CAEPLA
Canadian Association of Energy and Pipeline Landowner Associations
Landowners want in!

April 18, 2016

Chantal Briand, Regulatory Approaches
National Energy Board
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Re: National Energy Board Proposed Regulations for Pipeline Damage Prevention in Canada Gazette, Part I, 19 March 2016.

Dear Ms. Briand,

After reviewing the proposed update of National Energy Board regulations for pipeline damage prevention I provide the following comments.

I will though begin this submission with the two questions I use to end the submission in the hopes that it will raise awareness by the Minister and his staff at Natural Resources Canada:

- *What will the resolution of the regulatory gaps in the Pipeline Safety Act say about this government's commitment to the modernization of the NEB and its commitment on safety?*

- *Will this be a modernization of the National Energy Board and some of its enacting legislation or simply a further retreading of a captured regulator?*

CAEPLA has always put pipeline safety and environmental Damage Prevention first. That is what CAEPLA advocates for and negotiates in the contractual settlements we have spearheaded on many pipeline projects over the past two decades.

CAEPLA and its founding directors and member associations have consistently provided our views on these issues, for more than 20 years, and again take this opportunity to comment, but are frustrated by the lack of landowner consultation in the past and today the lack of gravity given to CAEPLA's jurisprudence regarding landowner safety and property rights in relation to pipelines on their land.

We do find it challenging that the NEB does not realize the suggestions CAEPLA provides puts responsibility where it belongs, with the companies, creating far safer pipelines and increased pipeline company transparency and accountability regarding the safety of their facilities. Not just for the directly affected landowners we represent, but would significantly increase public safety with the additional outcome of increased public trust in the National Energy Board.

Having said this, I again attach our faxed submission letter dated November 13, 2015 from CAEPLA's legal counsel on our behalf. I suggest that the National Energy Board make an attempt to understand the significance of the issues we address and our proposed resolution of those issues in context of the Damage Prevention Regulations. If the NEB and NRCan were to review CAEPLA's past input on Damage Prevention Regulations a consistency in the proposals submitted is easily identified.

CAEPLA finds it disconcerting that the NEB has been tasked with handling discussions of legislative and regulatory change regarding Damage Prevention Regulations in relation to the Pipeline Safety Act Legislation. The National Energy Board has, since 1996, claimed it has no influence on the creation of legislation or the enactment of regulations, which is the responsibility of Natural Resources Canada (NRCan). The NEB has claimed (as per the past chairman) it can only do what the enacting legislation allows. My understanding of the legislation is that the Minister of Natural Resources is responsible, making the minister and NRCan responsible for legislative and regulatory change. This removes any conflict of interest or bias from the NEB in developing its own legislation and regulations.

CAEPLA also has concerns about the competing roles that the NEB claims to hold and the lack of credibility these conflicts of interest lend to this process.

The NEB claims to be a facilitator, a regulator and an ombudsman for landowners. These roles are all competing and in today's environment are easily seen as such. Pipelines and the NEB are no longer out of sight out of mind.

With today's public awareness, how can this government and NRCan continue to allow a body, created to facilitate pipeline construction, providing financial benefit to private industry through Right of Entry and land restrictions (which allows externalization of pipeline company responsibilities), be given the responsibility to create clearer Damage Prevention Regulations in the public interest? The NEB does not understand the predicament it has created for this government and as you can see below, simply is retreading its outdated safety initiatives.

I am also attaching a copy of the Affidavit I provided in a Class Action Lawsuit concerning Section 112 of the National Energy Board Act to give further gravitas to Mr. Goudy's submission provided on CAEPLA's behalf last fall. We continue to stand behind the views expressed in Mr. Goudy's letter and think they need to be more seriously considered and accurately represented in these proposed amendments. The NEB chooses to continue to do the same thing over and over….expecting a different result.

I will highlight a few things we have noted in the amendments as gazetted:

The Restricted Area

The Pipeline Safety Act effectively negated the 30 metre "Safety Zone" (originally called the Control Zone) and rather than take this opportunity to provide a more effective safety initiative to prevent damage to pipelines, the NEB has simply recreated the zone providing the same benefits to pipeline companies rather than seriously addressing the safety issue. The proposed regulatory change simply

continues the 30 metre zone (**an interest in the land**), but slightly reduces the size of the "taking" by moving the edge to the center of the pipe rather than the edge of the easement.

