

National Energy  
Board



Office national  
de l'énergie

File OF-Surv-AMP-2015-005  
5 February 2016

## LETTER DECISION

Mr. Guy Jarvis  
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Mr. Robert Steedman  
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National Energy Board  
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Ms. Laura Estep  
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Dear Ms. Estep and Messrs. Jarvis and Steedman:

**Enbridge Pipelines Inc.  
Request for Review AMP-005-2015 (Environment)  
National Energy Board Letter Decision**

### BACKGROUND

On 18 July 2013, the National Energy Board (Board on NEB) issued Order XO-E101-016-2013 (Order), which granted Enbridge Pipelines Inc. (Enbridge) approval to construct and operate a new replacement pipeline between the Cromer Terminal and the tie-in point within NW-9-926 WPM.

Condition 3 of the Order states:

Enbridge shall implement or cause to be implemented all of the policies, practices, programs, mitigation measures, recommendations, procedures and its commitments for the protection of the environment included in or referred to in its application and its related submissions.

Pursuant to Part IX of the *National Energy Board Act* (NEB Act) and section 2(3) of the *Administrative Monetary Penalties Regulations* (AMP Regulations), the Administrative

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Monetary Penalty (AMP) Officer issued Notice of Violation AMP-005-2015 (NOV) to Enbridge on 23 February 2015, for failure to comply with Condition 3 of the Order by failing to implement measures committed to by Enbridge in its Environmental Protection Plan (EPP). The penalty was set in the amount of \$100,000.

On 25 March 2015, the Board received Enbridge's Request for Review of both the penalty amount and the facts of the violation.

The Board issued a procedural letter on 10 April 2015, setting out the process through which the Request for Review would be considered. In accordance with this process, the Board received the AMP Officer's disclosure package (Disclosure) on 24 April 2015 and Enbridge's submission dated 25 May 2015. The AMP Officer filed his response submission on 24 June 2015. Enbridge did not file a reply to the AMP Officer's response submission, an opportunity afforded by the Board's procedural letter.

As noted above, Enbridge requested a review of both the penalty amount and the facts of the violation. The Board's decision in this matter, set out below, addresses the facts of the violation first, and the amount of the penalty second.

## **DISPOSITION**

For the reasons that follow, the Board has determined that:

- **Enbridge committed the violation; and**
- **The total gravity value, which had previously been assessed at [”+5”, is adjusted to “+3” and the amount of the penalty is hereby reduced accordingly to \$76,000.00.**

## **ANALYSIS**

### **The Facts of the Violation**

#### *Views of the Parties*

#### *The AMP Officer*

In the NOV, the AMP Officer alleges that NEB Inspection Officers, during an inspection of the Project's Right of Way (RoW) conducted on 9 and 10 July 2014, observed that multiple environmental mitigation measures to which Enbridge had committed in its EPP to conserve topsoil, control erosion, control vegetation (including weeds) and manage drainage were not implemented. According to the AMP Officer, this lack of EPP implementation resulted in numerous non-compliances on and off construction RoW causing environmental damage to wetlands and property damage to a substantial amount of agricultural land.

***Enbridge***

Enbridge argues that the AMP Officer has not established, on a balance of probabilities, that Enbridge committed the violation in the manner described in the AMP as required by section 148 of the Act. Enbridge requests, pursuant to sections 144 and 147 of the NEB Act, that the AMP be rescinded, or in the alternative, that the amount of the penalty be reduced for the following reasons:

- (a) the Disclosure is incomplete in important respects;
- (b) the adverse conclusions drawn, and aggravating factors applied in determining the gravity values referenced in the AMP are not supported by the evidence that is provided in the Disclosure;
- (c) the Missing Records show that the adverse conclusions drawn and aggravating factors applied in determining the gravity values referenced in the AMP failed to consider relevant factors and evidence;
- (d) breaches of procedural fairness and natural justice occurred during the July and August Inspections that prejudiced Enbridge; and
- (e) the \$100,000 penalty does not comply with the stated intent of the Act or the principles of the AMP process.

