National Energy Board | Office national de l'énergie

Regulatory Proposal
National Energy Board Designated Company Cost Recovery Regulations

Purpose

The purpose of the Regulatory Proposal is to seek feedback on the design of regulations for recovering amounts paid out of the Consolidated Revenue Fund (CRF), when a company has been designated by the Governor in Council (GIC) following failure to fully address an unintended or uncontrolled release. The National Energy Board (NEB or Board) is soliciting feedback on this Regulatory Proposal for a period of 30 days, until 7 February 2018.

Background

Pipeline Safety Act

On 19 June 2016, the *Pipeline Safety Act* (PSA)[1] came into force. The PSA amended the *National Energy Board Act* (NEB Act) to reinforce the "polluter pays" principle by, among other things, imposing financial requirements on pipeline companies in respect of an unintended or uncontrolled release of oil, gas or any other commodity.

Designated Company

In the event of a release, GIC may, on the recommendation of the Minister of Natural Resources, "designate" the responsible company if the company does not have or is not likely to have the financial resources necessary to pay the costs, expenses and damages associated with the release, or the company does not comply with an order of the NEB with respect to the release. Designation could occur immediately or any time after a release. There is potential that sometime after clean-up activities have been completed, a company may not be able to pay remaining damages that are in the process of being settled.

Upon designation, a number of things can happen. The NEB could: take any action or measure in relation to the release or may authorize a third party to do so; reimburse the costs and expenses of government institutions, Aboriginal governing bodies, or any person in relation to the release; and pay certain costs, expenses and remuneration associated with any pipeline claims tribunal established by the GIC, as well as its compensation awards.

The Minister of Finance, on the recommendation of the Minister of Natural Resources, is authorized to establish an amount to be paid out of the CRF to fund the above NEB directed activities related to a designated company release. The NEB Act provides that, subject to Treasury Board's approval, the Board shall make the regulations for the purposes of recovering these amounts. Amounts are to be recovered from the designated company and the companies who operate pipelines that transport the same commodity (e.g. oil, gas and non-hydrocarbon) or a commodity of the same class (e.g. liquids vs gases regardless of being hydrocarbon or non-hydrocarbon) as the commodity that was released.

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[1] Full text for *Pipeline Safety Act* *http://laws-lois.justice.gc.ca/eng/annualstatutes/2015_21/page-1.html*

Objective

This Regulatory Proposal is provided to solicit feedback on how to recover amounts paid out of the CRF and does not include any proposals on damage claim criteria or award processes related to a release.

It should be noted that there are many regulatory measures in place that reduce the likelihood of a company being designated, including:

- The *National Energy Board Onshore Pipeline Regulations* requirement that companies must establish, implement and maintain effective management systems and protection programs in order to anticipate, prevent, mitigate and manage conditions that may adversely affect the safety and environment;
- The Board's application assessment processes and compliance and enforcement activities that help to verify that companies are meeting regulatory requirements;
- The financial resource requirements introduced as part of the PSA which provide the Board with increased oversight of the financial capability of regulated companies to respond to a release; and
- The NEB's past experience which suggests that there is a very low risk that a company will not have the necessary financial resources to respond to a release, or would not comply with a Board Order with respect to the release.

Regulatory Considerations

The following criteria guided the NEB in evaluating regulatory options:

I. *Effective Recovery*: The regulations should be effective in recovering the amounts paid out of the CRF in respect of a release involving a designated company.

II. *Equitable Recovery:* The regulations should achieve a fair and equitable allocation of charges.

III. *Reinforcement of the Polluter Pays Principle:* To the extent possible, costs should be recovered first from the certificate holder under the NEB Act for the pipeline from which the release occurred (the designated company), and then the companies who operate pipelines that transport the same commodity or a commodity of the same class. Taxpayers should not be responsible for paying the charges back to the CRF in a designated company situation.

IV. *Operational Simplicity:* The method for allocating charges among the designated company and companies that transport the same commodities should be transparent and relatively easy to understand and implement.

The following are the necessary elements of the scheme for imposing charges:

A. Defining the companies subject to recovering amounts back to the CRF;

B. Allocation of charges among the designated company and companies that transport the same commodity or commodity of the same class as the commodity that was released;

C. Calculation of charges imposed and their payment to the Board to recover the amounts paid out of the CRF under section 48.46(1) of the NEB Act;

D. Invoicing process, interest and repayment.

A. Defining the companies subject to recovering amounts back to the CRF

Defining the companies that will be subject to the regulations is an essential factor for determining the allocation of charges imposed to recover the amounts paid out by the CRF among companies.

