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December 3, 2013

**VIA FEDEX AND EMAIL**

Mayor and Members of the City Council  
City of South Portland  
25 Cottage Road  
South Portland, ME 04106

Re: Proposed Moratorium on Development Proposals Involving Oil Sands/Tar Sands  
Products in South Portland

Dear South Portland City Council:

The South Portland City Council is considering a proposed moratorium on “development proposals involving the loading of oil sands/tar sands products onto marine tank vessels docking in South Portland” (“Moratorium”). The American Petroleum Institute (“API”) objects to the Moratorium and recommends that the City Council not adopt the proposal. API is a trade association representing more than 500 companies involved in all aspects of the oil and natural gas industry, including the development of oil sands (also known as “tar sands”) as a future energy supply for the United States. Many API members would be directly impacted by the proposed Moratorium, including members that operate and rely on facilities in South Portland that could be used or adapted for the future transport and handling of oil sands products.

The stated purpose of the proposed Moratorium is to prohibit the transport of oil sands products through South Portland for an indefinite period of at least 180 days, to provide time for the City Council to consider and draft amendments to the South Portland Code of Ordinances to protect the public from purported “health and safety risks including . . . the potential adverse environmental, public health and public safety effects of an oil sands/tar sands product discharge and air emissions related to both an oil sands/tar sands product discharge and the loading of oil sands/tar sands products onto marine tank vessels if not properly regulated.” The Moratorium would bar city officials from considering or processing “any new development proposals involving the loading of oil sands/tar sands products onto marine tank vessels docking in South Portland after the November 6, 2013 applicability date,” and would subject any person or organization that engages in “loading of oil sands/tar sands products onto marine tank vessels docking in South Portland” in violation of the Moratorium to immediate fines and penalties. The proposed Moratorium was introduced at a City Council workshop on November 6, 2013, within hours of the November 5 rejection of the proposed Watershed Protection Ordinance (“WPO”). API is disappointed that the City Council has chosen to propose the Moratorium in this precipitous manner, without taking more time to consider the voters’ response to and rejection of the WPO and the facts underlying the purported need for the Moratorium.

Like the failed WPO, the Moratorium is unjustified and unnecessary. API and its members welcome the opportunity to work with the City Council to address the concerns and questions identified in the proposed Moratorium, and to explain why the stated concerns that the shipping, handling, and storage of oil sands products pose greater environmental or safety risks than the handling of other petroleum products are unfounded. There is no need for a Moratorium for such discussions to occur, however, nor is there any evidence that existing federal and state environmental and safety laws and regulations are inadequate to regulate the transport and handling of oil sands products in South Portland or to protect public health and safety. There is certainly no reason to impose an immediate, and potentially indefinite, prohibition on city officials from even considering any proposals and applications that may be submitted for the transport and handling of oil sands products in South Portland.

Moreover, the proposed Moratorium could cause substantial harm to local, state, and national interests. The development of oil sands promotes North American energy security and brings substantial economic benefits to the State of Maine and the entire nation. The Moratorium, and any permanent ordinances drafted and adopted pursuant to it that would prohibit or unduly restrict the transport and handling of oil sands products in South Portland, would hinder the development of oil sands. Delaying or prohibiting this development could harm the State of Maine and the nation. Such a ban would also have a profound impact on existing petroleum-related businesses within South Portland. These businesses are well-situated to handle oil sands products, but would be unable to do so under the Moratorium and any permanent ban that may be enacted during the Moratorium. This would prevent these businesses from adapting to current and future energy trends and the increasing importance of oil sands, and could therefore undercut the viability of all oil-related industry within South Portland, to the detriment of the many persons and businesses that rely on them.

