

March 8, 2019

VIA EMAIL (pipeline.financialresources@neb-one.gc.ca)

Sheri Young
Secretary of the Board
National Energy Board
210 - 517 10th Ave SW
Calgary, Alberta T2R 0A8

Dear Ms. Young,

RE: Draft Pipeline Financial Requirements Guidelines

Trans-Northern Pipelines Inc. (**TNPI**) is in receipt of the National Energy Board (**NEB** or **Board**) letter dated 15 February 2019 requesting comments from NEB-regulated pipeline companies and other interested persons regarding the Draft Pipeline Financial Requirements Guidelines (**Draft Guidelines**). Specifically, the Board requested feedback regarding any areas in the Draft Guidelines where definitions, interpretations or expectations should be adjusted, and any areas where the Draft Guidelines are unclear.

TNPI very much appreciates the opportunity to provide feedback and respectfully wishes to advise the Board of its concerns regarding:

- the manner in which “Capacity” has been defined in the Draft Guidelines,
- the source of the Board’s authority to limit a company’s reliance on insurance, and
- the apparent lack of alignment between certain aspects of the Draft Guidelines and the Regulatory Impact Analysis Statement (**RIAS**) setting out the Department of Natural Resources’ (**NRCan**) intent regarding the implementation of the *Pipeline Financial Requirements Regulations* (**Regulations**).

Definition of “Capacity” and proposed application of the term

The Draft Guidelines define “Capacity” as follows:

Capacity - a pipeline’s maximum daily Capacity assuming the pipeline(s) is (are) operating at 100% of design specifications. Capacity will account for all Board-approved facility additions, removals, decommissionings, and deactivations.

Section 3.3 of the Draft Guidelines goes on to explain how the Board intends to apply this definition and determine Capacity for oil pipelines. In particular, the Draft Guidelines state:

Available capacity, average throughput, or maximum throughput over a given time period, will not be relied upon as measures of Capacity. The capacity resulting from voluntary, temporary, or

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Board-mandated pressure or flow restrictions will not determine Capacity for the purposes of Absolute Liability Class. [Emphasis added.]¹

In TNPI's view, the proposal not to consider Capacity reductions resulting from Board-mandated pressure or flow restrictions is not reasonable and inconsistent with the purposes of the *Pipeline Safety Act (Act)* and Regulations which include ensuring that liability and financial resource requirements for pipeline operators are commensurate or aligned with the associated risks.

When assessing the risk posed by oil pipelines, NRCan's analysis of historical pipeline releases, pipeline characteristics and pipeline operations determined that the key risk factor is throughput capacity.² Having regard to this determination and in response to feedback during industry consultation, the Regulations were amended to clarify that liability limits and associated financial resource requirements would only apply to in-service pipelines that have throughput capacity.

Board-mandated pressure or flow restrictions reduce the throughput capacity of pipelines, thereby reducing the degree of risk posed by the pipeline's operations. In accordance with the purposes and underlying principles of the Act and Regulations, changes in capacity resulting from Board-mandated restrictions should be considered when determining Capacity under the Draft Guidelines.

In addition to being inconsistent with the purposes and principles that underly the Regulations, the Draft Guidelines contain an internal inconsistency with respect to the assessment of changes to pipeline Capacity. Section 3.3(e) of the Draft Guidelines acknowledges that "pipelines may go through design changes throughout their lifecycle which impact Capacity or Risk Value, [and that] Absolute Liability Classes may change accordingly."³

The Draft Guideline state that:

Practically, a pipeline Company may modify, decommission, abandon, or deactivate facilities, which could reduce the pipeline's Capacity or Risk Value to the point where the pipeline would be classified in a lower Absolute Liability Class.

The Board will only consider facility changes that have been approved by the Board as affecting a Company's Capacity or Risk Value. Accordingly, reduced throughput levels, voluntary pressure restrictions, and other facility changes for which no Board order/decision/filings are required will not be determinative in assessing a Company's Absolute Liability Class. In addition, Board-directed pressure or flow restrictions will not affect a Company's Absolute Liability Class. [Emphasis added.]