A zone that **most** people do not understand, likely cannot identify, impacts neighbouring properties, causes confusion, is simply a land grab and further exasperates pipeline safety.

When confronted by an NEB employee responsible for safety issues at a conference in 2000 he asked me why CAEPLA found the 30 metre "control" zone so offensive. For clarity I asked him why it was created. He stated, "In western Canada landowners have a hard time identifying where the pipeline is and so we wanted to create this broader area of restrictions to protect the pipeline".

I was astonished by this explanation. I simply responded, "If the landowner or his contractor cannot identify where the pipeline is, then how will they know where the control zone is? Further, the NEB has never directly contacted landowners to make them aware of this added restriction (and has no mandate to) nor forced the companies to claim the zone as part of their easement rights so that it would be attached to land title. Therefore the zone is not registered on title and the majority of landowners and the public know nothing about it. It seems completely irresponsible and puts everyone at risk." His jaw dropped and he said, "We didn't think of that." It would appear the NEB continues not to think. Even back then CAEPLA suggested a simple One Call system as the best solution. **A landowner would call for a locate before they dig taking any guesswork out of the decision and thereby providing safety.**

In other words, the 30 metre zone was an archaic piece of legislation, created before One Call systems were prevalent and was simply a taking of an interest in land that allowed pipeline companies to continue to poorly mark their pipeline route, resulting in landowner risk and the transfer of industry's safety responsibilities to landowners.

Confusion and angst is created because the NEB/NRCan is enacting a "taking of interest" in property without notice or compensation. The conundrum is NRCan can enact the taking, but the NEB cannot directly notify the landowners of the taking. What further frustrates this initiative is that this taking is also not registered on title, providing no forewarning or identification of the limited property rights or safety issues to landowners purchasing property with pipelines on it.

The 30 metre Zone is a controversial, misunderstood, poorly instituted, poorly promoted taking of interest in land that ultimately compromises pipeline Damage Prevention. **A simple One Call system provides clarity on responsibilities: who to contact, while at the same time would provide safety for whole properties, families and the public without the taking of property.**

I suggest that NRCan and the Minister need to get this right, with this legislation, to avoid confusion and future lawsuits. There is an understanding that past lawsuits concerning Section 112 were directed to the wrong defendants. With the development of the Pipeline Safety Act and recreation of the 30 metre Zone and the continued controversies surrounding who is responsible for the taking, reconsideration of defendant will be under study.

Power Operated Equipment

Under the current NEB Act, Section 112 prohibits power-operated excavation within the regulated area (30 m control zone) without Board approval or company permission. Under the new Pipeline Safety Act, it is "ground disturbance" that is prohibited without permission. Although there are some exceptions built into the definition of "ground disturbance" in Section 2 of the Pipeline Safety Act, there is nothing stated about use of power-operated equipment versus non-power-operated equipment.

In practice, there is likely not much difference between what is caught by "excavation" and what is caught by "ground disturbance", but under the new regime it won't matter whether you're digging by hand or using power-operated equipment. If you're digging a hole deeper than 1 foot with a shovel anywhere within 30 m of a pipeline, you will need written consent from the company (or, alternatively, an order from the NEB). This creates many potential problems for landowners.

As one of our advisors pointed out, "Could you imagine if you dug a 2 foot hole 29 m away from a pipeline on your property without having prior written permission from the pipeline company or an order from the NEB? Keep in mind that under the DPRs Part II, pipeline companies have a positive duty to report immediately to the NEB every contravention of the Damage Prevention Regulations. And also keep in mind that landowners who contravene the regulations face administrative monetary penalties."

Obviously an exemption for non-power-operated excavation needs to be maintained. **But again a simple One Call system resolves this issue also**.

Obligations Respecting Certain Locations

Agricultural activity

7 Even if the condition set out in paragraph 13(1)(a) of the National Energy Board Pipeline Damage Prevention Regulations – Authorizations is met, when the operation of vehicles or mobile equipment across a pipeline at specific locations for the purposes of performing an agricultural activity could impair the pipeline's safety or security, the pipeline company must identify those locations and notify the following persons in writing of those locations:

(a) landowners of the specific locations in question; and
(b) persons engaged in agriculture that raise livestock or grow crops, rent or lease the land or work as service providers or employees at the specific locations in question.

