

NOTES FOR TALK WITH THE MODERNIZATION PANEL

By Horst Sauerteig

1.) The Onshore Pipeline Regulations OPR(SOR/99-294) under the NEB Act (the Act) require in subsection 6 a company, when designing, constructing, operating or abandoning a pipeline, in each phase to achieve three basic requirements,:

- a) The safety and security of the public and the company's employees;
- b) The safety and security of the pipeline; and
- c) The protection of property and the environment

To emphasise that the NEB indeed requires a company under its jurisdiction to adhere to these maxims, as well as in cases when the NEB is ruling on matters where a company and the public differ, and to make sure that in its ruling both parties are being treated equally, these three requirements should be listed as a preamble to the Act as the NEB's basic position in any company versus the public dispute which has to be adjudicated by the NEB. This would help to build public trust in the regulatory framework of the NEB.

2.) The recent Pipeline Safety Act has gotten a lot of attention, but generally with Safety goes Security, and they are both listed together in the pipeline literature [example in the Act 48(2)] because both are in the Public Interest. Surprisingly Security is missing in the Safety Act, except that "monitoring" is mentioned, which could be a reference to a regular surveillance of a pipeline for security purposes. A definition of monitoring would be helpful. But to comply with the three basic requirements mentioned before, it seems advisable to collect information on the various activities relating to Security, starting with the letter to all companies of 24 April 2002, in one single file, a new Pipeline Security Act, as a supplement to the Safety Act. It has to include adequate security measures against terrorism and other criminal activities.

3.) The Act in 26,(1) requires the Board to study and keep under review matters over which Parliament has jurisdiction relating to ...the production, recovery, manufacture, processing...of energy and sources of energy in and outside of Canada, and report (1.1) the matters referred in (1) from time to time to the Minister; and shall provide the Minister in (2)(a) with such advice as the Minister may request, and recommend to the Minister in (2)(c) the making of such arrangements as it considers desirable for cooperation with governmental and other agencies...

I argue that the above requires the NEB "to study and keep under review" the excavation and processing of the bitumen which, mixed with diluent, is the dilbit which the Energy East Pipeline Co. proposes to ship out of the Port of Saint John, and that this process might increase Canada's GHG production above the limit agreed upon in the Paris Agreement, and that this GHG increase might over the life of the Energy East Pipeline outweigh the damage to the environment and the public over any possible benefits it might create for the public. I suggest that the Act should be changed to make it a duty of the NEB to study the environmental results of increases of bitumen production at the oil sands in Alberta, Saskatchewan and else-where and take these results into consideration when conducting the licensing process for proposed new mines and/or pipelines.

4.) The NEB, to gain the public's trust, has to demonstrate in its dealings with the public its impartiality and regulatory excellence by showing the outmost integrity of its Board and its staff, their dedication to the above three basic requirements, and stellar competence in their actions,

their judgements and their decisions. In my experience, some improvements and/or changes to the NEB's dealings with the public are called for.

5.) I list examples where the principles listed in 4.) will improve the public opinion of the NEB:

(a) Presently in the Hearing Process for the licensing of a proposed pipeline, the Hearing Panel considers only the application of the proponent. No alternate proposals are being considered. This happened to me. I had submitted an alternate proposal to rout the Emera NB Gas pipeline around the city of Saint John through the Outer Harbour instead through the city. Obviously it was a safer route for the public, and I had submitted my proposal to the company, as instructed, prior to the Hearing, but had received no reply. During the Hearing the Panel's chair prevented me from questioning the witness for the company about this alternate route. I submit that there has to be a means made available by the NEB for citizens to discuss with the company in public alternate proposals, especially when they offer better safety and security for the public.

(b) The NEB has to establish a compliance verification process. There is no point in adding "conditions" to a license to build and operate a pipeline, when the company can decide, after the pipeline is in operation, to change these conditions and thereby endanger the safety and security of the public and the environment. Here in Saint John the NEB did not act on complaints about the changes which the Emera Brunswick Pipeline Co made to the patrolling of the RoW, on them closing down of several Community Liaison Committees, on the incomplete execution of the Emergency Response Exercise required by Condition 21 of Certificate GC-110, nor with NEB's promised follow-up when in 2 ADR sessions many items of the agendas could not be resolved.