TNPI acknowledges that voluntary pressure restrictions and other facility or operational changes for which Board approval is not required should not affect a Company's Absolute Liability Class.⁴ In such circumstances, TNPI recognizes that there is a risk that voluntary pressure restrictions or other changes that may be reversed without Board oversight should not be determinative of the Absolute Liability Class of a pipeline. However, as evidenced by the quote above, that is not the case for facility or operational changes that require Board approval. In circumstances where the Board retains oversight of any proposed

¹ While the same limitation is imposed for gas pipelines, the discussion in this letter is limited to oil pipelines.

² Canada Gazette, Vol. 150, No. 41, October 8, 2016, Regulatory Impact Analysis Statement for the *Pipeline Financial Requirements Regulations*, online: <<http://www.gazette.gc.ca/rp-pr/p1/2016/2016-10-08/html/reg3-eng.html>> (the **RAIS**), Rationale.

³ Draft Guidelines, page 11.

⁴ As defined in the Draft Regulations.

increases or decreases in pipeline Capacity, it will equally retain oversight of the relative risk posed by the pipeline's operations. It should, therefore, be permissible for the Absolute Liability Class to be determined based on the actual, Board-restricted Capacity of the pipeline rather than the pipeline's design capacity in such circumstances.

Pursuant to the section of the Draft Guidelines reproduced above, a modification to pipeline facilities that results in decreased Capacity will be considered for the purpose of determining Absolute Liability Class, but a Board-mandated pressure or flow restriction will not. This distinction is maintained in the Draft Guidelines notwithstanding the fact that both pipeline conditions require Board approval to be reversed.⁵

TNPI submits that this distinction is internally inconsistent and not reflective of the attendant risks and, therefore, should be revised in the final version of the Draft Guidelines. The Board would retain oversight over the authorized capacity, and assurance adequate financial resources are in place associated with the absolute liability relative risk as part of the application process prior to an authorized modification of pressure.

Unreasonable limitation on business decisions regarding financial instruments

In TNPI's view, section 4.3 of the Draft Guidelines purports to limit pipeline companies' choice regarding how it satisfies the financial resource requirements prescribed by the Act and Regulations. Section 4.3 states:

The Board expects Companies to explain how they can fund initial release response measures in a timely manner prior to insurance claims being submitted, processed, and paid. Accordingly, the Board expects Companies to take a broad approach to planned funding of spill response – utilizing various types of resources, such as cash on hand, internal resources, credit lines, and commercial paper programs, prior to reliance on insurance.

The Board is unlikely to accept solely insurance, along with the minimum required "readily accessible" portion of Financial Resources, as an adequate means of maintaining Financial Resources. The Board expects Companies to have sufficient resources to respond to an incident in a timely manner prior to insurance claims being made, processed, and paid. To date, the Board has not accepted insurance for more than 50% of a Company's Financial Resources requirement. [Emphasis added.]

While TNPI understands and appreciates the need to ensure that pipeline companies have sufficient resources to respond to an incident in a timely manner, TNPI submits that this consideration has been adequately addressed through the Regulations.

In the process of developing the Regulations, NRCan undertook an analysis of historical spill data to determine the quantum of financial resources that must be readily accessible to address immediate cleanup expenditures. Following this analysis, the original proposal requiring 10% of the Absolute Liability⁶

⁵ For example, Condition 4.f of Amending Safety Order AO-002-SO-T217-03-2010 states that TNPI shall, at least 45 days prior to any request to raise the restricted MOP of any pipeline or section of pipeline, file a request with the Board for approval to do so.

⁶ As defined in the Draft Regulations.

to be readily accessible was reduced to 5%.⁷ In accordance with the Regulations and the RAIS, this 5% amount has been deemed sufficient to respond to an incident in a timely manner. The basis for the Board's conclusions in section 4.3 of the Draft Guidelines is, therefore, unclear.

The Act and Regulations do not constrain the type of financial resources that a company may utilize to satisfy its Absolute Liability. Section 48.13(1) of the Act simply states:

A company that is authorized under this Act to construct or operate a pipeline shall maintain the amount of financial resources necessary to pay the amount of the limit of liability referred to in subsection 48.12(5) that applies to it or, if the Board specifies a greater amount, that amount.
[Emphasis added.]

