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30-Day Comment Period for National Energy Board Proposed Regulations for Pipeline Damage Prevention in *Canada Gazette, Part I* on 19 March 2016, Vol. 150, No. 12, pages 813-854

<http://news.gc.ca/web/article-en.do?nid=989109&tp=1>

Pipeline Safety Act (Bill C-46) received Royal Assent on June 18, 2015, for enforcement June, 2016.

This legislation improves Canada's safety system even further by:

- *Introducing absolute liability for all NEB-regulated pipelines, meaning that companies will be liable for costs and damages irrespective of fault — \$1 billion for companies operating major oil pipelines — the only absolute liability that exists among our peer jurisdictions (U.S., the UK and Australia). Companies continue to have unlimited liability when at fault or negligent.*

\$1 Billion (Canadian\$ or US\$?) of absolute liability is recklessly **INSUFFICIENT**. One only has to consider the enormity of costs attributed to the Kalamazoo River oil spill in 2010: Enbridge Energy Partners reports in a US Securities and Exchange Commission filing number 1-10934, for the quarterly period ended September 30, 2014, the total cleanup cost of the 2010 Kalamazoo River oil spill to be \$1.21 billion (USD). This figure included \$551.6 million spent on response personnel and equipment, \$227 million on environmental consultants and \$429.4 million on professional, regulatory, and other costs. In addition, on May 12 of 2015, A \$75 million (USD) settlement was reached with Enbridge Energy over the 2010 oil spill. The restoration projects are in addition to completing the cleanup work. (=\$1.285 Billion USD and still counting!)

The National Academy of Sciences has released a report, *Spills of Diluted Bitumen from Pipelines: A Comparative Study of Environmental Fate, Effects, and Response (2016)*, ISBN: 978-0-309-38010-2, examining the environmental fate of the most common form of tar sands oil--diluted bitumen--when it is spilled from pipelines. In the NAS' latest report, [researchers confirmed that diluted bitumen from Alberta's tar sands differs substantially](#) from other types of oil commonly moved by pipeline

- *Providing the NEB authority to order reimbursement of any clean-up costs incurred by governments, communities or individuals;*

Having the authority to order does not mean the NEB *will* order reimbursement. This must state, "the NEB **will order the reimbursement** of any clean-up costs incurred by governments, communities or individuals".

- *Providing the NEB authority and resources to take control of incident response if a company is unable or unwilling to do so (i.e., in exceptional circumstances); and*

How quickly can the NEB mobilize the necessary resources to do this, and at whose cost?

- *Requiring companies operating pipelines to hold a minimum level of financial resources, set at \$1 billion for companies operating major oil pipelines.*

\$1 Billion (Canadian\$ or US\$?) of financial resources is recklessly **INSUFFICIENT**.

That Canada may be unique with this financial capacity and absolute liability does not even represent the potential minimum cost *to respond to any incident and to remedy damage caused by pipeline spills*

- *Increasing annual inspections of oil and gas pipelines by 50 percent and doubling the number of comprehensive audits to improve pipeline safety across Canada*

This will not change the irresponsible corporate mentality of pipeline companies.

- *Introducing new financial penalties on pipeline companies for small infractions to prevent larger incidents from occurring*

Administrative Monetary Penalties have already been shown to be a farce, as the NEB has either rolled some of those assigned back, or the NEB has reversed them altogether.

- *Giving the NEB the ability to provide guidance on the use of the best available technologies used in federally regulated pipeline projects. This includes materials, construction methods and emergency response techniques.*

The NEB chose to cut back on safety to lavishly outfit their new offices.

<https://mikedesouza.com/2014/06/14/national-energy-board-spends-21-million-on-calgary-move/>

Canada's [national energy regulator](#) estimates it will spend about \$21 million over two years – more than new funding announced to improve its existing oversight of pipeline companies – to move into its new Calgary offices.