Proposed approach:

Companies subject to the regulations will be classed based on commodity type pursuant to section 48.17 (1)(a) of the NEB Act.

This is also the methodology used in the current *National Energy Board Cost Recovery Regulations* (NEB Cost Recovery Regulations) in which pipelines are divided by gas, oil and non-hydrocarbons. The Cost Recovery Regulations are made under section 24.1 of the NEB Act. Their purpose is to recover the NEB's normal operating costs from the regulated industry.

"Border accommodation pipelines" will be the only class of company exempt from recovering amounts back to the CRF. Border accommodation pipelines are pipelines constructed for the transportation of natural gas across a border, that: have an outside diameter of less than 100mm, carry gas at pressures of not more than 700 kilopascal, and have a capacity of less than 500 ^{m3} per day.

B. Allocation of Charges among the Designated Company and Companies that Transport the Same Commodity as the Commodity that was Released

Proposed approach:

The NEB Cost Recovery Regulations will provide the basis for the allocation of charges. That is, allocation of charges will be based on the relative size of company invoice amounts charged under the NEB Cost Recovery Regulations from the year immediately preceding the designation by the GIC. The invoice amount under the NEB Cost Recovery Regulations for each applicable company will be divided by the sum of all the invoices of companies that transport the same commodity as the commodity that was released by the designated company for the year preceding the designation. The resulting percentage is the percentage of the CRF amount that the company is responsible to pay.

C. Calculation of charges imposed and their payment to the Board to recover the amounts paid out of the CRF under section 48.46(1) of the NEB Act

The Board will, each year, determine the total amount of charges imposed for the purpose of recovering amounts paid out by the CRF. This will account for the funds disbursed as well as the addition of carrying charges at the rate prescribed by the Minister of Finance.

Proposed approach:

While recovering costs, a contributing company[2] may be unable to pay amounts owed due to its own financial circumstances. Contributing companies will be provided an option to pay no less than 5 per cent of their total revenue per NEB fiscal year, in addition to any carrying charges

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[2] Contributing Company: a company, other than the Designated Company that, on the Designation Date, operated one or more pipelines that transported the same commodity as the commodity that was released

imposed by the Minister of Finance. This is only an option, as each company may elect to pay a higher percentage of their spill allocation or the entire balance allocated to it up front.
Please refer to the appendix for an example of the methodology.

D. Invoicing Process, Interest and Repayment

The NEB will need to calculate total imposable charges, allocate those charges among the companies, and invoice companies for those amounts for the purposes of recovering the amounts paid out by the CRF.

Proposed approach:

The Board will invoice based on actual amounts paid out of the CRF incurred in the preceding invoicing period.

If a company fails to pay any charges invoiced by the Board within the period required by the NEB Designated Company Cost Recovery Regulations, the company will pay interest on the outstanding amount at the CRF lending rate which the Department of Finance will establish at that time for the NEB. As provided for in the NEB Act, the Board will then deposit the amounts paid out under subsection (1) of section 48.46 of the NEB Act to the credit of the Receiver General in accordance with the terms and conditions established by the Minister of Finance.

Pipeline Incident Cost Analysis:

To better position the reader to evaluate the methodology as represented in the appendix, it may be helpful to refer to some examples of past incident costs.

There is limited public data available for spill clean-up costs.

Actual spill costs of between approximately $2,500 and $30,000 per barrel were described in the Report of the Joint Review Panel for the Enbridge Northern Gateway Project (the Northern Gateway Panel). The Northern Gateway Panel decided to use a per barrel spill cost estimate of $22,000 to represent the average per barrel cost of a spill. The following are actual costs of oil spills:

Oil Spills in Alberta and British Columbia between 2000 and 2011 Actual Costs

Year	Spill Description	Volume of Spill (m^3/bbl)	Spill Environment	Spill Costs ($ million)	Per Barrel Spill Cost ($)
2000	Pembina Pipeline Corp. Pine River crude oil Spill, Chetwynd, BC	985.72 m^3 6,200 bbl	Land and fresh water	$26 MM for cleanup and restoration $5 – 6 MM third party economic loss	$5,161
2005	Lake Wabamun bunker oil spill from freight train, Whitewood Sands, AB	695.57 m^3 4,375 bbl	Land and fresh water	$87 MM cleanup, mitigation, remediation $45.3 MM third party claims	$30,240
2007	Trans Mountain Pipeline Inc. spill heavy synthetic crude oil into an urban area and Burrard Inlet, BC	238.48 m^3 1,500 bbl	Urban and Marine	$15 MM environmental mitigation, remediation, restoration Third party damages N/A	$10,000
2011	Plains Rainbow pipeline crude oil spill, Peace River, AB (Provincial pipeline operated by Plains Mainstream Canada ULC, regulated by AER)	4,451.64 m^3 28,000 bbl	Remote, densely forested muskeg	$70 MM cleanup and restoration	$2,500

Source: NEB Report Northern Gateway, - Volume 2 – Considerations, adobe 356 of 425

In addition to these incidents, there is also a more recent example from the 2016 Husky Energy at North Saskatchewan River, SK.

Year	Spill Description	Volume of Spill (m^3/bbl)	Spill Environment	Spill Costs ($ million)	Per Barrel Spill Cost ($)
2016	Husky Energy at North Saskatchewan River, SK A pipeline leak occurred on the south shore of the North Saskatchewan River spilling heavy oil and diluent.	225 m^3 1415 bbl	Land and fresh water	$107 MM [3]cleanup and restoration	$75,618

Based on the actual costs listed above, it is unlikely that a company will meet the criteria to be designated.

[3] http://huskyenergy.com/downloads/abouthusky/publications/annualreports/HSE_Annual2016.pdf

Scenario 1: Designated company scenario allocation based on an oil release that costs 1 billion dollars (and the designated company has become insolvent) with a 5 per cent of annual revenue minimum payback.

The following scenario is meant to be illustrative only. For this reason, a sample of hypothetical companies has been shown to illustrate the mechanics of the regulations. In a real designated company situation, costs would be recovered from all oil pipeline companies, should costs not be recoverable from the designated company.

The following formula will be applied:

$$B*(C^1/C^2) = A$$

Where for oil:

- A = charge or levy imposed on a company that transports the same commodity or a commodity of the same class as the commodity that was released
- B = year-end balance of the Consolidated Revenue Fund amount to be recovered in respect of a release
- C^1= invoice of individual company under the current cost recovery regulations for the year preceding the designation
- C^2= sum of all invoices of companies that transport the same commodity as the commodity that was released by the designated company under the current cost recovery regulations for the year preceding the designation

Table 1 – Scenario 1 – Spill Cost Allocation Scenario for Oil Pipeline Companies - $1 billion of costs to be allocated

Company	Year End Balance (B) (000$)	Recent Invoice Amount (C1) (000$)[4]	Sum of C1 = C2 (000$)	C1 / C2 (%)	Spill Cost Allocation (A) (000$)
I	1,000,000	31,000	40,021	77.46%	774,593
II		6,000		14.99%	149,921
III		3,000		7.50%	74,961
IV		10		0.02%	250
V		10		0.02%	250
VI		0.5		0.001%	12
VII		0.5		0.001%	12
Total		$40,021		100.00%	$1,000,000

[4] Please note that numbers are estimates for modelling purposes.

Table 2 – Scenario 1 – Payment breakdown and Payback Periods for Oil Pipeline Companies

Company	Spill Cost Allocation (A) (000$)	Company's Total Annual Revenue[5] (000$)	Minimum Payback of 5% of Revenue (000$)	Cost recovery amount year 1* (000$)	Cost recovery amount year 2* (000$)	Cost recovery amount year 3* (000$)	**Total years to pay balance**
I	774,593	3,000,000	150,000	165,492	162,492	159,492	7
II	149,921	500,000	25,000	27,998	27,498	26,998	7
III	74,961	300,000	15,000	16,499	16,199	15,899	6
IV	250	35,000	1,750	255	0	0	1
V	250	1,000	50	55	54	53	6
VI	12	4,500	225	13	0	0	1
VII	12	500,000	25,000	13	0	0	1
Total	$1,000,000			$210,325	$191,395	$187,897	7

*Companies that are subject to the designated company cost recovery regulations will have an option to pay no less than 5% of their total annual revenue from the year preceding the designation per invoicing period, in addition to any carrying charges imposed. Companies may elect to pay a higher percentage of their spill allocation or the entire balance allocated to it up front. The table assumes that carrying charges of 2% per annum are imposed by the Minister of Finance, and are applied annually at each year end. The table assumes that balances owing are paid at each year end, after carrying charges have been applied. The table assumes that where spill cost allocations exceed 5% of a respective company's revenue, all of the companies eligible will elect only to pay back that 5%, plus carrying charges, each year. This is only an assumption for illustration, as each company may elect to pay the entire balance allocated to it up front.

