

# **Pipeline Safety Act**

## **-An Assessment-**

**Great Lakes and St. Lawrence  
Cities Initiative**

**October 2016**



**Great Lakes and St. Lawrence Cities Initiative**  
**Alliance des villes des Grands Lacs et du Saint-Laurent**

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# Message from the Chair

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Mayors of the Great Lakes and St. Lawrence Cities Initiative are a unique and united political voice who are active in the protection, restoration and enhancement of the Great Lakes and the St. Lawrence River, improving the quality of life for this immense region's population. By using their integrated approach to environmental issues, the Cities Initiative's Canadian and American mayors form a force to ensure the long term sustainability of these precious resources for future generations.



Denis Coderre



Mayor Denis Coderre  
Montréal, Québec  
Cities Initiative Chair and  
Director



# Board of Directors

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## About Us

The Great Lakes and St. Lawrence Cities Initiative is a binational coalition of over 120 U.S. and Canadian mayors and local officials working to advance the protection and restoration of the Great Lakes and St. Lawrence River. The Cities Initiative and local officials integrate environmental, economic and social agendas and sustain a resource that represents approximately 20 percent of the world's surface freshwater supply, provides drinking water for 40 million people, and is the foundation upon which a strong regional economy is based. Members of the Cities Initiative work together and with other orders of government and stakeholders to improve infrastructure, programs and services and increase investments that protect and restore this globally significant freshwater resource. Only by working together to protect the Great Lakes and the St. Lawrence can we preserve and enhance the quality of life and economic well-being of the people of the region.



## Executive Summary

In 2014, the Canadian federal government introduced Bill C-46 in the House of Commons to overhaul the statutory liability regime for federally-regulated pipelines, which has been historically considered inadequate. The Bill, also known as the *Pipeline Safety Act*, came into force on June 18<sup>th</sup>, 2016. It establishes a statutory liability regime for pipeline spills, including a \$1 G liability limit for the biggest pipeline companies for incidents in which fault or negligence has not been proven. Also noteworthy is the bill's provision for a pipeline claims tribunal to be established, in certain circumstances, to adjudicate compensation claims for damage caused by a pipeline spill. The Act builds on previous federal government action to provide the NEB with authority to levy administrative monetary penalties and increase the number of inspections and audits that it conducts, as well as other legislative measures<sup>1</sup>. Provisions of the Bill include measures related to incident prevention, liability and compensation, and incident preparedness and response.

Implementation of the Act will result in several positive outcomes, such as holding polluters absolutely liable for harm caused by a pipeline spill, including losses of “non-use value” public resources, environmental damages and recovery of clean-up costs. However, the Act is too discretionary and doesn't impose unlimited absolute liability, nor does it provide any clear guidance on the calculation of “environmental damages”. The capacity of the NEB to assure proper oversight and enforcement of regulations also remains a controversial issue. Furthermore, the Act does not grant sufficient recognition to municipalities as concerned stakeholders, notably on the issue of operators filing comprehensive emergency preparedness and response plans. Finally, it lacks a proper regime to ensure municipalities have the financial resources needed to prepare and respond to a pipeline emergency.

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<sup>1</sup> This Act is complementary with other legislation introduced by the previous conservative government dealing with liability regimes for oil and gas activities under federal jurisdiction, such as Bill C-22, *The Energy Safety and Security Act* (short title), which “modifies Canada's civil liability regimes both for the offshore oil and gas industry and for the nuclear energy industry and the *Safeguarding Canada's Seas and Skies Act*, (formerly Bill C-3), which amended the Marine Liability Act to implement the international convention on liability and compensation for damage in connection with the carriage of hazardous and noxious substances by sea.

After a comparative analysis of the Act with previous related legislation (prevention, preparedness and response, liability and compensation) and with GLSLCI's recommendations to the NEB at the 2013 Enbridge hearings, the report concludes with six recommendations, notably on the issues of discretionary application, unlimited liability, the role of municipalities and other local governments as concerned stakeholders, the filing of emergency preparedness and response plans, and a review of NEB measures taken to assure proper oversight and enforcement of regulations.

## 1. Background

Canada has in place an estimated 825,000 kilometres of transmission, gathering and distribution pipelines, approximately 73,000 km (or 9 %) of which are federally regulated by the National Energy Board (NEB).

Federally regulated pipelines primarily include transmission lines, which move approximately 1.3 billion barrels of oil annually across provincial and international borders. While pipelines are deemed by many to be a relatively safe method of transporting oil and gas<sup>2</sup>, Canada's liability regime in the event of a pipeline rupture or oil spill has historically been considered inadequate.

Canadian taxpayers and local governments have shouldered an inappropriate degree of risk in the event of a serious pipeline accident. The aggregate cost to clean-up and remediate the largest recent pipeline incident in Canada, the Plains Midstream Pipeline failure in northern Alberta in 2011 which released 4.5 M litres of crude oil, was approximately \$70 M USD. By way of comparison, Enbridge, which spent \$1.2 G USD for clean-up operations following the 2010 Kalamazoo River spill in Michigan, would have only been liable for a paltry \$40 M under Canada's previous liability regime.

