with the following directive:

> "The Department of Environmental Protection, in consultation with interested parties, shall review and evaluate the current framework for funding investigations and the cleanup of tank-related oil discharges at voluntary response action program sites under the

[1] See Maine Department of Environmental Protection, *Remediation Guidelines for Petroleum Contaminated Site in Maine*, revised November 20, 2008.
[2] There currently are about 450 oil discharge sites on the department's list of long-term remediation sites requiring additional investigation and cleanup work. Each is assigned a priority based on the degree of risk the site poses to human health and drinking water supplies. Sites are closed out and removed from the list when remediation work is completed.
[3] LD 1332, section 15 (124th Legis. 2009).
[4] *Id*. sections 20 and 23.

Maine Revised Statutes, Title 38, section 343-E and sites contaminated by discharges during the delivery of oil to an oil storage facility. The department shall make recommendations for sustainable public or private funding of the investigation and cleanup of those sites. By January 15, 2010, the department shall submit to the Joint Standing Committee on Natural Resources a report detailing its findings and recommendations, and the committee may report out legislation to the Second Regular Session of the 124th Legislature relating to the report."[5]

II. Establishment of the Ground Water Oil Cleanup Fund, the Fund Insurance Program and the Fund Insurance Review Board

The Ground Water Oil Clean-up Fund was established in 1985 to be used by the department in administering Maine's oil storage tank laws.[6] It is the main source of money for costs incurred by the department to prevent, contain and clean up tank-related oil discharges. Revenue in the fund is derived from fees on each barrel of refined oil offloaded in the State from ocean-going tankers, rail cars and tank trucks.[7]

In 1990, the fund law was amended to establish an insurance program (herein "Fund Insurance Program") to help tank owners meet federal requirements for pollution liability insurance.[8] Federal law requires owners and operators of underground oil storage to carry $1 million in coverage against the possibility of a discharge.[9] Maine, like most states, established a state mechanism to meet this requirement when it became clear that affordable private insurance was not readily available in all cases.

Under the Fund Insurance Program, owners and operators of leaking oil storage tanks are eligible for coverage of cleanup costs up to $1 million per incident, less certain statutorily-established deductibles.[10] Coverage of these costs was supported by an increase in the oil import fees. The fee on gasoline was raised from 9¢ per barrel to 44¢ per barrel [about 1¢ per gallon] and the fee on other refined oil products from 8¢ to 25¢ [about ½¢ per gallon].

When the Fund Insurance Program was established in 1990, it only covered discharges from underground oil storage tanks because only underground tanks are subject to the federal insurance requirement. And it did not cover underground facilities if they were affiliated with an oil refinery (e.g., Exxon, Mobil and Irving), presumably on the premise that those multi-national companies did not need State assistance in meeting federal insurance requirements.

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[5] See PL 2009, c. 319, §24, eff. September 12, 2009.
[6] See PL 1985, c. 496, §14, eff. June 28, 1985 enacting 38 MRSA chapter 3, subchapter II-B [titled "UNDERGROUND OIL STORAGE FACILITIES AND GROUND WATER PROTECTION]. Subchapter II-B as amended currently encompasses 38 MRSA §§561 through 570-M. The Ground Water Oil Clean-up Fund is established under §569-A.
[7] See 38 MRSA §569-A, sub-§5.
[8] See PL 1989, c. 865, §§14 through 25, eff. April 19, 1990.
[9] The federal financial coverage requirements are found in 40 CFR Part 80, subpart H, promulgated by the U.S. Environmental Protection Agency pursuant to the Resources Conservation and Recovery Act, Subtitle 1.
[10] Under current law, tank owners and operators found to be eligible for fund must pay applicable standard and conditional deductibles under 38 MRSA §568(2).

In 1993, the law was amended[11] to extend eligibility for coverage under the Fund Insurance Program to owners and operators of aboveground oil storage tanks (ASTs), a population that captures almost every bulk oil storage tank except those at oil terminals[12] and almost every Maine home that heats with oil. The oil import fees were not raised to pay for this expanded coverage. The Legislature instead opted to establish an 8-member Fund Insurance Review Board (FIRB) and charged it, among other things, with the responsibility to: 1) report annually on the adequacy of the fund to cover anticipated expenses; and 2) make recommendations on needed statutory changes.[13]

Not surprisingly, the FIRB's 1995 annual report showed that fund expenditures greatly exceeded revenues. The report attributed the deficit largely to the expansion of the Fund Insurance Program to cover ASTs. The recommended fix, signed into law by the Governor in June 1995, was to empower the FIRB to adopt rules increasing the base fee on gasoline (currently 38¢ per barrel) by 10¢ and the base fee on other oil products (currently 19¢)[14] by 5¢ whenever the fund balance dropped below $3 million.[15] The bill also increased the number of public members on the FIRB from 3 to 5, charged the board with the responsibility to monitor fund income and disbursements, and gave it authority to order an independent audit to carry out this responsibility.