[5] The minimum amount that a company is expected to pay back annually is based on its total annual revenue. This calculation is independent of the total spill cost allocated to the company for any given year (which is based on cost of service and throughput). Therefore, a company could have a large total annual revenue, but their calculated spill cost based on their NEB cost recovery invoice could potentially be relatively small if they do not have significant deliveries through NEB regulated pipelines and/or facilities.

Scenario 2: Designated company allocation scenario based on a gas release that costs 200 million dollars (and the designated company has become insolvent) with a 5 per cent of annual revenue minimum payback.

The following scenario is meant to be illustrative only. For this reason, a sample of hypothetical companies has been shown to illustrate the mechanics of the regulations. In a real designated company situation, costs would be recovered from all gas pipeline companies, should costs not be recoverable from the designated company.

The following formula will be applied:

$$B*(C^1/C^2) = A$$

Where for gas:

- A = charge or levy imposed on a company that transports the same commodity or a commodity of the same class as the commodity that was released
- B = year-end balance of the Consolidated Revenue Fund amount to be recovered in respect of a release
- C^1= invoice of individual company under the current cost recovery regulations for the year preceding the designation
- C^2= sum of all invoices of companies that transport the same commodity as the commodity that was released by the designated company under the current cost recovery regulations for the year preceding the designation

Table 3 – Scenario 2 – Spill Cost Allocation Scenario for Gas Pipeline Companies - $200 million of costs to be allocated

Company	Year End Balance (B) (000$)	Recent Invoice Amount (C1) (000$)[6]	Sum of C1 = C2 (000$)	C1 / C2 (%)	Spill Cost Allocation (A) (000$)
I	200,000	4,000	14,022	28.53%	57,053
II		10,000		71.32%	142,633
III		10		0.07%	143
IV		10		0.07%	143
V		0.5		0.004%	7
VI		0.5		0.004%	7
VII		0.5		0.004%	7
VIII		0.5		0.004%	7
Total		$14,022		100.00%	$200,000

[6] Please note that numbers are estimates for modelling purposes.

Table 4 – Scenario 2 – Payment breakdown and Payback Periods for Gas Pipeline Companies

Company	Spill Cost Allocation (A) (000$)	Company's Total Annual Revenue[7] (000$)	Minimum Payback of 5% of Revenue (000$)	Cost recovery amount year 1* (000$)	Cost recovery amount year 2* (000$)	Cost recovery amount year 3* (000$)	**Total years to pay balance**
I	57,053	750,000	37,500	38,641	19,944	0	2
II	142,633	12,000,000	600,000	145,486	0	0	1
III	143	4,500,000	225,000	145	0	0	1
IV	143	10,000	500	145	0	0	1
V	7	500,000	25,000	7	0	0	1
VI	7	3,000,000	150,000	7	0	0	1
VII	7	750,000	37,500	7	0	0	1
VIII	7	1,000	50	7	0	0	1
Total	$200,000			$184,447	$26,986	0	2

*Companies that are subject to the designated company cost recovery regulations will have to option to pay no less than 5% of their total annual revenue from the year preceding the designation per invoicing period, in addition to any carrying charges imposed. Companies may elect to pay a higher percentage of their spill allocation or the entire balance allocated to it up front. The table assumes that carrying charges of 2% per annum are imposed by the Minister of Finance, and are applied annually at each year end. The table assumes that balances owing are paid at each year end, after carrying charges have been applied. The table assumes that where spill cost allocations exceed 5% of a respective company's revenue, all of the companies eligible will elect only to pay back that 5%, plus carrying charges, each year. This is only an assumption for illustration, as each company may elect to pay the entire balance allocated to it up front.

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[7] The minimum amount that a company is expected to pay back annually is based on its total annual revenue. This calculation is independent of the total spill cost allocated to the company for any given year (which is based on cost of service and throughput). Therefore, a company could have a large total annual revenue, but their calculated spill cost based on their NEB cost recovery invoice could potentially be relatively small if they do not have significant deliveries through NEB regulated pipelines and/or facilities.