Coquitlam

Direct Line: 604-927-3092
Facsimile: 604-927-3445

April 15, 2016
Our File: 06-2430-20/14-02/1
Doc #: 2247682.v1

VIA EMAIL (damagepreventionregs@neb-one.gc.ca)

Chantal Briand
Regulatory Approaches
National Energy Board
517 Tenth Avenue S.W.
Calgary, AB T2R 0A8

Dear Ms. Briand:

RE: 30 Day Comment Period for National Energy Board Proposed Regulations for Pipeline Damage Prevention in *Canada Gazette* Part 1, 19 March 2016
Your File No: Ad-GA-ActsLeg-Fed-NEBA-RRG-DPR 02 01

The City of Coquitlam is one of several municipalities whose staff has spent considerable time studying the *National Energy Board Act*, the new *Pipeline Safety Act,* and their existing and the proposed new regulations over the last few years. The City shares the Board's goal of ensuring interjurisdictional pipeline activities are regulated to operate safely, and the City is supportive of a fulsome review of pipeline regulation in Canada. Regrettably, the City of Coquitlam has a number of procedural and substantive concerns with the proposed Pipeline Damage Regulations as published in the 19 March 2016 *Gazette*.

On the procedural side, Coquitlam questions the timing of the proposed amendments. While we understand the desire to update the Regulations in tandem with the coming into force of the *Pipeline Safety Act* on June 19, 2016, as the Board is aware, the hearing record in the Trans Mountain Expansion Project (TMX) application has recently closed. The enactment of new regulations at this time seems to undermine the public participation in the hearing process. For example, as intervenors in the TMX hearings, Coquitlam and four other Lower Mainland municipalities submitted for consideration a set of Joint Municipal Conditions if TMX is approved. Those Conditions were drafted in the context of the existing regulatory landscape. The appropriate time to draft and receive comments on proposed

changes to those regulations is after the Board releases its conditions and recommendations in respect of the TMX application, and once the government determines whether or not to approve it. At that time, Canadians will have a better understanding of which elements of pipeline safety and operations are appropriately the subject of project approval conditions, and which elements must be addressed in a new regulatory regime.

As both a level of government and as affected landowners, municipalities are uniquely situated to provide input into pipeline regulation. Despite this significant role, Coquitlam notes that it was not directly notified of this 30 day comment period. It also does not appear the umbrella organizations representing municipalities' interests in British Columbia and nationally (e.g. Union of British Columbia Municipalities, Federation of Canadian Municipalities) were consulted during the drafting process.

In terms of substantive comments on the proposed Regulations, the City of Coquitlam refers you to the deficiencies and concerns outlined by the City of Surrey in its letter dated April 12, 2016, a copy of which is enclosed. The City of Coquitlam requests that the National Energy Board revise the proposed Regulations to remedy these deficiencies. As set out in the City's written arguments in the TMX application (https://docs.neb-one.gc.ca/ll-eng/llisapi.dll?func=ll&objId=2905654&objAction=browse&viewType=1), a lawful federal regulatory scheme must advance goals within its legislative authority, such as pipeline safety, in a way that minimally impairs municipalities' ability to regulate matters within their legislative authority, such as use and occupation of highways. Also, the federal regulatory scheme must not unduly transfer risk and burden from private pipeline companies to the residents for whom municipalities operate and maintain those public assets. The City of Coquitlam respectfully says that the proposed Regulations do not meet either of these requirements.

In short, outstanding issues of considerable concern to municipalities, which are not dealt with in existing legislation, remain unaddressed in the proposed Regulations.

Yours truly,

Stephanie James
Assistant City Solicitor

Encl. - City of Surrey – 12 April 2016 Letter to NEB Re: 30-Day Comment Period for National Energy Board Proposed Regulations for Pipeline Damage Prevention in Canada Gazette Part I (date of publication: March 19th, 2016)

c- Federation of Canadian Municipalities

CITY OF SURREY

the future lives here.

