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VIA FACSIMILE TRANSMISSION

November 13, 2015

NEB Pipeline *Damage Prevention Regulations*

Sheri Young, Secretary of the Board
National Energy Board
517-10th Avenue SW
Calgary, AB T2R 0A8

Dear Madam Secretary:

**RE: Canadian Association of Energy and Pipeline Landowner Associations (CAEPLA)
Comments on the Proposed Updates for the NEB's Pipeline Damage Prevention Regulations**

We are counsel to the Canadian Association of Energy and Pipeline Landowner Associations ("CAEPLA") and are writing in response to the NEB's letter of October 20, 2015 to provide CAEPLA's comments on the proposed updates for the NEB's pipeline damage prevention regulations. CAEPLA is the nationally-recognized voice for farmers, ranchers, and other rural landowners whose properties and farming operations are affected by energy and pipeline projects. On behalf of landowners across Canada, CAEPLA has advocated for fairness for agricultural landowners in the regulation of pipeline safety for more than a decade.

Enhancing Pipeline Safety and Fairness for Landowners

Fairness for landowners in government regulation of pipeline safety means two things. First, it means putting responsibility where it belongs – with the pipeline companies who have the inside knowledge and expertise to determine where and when their pipelines may be at risk. It is not fair to require pipeline landowners who do not have the inside knowledge of the condition and location of pipelines (including pipe integrity and depth of cover) to make the call on whether agricultural activities can be carried out over pipelines. And it is certainly not fair to expose those landowners to penal and monetary penalties in connection with having to make the call.

Second, fairness means recognizing that pipeline companies are required to construct and operate their pipelines in a way that permits normal farm operations over the pipe. From the beginning, pipeline companies have obtained land rights for pipeline projects through expropriation or through agreements made under the threat of expropriation on the condition that agricultural activities could continue. The vast majority of pipeline landowners have agreements with pipeline companies in which the companies have specifically agreed to bury their pipes to accommodate agricultural activities. Government regulation is unfair to the extent that it absolves pipeline companies of their contractual obligations to landowners and allows companies to avoid upgrading and properly maintaining their pipelines at the expense of the landowners and their agricultural operations.

But that's exactly what happened when Parliament amended Section 112 of the NEB Act in 1990 to create the 30-metre control zone and to require company permission to cross a pipeline with vehicles or mobile equipment. The same goes for the *Pipeline Crossing Regulations* created by the NEB in 1988. Since that time, whether they have actually realized it or not, pipeline landowners have been at risk of penal and regulatory liability for carrying out normal farm operations across pipelines that were supposed to be installed so as to permit normal farm operations. Government regulation has spared pipeline companies the expense of correcting situations where the condition and location of the pipeline are not adequate to accommodate farming activities.

In CAEPLA's submission, the changes coming to Section 112 of the NEB Act (made pursuant to the *Pipeline Safety Act*) present a clear opportunity to the NEB to correct the imbalance of responsibility for pipeline safety that exists as between pipeline companies and agricultural landowners while actually enhancing pipeline safety. Through regulations under the new Section 112, the NEB can implement a safety regime for agricultural activities over pipelines that relies on the inside knowledge and expertise of pipeline companies rather than on the guesswork of farmers. If restrictions on agricultural activities are necessary to ensure pipeline safety, those restrictions should be set by individual pipeline companies on a case-by-case basis rather than by blanket government regulation.

CAEPLA proposes the following changes to the NEB's proposed Damage Prevention Regulatory Framework:

1. Pipeline Company Responsibility for Setting Restrictions on Agriculture

The new Damage Prevention Regulations should first exempt all agricultural activities from the requirements to obtain authorization as set out in Sections 112(1) and 112(2) of the Act. Then, in place of the current system where farmers must decide when their activities are exempt and when special pipeline company permission is required, the new regulations should make it the responsibility of the pipeline company to determine where and when agricultural activities may jeopardize the safe and secure operation of a pipeline. In such cases, the pipeline company would have the following options for addressing its safety and security concerns:

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.

