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April 18, 2016

Ms. Chantal Briand
Regulatory Approaches
National Energy Board
517 Tenth Avenue SW
Calgary, Alberta T2R 0A8

Dear Ms. Briand:

**Re: Proposed Regulations for Pipeline Damage Prevention
Canada Gazette Part I – March 19, 2016 – Pages 813 to 854
Submission of Comments – NEB File Ad-GA-ActsLeg-Fed-NEBA-RRG-DPR 02 01**

Introduction

The March 19, 2016 edition of the *Canada Gazette Part I* contained a series of proposed regulations on the aspect of pipeline damage prevention. More particularly, this series includes:

- the proposed *NEB Pipeline Damage Prevention Regulations*, which would replace the *NEB Pipeline Crossing Regulations, Part I*;
- the proposed *NEB Pipeline Damage Prevention Regulations*, which would replace the *NEB Pipeline Crossing Regulations, Part II*;
- proposed amendments to the *NEB Onshore Pipeline Regulations*; and
- proposed amendments to the *NEB Administrative Monetary Penalties Regulations*.

Further to the notice provisions, Alliance is taking this opportunity to provide written comments on this series of proposed regulations.

Pipeline Safety Act

As reflected in the captioned publication, the catalyst for this proposal has been the passage of the *Pipeline Safety Act* and the associated amendments that will statutorily take effect for the *National Energy Board Act* on June 18th of this year. This timing implication is positive, in that it will bring closure to a regulatory initiative that has been many years in the making.

Alliance recognizes the arduous nature of the federal regulation making process, and the corresponding desire by all parties to have regulations that are clear, reasonable, practical, and robust. Alliance is submitting its comments within this essential context.

Prescribed Area

In Alliance's view, the most critical feature of the proposal is the definition being attached to the "prescribed area" term that will soon appear in section 112 of the *National Energy Board Act*.

Whereas section 112 of the *National Energy Board Act* has historically provided for a 30-metre “safety zone” measured from either side of the pipeline easement, the current proposal would instead employ a “prescribed area” measured 30 metres from either side of the centerline of the pipe.

Alliance notes that this proposal would significantly reduce the width of the land strip within which permissions would have to be sought and appropriate controls exercised. More specifically, the width of the land strip would effectively be reduced or narrowed by the width of the right-of-way or easement (which could range up to 20 metres or more).

Consistent with its prior submissions, Alliance would implore the Board to retain the same spatial boundaries that have historically applied. In Alliance’s respectful submission, any narrowing of the land strip would lessen safety and lead to confusion among the vast array of stakeholders who have been educated over the course of decades on this subject. Furthermore, Alliance would urge the Board to retain the “safety zone” terminology in its regulations, as it is widely engrained and carries the right positive connotation.

Specifically, Alliance would recommend that section 2 of the proposed *NEB Pipeline Damage Prevention Regulations – Authorizations* be modified as follows:

For the purposes of subsection 112(1) of the Act, the prescribed area means a strip of land ~~measured 30 m perpendicularly on each side from the centerline of the pipe~~ consisting of the pipeline easement as well as a safety zone measured 30 m perpendicularly on each side of the pipeline easement.

In Alliance’s respectful submission, the advantages of retaining the historical boundaries out-weigh any advantages of adopting a more narrow land strip measured from the centerline of the pipe. In this connection, Alliance notes that the associated commentary in the Regulatory Impact Analysis Statement is silent on the implied reduction of the controlled area and corresponding risks.¹

Use of Explosives near Pipeline

As noted in the Regulatory Impact Analysis Statement (at Page 816), the *Pipeline Safety Act* replaces references to the activities of excavating using power equipment or explosives within 30 metres of the pipeline with the term “ground disturbance” within the prescribed area.

One implication of the current proposal is that third parties would be at liberty to use explosives even closer to the pipeline than they are today without having to seek pipeline company or Board permission. This raises significant safety risks, and presents another compelling reason for the retention of the wider boundaries that now prevail under the 30-metre safety zone concept (i.e. as measured from the edge of the right-of-way and not the centreline of the pipe).

