



canadian
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association | association
canadienne
de pipelines
d'énergie

Suite 200, 505 – 3rd St. SW
Calgary, Alberta T2P 3E6
PHONE 403.221.8777
FAX 403.221.8760

27 September 2012

Ms. Dana Cornea
Project Manager
Administrative Monetary Penalty Regulations
National Energy Board
444 – 7th Ave SW
Calgary, Alberta T2P 0X8

Dear Ms. Cornea,

Thank you for the opportunity to comment on the National Energy Board's proposed Administrative Monetary Penalties (AMP) scheme described in the Discussion Paper prepared by Board staff. The Canadian Energy Pipeline Association (CEPA) is pleased to provide the following comments on behalf of its member companies.

CEPA represents Canada's transmission pipeline companies. Our members transport 97% of Canada's daily natural gas and onshore crude oil production from producing regions to markets throughout Canada and the US. Most of our members build and operate pipelines and associated facilities that are under the regulation of the National Energy Board. Thus, the proposed AMP scheme is of direct interest to us.

The Discussion Paper provides an outline of the NEB's proposed approach to three areas to be prescribed in the regulations to be enacted pursuant to Part IX of the *National Energy Board Act* (the Regulations):

- (1) Designating what constitutes a violation,
- (2) Method of determining the amount payable as the penalty, and
- (3) Method to serve notification documents.

Our comments and recommendations in regard to these questions are set out below. We have also provided comments on other areas of interest to CEPA, specifically related to the details of implementation of the Regulations. We hope the Board will consider these comments as it moves forward from drafting to implementation of the Regulations.

Question 1 – Designating what constitutes a violation

CEPA has confirmed with Board staff that the NEB intends to focus the Regulations and the use of AMPs on environmental and safety matters at this time, and therefore AMPs will not be applied to matters under Parts IV and VI of the NEB Act. We agree that AMPs are a useful addition to the suite of compliance tools currently available to the Board.

CEPA believes that the Board should be as clear as possible on what constitutes a violation that may be subject to AMPs. We suggest that the Board consider a schedule to the Regulations that sets out the sections of the NEB Act, the *Onshore Pipeline Regulations, 1999*, the *Crossing Regulations* and others as appropriate, including the general category of certificate conditions, to which AMPs may be applied. A schedule similar to the one provided in the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations Respecting the Pest Control Products Act and Regulations (SOR/2001-132)*, setting out the violation and the severity of it, would enhance the clarity and effectiveness of AMPs as a compliance tool.

While the Board signaled its intention to classify AMP offences as either serious or very serious, CEPA believes that adding the category “minor” to the scheme would be appropriate. That approach is utilized in the *Agri-Food Administrative Monetary Penalties Regulation*. In order to assist the Board, CEPA is preparing a schedule, for illustrative purposes, which it will be sending in shortly, of the types of offences CEPA members would expect to attract AMPs, including their severity. Such a schedule will address environmental protection and safety offences.

As damage to pipeline facilities by third parties is a primary concern to CEPA-member companies, CEPA requests that the Board have primary regard for the use of AMPs as a tool in damage prevention and state so clearly in its communications to all parties. Responsibility for safety is shared, with regulatory oversight by the NEB, between pipeline operating companies, directly affected landowners, and the public who use pipeline rights-of-way. AMPs will provide a significant incentive to ‘call before you dig’ and to respect the prohibitions of the safety zone in the interests of public safety and the protection of the environment.

Question 2 – Method of Determining the Amount Payable as a Penalty

CEPA agrees in principle with the scheme for a baseline penalty that can be adjusted with regard to specific circumstances as set out in the Discussion Paper for the determination of penalties. However, CEPA recommends that the Board add a ‘minor’ level of violation to the scheme to emphasize the intention to apply AMPs to a wide range of violations and violators.