Legal Services
CRAIG MacFARLANE, City Solicitor
MAUREEN ST. CYR, Assistant City Solicitor
KELLY RAYTER, Assistant City Solicitor
ANTHONY CAPUCCINELLO, Assistant City Solicitor
PHILIP C.M. HUYNH, Assistant City Solicitor
BENJIE LEE, Assistant City Solicitor
HUGH CAMPBELL, Assistant City Solicitor

Our File: 5500-01/ #1
2430-20-591
Direct Line: (604) 591-4188

VIA EMAIL: damagepreventionregs@neb-one.gc.ca

April 12, 2016

Chantal Briand, Regulatory Approaches
National Energy Board
517 Tenth Avenue S.W.
Calgary, AB T2R 0A8

Dear Sirs and Mesdames:

Re: 30-Day Comment Period for National Energy Board Proposed Regulations for Pipeline Damage Prevention in *Canada Gazette* Part I (date of publication: March 19th, 2016)

In light of the brief period available for comment, the focus of this letter is limited to highlighting deficiencies in the proposed regulations that from a preliminary review alone are glaringly obvious. The fact that other provisions have not been commented on should not be construed as the City of Surrey's endorsement of those provisions, nor should one infer that Surrey does not have concerns with them. Unfortunately, in the absence of direct consultation with the City of Surrey (one of the municipalities most impacted by federal pipelines) and other impacted municipalities and without a meaningful comment period, this letter is all that time permits.

Firstly, the general tenor of the proposed regulations is that they unfairly shift burdens, obligations, costs and liabilities to municipalities and continue to frustrate and delay the ability of municipalities to undertake even the most routine services. Sadly, one cannot avoid being left with the impression that the draft regulations were written by pipeline company representatives.

Secondly, a glaring deficiency of the draft regulations is that they do not address the pipeline crossing issues raised by the City of Surrey and other municipalities (including the City of Coquitlam, the City of Abbotsford, the Township of Langley and the City of Edmonton) in the recent National Energy Board Hearing related to Kinder Morgan's Trans Mountain Pipeline Expansion Project (Board File: OF-Fac-Oil-T260-2013-03 02). The imperative to impose a cost allocation formula and provisions related to the issues and necessary requirements captured in the *Joint Municipal Conditions* (which are set out on p.180 to p.182 of the enclosed Written Argument) have been ignored by the drafters of the proposed regulations. Also ignored is the fact that pipeline companies do not compensate municipalities for their pipelines occupying and crossing municipal highways and that municipalities incur extraordinary present and future costs

as a consequence of such occupation and crossings. The City of Surrey and other municipalities requested that these "*Joint Municipal Conditions*" be imposed because, in part, the following issues and necessary requirements they address are not dealt with in legislation and continue to remain unaddressed in the proposed regulations:

- The allocation of present and future costs to the pipeline company arising as a consequence of the pipeline occupying or crossing highways and impacting utilities including, but not limited to:

    (i) costs to realign, raise or lower the pipeline;
    (ii) costs to excavate material from around the pipeline;
    (iii) costs to add casing or other appurtenances for the protection of the pipeline; and
    (iv) costs to accommodate future construction projects including, but not limited to, the construction, upgrading, maintenance, renewal, widening and/or replacement of any improvements, infrastructure, utilities and/or highway that occurs across, under, over or in proximity to the pipeline;

- The obligation of the pipeline company to provide necessary consent and obtain necessary consent from other interest holders in the pipeline company's statutory right of way/easement to enable municipalities and the Province to dedicate required land for highway/road;

- Fixed timing of pipeline work to be performed by the pipeline company to accommodate highway, utility, infrastructure and improvement projects so as not to delay municipal projects;

- Prohibiting the pipeline company from including certain terms in its consents or permits such as terms requiring municipalities to release and indemnify the pipeline company and assume liabilities and pay costs;

- Requiring the pipeline company to release and indemnify municipalities from any and all liabilities, damages, claims, suits and actions arising out of the pipeline company's operations and/or the construction, installation or placement of its infrastructure, including but not limited to, the pipeline, across, under, over or within the highway or in proximity to municipal utilities other than liabilities, damages, claims, suits and actions resulting the gross negligence or willful misconduct of the municipality; and

- Requiring the pipeline company to enter into agreements related to impacted utilities including highway occupation and crossings with each affected municipality and affected Provincial highway authorities prior to construction, failing which terms shall be imposed by the NEB.