A number of new pipeline projects are presently being considered across Canada, notably Enbridge's Northern Gateway (525,000 barrels per day), Kinder Morgan's Trans Mountain expansion (890,000 barrels per day) and TransCanada's Energy East (1.1 M barrels per day). Considering that each project comes with an array of significant environmental risks, the threat of a major oil spill – a tangible and pressing concern – made the adoption of a stricter, more comprehensive liability regime a necessity both for the general public and all levels of government.

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<sup>2</sup> Federally regulated pipelines have not caused any major spills in recent years, although it should be noted that most pipelines in Canada are not federally regulated. Any incidents related to federally regulated pipelines that do occur must be reported immediately to the NEB, which compiles the information and releases it to the public. From January 2008 to September 2014, the NEB reported a total of 619 incidents in relation to federally regulated pipelines which included 20 serious injuries, 6 fatalities, 64 incidents related to operation beyond design limits, 126 fires, 8 explosions, 46 liquid releases (totalling about 1.5 M litres) and 361 natural gas and other high vapour pressure releases. The largest quantity of liquid releases from federal pipelines took place in 2009 with 495,050 litres released in 7 incidents, and in 2013, which saw 42,780 litres spilled in 9 releases.



In 2014, the federal government introduced Bill C-46 in the House of Commons to overhaul the statutory liability regime for federally-regulated pipelines. The Bill, also known as the *Pipeline Safety Act*, obtained royal assent and came into force on June 18<sup>th</sup>, 2016. This report will assess the implications of the Act for Canadian members of the Great Lakes and St. Lawrence Cities initiative (GLSLCI) and propose further recommendations. This report includes: highlights of the Act, notable changes to previous legislation, remaining gaps in the legislation, an analysis of how the Pipeline Safety Act covers recommendations made by the GLSLCI to the NEB in 2013, and an overview of the opinions and concerns of selected member cities regarding the Act.

## 2. Highlights of the *Pipeline Safety Act*

Bill C- 46, *An Act to amend the National Energy Board Act and the Canada Oil and Gas Operations Act* (short title: *Pipeline Safety Act*), received its first reading in the House of Commons on December 8<sup>th</sup>, 2014. The Bill made numerous amendments to the National Energy Board Act and the Canada Oil and Gas Operations Act with a stated goal to “strengthen the safety and security of pipelines regulated by those Acts”<sup>3</sup>. The Pipeline Safety Act (hereby referred as the Act) notably includes:

### **New Incident Prevention Measures**

- The Act enshrines for the first time in NEB legislation the “polluter pays” principle, making pipeline companies fully responsible for the costs and damages they cause through the release of oil, gas or any other commodity from a pipeline [sections 16, 48.11-48.17 of the Act];
- It clarifies and expands the audit and inspection powers of the NEB;
- It expands the NEB’s powers to ensure companies operating pipelines remain responsible for their abandoned pipelines, including by requiring that companies operating pipelines maintain funds to pay for the abandonment of their pipelines or for their abandoned pipelines [sections 13-15 and 48-49] (See Appendix 1 for more information on abandoned pipelines).

### **New Liability and Compensation Measures**

- The Pipeline Safety Act builds on the unlimited liability of pipeline companies under common law or civil law, for damages caused by their fault or negligence.
  - **Fault and Negligence** – Making pipeline companies and any other persons who by fault or negligence cause a spill, jointly and severally liable for a variety of damages, including (i) all actual loss or damage caused to any person and (ii) the costs incurred by Canada, a province or any other person in response to an incident [sections 48.12(1)-(3)].
  - **Absolute Liability** – Making all companies who operate a pipeline “absolutely liable,” without proof of fault or negligence, for any releases

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<sup>3</sup> Appendix 5 details witnesses heard during the legislative process, both at Commons and Senate hearings.

from a pipeline, up to a limit of liability for major pipelines (over 250,000 barrels/day) of \$1 G. For smaller pipelines, the regulations will specify the limit. This new, absolute liability is in addition to the unlimited liability provisions in the Act and common law [sections 48.12(4)-(12)].

- o **Statutory Causes of Action** – Creating new statutory causes of action for both fault and absolute liability claims, which may be pursued in any court of competent jurisdiction, with a limitation period of three (and not more than six) years [sections 48.12 (10)-(12)]. This is longer than the standard two-year limitation period in most limitation statutes.
- The Act provides governments with the ability to pursue pipeline operators for the costs of environmental damages.
- It provides the NEB with the authority to order reimbursement of spill cleanup costs incurred by any governments, including municipal, Aboriginal governing body, or individuals [section 48.15].
- It expands the NEB’s authority to recover costs incurred for incident response from industry, in exceptional circumstances.

#### **New Incident Preparedness and Response Measures**

- **Financial Assurance** – The Pipeline Safety Act will require companies that operate pipelines to hold a minimum level of financial resources, set at \$1 G for companies operating major pipelines. These financial resources must be readily accessible to ensure rapid response to any incident. It will also give the NEB the power to order that larger amounts be held, and in a specified manner (e.g. letters of credit, guarantees, bonds or insurance) [section 48.13].
- **Pooled Fund** – Allows companies to create a “pooled fund” in a manner approved by NEB regulation, to hold these minimum levels of financial resources [section 48.14].
- **Enhanced NEB Authority for Spill Response & Reimbursement** – Provides the NEB with the authority to take control of incident response and cleanup in exceptional circumstances, if a company is unable or unwilling to do so, and to order the reimbursement of any level of government, Aboriginal governing body or person for their cleanup costs. The Act also allows the Governor in Council of the NEB to establish, in certain circumstances, a pipeline claims tribunal whose purpose is to examine and adjudicate the claims for compensation for damage

caused by an unintended or uncontrolled release of oil, gas or any other commodity from a pipeline. The NEB may also draw on the pooled fund to finance such a cleanup or reimbursement, or make payment out of the Consolidated Revenue Fund [sections 48.16 - 48.17 and 48.46].