Finally, like the WPO before it, the Moratorium is an attempted end-run around federal and state policy, and cannot be adopted because it is contrary to state law, it is preempted by federal and state law, and it violates the U.S. Constitution. More specifically, the Moratorium should not be adopted for the following reasons:

*First*, there is no evidence that the Moratorium is necessary “[t]o prevent a shortage or an overburden of public facilities,” or that “the application of existing comprehensive plans, land use ordinances or regulations or other applicable laws . . . is inadequate to prevent serious public harm,” and thus the Moratorium cannot be lawfully enacted under Maine law. *See* 30-A M.R.S. § 4356. There are no applications currently pending that seek approval to reverse the flow of the existing Portland-Montreal pipeline or to develop and operate the facilities necessary to load oil sands products into tankers in South Portland. Furthermore, there is no evidence that any such applications would overburden local resources and could not be adequately handled by local, state, and federal agencies. Any such applications that are made in the future can and should be addressed on an individual basis pursuant to all applicable laws and regulations, as they have been in the past.

Similarly, the facts do not support the proposed Moratorium’s claims that the transport and handling of oil sands products may pose greater environmental and safety risks than petroleum products from other sources, and that the transport and handling of oil sands products in South Portland should be banned pending further study. The characteristics of oil sands products, including diluted bitumen, and the potential environmental and safety impacts of oil sands discharges have been subject to extensive study and consideration. For example, a study required by federal law and sponsored by the federal Pipeline and Hazardous Materials Safety Administration (“PHMSA”) was recently completed by a

committee of experts convened by the National Research Council of the National Academy of Sciences.<sup>1</sup> The committee determined that diluted bitumen does not have unique properties that make it “more likely than other crude oils to cause internal damage to transmission pipelines from corrosion or erosion” or “to cause damage . . . from external corrosion or cracking or from mechanical forces,” and that “[p]ipeline O&M practices are the same for shipments of diluted bitumen as for shipments of other crude oils.”<sup>2</sup> An October 2013 report that looked at these issues cited the NRC Report and three other studies conducted since 2011, and concluded that “pipeline corrosion is well understood,” and that there is “no evidence that oil sands crudes subject pipelines to greater risk of damage or spills than other crudes.”<sup>3</sup> The proposed Moratorium relies on concerns that the transport of oil sands products through the existing Portland-Montreal pipeline may pose greater risks than existing uses, yet such concerns have been studied and found to lack any factual basis.

The proposed Moratorium also claims that the possible cleanup challenges posed by a potential discharge of oil sands products have not been adequately studied or understood. This issue, however, has likewise been carefully studied and is being addressed at the national and state level. For example, the University of New Hampshire’s Center for Spills in the Environment hosted a meeting of experts in Portland in December 2012, in cooperation with the Maine Department of Environmental Protection and the U.S. Environmental Protection Agency that collected expertise from a wide range of sources, drew on past experiences, and provided training and information on oil sands characteristics and cleanup.<sup>4</sup> The claim that potential cleanup challenges are not being addressed at the national and state level, and that an indefinite ban on oil sands in South Portland is needed to allow the City to conduct its own review, is not supported by the facts.

In short, there is no indication that the proposed Moratorium is necessary to “prevent a shortage or an overburden of public facilities” or “to prevent serious public harm.” Thus, the Moratorium is not justified and does not meet the requirements for development moratoria imposed by Maine state law. If enacted, it would be subject to legal challenge and likely overturned on that basis as well as for the reasons discussed below. Any local-level issues associated with future proposals to transport oil sands through South Portland that fall within the City’s regulatory scope and authority can and should be handled through the appropriate regulatory channels.

*Second*, the Moratorium is invalid because it is preempted by federal law. The Pipeline Safety Act (“PSA”) completely preempts state authorities, including municipalities, from regulating in the area of interstate pipeline safety. 49 U.S.C. § 60104(c). The purpose of the PSA is “to provide adequate protection against risks to life and property posed by pipeline transportation and pipeline facilities.” *Id.*

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<sup>1</sup> TRB Special Report 311: Effect of Diluted Bitumen on Crude Oil Transmission Pipelines (2013) at 24, available at [http://www.nap.edu/catalog.php?record\\_id=18381](http://www.nap.edu/catalog.php?record_id=18381).