Enbridge submits that the Disclosure is missing several documents and it is incomplete. As a result, Enbridge argues that the Board must conclude that the missing documents were not considered, which resulted in the AMP Officer failing to consider relevant facts when deciding to issue the AMP.

Enbridge further submits that because of severe weather and flooding there was no feasible way to maintain the RoW in the same condition as when the construction was suspended in March 2014. According to Enbridge, in the light of the severe flooding in Cromer, the mitigation measures employed at the suspension of construction were in alignment with the EPP and were reasonable for the conditions of the RoW, and the phase of construction underway at that time.

Enbridge argues that it was following its EPP by shutting down construction activity on 20 March 2014 due to wet conditions associated with spring thaw. Enbridge states that “after construction was suspended, and prior to the flooding, the RoW was inspected every two weeks to identify areas needing corrective work. In advance of the flooding, some areas had been identified that needed repair or erosion installations and Enbridge was able to make some of those corrections where foot access allowed until the time that flooding rendered the RoW inaccessible.”

Enbridge states that it applied: the Wet/thawed Soils Contingency Plan by shutting down construction operations when the soil became too wet to continue working; the Soil Erosion Contingency Measures before leaving the RoW even though some of those measures were overcome by the unexpected flood conditions; the Siltation of Drainage or Wetlands Contingency Plan by suspending construction in March; and the Adverse Weather Contingency Plan for the Drainage Crossing, which withstood the flooding because erosion and sedimentation was not found to be an issue during the action plan assessment conducted in order to fulfil the work suspension order (Inspection Officer Order) issued by the Board inspector officer in relation to the Project.

According to Enbridge, the action plan developed by its third party contractor to address the Inspection Officer Order conditions did not note or confirm any non-compliances, as the AMP Officer alleges, and the action plan was designed to address the majority of the issues during the remainder of construction and final clean-up since the Project was mid-construction.

### ***Views of the Board***

The Inspection Report dated 9-10 June 2014, which is part of the Disclosure, listed non-compliances to 29 specific mitigation commitments from the EPP in the areas of:

- soil handling;
- rutting;
- weeds;
- debris;
- erosion and siltation control;
- drainage control;
- wildlife and vegetative species of concern;
- wetlands and riparian buffers;
- access and agricultural interference reduction;
- protective caps on pipe; and
- trenching and open excavation.

The Board, after reviewing all of the evidence on the record and submissions by the parties, finds that the AMP Officer has proved on a balance of probabilities that Enbridge has breached the following commitments made in the EPP regarding:

#### Soil handling:

1. Failed to maintain a separation distance between topsoil and spoil piles to prevent mixing;
2. Drove or set equipment on portions of the Project site where unsalvaged and unprotected topsoil is present, causing rutting and subsequent topsoil/subsoil admixing;

Debris:

3. Failed to collect and dispose of all construction-related garbage (including staking and flagging), debris, waste and hazardous material from the construction right-of-way in designated containers or at approved facilities;

Erosion and Siltation Control:

4. Failed to install temporary berms on the approach to the drainage and wetlands, and erect silt fence or equivalent temporary erosion/sediment control device (e.g., hay bales, coir logs, etc.) near the base of the approach to the drainage and wetlands immediately following grading; and inspect the temporary erosion control structures on a daily basis and repair, if warranted, before the end of each working day;
5. Failed to install and maintain temporary erosion control structures (e.g., silt fences, coir logs) immediately following the completion of backfilling lands adjacent to the drainage crossing and wetlands where the potential for sedimentation of the drainage or wetlands exists;
6. Failed to install a temporary sediment barrier (e.g., silt fence) to eliminate the flow of sediment from spoil piles and disturbed areas into nearby wetlands;
7. Failed to install temporary erosion control structures (e.g., silt fences and/or straw bales) immediately following backfilling of wetland crossings; ensure silt fences have been installed properly, are solid and filter fabric is tight; and ensure straw bales used come from a weed and disease (i.e. clubroot) free source;
8. Failed to inspect the temporary erosion control structures on a daily basis and repair, if warranted, before the end of each working day;
9. Failed to implement the procedures outlined below should an extreme precipitation/stream flow event threaten, or other circumstances occur, which may render the existing sediment control measures inadequate:
  - Prohibit the operation of construction equipment close to the banks of the drainage or wetlands where there is a risk of bank sloughing, failure of the vehicle crossing or flooding of the work area;
  - Install additional silt fencing to prevent silt laden water from entering the drainage or a wetland;
  - Effective sediment and erosion control measures are required until adequate revegetation occurs;
  - Excavate cross ditches to divert runoff away from the drainage and wetlands;
  - Construct berms of subsoil, coir logs, sandbags, rock, timber, straw bales or hay bales on approach slopes and/or banks to divert runoff from the right-of-way and onto well-vegetated lands. The location and material of the sediment control structures will be determined by the Environmental Inspector. Ensure bales used come from a weed and disease (i.e. clubroot) free source;
  - Import sandbags and place strategically to help stabilize and add height to banks to prevent flooding to nearby areas, especially where vegetation has been removed; and
  - Implement the Soil Erosion Contingency Measures (Appendix D11) if warranted.

### Drainage Control

10. Failed to maintain drainage across the construction right-of-way during all phases of construction; Failed to ensure construction activities do not cause the ponding of water or unintentional channelization of surface water flow;
11. Failed to provide surface drainage of adequate capacity across the construction right-of-way including soil windrows and the trench crown;
12. Failed to identify locations where gaps in snow (where present), topsoil and spoil windrows, if needed, are to be created. Gaps are typically associated with terrain features (e.g., slope changes), crossings (i.e., drainage, roads, rights-of-way) and bends. Breaks in the snow, topsoil and spoil windrow should coincide with gaps in slash windrows, as well as strung and set-up pipe
13. Failed to implement the following measures, as directed by the Environmental Inspector, where right-of-way re-contouring and topsoil replacement are delayed until after spring breakup:
  - Identify locations where cross drainage is needed. If feasible, consult with
  - landowners to confirm locations where cross drainage is needed;
  - Ensure grade material is well packed into its present position;
  - Create frequent breaks in the topsoil windrow at low areas, mid-slope and at
  - obvious cross drainage swales;
  - Compact the trench backfill downslope of the topsoil windrow breaks for a distance of at least 10 m using a compaction wheel or backhoe bucket.
  - Install a temporary berm across the trench to reduce the channeling of any surface water flow; and
  - The Environmental Inspector will assess the potential for wind erosion on the
  - topsoil windrow. Where warranted, apply snow, water or tackifier to the topsoil windrow.

### Protective Caps on Pipe:

14. Failed to confirm that caps (e.g., cardboard barriers) on all strung pipe remain in place until immediately prior to welding to avoid trapping or confining wildlife; and
15. Failed to store excavated material in a manner that does not interfere with natural drainage patterns.

**Having found, on a balance of probabilities, that each of the acts or omissions described above occurred, the Board hereby finds that Enbridge committed the violation.**

## **Penalty Amount**

### ***Background***

In the NOV, the AMP Officer applied different gravity levels to the criteria as set out in the table in section 4 of the *Administrative Monetary Penalties Regulations (National Energy Board)*:

1. Other violations in the previous seven years: “+1;”
2. Any competitive or economic benefit from violation:” 0;”
3. Reasonable efforts to mitigate/reverse the violation’s effects: “-1;”
4. Negligence on the part of person who committed violation: “+1;”
5. Reasonable assistance to Board with respect to the violation: “+1;”
6. Promptly reported violation to Board: “+2;”
7. Steps taken to prevent reoccurrence of violation:” -1;”
8. Violation was primarily reporting/record-keeping failure: “0;” and
9. Any aggravating factors in relation to risk of harm to people or environment: “+2.”