In 2001, following yet another report by the department highlighting the structural deficit in the fund,[16] the Legislature enhanced the FIRB's statutory authority to increase fees to avoid a shortfall in fund.[17] The board now has authority to impose a surcharge of up to 20¢ per barrel of gasoline and 10¢ per barrel of other petroleum products whenever the fund balance drops below $5 million. A separate provision in the enacting bill ended the exclusion from fund coverage for facilities affiliated with an oil refinery.[18] Discharges discovered at those facilities after September 30, 2001 are now fully eligible for the coverage under the Fund Insurance Program up to the $1 million per incident limit, less applicable deductibles.[19]

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[11] See *An Act to Establish the Fund Insurance Review Board*, PL 1993, c. 363, eff. June 16, 1993.

[12] Oil terminal facilities are excluded from the definition of aboveground oil storage facility. See 38 MRSA §562-A, sub§1-A. An oil terminal facility as defined means a facility "used or capable of being used for the purpose of transferring, processing or refining oil, or for the purpose of storing the same…" 38 MRSA §542, sub-§7, and §562-A, sub§1-A . §542, sub-§7, and

[13] See 38 MRSA §570-H. The FIRB also is responsible for hearing appeals of insurance coverage decisions by the Commissioner of Environmental Protection and the State Fire Marshal. See 38 MRSA §§568-A, sub-§3-A and 568-B, sub-§2, ¶A. Under the current statutory scheme, eligibility for fund coverage of UST-related cleanup costs is decided by the commissioner; eligibility for AST-related claims is decided by the fire marshal. See 38 MRSA §568-A, sub-§1, ¶F.

[14] The base fees were reduced by 6¢ (from 44¢ to 38¢ for gasoline and from 25¢ to 19¢ for other oil products) in 1999 when the Legislature repealed 38 MRSA §569-A, sub-§6, requiring 6¢ of the fee collected on each barrel to be transferred to the Finance Authority of Maine for deposit in the Underground Oil Storage Replacement Fund. See PL 1999, c. 505, §§a-12 and A-13, eff. September 18, 1999.

[15] See PL 1995, c. 399, eff. June 30, 1995, enacting 38 MRSA §569-A(5)E).

[16] Department of Environmental Protection, *Ground Water Oil Clean-up Fund Report*, submitted to the Joint Standing Committee on Natural Resources, 120th Maine Legislature, December 15,2000.

[17] See PL 2001, c. 216, §3, eff. September 21, 2001, amending 38 MRSA §569-A(5)(E).

[18] By the time the exclusion was ended, Maine's Fund Insurance Program was the only state assurance fund known to exclude tank owners and operators from eligibility based on a business relationship with a refinery. See Rounds & Associates, *Maine Financial Responsibility Alternatives*, May 2001, p 10.

[19] See PL 2001, c. 216, §1, eff. September 21, 2001, amending 38 MRSA §568-A(1)(E.)

The FIRB adopted rules imposing the maximum allowable surcharge in November 2001.[20] The surcharge remains in effect today and will remain in effect until the fund balance averages $7 million or more for 3 consecutive months.[21] The surcharge-enhanced oil import fees generated $15.4 million in revenue in FY 2009.

III. Fund Insurance Program coverage of VRAP cleanup costs

The voluntary response action program (VRAP) was established in 1993 as a way to help get contaminated property cleaned up and back on the market.[22] It does that by allowing a person with an interest in redeveloping contaminated property to voluntarily clean it up to DEP satisfaction in exchange for assurances that the department will not take enforcement action related to the contaminant release that is the subject of the cleanup plan.

Before the VRAP law was enacted, developers were hesitant to acquire contaminated property because a new owner could be held liable for the cleanup costs and those costs typically were unknown. The VRAP program, by establishing a process for obtaining approval of an investigation and cleanup plan, allows landowners and prospective developers to calculate the costs of cleanup measures needed to satisfy DEP requirements.

If a party then opts to cooperate with the DEP to clean up the contamination, the department will not hold that party responsible for the underlying spill, and will not take enforcement or cost recovery action against those parties. This "no-action assurance" as it is called in the statute, together with the identification through VRAP review of the nature and extent of the contamination, provides developers and lenders with the kind of reliable information they need to make financial decisions about developing polluted property.[23]

A secondary benefit of the VRAP program, as articulated to the Legislature's Natural Resources Committee at the time of adoption, was to encourage voluntary cleanup of under-utilized contaminated property "with private as opposed to state dollars."[24] It was understood that the cleanup costs would be borne by the person seeking liability protection, thereby reducing outlays from the State cleanup funds.