<sup>2</sup> *Id.* at 2.

<sup>3</sup> IHS CERA Special Report, Critical Questions for the Canadian Oil Sands (October 2013), available at <http://www.ihs.com/pdfs/critical-questions-oil-sands-oct-2013.pdf>. See also Been, “Comparison of the Corrosivity of Dilbit and Conventional Crude,” prepared for Alberta Innovates-Technology Futures (September 2011), available at [http://ai-ees.ca/media/6860/1919\\_corrosivity\\_of\\_dilbit\\_vs\\_conventional\\_crude-nov28-11\\_rev1.pdf](http://ai-ees.ca/media/6860/1919_corrosivity_of_dilbit_vs_conventional_crude-nov28-11_rev1.pdf); Papavinasam et al., Corrosion Conditions in the Path of Bitumen from Well to Wheel,” NACE 2012 Northern Area Eastern Conference, (October 2012), available at <http://www.nrcan.gc.ca/minerals-metals/materials-technology/4542>; Penspen Integrity, “State of the Art Report: Dilbit Corrosivity” (February 2013), available at [http://www.cepa.com/wp-content/uploads/2013/02/FINAL-Penspen-Report-Dilbit\\_Corrosivity\\_Final.pdf](http://www.cepa.com/wp-content/uploads/2013/02/FINAL-Penspen-Report-Dilbit_Corrosivity_Final.pdf).

<sup>4</sup> Alberta Oil Sands Training Meeting Information and Resources, available at <http://www.crrc.unh.edu/workshop/cse/alberta-oil-sands-training>.

§ 60102(a)(1). The PSA assigns to the federal Department of Transportation the authority to “prescribe minimum safety standards for pipeline transportation and for pipeline facilities.” *Id.* § 60102(a)(2). The PSA precludes state authorities, including municipalities, from “adopt[ing] or continu[ing] in force safety standards for interstate pipeline facilities or interstate pipeline transportation.” *Id.* § 60104(c).

The proposed Moratorium attempts to regulate interstate pipeline safety by imposing an indefinite ban on projects involving oil sands products in South Portland, including the shipment of oil sands products through existing pipelines, because of purported pipeline safety concerns about the risks posed to public health and natural resources. The Moratorium is expressly designed to address purported risks to “the health, safety, and welfare of the City and its citizens,” to “South Portland’s natural resources and citizens,” and to “land resources,” “drinking water,” and “marine and aquatic resources,” and relies on the claim that existing applicable ordinances and laws are “not adequate to prevent serious public harm.” The focus on pipeline safety is underscored by the reference to two incidents purportedly involving discharges of diluted bitumen in other states, and the claim that such spills may have occurred because the pipelines “had not been specifically designed to carry oil sands.” The proposed Moratorium is based on the flawed premise that current laws and regulations are inadequate to address pipeline safety issues associated with oil sands products, and that South Portland has the authority to do so by banning oil sands products from the City and potentially implementing a permanent ordinance addressing oil sands pipeline safety. Because the PSA completely precludes municipalities and other state authorities from imposing pipeline safety standards, restrictions, and requirements of their own, the proposed Moratorium is not a proper vehicle for the City to address any perceived pipeline safety issues. If enacted, the Moratorium would be challenged and likely struck down as preempted by the PSA.

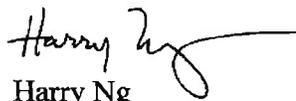
*Third*, the Moratorium, like the failed WPO, is invalid under Maine law because it is preempted by state law and regulations related to the transfer and transportation of oil and petroleum products. State law prohibits municipalities from enacting ordinances that conflict with the Maine Oil Discharge Prevention Law or any rule or order issued under that law. 38 M.R.S. § 556. Among other things, the Moratorium indefinitely prohibits activities and facilities that are currently authorized or may in the future be authorized under permits and orders issued under the law by the Maine Department of Environmental Protection, and is thus contrary to and preempted by the Maine Oil Discharge Prevention Law.