The legal basis, need, rationale and evidence relied upon for the inclusion of provisions addressing these issues and necessary requirements is set out in section 2.0 of the enclosed Written Argument (p.2 to 110). We also suggest that you listen to the City of Surrey's presentation to the NEB in order to appreciate their significance. The presentation can be viewed using the following link: http://neb.isilive.net/TMPULC/2016-01-19/video-english.html.

Finally, as for specific provisions of the proposed regulations, we offer the following additional comments:

National Energy Board Pipeline Damage Prevention Regulations - Authorizations

s.4 - Duty to Inform - This exposes municipalities to extraordinary potential liability particularly in light of the joint and several liability provisions set out in section 16 of the *Pipeline Safety Act*, SC 2015, c.21, which amends the *National Energy Board Act* by adding s.48.12 to that *Act*. The addition of s.48.12 unfairly shifts liability to municipalities and arguably has the effect of nullifying the existing protection under s.86(2)(d)(ii) of the *National Energy Board Act* which Surrey and other municipalities have requested the NEB to clearly provide applies to municipalities as the owner of highways. Not only is it virtually impossible to prove that someone has been informed, but municipalities would have no reasonable means, nor can they be reasonably expected to know what subcontractors, if any, have been engaged. Also, keep in mind, that the duty to inform is far more difficult to satisfy than a duty to notify.

s.7(1)(c), s. 10(1)(c) - This improperly puts the onus on municipalities to be satisfied that they have obtained the information referred to in paragraphs 6(1)(a) and (c) of the regulation. The most municipalities can do is request said information and assume that the information the pipeline company provides is in fact all of the information s.6(1)(a) and (c) describes. It should not be left to the municipalities to assess the completeness and accuracy of the information provided by the pipeline company in response to a municipality's request.

s.7(3), s. 9(2), s.10(3) - The mandatory language "*must*" should be qualified with language similar to "*Unless otherwise ordered by the Board or consented to by the pipeline company, any person...*". On an application to the Board for a crossing, the NEB may relieve municipalities and others of some of these obligations.

s.7(3)(a), s.10(3)(a) - The language "*and that have been accepted by the pipeline company*", should be deleted. The pipeline company has either consented or it has not. This language creates uncertainty and arguably suggests that you need more than just consent but that you also need evidence of acceptance as well.

s.8(a) - The phrase "*compatible with the pipeline's safety and security*" should be deleted. Municipalities are not pipeline experts. Once the crossing is approved, it is enough that the facility (which includes "*highways*") is properly maintained in a good state of repair.

s.8(b) - This provision provides too much power to the pipeline company. What if the municipality does not agree that there is any "*deterioration*"? Keep in mind "*facility*" includes "*highways*".

s.8(d) - This provision puts a ridiculously uncertain onus on municipalities with the word "*could*". Why should municipalities be obligated to "*remove or alter the facility*"? One should also be mindful of the added exposure to municipalities created by the new liability provisions set out in the new s.48.12 of the *National Energy Board Act* (soon to be in force) added through section 16 of the *Pipeline Safety Act* which was enacted without municipal consultation and without regard to the unfair burden and additional liability it places on municipalities. Instead, the regulations should provide that the pipeline company shall undertake all necessary work to protect the pipeline at its expense. Again, one should not lose sight of the fact that pipeline companies do not compensate municipalities for their pipelines occupying and crossing municipal highways and

that municipalities incur extraordinary present and future costs as a consequence of such occupation and crossings.

s.10 - The incorporation of the definition of "*ground disturbance*" is problematic as the definition itself is unworkable. How could municipalities possibly prove there has been no "*reduction of the earth cover over the pipeline to a depth that is less than the cover provided when the pipeline was constructed*"? The obvious problems that result from such an unworkable definition are described in the letter from the Township of Langley dated November 13, 2015 which is enclosed with this letter.

Moreover, how are municipalities able to rely on the exception set out subparagraph (c) of the definition of "*ground disturbance*" in the *Pipeline Safety Act* without having any knowledge or reasonable means of ascertaining the depth of cover over the pipeline when the pipeline was constructed? The federally regulated Trans Mountain pipeline that traverses the City of Surrey was constructed in 1953 and we suspect that not even the NEB has the required information related to depth of cover. Also, in some cases, the depth of cover may have changed from the time of construction with the consent of the pipeline company or by order of the Board.