It may be that this proposed regulatory change will result in some cases in increased restrictions on agricultural activities when compared with the current regulatory approach. CAEPLA recognizes that. But the change will also result in more effective protection for pipelines and in greater safety for pipeline landowners and farmers. Pipeline companies, not landowners, will make the decisions about which agricultural activities in specific locations require special attention.

Pipeline companies have the resources and expertise to make this work. They can obtain equipment specifications directly from farm equipment manufacturers; they can determine the surface loading and other impacts generated by farming activities; they already possess information (or should possess information) about the location, depth and condition of their pipes. Where site specific locations are identified that will not accommodate the impacts of all farming activities, pipeline companies can determine what work is necessary to accommodate farming or what restrictions may be necessary. And pipeline companies can compensate landowners and farmers for restrictions that are necessitated by the unsafe condition of their pipes.

2. Regulated Minimum Standards for the Depth of Cover over Pipelines

CAEPLA proposes that the NEB's Damage Prevention Regulatory Framework include new prescriptive regulations setting minimum standards for the condition of pipelines to be maintained following construction. A major concern of pipeline landowners is the regulatory gap that exists with respect to depth of cover over pipelines. Although pipeline companies are required to install new pipelines at a depth of no less than 0.6 m, there is no regulatory requirement for the maintenance of depth of cover over pipelines following construction. CAEPLA and its member organizations have drawn attention to this gap for many years, so the NEB's recent acknowledgment of the gap in its report on the whistleblower allegations against TransCanada came as no surprise.

Depth of cover over pipelines is a key element in pipeline safety. CAEPLA proposes that the NEB require that depth of cover over all pipelines in agricultural lands be maintained throughout the pipeline lifecycle at a depth of no less than 0.9 m or the approved construction depth, whichever is greater. Depth of cover over all other pipelines should be maintained at a depth of no less than 0.6 m or the approved construction depth, whichever is greater. It makes no sense that a pipeline company can obtain NEB approval for the installation of pipelines on the basis that they will be buried to a specific depth and yet have no responsibility to maintain that level of depth of cover following construction. This is an issue that cries out for government regulation and has been ignored for too long.

3. Incorporation of the NEB's Enforcement Policy into the AMP Regulations

Pipeline landowners and farmers are rightly concerned about their exposure to administrative monetary penalties under the NEB Act. As noted above, they are unfairly tasked with determining when a pipeline is safe and when it cannot safely accommodate agricultural activities. Then, to add insult to injury, landowners and farmers face at a minimum a penalty of no less than \$1,000.00 (or \$4,000 for a corporation) if they make the wrong determination. And they have been deprived of any defence of due diligence and of the right to appeal the NEB's decision, and even face public denunciation by the NEB.

CAEPLA is particularly concerned about the opportunities for abuse of the system by pipeline companies and company representatives looking for retribution against individual landowners and farmers. As an

example, we have enclosed as **Schedule "A"** one landowner's story about such abuse with the names redacted to protect the identity of the parties involved.

In its question and answer document accompanying the October 20, 2015 letter, the NEB implies that landowners and farmers will only face administrative monetary penalties "when other enforcement tools such as letters, orders or voluntary commitments are not working." If that is the case, then CAEPLA proposes that the NEB's Enforcement Policy be written into the AMP regulations to guarantee protection for pipeline landowners and farmers from misuse of the enforcement system. A prescribed progressive disciplinary system should minimize the opportunity for abuse of administrative monetary penalties.

4. Setting the "Prescribed Area"

For the reasons stated above, CAEPLA proposes the exemption of agricultural activities from regulation under Sections 112(1) and 112(2) of the NEB Act. However, CAEPLA fully supports the use of one-call systems and pipeline locates in connection with non-agricultural ground disturbances in the vicinity of pipelines. CAEPLA proposes that the NEB set the "prescribed area" contemplated by Section 112(1) in the new Act as 3 m on either side of the centreline of the pipe. This 3 m area is consistent with the area in which excavation with mechanical equipment is generally prohibited by the current *Pipeline Crossing Regulations*.