*Fourth*, the Moratorium violates the Commerce Clause of the U.S. Constitution, which prohibits states and municipalities from discriminating against or unduly burdening interstate commerce. The Moratorium discriminates against interstate commerce by banning – perhaps indefinitely – the handling and transport of oil sands products that come exclusively from out-of-state sources, while allowing the transport and handling of other petroleum products. There is no factual basis to support this discrimination. The Moratorium places an undue burden on interstate commerce by precluding the use of existing pipeline and oil terminal facilities to handle the interstate flow of oil sands products from Canada through Maine to other destinations. Given limited existing available pipeline resources, the effects of such a ban on interstate commerce could be severe. Yet, the City has not demonstrated an adequate local interest in or need for such a ban. Any valid, local environmental safety concerns that are not preempted by federal or state law and regulations should be addressed by applying the same standards to facilities and activities related to oil sands products that apply to all other petroleum-related facilities and activities. Instead, the Moratorium, if enacted as an ordinance, would indefinitely ban the shipment of oil sands products through South Portland.

*Finally*, to the extent the Moratorium is an attempt to impose a national level economic and energy policy regarding oil sands through a local ordinance that would effectively ban or restrict the import of Canadian oil sands products to the northeastern United States, it is subject to challenge as an impermissible attempt to interfere with federal foreign affairs and foreign commerce powers. With respect to U.S. and Canada relations, the U.S. State Department notes that the United States and Canada “share the world’s largest and most comprehensive trading relationship,” that Canada is the “largest foreign supplier of energy to the United States,” that “[r]ecognition of the commercial viability of Canada’s oil sands has made it the world’s third largest holder of oil reserves,” and that Canada is the only non-OPEC member of the top five holders of oil reserves in the world.<sup>5</sup> Through the North American Free Trade Agreement, the Regulatory Cooperation Council, and other trade agreements and efforts the United States has sought to promote free trade and reduce trade barriers between the two countries, including the elimination of “unnecessary regulatory differences and duplicative actions that hinder cross-border trade and investment.”<sup>6</sup> The free trade relationship between the United States and Canada, and the import of oil sands products from Canada, is critical for the U.S. national economy, U.S. energy security, and U.S. bilateral and multilateral diplomacy. The City of South Portland cannot be permitted to enact a local moratorium whose purpose and intent is to bar the import of oil sands products from Canada. The Moratorium, and any other similar measures enacted by other states or local governments, would contradict national-level foreign policy, create friction in the vital U.S.-Canada relationship, and impermissibly undercut the national government’s ability to conduct foreign policy and diplomacy at the national level with Canada. For these reasons, the Moratorium could be found in violation of the foreign affairs power and Foreign Dormant Commerce Clause even if it were not directly preempted by or in conflict with federal level agreements and actions.

In sum, the Moratorium is ill-advised, unnecessary, and unsupported, discriminates against the rights and interests of API’s members, impermissibly encroaches on exclusive areas of federal and state law, and does not meet requirements for development moratoria under Maine law. If enacted, the Moratorium, like the failed WPO, would face strong legal challenges and would be found invalid under state and federal law. For these reasons, the City Council should vote against enacting the Moratorium.

Sincerely yours,



Harry Ng  
Vice President, General Counsel  
& Corporate Secretary  
American Petroleum Institute

cc: Tex Haeuser, City Planner  
James Gailey, City Manager  
Sally Daggett, Esq., City Attorney

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<sup>5</sup> U.S. Department of State Fact Sheet, U.S. Relations With Canada (August 23, 2013), available at <http://www.state.gov/r/pa/ei/bgn/2089.htm>.

<sup>6</sup> *Id.*