- **Pipeline Claims Tribunal** – The Pipeline Safety Act establishes a new *ad hoc* Pipeline Claims Tribunal to “examine and adjudicate, as expeditiously as the circumstances and considerations of fairness permit, the claims for compensation made under this Act in relation to the release” from a pipeline. The Tribunal has all of the powers, rights and privileges that are vested in a superior court, but is not bound by a court’s rules of evidence (as for most administrative tribunals) [sections 48.18 and 48.34].
- **Claims and Hearing Process** – The Pipeline Safety Act sets out in detail a compensation claims and hearing process before the Tribunal and the conditions under which, after a Tribunal award, the Board must pay a claimant’s compensation. Payment may be made from the Consolidated Revenue Fund. Claims can be made by any person, partnership, organization or government, including municipalities [sections 48.35-48.42 and 48.46].



### 3. Review of the Pipeline Safety Act

Implementation of the Act will result in several positive outcomes. Polluters will be absolutely liable for harm caused by a pipeline spill, which means that the company operating a pipeline will be liable in the event of a spill even if it hasn't been negligent and hasn't broken any laws. The Act also requires a company to have enough financial resources to cover, in full, the absolute liability limit of \$1 G for oil pipeline companies whose pipelines have the capacity to move at least 250,000 barrels per day. The limit for gas and other pipeline companies (as well as smaller oil pipeline companies) may be set out in a future regulation<sup>4</sup>.

The Act also makes polluters responsible for losses of "non-use value" public resources, or environmental damages, even if those damages don't affect the environment's commercial (or "use") value. Recognition of so-called "environmental damages" is rare in Canadian statutes, although it is well developed in U.S. oil spill legislation. Polluters will also be liable for any actual losses or damages suffered by individuals and for any clean-up costs incurred by the government (which level is concerned here is not specified).

The Pipeline Safety Act also implements several new tools that, if used, will enhance the National Energy Board's ability to cover clean-up costs from a polluter, including some that appear to allow the Board to recover more than the absolute liability limit. The Pipeline Safety Act also gives the Board the power, in certain circumstances, to recover costs associated with a spill from the pipeline industry at large, not just from the polluter. Cabinet will also have the ability to establish a special tribunal to hear and decide claims for compensation. Interestingly, any compensation awarded by the tribunal would be paid directly out of government revenue<sup>5</sup>.

Despite these significant improvements to the previous regime, the Act still contains significant gaps.

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<sup>4</sup> It is also worth noting that federal Cabinet has the power to increase, but not decrease, the absolute liability limit for major oil pipeline companies.

<sup>5</sup> This should make it easier for those affected by a spill to obtain compensation, but could leave taxpayers on the hook for this compensation if other tools aren't used to recover money from the polluter.

First, many of its new tools remains too discretionary since the NEB or politicians (i.e. Cabinet) may cherry pick which ones will be implemented. It is conceivable that some tools might not be implemented for political or other reasons, thus weakening the objectives of the Act. While it introduces several important improvements to Canada's pipeline liability regime, it's too early to tell whether this potential will translate to real, on-the-ground benefits for Canadian taxpayers and affected localities.

Second, the Act doesn't impose unlimited absolute liability on polluters – it takes a step back by eliminating the government's ability to recover clean-up costs for a pipeline spill under the *Fisheries Act*, which applies in certain circumstances to make a polluter absolutely liable<sup>6</sup>. No liability regime can be truly classified as a polluter pays regime unless polluters are made absolutely liable for the full costs of environmental harm. Although a liability limit of \$1 G for some companies is a good first step, the 2010 Kalamazoo River spill demonstrated that the clean-up costs for a major spill can top that number — and that doesn't include compensation for damages.

Other significant gaps include a lack of absolute liability limit for gas and other non-oil pipeline companies, or for small oil pipeline companies which might be set in the future by a Cabinet regulation. Likewise, the Act provides no clear guidance on the calculation of "environmental damages," nor does it provide the government with the power to develop such guidance at a later date through regulation. Because recognition of this kind of damages is very new in Canadian statutes, this omission makes it less likely that a government will try to recover compensation and weakens the potential benefits of including these damages.

As well, the capacity of the NEB to ensure proper oversight and enforcement of regulations remains a controversial issue. In her 2015 fall report, the federal Commissioner of the Environment and Sustainable Development, Ms. Gelfand, observed that despite the Pipeline Safety Act coming into force this June, the NEB "needs to do more to keep pace with the rapidly changing context in which it is operating". Her audit found that the NEB also needs to do more to inform the public about company compliance with pipeline approval conditions and concluded that the board did not adequately track companies' deficiencies and their implementation of pipeline approval

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<sup>6</sup> Ecojustice, 2015.

conditions. Ms. Gelfand's audit checked 49 cases and found 24 in which key documentation was missing, inaccurate or lacked an analysis or conclusion regarding whether conditions had been met. In all fairness, the NEB is currently in the process of implementing corrective actions in response to the audit with some still in progress<sup>7</sup>.