While subsection 48.13(2) of the Act authorizes the Board to direct the amount of a financial resource type (as set out in section 3 of the Regulations) that a company is required to maintain,⁸ this authority has been interpreted in the RAIS and Draft Guidelines to apply only in extenuating circumstances. For example, section 5 of the Draft Guidelines states that the Board may direct a Company to maintain Financial Resources in certain types and corresponding amounts if the Board is not satisfied with a pipeline Company's Financial Resources Plan, if a Company does not submit a Financial Resources Plan, or if the Board is otherwise of the view that direction is required.⁹

In TNPI's view, the Act and Regulations do not authorize the Board to establish a pre-determined limit on the amount or proportion of a particular type of financial resource that a company may utilize to satisfy its Absolute Liability. The terms of section 5 of the Draft Regulations, especially the purported 50% limitation on the use of insurance, appear arbitrary and do not have a clear statutory foundation. TNPI, therefore, respectfully submits that the referenced limitation should be removed from the final version of the Draft Guidelines.

Specific to TNPI, the company has confirmed with its insurer that TNPI's liability insurance policy reads "pay on behalf", where the insurance carrier would defend and pay claims on behalf of the insured. TNPI confirmed with its insurance broker that it only places liability policies on behalf of TNPI with reputable insurance companies, with no less than an A- rating. TNPI's broker advised that \$300M is an average risk to carry in the Canadian market for well established insurers.

Draft Guidelines are inconsistent with the NRCan RIAS

In addition, the purported limitation set out in section 5 of the Draft Regulations appears to be inconsistent with the terms of the RIAS. While TNPI acknowledges that the RIAS does not form part of the Regulations, it provides important insight into legislative intent and the manner in which the Regulations were expected to be implemented.

⁷ RAIS, Consultation.

⁸ Section 48.13(2) states: The Board may, subject to the regulations made under subsection (7), order a company, either individually or as a member of a class of companies authorized under this Act to construct or operate a pipeline, to maintain the amount of financial resources that is referred to in subsection (1) in the types that the Board specifies, including types that shall be readily accessible to the company and, if the Board specifies types of financial resources, it may specify the amount that the company is required to maintain under each type.

⁹ Draft Guidelines, page 17.

A review of the RIAS indicates that the Regulations were not intended to constrain a company's choice regarding the types of financial resources utilized to satisfy its Absolute Liability requirement. The need for flexibility and accommodation of individual business considerations is a clear theme in the RIAS, as evidenced by the following statements therein:

Until such a time as the NEB might choose to order a company to use specific financial instruments, companies are free to choose how they meet the financial resource requirements...¹⁰

It should be noted that compliance costs would not be generated unless and until such time as the NEB issues an order directing a company to use a specific financial instrument. Otherwise, how a company chooses to meet its financial resource requirements under the Pipeline Safety Act and the Regulations will be a business decision. For example, a company could choose to meet its financial requirements by using a combination of cash on hand and an existing insurance policy.¹¹

Unless and until such time as the NEB orders a company to maintain its financial resource requirement in one or more specific financial instruments, a pipeline operator may maintain its required financial resources as it sees fit (business decision). For example, a company could choose to hold its financial resources in cash and an insurance policy.¹²

Section 5 of the Draft Guidelines appears to be inconsistent with the RIAS. The RIAS, in contrast to the Draft Guidelines, indicates that it would be acceptable for a company to satisfy its Absolute Liability through cash on hand (i.e. for the readily accessible portion) and an insurance policy.

Having regard to the foregoing, TNPI respectfully submits that section 5 of the Draft Guidelines is inconsistent with legislative intent behind the Regulations and, therefore, should be removed from the final version.

If you have any questions or require additional information regarding the foregoing, please contact the undersigned.

Sincerely,



Michael Speagle

Manager, Business Services & Secretary-Treasurer

¹⁰ RIAS, "One-for-One" Rule.

¹¹ RIAS, Small business lens.

¹² RIAS, Rationale.