This has not turned out to be the case with the Ground Water Oil Clean-up Fund. The VRAP incentive, because it has worked so well,[25] has increased the demand on the Fund by about $3 million per year. This has happened because some VRAP applicants, by virtue of the fact the contamination they are cleaning up emanated from an oil storage tank, are eligible for coverage under the Fund Insurance Program. They can volunteer to clean up the site in exchange for a VRAP liability waiver, and then, as the owner of an oil storage that suffered a

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[20] Rules of the Fund Insurance Review Board, *Chapter 4: Oil Import Fees*, 90-564 CMR 4, eff. November 24, 2001.
[21] *Id*.
[22] See PL 1993, c. 355, §5, eff. June 16, 993, enacting 38 MRSA §343-E.
[23] Elizabeth Armstrong, Fleet Bank of Maine, in undated written testimony offering an amendment to L.D. 1509 (116th Legis. 1993).
[24] *Id*.
[25] Lenders now often require VRAP approval as a condition of financing.

discharge, apply under the Fund Insurance Program to have the cleanup costs paid from the fund.[26]

This usage of the Fund Insurance Program was not anticipated when the program was created in 1990 to help small businesses with retail gasoline sale meet federal insurance requirements. As these businesses close, however, and the property is sold, the buyer often is eligible for fund coverage of the costs to clean up the site for redevelopment even though the contemplated change in use is not subject to federal insurance mandates. When the fund is used in this manner, it functions as a brownfield redevelopment fund rather than insurance fund. Brownfield redevelopment is a legitimate public policy goal but not a goal that the Legislature budgeted for when it established the Fund Insurance Program.

It is likely that cleanup costs at some VRAP sites for which fund coverage has been obtained eventually would have been paid from the fund anyway as the department worked its way down the priority list of oil contaminated sites. What the VRAP incentive has done is accelerate the pace of cleanup work eligible for fund coverage, increasing the number of cleanups done per year and exacerbating the imbalance between revenues and liabilities. It has not changed funding priorities, however.

VRAP sites that are eligible for fund coverage are subject to the same priority-driven budgeting process as other eligible sites and thus complete for funding with those sites on the basis of health risk. If a VRAP site does not warrant priority attention (e.g., because of its industrial setting or otherwise low risk to neighbors), then reimbursement of cleanup costs may be delayed until work at higher priority sites has been completed and paid for.

The department can manage the re-shuffling of workload priorities that accompanies the advancement of VRAP cleanup projects for state funding. The typically higher cost of VRAP projects presents a more difficult challenge. Cleanup work approved under the VRAP program often costs more than non-VRAP cleanups for two reasons. First, VRAP cleanups often are undertaken in support of a change in use that demands a higher degree of cleanup than would be the case if the site continued to be operated as a gas station or bulk plant.[27] Secondly, more stringent cleanup measures are warranted as a condition granting the VRAP no action assurances because those assurances limit the department's ability to pursue cost recovery in the future.

[26] This is only the case for sites contaminated by a leaking oil storage tank. If the site is contaminated with hazardous substances, the VRAP applicant pays the cleanup costs in exchange for liability protection as originally envisioned; there is no recourse to State cleanup funds.

[27] In the petroleum industry, the term "bulk plant" or "bulk terminal" is used to refer to a wholesale receiving and distributing facility for petroleum products; includes storage tanks, warehouses, railroad sidings, truck loading racks, and related elements. See www.answers.com.

IV. Fund Insurance Program coverage of cleanup costs associated with discharges during the oil delivery

About one in five tank related oil spills occur either during the loading of fuel delivery trucks at bulk plants or the dispensing of fuel from delivery trucks. When this happens during home delivery, the fuel delivery company usually is prompt to make the tank owner whole and pay the full cleanup costs, making it unnecessary for the tank owner to seek coverage under the Fund Insurance Program. Recourse to the Fund Insurance Program is unnecessary because fuel delivery companies are required under the federal Motor Carrier Act to have insurance that covers costs related to discharges during the loading or off-loading of oil from their vehicles.[28] The minimum required amount of insurance for oil carriers is $1 million, the same as required of tank owners under the federal Resource Conservation and Recovery Act and the maximum available to tank owners under the Fund Insurance Program.