In Alliance’s respectful submission, within the context of section 112 of the *National Energy Board Act*, pipeline companies are well within their rights to dissuade and deny parties from using explosives in close proximity to the pipeline.

In this same vein, Alliance would expect the Board to be extremely judicious in considering any requests by parties to use explosives within the prescribed area, however that area is defined (i.e. in cases where pipeline companies have already refused such permission). More broadly, Alliance would expect the Board to be supportive in efforts to prevent the use of any explosives anywhere near the prescribed area.

¹ Reference in particular the first full paragraph on Page 822, and the reference to “accurate measurement” and the need for “a balanced approach”. In Alliance’s respectful submission, accurate measurements can be taken, and have been historically taken, from the edge of the pipeline easement. Furthermore, Alliance would contend that the maintaining of the historical spatial boundaries would strike the right balance to the benefit of all stakeholders.

Consistency with Subsection 81(1) of National Energy Board Act

Further to the preceding discussion, Alliance notes that subsection 81(1) of the *National Energy Board Act* already places a prohibition against any mining operations within 40 metres of the pipeline easement.¹ Given the common safety objectives, there should logically be some degree of alignment between the mining operations prohibition in subsection 81(1) and the damage prevention restrictions inherent in subsection 112(1).

To this point in time, the restricted areas under both subsection 81(1) and subsection 112(1) have been measured from the edge of the pipeline easement. Under the current proposal, which would see the subsection 112(1) measurement taken from the centerline of the pipe, this alignment would be broken and the gap between the restricted areas would be further increased.

In Alliance's submission, there is no need to create such misalignment. Again, Alliance would implore the Board to maintain consistency of approach by tailoring the "prescribed area" definition to the long-standing "safety zone" requirement (using the specific wording proposed earlier in this submission).

Definition of "Agricultural Activity"

Subsection 13(2) of the proposed *NEB Pipeline Damager Prevention Regulations – Authorizations* sets forward the following definition for "agricultural activity":

In this section, "agricultural activity" means the work of producing crops and raising livestock and includes tillage, plowing, disking, harrowing, pasturing, mushroom growing, nursery and sod operations, but does not include the construction of new buildings or impervious areas or the placement of footings, foundations, pilings or fence posts.

For the following reasons, Alliance recommends that "mushroom growing" and "nursery and sod operations" be removed from this definition:

- ❖ *Mushroom Growing* – Commercial mushroom growing operations take place in buildings and not in outside spaces over the pipeline.
- ❖ *Nurseries* – Based on this draft definition, nursery operators such as tree farmers would be able to plant and harvest trees within the right-of-way and over the pipeline. This would be contrary to the intent of the definition, as the farmer would need to excavate the trees from the ground thereby causing a ground disturbance.
- ❖ *Sod Operations* – Alliance notes that the sod farming involves a reduction of the soil depth of cover and the use of mechanical equipment over the pipeline right-of-way and the overall prescribed area. This would again be contrary to the intent of the definition, which is to identify those types of agricultural activities that may be carried out without having to seek separate advance permission.

To summarize, Alliance recommends that the definition be revised as follows:

In this section, "agricultural activity" means the work of producing crops and raising livestock and includes tillage, plowing, disking, harrowing, and pasturing, ~~mushroom~~

¹ Subsection 81(1) of the *National Energy Board Act* falls under the heading of "Protection of pipeline from mining operations", and states as follows: "No person shall work or prospect for mines or minerals *lying* under a pipeline or any of the works connected therewith, or within forty metres therefrom, until leave therefor has been obtained from the Board." The lengthy definition of "pipeline" in section 2 of the *National Energy Board Act* has consistently been interpreted to include the pipeline easement, thereby inferring that the 40-metre measurement is to taken from the edge of the easement (rather than the centerline of the pipe).

growing, nursery and seed operations, but does not include the construction of new buildings or impervious areas or the placement of footings, foundations, pilings or fence posts.