The total moving costs add up to \$20.7 million, say National Energy Board [records tabled in Parliament](#). Those include about \$12.4 million in 2013-2014 and about \$8.3 million in 2014-2015 to relocate within Calgary into a building on a site that was previously affected by a [large sinkhole](#).

The new money for the office move is almost double the new funding announced by the Harper government's 2012 budget to improve the board's safety oversight of pipelines.

Page 825 Implementation, enforcement and service standards

Under the NEB Act, the NEB enforces regulatory requirements to obtain compliance, deter future non-compliance, and prevent harm by using the most appropriate tools available. No change to compliance and enforcement authority or responsibilities would result from the proposal. The NEB has trained and

qualified damage prevention inspectors and enforcement personnel, and existing regulatory oversight programs. The NEB will continue to perform regular inspections and audits.

The NEB staff frequently questions management actions and decisions, morale is low, and consultants have been hired to fix its management problems.

<http://www.nationalobserver.com/2016/03/24/news/bad-morale-rocked-canadas-pipeline-watchdog-and-then-came-murder>

In its last available annual [performance report](#), tabled in Parliament, the NEB said that it had cut its anticipated spending on safety oversight measures such as inspections and the development of regulations by about \$17 million in 2014-2015. The report also estimated that it spent about \$14 million more than it had planned to spend on internal services such as communications or public relations for the year.

Is this the kind of guidance, methods, safety and best available technology we want from the NEB to continue into the future?

“I am pleased the Pipeline Safety Act delivered through Canada’s plan for Responsible Resource Development has received Royal Assent. These new measures demonstrate our meaningful commitment to enhancing environmental protection while supporting jobs and growth.”

Greg Rickford

Canada’s Minister of Natural Resources

The past Minister of Natural Resources did not hesitate to put the onus on the backs of Landowners and farmers to be responsible for ensuring the safety of pipelines by farmers having to modify or restrict customary farming practices and the use of today's equipment.

The current Minister, Jim Carr, must mandate the pipeline companies to have minimum depth of cover over their lines and be responsible to monitor that depth of cover on a regular basis to ensure it does not deviate from a prescribed minimum.

That the Landowners need to refer to a pipeline company's tool and/or contact a pipeline company for permission to cross their own lands is ridiculous, onerous and .in defiance of the Right to Farm. It perpetuates unreasonable interference with a landowner's use of his or her land.

The Pipeline Safety Act provides that the following are not considered ground disturbance:

- *Cultivation to a depth of less than 45 cm below the surface of the ground, or*
- *Any other activity to a depth of less than 30 cm and that does not result in reduction of the earth cover over the pipeline to a depth that is less than the cover provided when the pipeline was constructed.*

This is unreasonably restrictive. A minimum depth of cover would obviate responsibility of any ground disturbance from the Landowners, and place it where it belongs: with the pipeline companies.

Page 849 Amendments

1 The National Energy Board Onshore Pipeline Regulations³¹ are amended by adding the following after section 47.1:

Damage Prevention Program

47.2 A company shall develop, implement and maintain a damage prevention program that anticipates, prevents, manages and mitigates damage to its pipeline and meets the requirements set out in section 16 of the National Energy Board Pipeline Damage Prevention Regulations — Obligations of Pipeline Companies.

When do pipeline companies have to have their damage prevention programs in place?

The pipeline companies can obviously anticipate that farmers will use large and heavy equipment to cross pipelines and/or create ground disturbances, and can therefore act to prevent same by ensuring their pipelines are adequately marked and covered to prevent any damages.

2. The Pipeline Safety Act introduces the term **prescribed area**, which is the area near the pipeline where activity causing ground disturbance is prohibited, unless the activity is authorized by order or regulations. The Pipeline Safety Act provides that the NEB may set out the prescribed area in regulations or orders.

Q & A <http://www.neb-one.gc.ca/bts/ctr/gnnb/dmgprvntnrgltn/2016-03-18fq-eng.html>

How is the prescribed area defined?

Providing the “prescribed area”, which is the area near the pipeline where activity causing ground disturbance is prohibited, unless the activity is authorized by order or regulations.