The total gravity factor of “+5” resulted in a penalty amount of \$100,000.00, which is the maximum daily penalty that may be determined in accordance with the NEB Act.

Enbridge is disputing the gravity values ascribed to criteria number 4 (negligence), 5 (reasonable assistance) and 9 (any aggravating factors) in the NOV. The Board has examined all the criteria and finds the gravity factors ascribed to criteria 1, 2, 3, 6, 7 and 8 are appropriate. The Board will deal with the disputed gravity factors below.

### **Negligence on the part of person who committed violation**

#### ***Views of the Parties***

In the NOV, the AMP Officer applied a gravity value of “+1,” stating that “Enbridge was negligent in its commitments relating to environmental protection as outlined in its EPP as it did not take all reasonable steps to prevent environmental damage.”

Enbridge stated that it was not negligent in applying the EPP for the following reasons:

- the February inspection by the NEB confirmed the implementation of the EPP as evidenced in the February inspection report Inspection Report with three exceptions;
- Enbridge maintained regular environmental inspections during construction and when construction was suspended;
- Although environmental issues were identified prior to the flooding and during the temporary suspension of construction, Enbridge could not access many areas of the land due to the saturated topsoil;

- From the March 2014 construction shut-down to the July inspection, Enbridge could not access lands for the purpose of removing sedimentation from topsoil, off-RoW or wetlands because it was too wet; water levels were high and soils were saturated; and
- Some mitigation measures were overcome by the heavy rains and flooding, causing some issues along the RoW that Enbridge was aware of and planned to remediate as soon as conditions were dry enough to permit access.

### ***Views of the Board***

While the defence of due diligence is expressly inapplicable to the commission of the violation pursuant to subsection 140(1)(a) of the NEB Act, the Board may consider it an available defence to the aggravating criterion of negligence on the part of the person who committed the violation. It is open to the person who committed the violation to prove that all due care was taken since that person alone has knowledge of what was done to avoid the breach, and it is not improper to expect that person to come forward with evidence of due diligence.<sup>1</sup>

In the case at hand, the EPP contains a variety of measures to prevent erosion control and sedimentation into sensitive watercourses and wetlands, including the Siltation Contingency Plan that requires installation of additional measures in the event an extreme precipitation event threatens. There is no evidence on record that these additional measures were implemented prior to the extreme rains and significant erosion along the RoW and sedimentation into wetlands occurred. There is also no evidence on the record to show that during most periods between March and July, access by some means was not possible, nor that reasonable steps were taken, to carry out monitoring and complete some necessary repairs or installations. In any event, it would have been reasonable to expect Enbridge to notify the Board of all of these difficulties in its required updates. Therefore, there is no evidence on the record which would demonstrate that Enbridge exercised due diligence with respect to its EPP commitments relating to environmental protection in the course of committing the violation.

Based on the above, the Board finds that the gravity value for this criterion was applied appropriately.

### **Reasonable assistance to Board with respect to the violation**

#### ***Views of the Parties***

In the NOV, the AMP Officer applied a gravity value of “+1,” stating that “Enbridge responded to landowner environmental concerns noted above only when required to do so by the Inspection Officer Order.” Enbridge asserts the factor 5 relates to the provision of reasonable assistance to the Board, and not to the landowner. Enbridge also argued that it did provide assistance to the

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<sup>1</sup> *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299, at page 1326; *La Souveraine, Compagnie d'assurance générale v. Autorité des marchés financiers*, [2013] 3 S.C.R. 756, at para. 56.