Perhaps because motor carriers in the business of delivering oil already have federally mandated insurance, oil delivery companies are not eligible to apply for coverage under the Fund Insurance Program. Only tank owners and operators may apply for coverage. The term "applicant" is defined in the law to mean "the owner or operator of an … oil storage facility that has suffered a discharge of oil and who is seeking coverage of eligible clean-up costs…"[29] The law further provides that money may be disbursed under the Fund Insurance Program only for the purpose of making payments "to and on behalf of applicants eligible for coverage…"[30]

Our review of fund coverage applications suggests that relatively few tank owner or operators actually apply to the Fund Insurance Program for coverage of cleanup costs associated with a delivery related spill, perhaps because oil delivery companies are bearing the full cost of cleanup in most cases. When such claims are made, however, and the tank owner or operator is awarded fund coverage, the statute effectively bars the department from seeking reimbursement of the fund disbursements from the delivery company responsible for the spill. See 38 MRSA §569-A, sub-§ 10 [the commissioner shall seek recovery of all sums expended from the fund *when no applicant was found by the commissioner to be eligible*] and §570 [each responsible party is jointly and severally liable for all disbursements made by the State pursuant to Fund Insurance Program *except for costs found by the commissioner to be eligible for coverage under the fund*].

One way to view this situation is that the Fund Insurance Program currently lets tank owners and operators in through the front door by inviting them to apply for coverage, and lets delivery companies in through the back door by barring the department from seeking reimbursement from them if the tank owner or operator applies for coverage. The issue for policymakers is whether this backdoor coverage is an inadvertent loophole or a deliberate

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[28] The federal financial responsibility requirements for motor carriers are found in 40 CFR §§387.1 to 387.17. The statutory authority for these regulations derives from the federal Motor Carrier Act of 1980, §§29 and 30, PL 96-296, 96th Cong. 2d Sess. (July 1, 1980). As since amended, the relevant part of this Act is now found at 49 U.S.C. § 31139. For more information about this federal law, see memorandum dated August 30, 2001 to David Lennett from Mary Sauer, Assistant Attorney General, Maine Department of Attorney General. A copy of this memo is attached to this report as Appendix 1.

[29] 38 MRSA §562-A, sub-§2.

[30] 38 MRSA §569-A, sub-§8, ¶J.

policy decision. Should delivery companies be eligible for fund coverage of costs related to a discharge that they caused? The rationale for coverage is not obvious given that they are required under the federal Motor Carrier Act to have insurance that covers costs related to discharges during the loading or off-loading of oil from their vehicles.

If the purpose of the Fund Insurance Program is to provide insurance in absence of other valid and collectible insurance for the costs of cleanup, one option for furthering that purpose is to amend the statute to give the department subrogation rights. Subrogation refers to the principle whereby an insurer that has paid a loss (e.g., the State in the case of the Fund Insurance Program) is entitled to all the rights and remedies belonging to the insured (e.g., tank owners and operators) against a third party (e.g., other insurers) with respect to the loss covered by the policy. Subrogation is standard practice in the private insurance industry and all policies include subrogation clauses.

Under a subrogation approach, the department would first make applicants for fund coverage whole by paying all eligible cleanup costs associated with the discharge, and then would pursue cost recovery by asserting the applicants' rights and remedies against third parties. The applicant, as a condition of coverage, would in turn be obligated to do whatever is necessary to assist the department in securing the right to pursue third parties. For example, if the tank owner or operator who obtained fund coverage holds commercial insurance policies that might cover the spill, they would execute the paperwork needed to secure the rights that enable the department to file a claim under the policy.

Basically, the right of subrogation would allow the department to pay claims for coverage under the Fund Insurance Program and then pursue third parties for the payments made. The exercise of this right would not require the hiring of additional staff or require the department to pay administrative costs from existing resources. There are numerous insurance claim professionals that offer subrogation recovery services and the department likely would hire one of these experienced professionals on a contingency fee basis to pursue recovery.

V. Consultation with interested parties

The department consulted with a small group of interested parties in preparing this report. The group met three times in November and December 2009. Attendees included:

- Patricia Aho, Pierce Atwood LLP;
- Leslie Anderson, Dead River Company;
- Elizabeth Armstrong, EMSOURCE;
- Ben Gilman, Maine Energy Marketers Association;
- Heather Parent, Eaton Peabody; and
- Mark St.Germain, St.Germain & Associates.

VI. Recommendations

Recommendation 1: The membership and responsibilities of the Fund Insurance Review Board should be modernized with the aim of improving its effectiveness.

There was agreement among the interested parties consulted that the makeup of the FIRB should be revised to allow recruitment of a wider range of relevant expertise. It also was agreed that the board should meet more regularly. The goal of these changes is to make the FIRB a more effective voice in advising the Legislature on statutory changes to the Fund Insurance Program.

Recommendation 2: Further discussion of fund coverage of VRAP cleanup costs should be postponed for consideration by a reconstituted Fund Insurance Review Board.

There was consensus among the interested parties consulted that the formulation of recommendations on fund coverage of VRAP costs should be postponed until the matter can be taken up by a reconstituted FIRB. Until that happens, it was agreed that it makes little sense for the department to revisit the issue with the Legislature.