The proposed regulations define the prescribed area as a strip of land measured 30 metres perpendicularly on each side from the centreline of a pipe. This distance can be accurately measured, providing a measureable distance from a known point on a pipe.

The prohibition against activities causing ground disturbance within the prescribed area in the Pipeline Safety Act provides clarity to ensure safety and protection of the environment.

Requiring pipeline companies to be members of one-call centres

Aligning the structure of the regulations to incorporate the ground disturbance and prescribed area requirements in the Pipeline Safety Act. The proposed regulations largely maintain the existing conditions and measures required for anyone planning construction or activity near a pipeline, or crossing it with a vehicle or mobile equipment.

This **prescribed area** does not form any part of any of the easement agreements for the 4 pipelines on my property. The NEB has unilaterally defined a **prescribed area** to suit the pipeline companies, without consultation, without consideration, and without compensation to Landowners. This **prescribed area** redefines "Landowner property rights" as "pipeline company rights".

https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/441806/456607/459849/462261/468439/C-2-5aa_-_13_Brinkman_Report_A0Z5C3.pdf?nodeid=468271&vernum=-2

ASSESSMENT OF COMPENSABLE INTEREST FOR AGRICULTURAL LAND_C-2-5aa__-
_13_Brinkman_Report_A0Z5C3.pdf

Adobe page 6 - *It is important to note that the agreements specify no restrictions on normal farming practices, crossing the pipelines with vehicles or mobile equipment, prolonged delays in granting permission for repairs or other operations, or specific liability levels. These terms strongly show the intention of the agreeing parties that the construction and operation of the pipeline would not restrict agricultural practices and management.*

That was then and this is now. The easement agreement is not worth the paper it is written on. The NEB did not consider Landowners in their dictates of control zones, prescribed areas, ground disturbances, etc. - only pipeline companies' wishes, which are construed to be "*in the public interest*".

<http://news.gc.ca/web/article-en.do?nid=989109&tp=1>

Page 828-829 Designation of temporary prohibition area - under what conditions would this be designated, and what compensation would Landowners receive. Be reminded, Landowners receive NO compensation for the "prescribed area" foisted upon by the NEB.

Brinkman Report

Adobe pages 5-6

5.0 Assessment of Compensable Interest

*There is no question that the increased restrictions on farming operations imposed by s.112 of the NEB Act and related regulations have resulted in a **diminishment of the right of agricultural landowners to the full use and enjoyment of easement and control-zone lands. Regulatory controls on the agricultural practices and farm management of agricultural landowners are limitations on their ownership rights for which they have not been compensated.***

*The imposition of the 30 metre control zone on each side of the pipeline easement, restrictions on crossing the pipeline, and pipeline company consent requirements are **all restrictions introduced under s.112 of the NEB Act absent negotiation or consultation with agricultural landowners, and absent any compensation.** These restrictions limit the full use and enjoyment of farmers' lands by imposing*

upon them the requirement of obtaining from the pipeline company consent for the conduct of normal farm operations and land use. Even if this consent is applied for and granted by the company, the very requirement for company consent and the associated time delays represent a significant interference with efficient farm management. In fact, since the time sensitivity of many normal farm operations simply will not permit the delays necessary to obtain the required company consent without exposing the farmer to irreparable losses, most farmers are often unable to comply with these regulatory requirements. As a result, they are forced to incur the risk not only of prosecution for regulatory contravention, but of potential injury to themselves, their families, and their property, and substantial liability to others for any damage which may occur.

Ibid Adobe page 10 - ***5.1.6 Control of land use for landowners without easement agreements and pipelines on their property, but affected by the extended control zone***

. . . adjacent landowners now have restrictions on the use of their land even though they do not have a pipeline on their property, have never signed an easement agreement, and have never received compensation for the restrictions. It is an important economic loss when you cannot expand or undertake construction on your property, or must seek permission and experience extended delays, especially when the pipeline company has no legal agreement with the landowner.