At a minimum, if this definition is to remain, then the regulation should clearly provide that certain activities are permitted to a depth of 30 cm without the added requirement that there be no reduction of the earth cover over the pipeline. There should also be a requirement that the pipeline company provide the depth of cover information required.

s.10(a) (see comments related to s.3(2) of the proposed *National Energy Board Pipeline Damage Prevention Regulations – Obligations of Pipeline Companies*) - There must be limitations imposed on the terms and conditions that can be imposed in a consent. While s.3(2) of the *National Energy Board Pipeline Damage Prevention Regulations – Obligations of Pipeline Companies* states that the conditions must relate to "*... conditions necessary for the protection of property and the environment, the safety and security of the public and of the company's employees or the pipeline's safety and security*", the pipeline company practice has been to include conditions imposing indemnities, releases and other provisions related to liability all in favour the pipeline company which have the effect of nullifying existing protections under the *National Energy Board Act* (such as those set out in s.86(2)(d)(ii) of the *National Energy Board Act*) as well as eliminating common law and other statutory defences available to municipalities. Unless a prohibition is expressly included in the regulations that has the effect of prohibiting such terms and conditions from being added then this pipeline company practice will undoubtedly continue.

s.10(3)(c) - By incorporating the definition of "*ground disturbance*" in this provision, the same concerns expressed above in relation to s.10 generally apply.

s. 10(3)(c) (ii) - Also, the 60 cm depth differential requirement is too large. An acceptable municipal standard is 30 cm clearance. The imposition of a 60 cm depth differential practically sterilizes otherwise usable portions of highway and utility corridors (which are already constrained for space) by effectively requiring municipalities and other utilities to place all facilities beneath the pipeline at tremendous expense. These facilities would include municipal and third party utilities that are typically placed very shallow in highways for access and construction cost reasons and include streetlighting, water lines and mains, catch basins, gas lines and mains, and electrical and telecommunication conduit, etc.

s.12 - When read in conjunction with the new section 112(2) of *National Energy Board Act* enacted by s.34 of the *Pipeline Safety Act* which will be in force shortly, section 12 of the proposed regulation does not go far enough. The ambit of varied routine municipal activities that must be undertaken with a vehicle or mobile equipment such as ditch cleaning, arguably cannot under the current language of the draft regulation be undertaken without the pipeline company's consent. The exemption for vehicles and equipment operated within "*the travelled portion of a highway or road*" set out in section 112(2)(b) is not helpful or workable because of the uncertainty of what constitutes the "*travelled portion of a highway or road*". At a minimum, s.12 of the regulation should be expanded to clearly provide that the operation a vehicle or mobile equipment for the purposes of undertaking certain routine municipal activities are permitted across a pipeline without the pipeline company's consent.

National Energy Board Pipeline Damage Prevention Regulations – Obligations of Pipeline Companies

s.3(2) - There must be limitations imposed on the terms and conditions that can be imposed in a consent. While s.3(2) of the *National Energy Board Pipeline Damage Prevention Regulations – Obligations of Pipeline Companies* states that the conditions must relate to "*... conditions necessary for the protection of property and the environment, the safety and security of the public and of the company's employees or the pipeline's safety and security*", the pipeline company practice has been to include conditions imposing indemnities, releases and other provisions related to liability all in favour the pipeline company which have the effect of nullifying existing protections under the *National Energy Board Act* (such as those set out in s.86(2)(d)(ii) of the *National Energy Board Act*) as well as eliminating common law and other statutory defences available to municipalities. Unless a prohibition is expressly stated that has the effect of prohibiting such terms and conditions from being added then this pipeline company practice will undoubtedly continue.

In light of the above, we trust that you will take necessary action and revise the draft regulations to address the concerns raised and the deficiencies identified in this letter.

Yours truly,

ANTHONY CAPUCCINELLO
Assistant City Solicitor

AC:kls
Enclosures:
- Written Argument of the City of Surrey dated January 12, 2016 (excluding Appendix "B" and Appendix "C")
- Township of Langley Letter dated November 13, 2015

c.c. Federation of Canadian Municipalities (Via Email)
Scott Neuman, Manager, Design & Construction

u:\legalsrv\litigation\national energy board\misc correspondence\041116 1127 - k13.docx
KS 4/12/16 3:23 PM