This seems to go some extent toward the framework that CAEPLA had proposed to the NEB in our November submission. In that framework, companies would be required to identify locations where agricultural activities could not be conducted and then take steps to correct the pipeline so that activities could be conducted. Where changes to the pipeline could not be undertaken (where it was impracticable), the company would have to provide clear written direction on any restrictions and would either have to mitigate or have to compensate for any resulting damage or loss.

What the NEB has done, it seems, is to empower companies to refuse to permit crossing of the pipeline with vehicles or mobile equipment in specified locations, with a requirement to notify landowners and

other individuals of the restriction, but with nothing else beyond that. The NEB regulation would effectively authorize companies to prohibit crossing the pipeline with vehicles or mobile equipment for agricultural activities, even in those instances that meet the requirements of Section 13 of the DPRs (Part I) (where the loaded axle weight and tire pressures of the vehicle or mobile equipment are within the manufacturer's approved limits and operating guidelines), without spelling out any requirements to deal with the consequences of the prohibition.

So the company comes along and says – "Sorry, you're not going to be able to drive your equipment over this part of your farm because our pipe is too shallow, too old, etc." You are given notice of this and then you will be prohibited from operating vehicles or mobile equipment over the specified area unless you get specific permission from the company or get an order from the NEB. That's all fine, but our question is whether the factors that make the pipeline unsafe to cross will be mitigated (lowering the pipe or replacing it) and if not will the landowner be made "whole".

There's nothing in the regulations that compels the company to fix the situation to allow for continued farming activities or as an alternative compensation. Another situation leaving landowners to consider litigation concerning a taking of interest in their property.

In CAEPLA's view, the DPRs should impose obligations on pipeline companies to correct situations so that agricultural activities can be carried out safely. Even if the regulations are not going to include a specific requirement to compensate (leaving landowners to rely on Section 75 of the NEB Act), the regulations should do something to ensure that farmland is not being sterilized because of pipeline deficiencies.

> 1. Remove, repair, modify, relocate or replace its pipeline so as to ensure that agricultural activities will not jeopardize the safe and secure operation of the pipeline; or,
> 2. In instances where option 1 is not practicable, provide affected landowners and farmers with clear written direction on any restrictions to be applied to agricultural operations in specified locations and pay the landowners and farmers compensation for any resulting business losses or other related damages or loss.

In conclusion, CAEPLA considers the amendments to the Damage Prevention Regulations, as proposed, a continued compromise of public/pipeline safety and protection of the environment. We see these proposals as misguided. Rather than simply preventing damage and protecting public safety these amendments create restrictions that encourage companies to avoid upgrading their facilities to make them safe. A One Call system prevents damage. It would seem the NEB sees restricting farmers and their property rights as far easier and less costly than holding pipeline companies accountable to upgrade aging, shallow, corroding, outdated pipelines that are in operation. CAEPLA sees these proposed regulations by the NEB as irresponsible and complicit in putting landowners, their families, employees and the public at risk.

Again a Federal One Call system, if enacted would not prejudice one property over another, it protects all underground infrastructure including federally regulated pipelines.

My reading of a records of the Joint Committee on the Scrutiny of Regulations shows me that members of that committee had serious questions concerning the enacting of Section 112 of the Act in 1988, and its modifications in 1990. Even then members of the committee were concerned about the issue of the taking of rights of farmers and landowners. NEB legal counsel at the time convinced the committee it was not an issue even though affected landowners or their advisors were never consulted.

Is this government sincere in modernizing the NEB? This will be the first new pipeline legislation to come into force under this government. We have been supportive of the new Pipeline Safety Act, but pointed out the seriousness of getting the NEB Damage Prevention Regulations right. Yes, it received Royal Ascent under the previous government, but filling those NEB gaps is this government's responsibility and will reflect on its image.

What will the resolution of the regulatory gaps in the Pipeline Safety Act say about this government's commitment to the modernization of the NEB and its commitment on safety?

Will this be a modernization of the National Energy Board and some of its enacting legislation or simply further retreading of a captured regulator?

Sincerely,

David R. Core
CEO and Director of Federally Regulated Projects

Cc. Honourable Jim Carr
Cc. Lisanne Bazinet NRCan

Attached: Faxed Submission Letter of November 13, 2013
Attached: Affidavit of Dave Core