Recommendation 3: The law governing the Fund Insurance Program should be amended to give the department subrogation rights.

Subrogation (see discussion on the previous page) is a tool the department could use to recover disbursements under the Fund Insurance Program where other insurance is available.

VII. Implementing legislation

Draft legislation to implement the above recommendations follows on the next page.

An Act to Improve Oversight of Disbursements from the Ground Water Oil Clean-up Fund

Proposed by the Department of Environmental Protection for consideration by the Joint Standing Committee on Natural Resources

124th Maine Legislature, Second Regular Session—2010

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 38 MRSA §568-A, sub-§2, 2nd ¶, as repealed and replaced by PL 1995, c. 361, §5, is amended to read:

The commissioner and the State Fire Marshal shall make written findings of fact when making a determination of deductible amounts under this subsection. The ~~commissioner's~~ findings may be appealed to the Fund Insurance Review Board, as provided in ~~sub~~section 568-B, subsection 5 ~~3-A~~. On appeal, the burden of proof is on the commissioner and the State Fire Marshal as to which deductibles apply.

Sec. 2. 38 MRSA §568-A, sub-§3-A, as enacted by PL 1993, c. 363, §5, is repealed.

Sec. 3. 38 MRSA §568-A, sub-§6-B, is enacted to read:

6-B. Subrogation. If eligible clean-up costs are paid under this section, the department shall be subrogated to all the applicant's rights of recovery for those costs against any person or organization and the applicant shall execute and deliver such instruments and papers and do whatever is necessary to secure such rights including without limitation, assignment of applicant's rights against any person or organization who caused the discharge or is responsible for any conditions resulting in the discharge or is responsible for any discharge on account of which the department made payment. The applicant shall do nothing to prejudice the department's rights under this paragraph. Any recovery as a result of subrogation proceedings arising out of the payments made by the department shall first be made to the department up to the amount of payments paid by the department and then to the applicant. Expenses incurred in such subrogation proceedings shall be apportioned between the department and the applicant in the proportion that each participates in the total recovery.

Sec. 4. 38 MRSA §568-B, as amended by PL 2009, c. 319, §13, is repealed and the following enacted in its place:

§568-B. Fund Insurance Review Board

1. Board established. The Fund Insurance Review Board, as established by Title 5, section 12004-G, subsection 11-A, is created to hear and decide appeals from insurance claims-related decisions under section 568-A and to monitor income and disbursements from the Ground Water Oil Clean-up Fund under section 569-A. The board consists of 10 members appointed for 3-year terms as follows:

A. Two persons representing the petroleum industry, one appointed by the President of the Senate and one by the Speaker of the House of Representatives and one of whom is nominated by the Maine Energy Marketers Association;

B. Two persons, one appointed by the President of the Senate and one by the Speaker of the House of Representatives, who have expertise in oil storage facility design and installation, oil spill remediation or environmental engineering;

C. Four members of the public, appointed by the Governor, two of whom have expertise in biological science, earth science, engineering, insurance or law;

D. The commissioner or the commissioner's designee; and

E. The State Fire Marshal or the fire marshal's designee.

The public members described in paragraph C must not be employed in or have a direct and substantial financial interest in the petroleum industry.

Members described in paragraphs A, B and C are entitled to reimbursement for direct expenses of attending meetings of the full board or meetings of the appeals panel under subsection 5.

2. Powers and duties. The Fund Insurance Review Board has the following powers and duties:

A. To hear appeals from insurance claims-related decisions of the commissioner and the fire marshal under section 568-A;

B. To monitor income and disbursements from the Ground Water Oil Clean-up Fund and adjust fees under section 569-A, subsection 5, paragraph E, as required to avoid a shortfall in the fund;

C. To review department priorities for disbursements from the Ground Water Oil Clean-up Fund and make recommendations to the commissioner on how the fund should be allocated.

D. To consult with the Finance Authority of Maine at such times as are necessary, but no less than annually, to review income and disbursements from the Waste Oil Clean-up Fund under Title 10, section 1023-L. The board, at such times and in such amounts as it determines necessary, and in consultation with the Finance Authority of Maine, shall direct the transfer of funds from the Underground Oil Storage Replacement Fund under Title 10, section 1023-D, to the Groundwater Oil Clean-up Fund;

E. To contract with the Finance Authority of Maine for such assistance as the board may require in fulfilling its duties; and

F. To adopt rules and guidelines necessary to the furtherance of its duties and responsibilities under this subchapter

3. Meetings. The Fund Insurance Review Board shall meet six times per year unless the board votes not to hold a meeting. Action may not be taken unless a quorum is present. A quorum is 5 members.

