



November 13, 2015

BY EMAIL

NEB Pipeline *Damage Prevention Regulations*
Sheri Young
Secretary of the Board
National Energy Board
517-10th Avenue SW
Calgary, AB T2R 0A8

Email: damagepreventionregs@neb-one.gc.ca

Dear Ms. Young:

Re: Township of Langley Comments on National Energy Board *Damage Prevention Regulatory Framework*

This letter sets out the comments of the Township of Langley on the framework overview of the proposed amendments to the National Energy Board's Damage Prevention Regulatory Framework.

Our specific comments are set out below. As a general framework to our comments, it is important to recognize that the Township of Langley treats pipeline safety within our community as a priority. The development of an efficient system for ensuring pipeline safety that is marked by certainty of obligations is of significant importance to the Township of Langley.

Township of Langley's Recent Experiences with Regulatory Framework

In recent years, the Township of Langley has had to spend unnecessary time and resources in addressing issues arising from one pipeline company, and subsequently the National Energy Board, misapplying the existing pipeline safety regulations and seeking to extend regulatory control beyond the legislated safety zones. The Township of Langley relies upon the standards set out in the *National Energy Board Act* and regulations when planning, authorizing and carrying out municipal infrastructure work. As currently worded, s. 112 of the *Act* states:

112. (1) Subject to subsection (5), no person shall, unless leave is first obtained from the Board, construct a facility across, on, along or under a pipeline or excavate using power-operated equipment or explosives within thirty metres of a pipeline.

To the extent that the language and standards are clear, there is no basis for pipeline company interference with municipal works that fall outside the regulated safety zone. This causes delay and expense to the municipality. To the extent that there is any uncertainty in the regulatory language and standards, the Township of Langley supports legislative efforts to remove that uncertainty.

The National Energy Board has on three occasions of which we are aware supported the pipeline company in its allegations of “unauthorized activity” by the Township of Langley, without providing the Township of Langley an opportunity to respond. In each case, the Township of Langley’s view is that the safety regulations were clear, and the Township of Langley was operating well within what is permitted under the law. For context and for your reference, we provide a summary of the incidents here:

- 1) One ditch cleaning incident that was determined in advance by the Township of Langley to be well outside the 30 meter regulated safety zone established by s. 112(1) of the *Act*. In fact, the cleaning occurred 150 meters away from the pipeline in question. This was confirmed by the pipeline company representative who visited the site. There was no reasonable or legal basis to suggest that the municipality had done anything contrary to the *Act* or regulations, or to jeopardize pipeline safety. Nevertheless the company and subsequently the National Energy Board asserted that the ditch cleaning was “unauthorized activity”. Although the NEB appears to have subsequently acceded that there is no factual basis for such an assertion, it has not as far as we have been advised, corrected its records on this incident.
- 2) One tree removal incident in which the Township of Langley’s contractor removed a tree by hand within the regulated safety zone. No power-operated equipment was used. Leave of the Board is not required for excavation by hand (see text of s. 112 above). Nevertheless, the National Energy Board has recorded this as an “unauthorized activity” by the municipality.
- 3) The NEB recorded municipal crews milling and paving a road to a depth of 75mm within the 30 meter regulated zone as an “unauthorized activity.”
 - a. The Township of Langley does not understand milling or paving to be an “excavation”, which is what is regulated under the *Act*. Existing pavement is merely ground and repaved. Therefore, leave of the Board is not required for that activity: *NEB Act* s. 112(1).
 - b. However, even if the Township of Langley is wrong on its interpretation of “excavation” as excluding milling and paving, this activity was well within the depth permitted by the *National Energy Board Pipeline Crossing Regulations, Part 1* SOR/88-528 apply: s. 3 (which apply under the *Act*, s. 112 (1) and (5)). Leave of the Board is not required for excavation below 300mm that will not reduce the overall cover over the pipeline: the 75mm to which the road is milled is far below that threshold, and the repaving replaces the depth of cover.

Comments based on Recent Experiences for Framework Update Process

These experiences lead to the following comments relevant to the update of the NEB's damage prevention regulatory framework:

- First, incidents #1 and #2 above should not have arisen as incidents at all. The Township of Langley was well within the scope of allowed activity under the regulatory framework, and there was no reasonable basis for the pipeline company to interfere with the Township of Langley's activities, nor for the National Energy Board to support the company's position. Such interference is a drain on resources, without any benefit to pipeline safety, which is our shared goal. The revised regulatory framework should leave no ambiguity for pipeline companies, the National Energy Board, and the communities that host pipelines about the boundaries and limits of the regulations.
- With respect to the third incident, the Township of Langley's position is that the existing regulatory language permits, on its face, milling and paving. However, as the word "excavation" will be removed from s. 112 of the Act upon coming in to force (and in so far as there may have been ambiguity or disagreement about the interpretation), then this regulatory update process is an excellent opportunity to eliminate that uncertainty. The Township of Langley will submit below that certain activities, including milling and paving, should be expressly permitted under the new regulations in the same way that "Low Risk Crossings by Agricultural Vehicles" will be permitted under the new regulations.

Comments on NEB's Three Areas to be Updated

The new model of a "positive structure" for regulation, as the NEB describes it, will only be of assistance to the shared goal of pipeline safety if the regulations under s. 112(5) give greater certainty and clarity than the *Act* will provide upon the coming into force of the amendments.

- 1) **"Ground Disturbance"**: The new negative definition of ground disturbance risks confusion and uncertainty at the implementation stage. In particular, part (c) of the definition will be difficult to implement in practice. That part excludes from the definition of "ground disturbance": "any other activity to a depth of less than 30 cm and that does not result in a reduction of the earth cover over the pipeline to a depth that is less than the cover provided when the pipeline was constructed".