The Act also doesn't grant sufficient recognition to municipalities and other local governments as concerned stakeholders. First, in section 48.12, the Act restricts the determination of "environmental damages" to provincial and federal governments, which is consistent with other jurisdictions. However, the Act doesn't specifically list municipalities or other local governments. Since one needs only to consider the tragedy at Lac Mégantic to see that it is often municipalities that bear the brunt of environmental harm, the Act should allow greater recognition of local governments as concerned stakeholders and grant municipalities the legal opportunity to provide testimony and challenge emergency preparedness and response planning within the NEB filing and hearing process at the project assessment stage<sup>8</sup>.

Further, on a more specific issue, proponents should be required to file comprehensive emergency preparedness and response plans prepared in collaboration with concerned local governments and relevant organizations implicated in emergency preparedness and response, a requirement not included in the Act.

Also, since significant investments are made by municipalities to ensure emergency preparedness, new pipeline infrastructure transporting new or increased volumes of fossil energies through or near communities requires new resources for planning, education, equipment, training, and skilled responders, all of which must follow an ongoing cycle of improvement and renewal. Therefore, while the Act establishes a regime for municipalities to recoup costs associated with a pipeline release, it lacks a proper regime to ensure municipalities have the financial resources they need to

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<sup>7</sup> For more detail on the actions: [www.neb-one.gc.ca/bts/pblctn/dtrrprtndnbnfnclsttmnt/nbrspns2016-eng.html](http://www.neb-one.gc.ca/bts/pblctn/dtrrprtndnbnfnclsttmnt/nbrspns2016-eng.html)

<sup>8</sup> In support to this claim, in its brief made May 28<sup>th</sup>, 2015, to the Standing Senate Committee on Energy, the Environment and Natural Resources, Dr. Martin Olszynski, Professor of Law at the University of Calgary, demonstrated that the Supreme Court of Canada in the Canadian Forest Products case explicitly endorsed the notion of municipalities as trustees of the environment for the benefit of residents.

prepare and respond to a pipeline emergency. Federal legislation should recognize the critical role that municipal governments and their first responders play in ensuring preparedness and implementing response to potential pipeline emergencies by legislating the necessary resources and collaboration required to equip and support municipal governments and their first responders, a concern also raised by the FCM<sup>9</sup>.

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<sup>9</sup> FCM, brief submitted on June 2<sup>nd</sup>, 2015, to the Standing Senate Committee on Energy, the Environment and Natural Resources.



## 4. Comparative analysis

In order to evaluate the impact of the Pipeline Safety Act on pipeline safety regulation in Canada, the Act must be assessed in light of recent measures introduced by the federal government, both legislative and regulatory. For instance, the NEB's inspection capacity was increased in 2012, while several significant provisions were introduced in Bill C-38 that same year (for more detail, see Appendix 2). Other non-legislative actions pursued by the federal government include working with Aboriginal communities and industry to develop a strategy to better integrate Aboriginal peoples in pipeline safety operations, and seeking guidance from the NEB on the use of best available technologies for pipeline projects.

### 4.1 Comparative analysis with previous related legislation (prevention, preparedness and response, liability and compensation)

This section offers a comparative analysis of the evolution of three governmental priorities for safer pipelines: 1) prevention, 2) preparedness and 3) response, liability and compensation<sup>10</sup>. The *before* period includes the new measures implemented at the NEB since 2012 as well as the measures included in the Pipeline Safety Act. The former elements are indicated by an asterisk in the next three tables.

**Table 1 – Prevention**

Action	Elements	Before	After
Inspections	Increase the number of annual oil and gas pipeline inspections*	100	150
Audits	Increase the number of annual comprehensive audits*	3	6
Guidance	Seek the National Energy Board's (NEB's) guidance on the application of "best available technology" for pipeline projects*	In practice	NEB guidance
Enforcement	Enable the NEB to issue Administrative Monetary Penalties for individuals and companies that violate the <i>National Energy Board Act</i> *	None	\$250 to \$100,000 per day <sup>11</sup>
Inspection Authorities	Strengthen and clarify inspection powers for NEB officers*	Defined	Enhanced

<sup>10</sup> Natural Resources Canada, December 2014.

<sup>11</sup> Although the NEB oversees the collection of penalties, all payments received are remitted to the Receiver General of Canada and managed as Public Money (See Appendix 3).