Numerous adjacent landowners do not even know they are proximal to a pipeline, that their land use is compromised by a control zone/prescribed area. It is not shown on property deeds. Pipeline companies have not informed multitudes of Landowners that their lands are affected and restricted by same.

The NEB must ensure that ALL Landowners are aware of these zones/areas attributed to their properties courtesy of the NEB, with NO easement agreement, NO compensation, and in all likelihood, NO notice.

Page 845 Damage Prevention Program Minimum content 16 *The damage prevention program that a pipeline company is required to develop, implement and maintain under section 47.2 of the National Energy Board Onshore Pipeline Regulations must include*

- (a) an ongoing public awareness program to inform the public*
- (b) ongoing monitoring of any changes in the use of the land on which a pipeline is located and the land that is adjacent to that land*
- (c) ongoing monitoring of any change in the landowner of the land on which a pipeline is located;*
- (d) a process to ensure a timely response to locate requests*

How is the NEB going to police/make companies accountable, for public awareness programs, monitor land use changes (don't suggest that Landowners apprise companies of land use changes - it's none of their business and not Landowners' responsibility), and landowner changes?

A one-call system for locates is efficient but **must be timely** for Landowners. If a farmer wants to replace a broken fence post to contain their cattle, they don't want to have to wait very long! Landowners' needs must be met on an expeditious basis.

Page 840 Obligations Following Request to Locate Timeline ...the pipeline company must, within three working days after the day on which the request is made...

This is unreasonable for many scenarios typical to farming. This timeline must be changed to reflect necessary and/or more urgent situations.

<https://www.neb-one.gc.ca/bts/ctrg/gnnb/dmgprvntnrgltn/pplnsftctfq-eng.html>

Q3. How are farmers impacted by the changes to the legislation?

- *Conducting unauthorized activity near pipelines, or otherwise failing to comply with damage prevention requirements, puts the safety of people and the environment at risk.*
- *Farmers' activities on their lands will not generally be restricted except within a certain distance from the pipeline that will be set by regulations. This is necessary to protect the farmer as well as the environment. Cultivation that is less than 45 cm deep and any other activities that don't go deeper than 30 cm, and that do not result in a reduction of cover over the pipeline are not considered ground disturbances according to the Pipeline Safety Act.*
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Q4. Can a landowner/farmer receive a financial penalty?

- *Administrative Monetary Penalties or AMPs are financial penalties the Board can impose on companies or individuals for not following any NEB requirement intended to promote safety or environmental protection.*
- *AMPs can be applied to both companies and individuals. The NEB's enforcement policy says that AMPs could be used when other enforcement tools such as letters, orders or voluntary commitments are not working.*

As an example, from 2015-02-06 to 2015-06-11 (<https://www.neb-one.gc.ca/bts/ctrg/gnnb/dmnstrvmntrypnlts/index-eng.html>), Enbridge was issued an AMP on three separate occasions at three different sites (*two for Ss.2(3) of the AMP Regulations, Failure to comply with a term or condition of any certificate, license, permit, leave or exemption granted under the NEB Act; and one for ss.4 of the NEB OPR - Failure to ensure that a pipeline is designed, constructed, operated or abandoned as prescribed.* These three were within a period of only 4 months, and they got caught! How many other episodes of violations, failure to comply, etc. have occurred that have gone unnoticed, unreported and/or covered up?

It must be recognized that most of these violations will involve Landowners' lands, and municipal/public lands. Whom is to be the recipient(s) of these AMPs? Landowners, who are often the unwilling victims

of the follies of the pipeline companies, need to be compensated for the companies' breaches they have undertaken and the infringements made upon Landowners' lands and rights. Give the penalties to the Landowners. Landowners need to be informed **IMMEDIATELY** that a company operating a pipeline across their property has any kind of issue requiring an emergency response, contamination, and/or has committed any violation on their property, or a violation that has, or could potentially, impact their property. "As soon as is practicable", is not soon enough.