In CAEPLA's submission, a 3 m area on either side of the pipe will provide sufficient protection for pipelines. Any non-agricultural ground disturbance planned within that area would require the person causing the ground disturbance to engage the one-call system and obtain a pipeline locate. If a pipeline company determines that it must restrict activities outside the 3 m area (on either side of the pipe), it should be for the pipeline company to take responsibility for doing so pursuant to the land rights it holds. Government regulation of land use along pipelines should be limited to the minimum level of regulation required to ensure pipeline safety.

Conclusions

Pipeline landowners and farmers have a role to play in pipeline safety on their properties. However, the NEB's current and proposed Damage Prevention Regulatory Framework pushes too much responsibility on to landowners and farmers in favour of pipeline companies. Landowners and farmers face penal and regulatory liability in making decisions about the relative safety of pipelines so that pipeline companies may be absolved of their responsibility to upgrade and maintain their pipeline systems.

CAEPLA advocates a framework that places the primary responsibility for pipeline safety where it belongs – with the companies that have the inside knowledge and expertise to determine when it may be necessary to restrict agricultural activities above pipelines. Through its proposed *Damage Prevention Regulations*, the NEB now has the opportunity to set the right balance. And by doing so, the NEB will create fairness for landowners and actually enhance pipeline safety across Canada.

Yours truly,
SCOTT PETRIE LLP
LAW FIRM

A handwritten signature in black ink that reads "John D. Goudy". The signature is written in a cursive style with a large initial "J" and "G".

John D. Goudy

Encl.

c.c.: The Honourable James Gordon Carr, Minister of Natural Resources
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SCHEDULE "A"

I want to give you this example of what can happen when there is no appeal process in place where a landowner can appeal an allegation of not complying with the regulations.

In the spring of 2015 **X** was farming our land in **C** and other land in **A**. **X** contacted the **COMPANY** and asked them to come out to the farm to locate and flag the pipeline because we were working the soil for spring planting.

They said they would be out in a couple of days to do the work because they would have to find someone else to mark the pipeline location because we have restricted access to one of the **COMPANY'S** Employees because of the lies he has told us. He is no longer allowed access on our land. All **COMPANY** employees in fact are now required to gain expressed permission before accessing our private property.

X said he would carry on farming, meaning that he would continue to work the fields away from the pipeline until the **COMPANY** got there to locate and mark the pipe.

Shortly thereafter we noticed that **COMPANY** employees were photographing the tractors as they were working in the fields. We were then contacted by **Y** who said he was the new "pipeline safety officer" (or something like that) and we were told that he would be reporting us to the NEB for not complying with the crossing regulations, implying in our view that we would be subject to up to a \$100,000 fine.

To be clear, we were farming the fields but we were no where near the pipeline easement. I contacted **Z** the independent Land Agent that has been hired by the **COMPANY** to try to negotiate a settlement on the damages done to our field in 20xx and to help negotiate a contract for the proposed replacement dig which is now scheduled for 20xx.

Z quickly organized a meeting at the farm with myself, **X**, **Z** and **Y** present. I would describe **Y's** demeanor to be very agitated and condescending on the edge of being able to control his emotions. Even threatening to leave the meeting by going to his truck and opening the door to leave. He was swearing at us and told us that he had pictures of us in contravention of the crossing regulations and that he was going to report us to the NEB. We told him that we had not contravened the crossing regulations and we would appeal the allegation and asked how we could do that. We were told there was no appeal process.

Y told us he would be forwarding the pictures to the NEB. We asked to see the pictures which he produced on his phone. We pointed out that the pictures clearly showed that we were no where near the pipeline and both he and **Z** agreed that we were correct. **Y** left the meeting without telling us that he would not be reporting us as previously stated nor did he contact us after the fact to inform us one way or the other. We assumed that because the pictures that we had seen clearly showed that we were not farming in contravention of the new crossing regulations that he would not be filing a report.

We tell this story because we have a very strong feeling that there may have been a vendetta against us because we have been a very loud voice in terms of unethical acts committed by the **COMPANY** and the shortcomings with respect to the National Energy Board Act and the National Energy Board itself as it relates to landowners.

Our concern is that if the new crossing regulations do not contain an avenue of appeal, any pipeline company could use these regulations to falsely accuse any landowner of wrong doing subjecting them to an Industry based penal system to bully landowners into submission.