Natural forces of accretion and erosion of soil and other materials will make it difficult, if not impossible, for the municipality to know whether shallow digging activities (i.e. less than 30 cm) might lessen the original cover of the pipeline. The ongoing relative depth of the pipeline is a matter within the pipeline company's means of knowledge, not the municipality's, however, this definition puts the responsibility on the municipality.

Recommendations:

a) **Grant express permission under s. 112(5) regulations for:**

a. Ditch cleaning

Ditch cleaning will often disturb soil, and may sometimes remove soil, although generally at depths less than 30 cm. Like cultivation and low risk agricultural vehicles, subject to appropriate restrictions, ditch cleaning is a very low risk activity to pipeline safety. To avoid uncertainty arising from the requirement to maintain original depth of soil under (c), it is recommended that ditch cleaning be expressly permitted, similar to the express permission anticipated for cultivation and low risk crossings by agricultural vehicles.

b. Milling, paving and routine highway maintenance

Road milling (and subsequent paving) would on the face of the revised definition of “ground disturbance” appear to be permitted under the *Act*. However uncertainty arises again with respect to the requirement at (c) with respect to original ground cover levels over the pipeline, which is a matter within the company’s means of knowledge, not the municipality’s. On the same basis that it is proposed that ditch cleaning should be expressly permitted under regulation, the Township of Langley submits that so too should milling and paving, subject to appropriate express conditions which the Township would be pleased to discuss with the NEB in this process.

The Township of Langley similarly supports the September 2015 resolution of the Union of BC Municipalities with respect to the filling of potholes and other “Routine Highway Maintenance Over Pipelines”:

WHEREAS timely maintenance of municipal highways is a matter of public safety;

AND WHEREAS Kinder Morgan has taken issue with municipalities filling potholes and performing routine maintenance citing regulations under the National Energy Board Act;

AND WHEREAS the National Energy Board General Order No. 1 Respecting Standard Conditions for Crossings of Pipelines imposes certain conditions which include a condition that a pipeline crossing a highway shall be located so that it will not interfere with highway traffic or maintenance;

AND WHEREAS there is uncertainty and confusion regarding the application of regulations cited by Kinder Morgan, the effect of National Energy Board General Order No. 1 Respecting Standard Conditions for Crossings of Pipelines and conditions that may have been imposed under the earlier enactments of s.108 of the National Energy Board which provides that any certificate approving a pipeline may contain terms and conditions related to pipelines crossing highways and other utilities:

THEREFORE BE IT RESOLVED that UBCM and FCM request the federal Ministry of Natural Resources to revise the regulations under the National Energy Board Act such that the regulations appropriately balance public safety and the continuing need for municipalities to undertake routine highway maintenance without having to first provide notice to or obtain a permit from the owner or operator of the pipeline.

c. Tree removal and replanting

“Cultivation” (part (b) of the definition of ground disturbance) should be defined. It is not clear whether tree planting and removal would be captured under the definition.

In any event, express permission should be given for tree planting and removal where the digging is done without power-operated equipment. As the current regulatory framework recognizes, hand digging for this purpose does not pose a threat to pipeline safety. This would relate to small to medium sized trees whose root systems are not deep enough to be close to pipelines. The planting or removal of larger trees with deep root systems that could approach depths of relevance to a pipeline would not be captured under this express exemption (in part because of the need for power operated equipment for removal of large trees).

b) Impose an express obligation upon pipeline companies to make original depths of pipeline relative to present depths readily available so as to prevent or minimize delay in municipal maintenance and work planning.

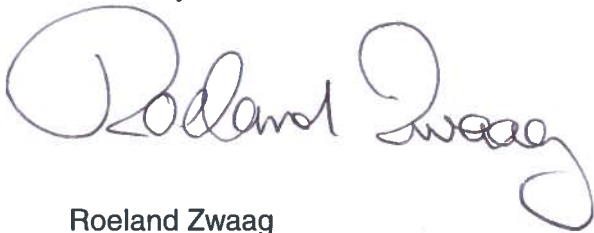
- 2) **“Prescribed Area”:** The Township of Langley submits that the existing 60 metre safety zone (that is, 30 m on either side of the pipeline) is an appropriate “prescribed area” for the regulatory framework.
- 3) **One-call requirements:** Based on the Township of Langley’s experience in recent years, as set out above, the Township of Langley submits that it is imperative that any legislated obligation to initiate a one-call request leave no ambiguity as to when such a request must be submitted. The Township of Langley submits that the 60 metre (30 + 30 metre) safety zone provides a sufficient buffer to reasonably protect pipelines. No obligation to call should arise when a contemplated activity is outside the zone of regulated activity (both in terms of distance from the pipeline or depth of disturbance).

- 4) **Identification of required measures to safe construction, activities and crossings of pipelines**: No measures have been provided for comment at this stage in the regulatory update process. The municipality would welcome the opportunity to review proposed measures and comment from the perspective of municipal works.

As stated above, the Township of Langley would welcome the opportunity to discuss with the appropriate conditions to be attached to the express permissions set out above. Certainty of language and practicality of conditions will be of fundamental importance to a successfully renewed pipeline safety regulatory framework.

If you have any questions, please contact the undersigned at 604.533.6163 or rzwaag@tol.ca.

Sincerely,

A handwritten signature in black ink, appearing to read "Roeland Zwaag". The signature is fluid and cursive, with a large initial "R" and a long, sweeping tail.

Roeland Zwaag
Director, Public Works