(c) A Company's Emergency Response Plan has to be presented in detail as part of its Proposal and scrutinized during the Hearing. To have a company present some "plan" just a few months before operations start is unfair to the public, who at that time has no possibility to have changes made to such a plan to improve the public's and the environment's protection.

(d) I will comment on Audits below, in case someone argues that this is a sufficient compliance verification process.

6.) The Act provides in section 22 that an appeal lies from a decision or order of the Board to the Federal Court of Appeal on a question of law or jurisdiction (after leave to appeal is obtained from the court). The application to appeal must be made within 30 days after the release of the contested order or decision of the Board. This is no problem for the pipeline companies and their Legal Departments, but a member of the public will be obliged to hire a lawyer in order to try in a comparatively short time span to have such an order or decision halted or reversed, as the case may be. This is not a level playing-field: the million-dollar budget of a company versus the savings of an aggrieved or concerned citizen.

7.) To alleviate the situation in 6.), I suggest the creation within the NEB organization of the position of an Ombudsman (or –person). Besides other rulings his or her office would look at complaints from the public about the pipeline companies and/or the NEB, and this office would try to find solutions, including in cases before a person's complaint would be referred to a judge of the Federal Appeals Court. Obviously, this office would get a lot of complaints from the public because at this stage no lawyer has to be hired, but this process would eventually lead to a "public license" for a proposed project and, equally important, to a fair treatment by the NEB.

8.) I furthermore suggest the creation of a “Maritime Desk” at the NEB Head Office. The NEB has satellite offices in Vancouver and Montreal, and a representation of the Maritimes, albeit much more modest, would certainly have many benefits. Somebody at Headquarters would be intimately familiar with the workings of the pipeline companies in the Maritimes, what the complaints about them are, who the complainants are, the rabble-rousers and the serious ones, etc. This “desk” would have input into cases going before the Ombudsman, and all correspondence from the Maritimes would be copied to this “desk” whereas, and this is my experience, it now goes from the Secretary of the Board to some group within Head Office and is never heard from again. This “desk”, in cooperation with the Ombudsman, would make the workings of the NEB much more transparent, and the public’s trust in it certainly would increase.

9.) This Maritime Desk would be of benefit to NEB Head Office as well. It would be able to give input into the selection of members for the Community Liaison Committees which, I submit are essential for a good public/company relationship, and whose selection cannot be left solely to the companies. And it could give similar input into the inquiries of an NEB-Audit team which tries to verify records with testimony of real persons. It should be obvious that employees put forward by a company will testify favorably about their employer, whilst citizens who had written to the NEB (and the desk) about matters of concern simply will not be called to testify. This in turn will result in a skewed picture or in an Audit solely based on company-produced records. But, I submit, an Audit should not only show that there are well kept records, an Audit has to verify that the three basic requirements [listed in 1.)] have been met.

10.) When I write above [in 9.)] of Public Involvement, I do not necessarily refer to only those who are directly involved. Nobody knows who will be directly involved when a pipeline incident occurs, nor do I refer exclusively to affected landowners, as the NEB sometimes identifies “the Public” in its various publications. A landowner can be in a situation where a few dollars from a pipeline company are quite welcome, or he or she could live in Florida and could care less if part of their property is dug up or cut up. “The Public” in NEB matters is anybody who takes an interest in NEB regulated projects, who takes the time to inform him- or herself, and who is concerned about any or all activities which could impede the safety and security of the public, the company’s employees and the environment. A modernized NEB has to pay attention to and recognize such a “Public”, or the pipeline companies will marginalise these concerned citizens and promote in their place their own cheerleaders to further solely company interests. A Public Involvement described above could be clarified in the “Definition” section of the Act.

11.) I spoke above (3) about NEB’s requirement to report on GHG in the excavation and upgrading of bitumen. I suggest that an equal requirement exists to protect the environment in the Bay of Fundy and the people who make a living from it, when the dilbit is loaded into tankers at the proposed Marine Terminal in Saint John. I suggest that the Act should be changed to extend the NEB’s jurisdiction not only to the production of bitumen and dilbit, but also to its loading, de-ballasting of and shipping in tankers on both the West- and the East Coasts. This would provide protection for the Bay of Fundy, its fauna and those living and working on its shores.