Detection of Deterioration

Section 9 of the proposed *NEB Pipeline Damage Prevention Regulations – Obligations of Pipeline Companies* states as follows:

- (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, or any deterioration that is detected.*
- (2) If an inspection reveals deterioration of a facility that would so impair the safety or security of the pipe as to warrant removal of the facility, the pipeline company must so notify the Board in writing.*

Alliance notes that the proposed inspection requirement is an appropriate fit for aboveground facilities that are observable during aerial patrols and any associated ground surveillance activities. However, the Board has to be mindful that there are also several categories of facilities which are underground, such as other buried pipelines and buried cables.

In the case of underground facilities, the pipeline company may only discover deterioration if there are associated observable surface impacts. In certain cases, the pipeline company may be prompted to locally investigate as a result of in-line inspection indications stemming from external causes. In other instances, deterioration of third-party facilities may be more randomly discovered during the course of investigative digs or new pipeline facility installations.

Particularly given the distinctions that exist for aboveground and underground third-party facilities, Alliance would recommend that section 9 be modified as follows:

- (1) To the degree practicable, the pipeline company shall undertake inspections that are necessary to ensure that for the purpose of detecting any deterioration of a facility that might adversely affect a pipe is detected and must notify the facility's owner, in writing, or any deterioration that is so detected.*
- (2) ~~If an inspection reveals~~ Upon discovering any deterioration of a facility that would so impair the safety or security of the pipe as to warrant removal of the facility, the pipeline company must so notify the Board in writing.*

Monitoring for Changes in Use of Land

Section 16 of the proposed *NEB Pipeline Damage Prevention Regulations – Obligations of Pipeline Companies* addresses the minimum content of a damage prevention program.

In this connection, paragraph 16(b) specifies that the damage prevention program include “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”.

From a damage prevention standpoint, Alliance is interpreting this provision as solely pertaining to the immediate narrow land area where the pipeline has been buried and the land in close proximity (such as within the prescribed area). Alliance recognizes that other monitoring obligations exist under the *NEB Onshore Pipeline Regulations* and the CSA Z662 standard, such as in relation to the monitoring of any developments within 200 metres of the pipeline that may lead to class location changes and the monitoring of populations and structures within emergency planning zones. However, such obligations have separate focuses and are outside the scope of the subject draft regulation.

To provide clarity and to ground expectations, Alliance would suggest that paragraph 16(b) be tightened up as follows:

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 ... (b) ongoing monitoring of any changes in the use of the land on ~~which a pipeline is located and land that is adjacent to that land~~ and in close proximity to the pipeline right-of-way, including within the prescribed area.

Absent such modification to the actual regulation, Alliance would urge the Board to set these appropriate expectations in any eventual guidance material or in any related publications.

Administrative Monetary Penalties

Alliance has reviewed the proposed amendments to the *NEB Administrative Monetary Penalties Regulations* as pertaining to damage prevention, and has no comments to offer on the particulars of those amendments.

Alliance notes that the proposed regulations reach beyond pipeline companies and also capture third-party excavators and builders. Going forward, Alliance would encourage the Board to fully utilize its penalty powers when dealing with any third parties who are willfully disregarding the Board's damage prevention requirements.

Alliance would also encourage the Board to use any monies collected under these penalty provisions to help fund the Board's own public awareness efforts (including in relation to any contribution programs for one-call centres and other organizations promoting damage prevention). In Alliance's view, this would be far more appropriate than simply directing such monies into general federal coffers.

Closing Remarks

Alliance appreciates having been provided the opportunity to comment on the proposed regulations and trusts that its submissions will be duly considered.

As noted, the most critical feature of the proposal is the definition being attached to the "prescribed area" term that will soon appear in section 112 of the *National Energy Board Act*. For the reasons provided in this submission, Alliance would again urge the Board to retain the same spatial boundaries that have historically applied under the "safety zone" concept (rather than narrowing such boundaries by taking measurements from the centerline of pipe).

Alliance has also provided a series of other comments on the specifics of the proposed regulations, including in the interests of setting clear and reasonable expectations around provisions for the monitoring of land-use changes and the detection of deterioration for third-party facilities.

In closing, should the Board have any questions relating to this submission, please contact the undersigned.

Sincerely,

[Original Signed]

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