**Table 2 – Preparedness and Response**

Action	Elements	Before	After
Minimum Financial Resources	Require all companies operating pipelines to have minimum financial resources to be prepared for an incident (set at \$1 G for major oil pipelines operators)	None	Set amounts
Accessible Cash	Require all companies to have a minimum amount of cash available at all times to respond quickly to incidents	None	Set amounts
Incident Response	Provide the NEB the authority to take control of incident response, in exceptional circumstances	No	Yes
Aboriginal Participation	Develop a strategy with industry and Aboriginal organizations to enhance Aboriginal participation in pipeline safety	Limited integrated strategy	Increased participation in planning, monitoring and response

**Table 3 – Liability and Compensation**

Action	Elements	Before	After
Unlimited Liability	Clarify unlimited financial liability when companies are at fault or negligent	Common law	Explicitly in law
Absolute Liability	Put in place liability to a set amount irrespective of fault or negligence for all companies operating pipelines	In practice	Set amounts (\$1 G for major oil pipelines)
Abandonment	Ensure pipeline operators are responsible for a pipeline during the entire lifecycle	In practice	Explicitly in law
Claims Tribunal	Enable the Government to establish a pipeline claims tribunal to examine and adjudicate claims for compensation in the event a company is unable to do so	No	Yes
Financial Backstop	Ensure resources are available for spill cleanup costs and damages, if a company is unable or unwilling to clean up and authorize the NEB to recover all costs	No	Yes
Arbitration Committees	Improve functioning of pipeline arbitration committees for compensation disputes with landowners including mandated timelines for appointments, hearings and decisions	None	Set timelines
Cleanup Costs	Provide the NEB the authority to order the repayment of spill cleanup costs incurred by federal, provincial, municipal or Aboriginal governments	No	Yes

While the three tables demonstrate significant progress in the three priority areas, they also illustrate the numerous gaps in both the Pipeline Safety Act and other recent measures. These gaps include the lack of unlimited liability, the discretionary application of measures, the lack of recognition of municipalities and other governments in the review process and the insufficient funding for proper emergency preparedness. These issues will be addressed in the conclusion of this report.

#### **4.2 Comparative analysis of the Act with GLSLCI's recommendations to the NEB at the 2013 Enbridge hearings**

On March 6th 2014, the NEB approved Enbridge's request to reverse the flow of Line 9 which extends from Hamilton to Montreal, running contiguously with Lake Ontario and the St. Lawrence and cutting through the Greater Toronto area. In addition to reversing the flow, Enbridge was seeking approval for an increase in capacity and a change in the nature of the product being transported, from refined oil to unrefined diluted bitumen (dilbit). The reversal also aimed to transport western oil to a Montreal terminal to be refined and then distributed to eastern markets.

This decision followed NEB hearings held in Montreal and Toronto during the autumn of 2013, where many participants expressed concerns about the integrity of the pipeline, spill risks and response to emergencies<sup>12</sup>. The Cities Initiative submitted its final arguments on August 8<sup>th</sup>, 2013, and made an oral presentation to the NEB panel on October 16<sup>th</sup> of the same year. The Cities Initiative's recommendations were:

1. A regulation exemption request;
2. Additional monitoring and prevention actions of the company;
3. Better knowledge of potential environmental impacts on water resources;
4. Proper emergency preparedness, response and clean-up operations capacity;
5. The creation of a spill contingency (or liability) fund and;
6. Full transparency and economic rationale relative to any future Line 9 extension towards further terminal points on the Eastern seaboard.

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<sup>12</sup> Seven Cities Initiative members, including the City of Hamilton, the Region of Halton, the City of Mississauga, the City of Toronto, the Town of Ajax, the City of Kingston and the City of Montréal also provided input into the NEB review process.

Table 4 offers a comparative analysis of the follow-up of the GLSLCI recommendations, between the specific NEB's March 2014 decision and the Pipeline Safety Act.

**Table 4 – Comparative Analysis of NEB Enbridge Decision and the 2016 Pipeline Safety Act**

	<b>NEB 2014 Enbridge Decision (Ordinance XO-E101-003-2014)</b>	<b>2016 Pipeline Safety Act</b>
<b>1 - Regulation exemption request</b>	Approval of the project while imposing conditions but denial of the company's request to start its operations before conditions are met and the pipeline inspected. This decision meets the Cities Initiative's first recommendation to refuse Enbridge's regulation exemption request.	Topic not addressed in the Act.
<b>2 - Additional monitoring and prevention actions of the company</b>	Requires Enbridge to conduct additional verification activities to ensure pipeline integrity, which echoes the Cities Initiative's second request for additional monitoring and prevention actions of the company which include a remaining life analysis and a rupture pressure ratio analysis, plus the filling of the Company's hydrostatic pressure testing program, albeit with existing data, and not with a new test.	<ul style="list-style-type: none"> <li>• Enshrinement of the "polluter pays" principle, making pipeline companies fully responsible for costs and damages caused [sections 16, 48.11-48.17 of the Act];</li> <li>• Clarifies and expands the audit and inspection powers of the NEB;</li> <li>• Expands the NEB's powers to ensure companies operating pipelines remain responsible for their abandoned pipelines, including by requiring pipeline operators to maintain funds to pay for the abandonment of their pipelines or for their abandoned pipelines [sections 13-15 and 48-49];</li> <li>• The Act gives new regulation outlines without making any technical precisions of measures to be taken.</li> </ul>
<b>3 - Better knowledge of potential environmental impacts on water resources</b>	Need to update Line 9's mainline valves system as well as the setting up of a Project-specific Watercourse Crossing Management Plan (WCMP) to identify watercourse crossing conditions and demonstrate how Enbridge will proactively manage them. However, the NEB conditions did not include any increased knowledge of potential environmental impacts on water resources, as a flow modeling study in the case of a rupture.	Topic not addressed in the Act.