We support the Board’s intention to use the adjustment factors to either increase or decrease the baseline amount of the penalty. In that regard, CEPA asks that the Board confirm that all parties who may be subjected to AMPs, including individual landowners, micro-business owners, contractors and regulated companies, will be able to benefit from the adjustment factors. The opportunity of all parties to reduce fines would incent positive behaviours as well as ensure all parties subject to AMPs are being treated fairly.

We recommend that the Board exercise its discretion and not impose daily AMPs on companies and landowners, without appropriate notice of its intention to do so. CEPA recommends that once the Board issues an AMP, it ‘stop the clock’ on daily incremental penalties and at the first instance establish a process to work with these parties to assist them to come into compliance, or provide them with a reasonable opportunity to do so. This could include approving corrective action plans and schedules to address the violation. In this way, the Board acknowledges that it may take some time to achieve compliance using the most appropriate and safest methods available. If the fines do not stop, even when actions to achieve compliance have begun, then the penalty becomes punitive, and the violator could be induced to use riskier or hasty manoeuvres to address the violation. If the corrective action plan does not proceed as planned or is ineffective, the Board would have the option to reinstitute daily penalties.

We recommend that the Board consider a maximum cap to the AMPs that may be related to a particular offence. Unlimited penalties are not only unfair, they are punitive, in particular in the case of administrative penalties which are meant to encourage compliance. CEPA notes that offences under the Criminal Code as well as other administrative schemes contain a range of punishments which include upper limits so that parties may be aware of the penalties they may face.

Question 3 – Method to Serve Notification Documents

Service of notification documents is a procedural step that initiates the 30-day period for review of the facts of an alleged violation or the amount of the penalty assessed. It is extremely important in the circumstances of absolute liability offences. In the case of CEPA-member companies, we recommend that the Board personally serve notice to a designated officer of the company in a manner that requires timely acknowledgement of receipt of the notice, such as by registered mail. Acknowledgement of receipt should be the action that initiates the 30-day review period.

Other Comments

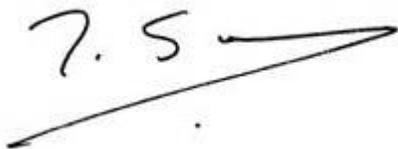
CEPA believes that the Board's implementation of AMPs would be greatly enhanced by provision of an over-arching updated compliance policy or guidance document setting out its approach to compliance matters in general and including indication of how it will use AMPs, what, if any, sequence of events (AVC, direction, order) will lead up to issuance of an AMP, what internal processes will be followed to prescribe AMPs in specific circumstances, and what review processes are available to violators. These matters are of significant interest to CEPA-member companies, and a guidance document will allow the Board to be clear and transparent in its intentions regarding compliance. To be most effective, this policy document should be available prior to publishing of the draft Regulations in the Canada Gazette, Part 1.

Consistency in implementation of any new regulation is a challenge. We ask that the Board consider how best to achieve consistency through use of its own internal processes – perhaps by designating one Board Member or senior NEB staff, such as a Professional Leader, to oversee or review AMP-related matters. This would enable the Board to use the appropriate number of individuals designated to issue notices of violation while still retaining oversight for consistency.

Related to the implementation of AMPs is the need to ensure due process and fairness, something upon which the Board has always prided itself. In the case of AMPs, this involves a clear process of investigation and fact gathering leading up to a decision to issue an AMP in any particular instance. This is particularly important as issuance of AMPs denotes an absolute liability offence for which due diligence and other standard defenses are not available. In fact, none of the common law defenses that may be available to individuals are available to CEPA member companies. The guidance or policy document on compliance and implementation of AMPs should address this matter.

Thank you for the opportunity to provide comments on the Board's proposed approach to AMPs. We will provide our recommendations on a schedule of offences, as mentioned above, shortly. CEPA and its member companies look forward to continuing to be engaged with the Board in development and implementation of the Regulations.

Yours truly,

A handwritten signature in black ink, appearing to read "Z. Saad", with a long horizontal line extending to the right.

Ziad Saad
Vice President, Safety & Sustainability