Does this behaviour by the NEB not pander to pipeline companies', who have very deep pockets and have corporate mentalities that just don't care? Amounts of the penalties are inconsequential to these companies, especially when they request review of the AMPs, and receive a reduced or withdrawn penalty. Would Landowners, whose financial capabilities pale by comparison, also receive these "get out of jail free cards":

Q5. What can a landowner do to avoid issues/enforcement actions?

There are several things landowners can do to make sure they are following the NEB's rules and avoiding any enforcement actions. These include:

- *Visiting the site where you would like to do work and looking for pipeline warning signs or locate marker posts;*
- *Contacting the pipeline company to obtain a copy of the pipeline company's guidelines for working near their pipeline;*
- *Contacting the one-call centre or the pipeline company directly, if there are no one-call centres serving your area, to have the pipeline located.*

Updated guidance materials will be developed for landowners and the public when the updated regulations are completed.

It should not be Landowners' responsibility to look after the pipeline companies' assets.

The NEB also requires companies to provide landowners with information on how they can keep pipelines safe. This should be done as part of a company's Public Awareness Program. The NEB audits companies' Damage Prevention Programs periodically to confirm they are meeting the Public Awareness requirement and holds companies accountable if they do not.

It is incumbent upon the NEB to require minimum depth of cover over pipelines. If that were the case, the responsibility would defer to the pipeline company, which is where it should be.

Q6. If a landowner/farmer causes damage to a pipeline will they liable for damages and/or spill cleanup? Are they liable in case of negligence?

- *The absolute liability provisions in the Pipeline Safety Act apply to the company that owns the pipeline, not landowners or other companies such as incorporated farms.*
- *Also, the NEB holds the company that owns the pipeline, and not farmers or others, responsible for any clean-up costs if there is a spill or rupture. The Pipeline Safety Act puts in place new*

measures to help ensure that pipeline companies hold enough financial resources to pay these types of costs in the event of a spill or rupture.

- *However, it is important to understand that civil law continues to apply.*

Erroneously, again the Landowners are being held responsible for insufficient actions by the pipeline company and the NEB.

Page 827 - Working day means any day that is not a Saturday or a Sunday or other holiday. Why are Landowners being forced by pipeline companies to allow them to perform their work on Saturdays? What penalty can be enforced upon companies who insist upon performing Saturday work on our lands?

Page 833 (h) *unless otherwise agreed on by the pipeline company and the person that is engaged in the activity, notify the pipeline company at least 24 hours before backfilling over a pipe.*

Conversely, why doesn't a pipeline company have to give the Landowner at least 24 hours notice before backfilling over a pipe? It should have to for planning, safety and operational reasons of the Landowner.

Page 841 - Detection of deterioration

9 (1) *The pipeline company must make any inspections that are necessary to ensure that any deterioration of a facility that might adversely affect a pipe is detected and must notify the facility's owner, in writing, of any deterioration that is detected.*

The NEB must mandate a minimum period of frequency that inspections are to be performed on all pipelines, and a maximum period of time within which features must be repaired/replaced..

Landowners must be notified in writing of **any and all** features that are detected during inspections and when they will be repaired/replaced.

https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/441806/456607/459849/462261/468439/C-2-5aa_-_13_Brinkman_Report_A0Z5C3.pdf?nodeid=468271&vernum=-2

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Adobe page 12 - *increased liability exposure is a substantial risk for farming on properties containing pipelines – a risk that other farmers do not face. This increased risk of liability may be manifested in increased stress and self-imposed restriction of farming practices in order to reduce exposure, as well as in lower profitability and in reduced land values. The added liability risk therefore represents an additional taking of the farmer's rights fully to use and enjoy his land by increasing his risk exposure and exposing him to physical and mental stress caused by facing a huge liability that could be disastrous for the farm business and family.*

Landowners and farmers are fed up with the impositions and restrictions put upon them by the NEB for pipeline companies.