	<b>NEB 2014 Enbridge Decision (Ordinance XO-E101-003-2014)</b>	<b>2016 Pipeline Safety Act</b>
<b>4 - Proper emergency preparedness, response and clean-up operations capacity</b>	<p>Increased emergency planning with first responders, notably through an update and implementation of Enbridge's continuing education program (including emergency management exercises), liaison program and consultation activities on emergency preparedness. The Company will have to inform the NEB on a regular basis of the regulatory authorities, municipalities and first responders.</p> <p>While this partly addresses the GLSLCI recommendation, the NEB does not, other than the required reporting by the Company, set any precise standards beyond its Onshore Pipeline Regulations (or OPR) nor offer options or resources that would help local communities and other first responders to better face any significant events related to the pipeline. Also, the NEB decision does not specifically address the issue of possible clean-up operations and related implications for the Company beyond initial response.</p>	<p>The NEB is also provided with the authority to take control of incident response and cleanup in exceptional circumstances.</p> <p>While the Act improves response measures, they remain more reactive than preventive, and do not increase municipalities' capacity to prepare for pipeline-related incidents.</p>
<b>5 - The creation of a spill contingency (or liability) fund and proper coverage</b>	<p>The creation of a spill contingency (or liability) fund and proper insurance coverage was not retained by the NEB since it considers Enbridge to be a well capitalized corporation, which can satisfy any clean-up and mitigation obligations by drawing upon its substantial financial resources.</p>	<p>The Act defines levels of financial assurance and allows the creation of a pooled fund. It also gives the NEB the capacity to order the reimbursement of any level of government, Aboriginal governing body or person for their cleanup costs.</p>
<b>6 - Full transparency and economic rationale</b>	<p>The NEB Board concludes that Enbridge's project is economically feasible and justified, as demonstrated by the existence of long-term service agreements (or TSAs) and that the facilities are expected to be used and useful for the economic life of the project.</p>	<p>Topic not addressed in the Act.</p>

## 5. Conclusions and recommendations

The Pipeline Safety Act is a much needed, overdue first step towards a “polluter pays” regime for pipelines in Canada. In general, it adds a lot of good, innovative tools to the NEB’s toolbox that could effectively protect Canadian taxpayers from paying the clean-up costs in the wake of a pipeline spill. Unfortunately, the effectiveness of these tools will largely be left to the discretion of the Board and politicians. This lack of certainty about the degree to which polluters will be required to pay for their pollution undermines what is, in principle, a good first step. In addition, insufficient municipal recognition and lack of adequate financial means to ensure proper preparedness remain unresolved issues. To address these issues, we submit the following recommendations:

**Recommendation no. 1.** In order to reduce the discretionary nature of the Act, regulations should include a more detailed, non-exhaustive list of possible environmental, economic or social impacts following an incident, which could trigger provisions of the Act such as claims for compensation. Possible impacts could include those on water quality, water intakes and access to drinkable water, shorelines, marshlands and other wildlife habitats, fishing, both commercial and recreational, boating and other leisure activities, amongst others.

**Recommendation no. 2.** The notion of unlimited liability should be reintroduced in the Act, beyond the actual limit of 1 \$G, to fully cover potential costs of an incident. Conversely, minimal liability should also be introduced for gas and other non-oil pipeline companies, as well as for small oil pipeline companies. Furthermore, companies should be required to show annually that they have the sufficient funds to cover all costs related to a worst case scenario incident, which would be the complete rupture of a pipeline. This would include the intervention costs, cleanup costs and the costs related to returning the area to the previous social, economic, physical and environmental state. The payment mechanisms from the company to the relevant authorities or individuals in the case of such incident should also be provided.

**Recommendation no. 3.** Municipalities and other local governments should be specifically mentioned in the Act, notably in section addressing costs incurred and claims (section 48.12 on liability) as well as the legal opportunity to testify as concerned stakeholders during the NEB filing and hearing process. The new approach to federal

environmental reviews announced by the government last January (see Appendix 4 for more details), while offering some relevant measures, doesn't address these issues.

**Recommendation no. 4.** For each new specific project submitted to the NEB, proponents should be required to file comprehensive emergency preparedness and response plans. These should be prepared in collaboration with concerned local governments and other organizations in order to ensure due consideration is given to important and/or environmentally sensitive municipal areas. The consultation process should also be prepared in collaboration with local governments depending on their needs. Emergency and preparedness plans must be completed before the beginning of the construction of the project and approved by the local governments potentially impacted.

**Recommendation no. 5.** The Act should recognize the critical role that municipal governments and their first responders play in ensuring preparedness and implementing response to potential pipeline emergencies by providing the necessary resources, tools and collaboration required to equip and support municipal governments and their first responders. A part of the pooled fund should be dedicated to financing joint projects to improve municipalities' capacity to respond to a pipeline-related incident and to support the development of municipal emergency preparedness and response plans. The transportation of petroleum products in the pipeline should not begin before local governments have had the time to adapt and implement their emergency and preparedness procedures.

**Recommendation no. 6.** In light of the 2015 audit and conclusion of the Commissioner of the Environment and Sustainable Development, an independent review of corrective measures actually being implemented by the NEB should be made in the upcoming months, notably on the issue of compliance.