Board, before and after the commission of the violation, as reflected by the NEB staff thanking Enbridge for the assistance provided in the February, July and November Inspection Reports. In response, the AMP Officer recommended that this gravity value be adjusted to “0,” to reflect the absence of mitigating or aggravating actions regarding this criterion.

### ***Views of the Board***

The Board agrees with Enbridge that this criterion relates to the assistance provided to the Board, and not to third parties. The Board notes that the application of this criterion requires consideration of both the aggravating and mitigating actions specific to the circumstances of each case. The Board also notes that this criterion requires an inquiry into the assistance provided after the commission of the violation and not before. Consequently, the actions taken by Enbridge leading up to the violation are not relevant to the application and assessment of this criterion.

The Board finds that following the July inspection, Enbridge did submit documentation as required to meet the conditions of the Inspection Officer Order, and maintained regular correspondence with Board staff and the Inspection Officer regarding mitigation measures relating to the Inspection Officer Order. Enbridge also participated in a follow-up environment inspection with NEB Inspectors in August. However, the Board is of the view that meeting the conditions of an Inspection Officer Order is a regulatory requirement and finds that the assistance provided to the Board following the violation met only the Board’s minimum compliance requirements that all NEB-regulated companies must fulfill. The Board finds that the assistance provided by Enbridge with respect to the violation does not warrant a mitigating factor being applied, and therefore ascribes a gravity value of “0” to this criterion.

## **Any aggravating factors in relation to risk of harm to people or environment**

### ***Views of the Parties***

In the NOV, the AMP Officer applied a gravity value of “+2,” stating that “NEB inspection found that a lack of EPP implementation resulted in numerous non-compliances observed both on and off the construction RoW causing significant environmental damage to wetlands and property damage to a substantial amount of agricultural land. Specific non-compliances included improper soil handling, rutting, weed control, and erosion posing a significant hazard to the environment. The non-compliances observed by NEB staff were confirmed by a 3<sup>rd</sup> Party Consultant Enbridge’s Action Plan submitted on 31 July 2014.”

Enbridge asserts that it put forth great effort to implement the EPP, and that any deficiencies were not due to lack of EPP implementation or negligence, but caused by severe flooding experienced on the construction footprint.

In response, the AMP Officer states that the aggravating factor of +2 was applied due to evidence of significant environmental damage observed during the July inspection, and Enbridge's non-compliance with mitigation measures outlined in its own project EPP.

***Views of the Board***

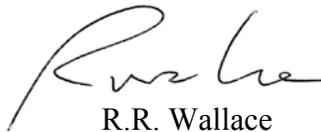
Criterion 9 specifically refers to the risk of harm to people or the environment, having regard to the circumstances of the violation, rather than any efforts on the part of the violator. The Board is of the view that Enbridge's failure to implement mitigation measures, in particular those relating to soil handling, erosion and sediment control and drainage control, resulted in increased risk of harm to the environment. The Board finds that at the time of the July Inspection, risk to the environment had materialized and environmental damage had occurred, including significant erosion and admixing of topsoil and subsoil, ponding throughout the RoW, substantial amounts of sedimentation in various wetlands and migration of soils on and off of the Project RoW.

The Board notes that following the violation, and in response to the Inspection Officer Order conditions, Enbridge submitted an Action Plan to address environmental issues, and adopted this Action Plan into its EPP for the Project. The Board finds that although there was risk of harm to people or the environment, the risk was localized and would likely have been mitigated through implementation of the measures specified in the Action Plan and EPP for the Project. Accordingly, the Board reduces the gravity value to "+1" for this criterion.

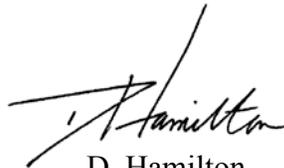
**Consequently, the total gravity value is adjusted to "+3" and the amount of the penalty is hereby set to \$76,000.00.**



C.P. Watson  
Presiding Member



R.R. Wallace  
Member



D. Hamilton  
Member