4. Chair. The board annually shall choose a member to serve as chair of the committee.

5. Appeals to board. An applicant aggrieved by an insurance claims-related decision under section 568-A, including but not limited to decisions on eligibility for coverage, eligibility of costs and waiver and amount of deductible, may appeal that decision to the Fund Insurance Review Board. The public members of the board shall hear and decide the appeal. Except as provided in review board rules, the appeal must be filed within 30 days after the applicant receives the decision. The appeals panel must hear an appeal at its next meeting following receipt of the appeal unless the appeal petition is received less than 30 days before the meeting or unless the appeals panel and the aggrieved applicant agree to hear the appeal at a different time. If the appeals panel overturns the decision, reasonable costs, including reasonable attorney fees, incurred by the aggrieved applicant in pursuing the appeal to the review board must be paid from the fund. Reasonable attorney fees include only those fees incurred from the time of a claims-related decision forward. Decisions of the appeals panel are subject to judicial review pursuant to Title 5, chapter 375, subchapter VII.

6. Report; adequacy of fund. On or before February 15th of each year, the Fund Insurance Review Board, with the cooperation of the commissioner, shall report to the joint standing committee of the Legislature with jurisdiction over natural resources matters on the department's and the board's experience administering the Ground Water Oil Clean-up Fund, clean-up activities and 3rd-party damage claims. The report must include an assessment of the adequacy of the fund to cover anticipated expenses and any recommendations for statutory change. The report also must include an assessment of the adequacy of the Underground Oil Storage Replacement Fund and the Waste Oil Clean-up Fund to cover anticipated expenses and any recommendations for statutory change. To carry out its responsibility under this section, the board may order an independent audit of disbursements from the Groundwater Oil Clean-up Fund, the Underground Oil Storage Replacement Fund and the Waste Oil Clean-up Fund.

Sec. 5. 38 MRSA §570-H, as amended by PL 2007, c. 292, §37, is repealed.

Sec. 6. Report. The Fund Insurance Review Board shall review and evaluate the appropriateness of disbursements from the Ground Water Oil Clean-up Fund to pay for investigations and cleanup of tank-related oil discharges at voluntary response action program sites under the Maine Revised Statutes, Title 38, section 343-E. By January 15, 2012, the board shall submit to the Joint Standing Committee on Natural Resources a report detailing its findings and recommendations. The committee may report out legislation to the First Regular Session of the 125th Legislature relating to the report.

SUMMARY

The bill gives the Department of Environmental Protection subrogation rights for the purpose of facilitating recovery of amounts disbursed by the department under the insurance provisions of the Ground Water Oil Clean-up Fund (the fund). The fund insures owners and operators of oil storage facilities for the costs of oil discharges up to $1 million per incident.

Subrogation refers to the principle under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy. Subrogation is standard practice in the private insurance industry.

The bill consolidates the responsibilities of the Fund Insurance Review Board in a single section and reconstitutes the makeup of the 10-member board for the purpose of improving citizen oversight of insurance payments from the Ground Water Oil Clean-up Fund.

APPENDIX 1

State of Maine
DEPARTMENT OF ATTORNEY GENERAL

Memorandum

To: Dave Lennett, DEP
Scott Whittier, DEP

From: Mary M. Sauer, Assistant Attorney General

Date: August 30, 2001

Subject: Federal DOT requirements on minimum levels of financial responsibility for motor carriers of property

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ISSUE

Whether federal Department of Transportation regulations on minimum levels of financial responsibility for motor carriers of property apply to accidents occurring during loading and unloading of oil.

SUMMARY

The MCS-90 endorsement is required by federal regulation for motor carriers of property. An MCS-90 endorsement on an insurance policy requires that an insurer pay any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles. Public liability includes liability for bodily injury, property damage, and environmental restoration. The minimum insurance required for for-hire and private carriage where oil is transported is $1,000,000. In most states including Maine, the general rule is that "use" of motor vehicles includes accidents occurring during loading and unloading of the commodity transported. In a standard commercial policy, a motor carrier would be insured for accidents resulting from ownership, maintenance, or use. In the case of a tank overfill caused by negligence by a motor carrier, the carrier's insurance policy would likely provide coverage for such an accident (subject to any specific exclusions in the policy), and, in any case, the MCS-90 endorsement would require the insurer to pay any final judgment recovered against the insured for bodily injury, property damage, or environmental restoration. The insurer has a right to reimbursement by the insured for any payment on account of any accident or claim involving a breach of the terms of the policy, and for any payment the insurer would not have been obligated to make under the provisions of the policy except for the endorsement.

ANALYSIS

Regulatory Background

Federal DOT regulations require minimum levels of financial responsibility for motor carriers of property. These regulations are found at 49 CFR §§ 387.1 to 387.17 (attached).