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## **Appendix 1 – Abandoned Pipelines**

In 2009, the NEB conducted a consultation on landowner concerns and generated a report, in part identifying the need for clarification on abandoned pipeline monitoring. When a pipeline is not needed, a company can apply to the NEB to deactivate or decommission the line. The facilities are then maintained and the pipeline can be brought back into use in the future.

However, if a transmission pipeline company decides to permanently stop using a pipeline, it must apply to the NEB for the abandonment of the pipeline and any connected pipeline facilities. Once a pipeline is abandoned, it cannot be used to carry oil, gas products or any commodity again. In some cases, pipelines may be deactivated for periods of time before they are abandoned.

It is the NEB's responsibility to make sure companies take proper action when abandoning a pipeline and frequently monitor it through various compliance measures, including:

- A requirement for an abandonment plan;
- A requirement for consultation with landowners, indigenous groups and other impacted stakeholders on the development of the abandonment plan;
- Once the application is deemed complete by the NEB, written or oral hearings for abandonment applications;
- Company notification of the abandonment hearing to landowners, indigenous groups and other impacted stakeholders;
- Examination of the company's plan to set aside funds for abandonment, future monitoring as well as unforeseen events;
- Setting out conditions that companies must meet in order to abandon a pipeline; and
- Regular compliance monitoring of pipeline abandonment through means such as NEB inspections, audits and enforcement action.



Companies are expected to consult with the public when developing an Abandonment Plan. This consultation includes:

- Details on what areas require containment or clean up;
- Discussion about what facilities should be removed;
- Information about what reclamation will be provided;
- Conversations about whether or not the correct land use is being accommodated; and
- How potential issues will be mitigated.

The procedures for abandonment may differ depending on the location of each pipeline and the future proposed uses for the land. A company's abandonment plan usually addresses key issues that relate to public safety, environmental protection, and future land use, such as:

- Land use management and ground settling;
- Soil and groundwater contamination and soil erosion;
- Pipe cleanliness;
- Water crossings;
- Utility and pipeline crossings; and
- Related pipeline equipment, e.g. risers, valves, piping, etc.

Abandoned pipelines can be removed completely, partially or abandoned in place, meaning left in the ground. The choice between removing or abandoning in place depends on the current and future uses of the land and the impacts each option will have on the surrounding environment. The NEB expects companies to fully consider all options.

If the NEB Board decides to allow the abandonment, the company must complete the steps it committed to take during the hearing and any additional measures the NEB requires the company to take (e.g. testing of soil or reclamation of the right-of-way). The NEB may also impose conditions that apply to the pipeline as long as it remains in the ground. To verify that the company meets these conditions and other legal requirements, NEB Inspection Officers and *Canada Labour Code* Safety Officers may conduct compliance inspections, review submissions and conduct audits.

Once the NEB is satisfied that all commitments have been met and the risks to public safety and the environment are eliminated or reduced to an acceptable level as determined in the hearing, the NEB's abandonment order takes effect and the pipeline is considered to be abandoned. At that point, the pipeline is no longer under the jurisdiction of the NEB, but falls under provincial authority.

Finally, a pipeline cannot be un-abandoned, since an application for a new pipeline authorization would have to be made to the NEB.

### **Legal provisions establishing liability for abandoned pipelines**

Legal provisions regarding abandoned pipelines are mainly stated in two laws, the *National Energy Board Act* (R.S.C., 1985, N-7, last amended on 2016-06-19) and the *Canada Oil and Gas Operation Act* (R.S.C., 1985, O-7, last amended on 2016-06-19). While these provisions do not *per se* establish a direct liability of facility owners and operators regarding the abandonment of pipelines, they do set rules by which they must adhere. Conversely, the *Administrative Monetary Penalties Regulations* (SOR/2013-138), an Annex of *National Energy Board Act*, specifies a list of violations specific to the abandonment of pipelines. Details relative to the abandonment of pipelines in each of these three legal texts are presented below.

The *National Energy Board Act* defines *abandoned pipeline* as “a pipeline the operation of which has been abandoned with the leave of the Board as required by paragraph 74 (1) (d) and that remains in place”, 2.

Section 24 of the latest version of the NEB Act requires a public hearing for abandonment applications. The public hearing may be a written process and may include an oral portion.

Pipeline abandonment is also covered in section 48, of the Act, notably on the issues of:

- Safety and abandoned pipelines, 48 (1);
- Prohibition, without the Board's consent, to leave, make contact with, alter or remove an abandoned pipeline, 48.1 (1);
- Cost and expenses related to abandonment, 48.49; and
- Funds required to maintaining the security of abandoned pipelines, 48.49 (2).

Other sections of the Act also address the abandonment of pipelines including granting leave to abandon pipelines, 58.34 (2); powers of pipeline companies regarding the abandonment of pipelines, 73 (b) and (e); and the requirement to submit an application to the NEB for companies wishing to “abandon the operation of a pipeline” permanently, 74.

As for the second legal text, the *Canada Oil and Gas Operation Act*, it mainly specifies:

- Prohibition for operators of abandoning a pipeline without the NEB’s consent, 4.01 (1);
- Costs and expenses related to abandonment, 4.01 (2.2);
- Regulatory power the Governor in Council to exercise powers and duties necessary for the abandonment of pipelines, 14 (1 c);

To be noted, the *Pipeline Safety Act*, assented on 2015-06-18, brought several amendments relative to the issue of abandonment, both relative to the *National Energy Board Act* and the *Canada Oil and Gas Operations Act*.