The statutory authority for these regulations derives from the Motor Carrier Act of 1980, §§ 29, 30. PL 96-296, 96th Cong. 2d Sess. (July 1, 1980). As since amended, the relevant part of this Act is now found at 49 U.S.C. § 31139, Minimum financial responsibility for transporting property (attached). The federal statute requires the Secretary of Transportation to prescribe regulations to require minimum levels of financial responsibility sufficient to satisfy liability amounts established by the Secretary covering public liability, property damage, and environmental restoration for the transportation by motor vehicle in interstate or intrastate commerce of oil in addition to hazardous materials, hazardous substances, and hazardous wastes. 49 U.S.C. § 31139(c)(1). The level of financial responsibility established for the transportation of oil shall be at least $1,000,000 for for-hire and private carriage in interstate or foreign commerce in any quantity, or in intrastate commerce, in bulk only. Id. § 31139(c)(3)(A).

The federal DOT promulgated its regulations on financial responsibility for motor carriers in 1981. 46 Federal Register 30974 (June 11, 1981). "The purpose of these regulations is to create additional incentives to motor carriers to maintain and operate their vehicles in a safe manner and to assure that motor carriers maintain an appropriate level of financial responsibility for motor vehicles operated on public highways." 49 CFR § 387.1.

The regulations apply to: (a) for-hire motor carriers operating motor vehicles transporting property in interstate or foreign commerce, and (b) motor carriers operating motor vehicles transporting hazardous materials, hazardous substances, or hazardous wastes in interstate, foreign, or intrastate commerce. Id. § 387.3. The term "hazardous materials" includes oil for the purpose of transportation. 49 CFR §§ 172.101, 387.9. With certain exceptions, the regulations do not apply to a motor vehicle that has a gross vehicle weight rating of less than 10,000 pounds. Id. § 387.3(c). The rules do not apply to the transportation of non-bulk oil, or non-bulk hazardous materials, substances, or wastes in intrastate commerce. Id. § 387.3(c)(2).

Under the regulations, no motor carrier shall operate a motor vehicle until the motor carrier has obtained and has in effect the minimum levels of financial responsibility as set forth in the regulations. Id. § 387.7(a). Proof of the required financial responsibility shall be maintained at the motor carrier's principal place of business. Id. § 387.7(d). Proof includes "Endorsement(s) for Motor Carrier Policies of Insurance for Public Liability Under Sections 29 and 30 of the Motor Carrier Act of 1980" (Form MCS-90) (attached) issued by an insurer. Id. § 387.7(d)(1). This requirement also may be satisfied by a surety bond (Form MCS-82) or self-insurance. Id. § 387.7(d)(2), (3). The minimum level of financial responsibility is $1,000,000 for oil listed in 49 CFR 172.101, for for-hire and private carriage in interstate or foreign commerce in any quantity, or in intrastate commerce in bulk only. Id. § 387.9.

Endorsements for insurance policies and surety bonds must be in the form prescribed. Id § 387.15. Illustration I in the rule contains approved Form MCS-90, titled "Endorsement for Motor Carrier Policies of Insurance for Public Liability Under Sections 29 and 30 of the Motor Carrier Act of 1980." Form MCS-90 contains the following definitions:

- Accident includes continuous or repeated exposure to conditions which results in bodily injury, property damage, or environmental damage which the insured neither expected or intended.

- Bodily Injury means injury to the body, sickness, or disease to any person, including death resulting from any of these.

- Environmental Restoration means restitution for the loss, damage, or destruction of natural resources arising out of the accidental discharge, dispersal, release or escape into or upon the land, atmosphere, watercourse, or body of water, of any commodity transported by a motor carrier. This shall include the cost of removal and the cost of necessary measures taken to minimize or mitigate damage to human health, the natural environment, fish, shellfish, and wildlife.

- Property Damage means damage to or loss of use of tangible property.

- Public liability means liability for bodily injury, property damage, and environmental restoration.

Id § 387.15. Under MCS-90,

> the insurer . . . agrees to pay, within the limits of liability described herein, any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles subject to the financial responsibility requirements of Sections 29 and 30 of the Motor Carrier Act of 1980 regardless of whether or not each motor vehicle is specifically described in the policy and whether or not such negligence occurs on any route or in any territory authorized to be served by the insured or elsewhere. Such insurance as is afforded, for public liability, does not apply to injury to or death of the insured's employees while engaged in the course of their employment, or property transported by the insured, designated as cargo. It is understood and agreed that no condition, provision, stipulation, or limitation contained in the policy, this endorsement, or any other endorsement thereon, or violation thereof, shall relieve the company from liability or from the payment of any final judgment, within the limits of liability herein described, irrespective of the financial condition, insolvency or bankruptcy of the insured. . . . The insured agrees to reimburse the company for any payment made by the company on account of any accident, claim, or suit involving a breach of the terms of the policy, and for any payment that the company would not have been obligated to make under the provisions of the policy except for the agreement contained in this endorsement.

Id.

Application of Federal Requirements to Loading/Unloading by Motor Carriers

Financial responsibility for motor carriers required by federal regulations appears available to cover oil spills caused during loading and unloading activities of motor carriers of oil for the reasons provided below.

Nothing in the MCS-90 endorsement or the federal rule expressly mentions loading or unloading of oil.[31] However, cleanup costs for discharges of oil from loading or unloading would likely fall within the definition of "environmental restoration" as "restitution for the loss, damage, or destruction of natural resources arising out of the accidental discharge . . . upon the land . . . of any commodity transported by a motor carrier." MCS-90.

Furthermore, the MCS-90 endorsement requires payment by the insurer of any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles. Similarly, under the language of a standard commercial policy, a motor carrier would be covered for accidents resulting from the ownership, maintenance, or use of a covered auto. See Motor Carrier Coverage Form, CA 00 20 07 97, Insurance Services Office, Inc.; Business Auto Coverage Form, CA 00 01 07 97, Insurance Services Office, Inc. In most states including Maine, the general rule is that "use" of motor vehicles includes accidents occurring during loading and unloading of the commodity transported. See Union Mutual Fire Insurance Co. v. Commercial Union Insurance Co., 521 A.2d 308, 310-11 (Me. 1987) (holding that utilization of vehicle for hunting trip was proper use of vehicle and that removal of firearm from vehicle was reasonable and proper use of vehicle). See also 7 Am. Jur. 2d Automobile Insurance, § 94 "Loading and Unloading" (1997); 15 A.L.R. 4th 10, "Automobile Liability Insurance: What Are Accidents or Injuries 'Arising Out of Ownership, Maintenance, or Use' of Insured Vehicle," §§ 23, 25; Couch on Insurance (3rd ed.) § 119:52 "Loading and Unloading." There must be a causal relationship between the accident or injury and the use of the vehicle. Union Mutual, 521 A.2d at 310. The fact that a policy does not specifically define the term "use" as loading and unloading is not determinative. Id. at 311, n.1. When an insurance policy is silent on this point, loading and unloading constitutes use of an insured motor vehicle. Id.; American Oil Co. v. Hardware Mutual Casualty Co., 408 F.2d 1365, 1367-68 (1st Cir. 1969) (upholding district court's construction of insurance policy that when a vehicle is normally used to transport oil, it is reasonable construction of policy that parties intended term "use" to include loading and unloading because these activities are essential to use of vehicle for transport of oil).

In the case of an oil tank overfill caused by negligence by a motor carrier, a motor carrier's insurance policy would likely provide coverage for such an accident (subject to any specific exclusions in the policy). Even if the accident is not covered by the policy as

[31] It is instructive, however, to examine the definition of "transportation" in federal DOT statute. Although the term is not defined in the section containing the minimum financial responsibility requirements, it is defined in another subtitle governing interstate transportation, Subtitle IV. "Transportation" includes "(A) a motor vehicle . . . related to the movement of passengers or property . . . ; and (B) services related to that movement, including arranging for, receipt, delivery, elevation, transfer in transit . . . storage, handling, packing, unpacking, and interchange of passengers and property." 49 U.S.C. §13102(19). This definition shows the DOT's broad interpretation of "transportation" as including delivery, packing, and unpacking. Before statutory amendments in the mid-1990s, the financial responsibility provision was included in the same subtitle to which the definition of "transportation" applied. See U.S.C.A. §§ 10102, 10927 (1994).

between the insured and the insurer for some reason, the MCS-90 endorsement would require the insurer to pay any final judgment[32] recovered against the insured for bodily injury, property damage, and environmental restoration resulting from negligence in the unloading or loading of the vehicle. The insurer has a right to reimbursement by the insured for any payment on account of any accident or claim involving a breach of the terms of the policy, and for any payment the insurer would not have been obligated to make under the provisions of the policy except for the endorsement.

[32] The Fifth Circuit Court of Appeals has found that use of the term "final judgment" in MCS-90 does not preclude an insurer from obtaining reimbursement from an insured after the insurer settles a court case. T.H.E. Insurance Co. v. Larsen Intermodal Services, 242 F.3d 667, 676 (5th Cir. 2001) ("If the insurer must pay a final judgment under the MCS-90, there is no reason why it could not seek a favorable settlement rather than risk litigating to a final judgment that could be more onerous. . . . Moreover, we note that the reimbursement provision of the MCS-90 permits the insurer to recover 'any payment,' not just final judgments, that the insurer would not have been obligated to pay except for the agreement contained in the MCS-90.").