The *Administrative Monetary Penalties Regulations* specify a list of three violations specific to the abandonment of pipelines, which can result in daily fines of up to \$100,000 for companies. These violations include:

- Abandonment of a designated international power line or interprovincial power line without leave, provision 58.34(1) of the *National Energy Board Act*;
- Failure to ensure that a pipeline is designed, constructed, operated or abandoned as prescribed, provision 4 of the *National Energy Board Onshore Pipeline Regulations*; and
- Failures to design, construct, operate or abandon as prescribed, provision 6 of the *National Energy Board Onshore Pipeline Regulations*.

The NEB also published, for the benefit of facility owners and operators, documents focused on the retirement of facilities, including abandoning pipelines (*Principle for the End State of Land Post-Retirement and Next Steps*, NEB Filling A22297) as well as a *Regulating Pipeline Abandonment* guideline. Both documents are available online for consultation.

### **Abandoned pipelines information**

Since 1971, the NEB has authorized 34 pipeline abandonments, including 8 since 2001. Two submissions are presently in progress and two more are under review. With the exception of the abandonment orders filed for the Montreal Pipeline in 1971 (113.2 km) and the Yukon Pipeline in 2009 (145.6 km), the length of abandoned pipelines has remained historically short. Excluding these two exceptions, the average length of abandoned pipelines is of 1.95 km.

Municipalities may consult the list of abandoned pipeline available on the NEB's website ([www.neb-one.gc.ca/bts/nws/fqs/pplnbndnmntfg-eng.html](http://www.neb-one.gc.ca/bts/nws/fqs/pplnbndnmntfg-eng.html)), however, the last update was made on September 16<sup>th</sup>, 2015. Furthermore, this data does not provide the precise localization of abandoned pipelines. More detailed information must be requested on an *ad hoc* basis directly to the NEB. As indicated in the *NEB Act* and in the NEB's *Regulating Pipeline Abandonment*, the NEB must, during compliance verification, liaise with applicable provincial and territorial jurisdictions as well as with any organizations or groups identified as having concerns during the abandonment hearing process. This remains, however, a procedural requirement and not a legal obligation. Conversely, NEB abandonment procedures specify that operators must communicate with all concerned stakeholders, including local governments, during the hearing process.

## Appendix 2 – 2012 Federal Government Measures Specific to the NEB

In 2012, the Government of Canada provided the NEB with an additional \$13.5 M to hire staff to increase inspections by 50% to 150 and double the number of comprehensive audits to six. Also, *The Jobs, Growth and Long-term Prosperity Act* (introduced as Bill C-38), which became law that same year, included several important provisions related to the NEB, notably:

- Setting a 15 month time limit for NEB review of a facility application. It should be noted that with the exception of the Mackenzie Gas Project, all NEB hearings in the eight years prior to 2012 were completed within 15 months;
- Amending the process for reviewing export and import licenses, including changing the requirement for hearings for some licensees. For exports, the Board can now only consider whether the quantity to be exported exceeds reasonably foreseeable Canadian requirements, whereas previously the Board could consider any matter that it believed to be relevant;
- Requiring that both approvals and denials by the Board on major facility applications are subject to final decision by the Governor in Council (GiC). Previously, NEB decisions to deny a project application were final and only NEB approvals were subject to a GiC decision;
- Providing the Board with authority to levy Administrative Monetary Penalties (AMPs) which can now be issued for violations related to safety and environmental protection. The maximum daily penalty is \$25,000 per violation for individuals and \$100,000 per violation for companies. Each day a violation continues is considered a separate violation, and penalties can be issued per infraction, per day with no maximum total penalty.

## Appendix 3 –Administrative Monetary Penalties (AMPs)

In July of 2012, the Government of Canada changed the NEB Act by requiring the Board to establish a system of Administrative Monetary Penalties or AMPs. On July 3, 2013, the AMP Regulations became law, allowing the Board to begin issuing AMPs to companies or individuals not meeting NEB requirements and posing a threat to pipeline safety or environmental protection.

Administrative Monetary Penalties, or AMPs, are financial penalties the Board can impose on companies or individuals for not following any NEB requirement intended to promote safety or environmental protection. The AMPs aim both to prevent harm and to deter future non-compliance. AMPs do not replace any of the Board's other enforcement tools.

AMPs can be applied to both companies and individuals. The NEB's enforcement policy says that AMPs can be used when other enforcement tools such as letters, orders or voluntary commitments are not working. There are two separate penalty ranges: one for companies and one for individuals. The NEB Act sets out the maximum daily penalties for both individuals and companies. For individuals, the daily penalty can range from \$250 to a maximum of \$25,000 per violation. For companies, the daily penalty can range from \$1,000 to a maximum of \$100,000 per violation.

AMPs collected a total of \$218,000 in 2014 and \$398,300 in 2015 for 6 and 9 violations respectively (2016 data is forthcoming). In comparison, the costs incurred by recent major incidents (e.g. Kalamazoo, Prince Albert) are significantly larger.

While the amounts collected from AMPs are aggregated into their current regulatory revenue in the NEB annual reports, the financial penalties resulting from the *NEB's Administrative Monetary Penalties Regulations* constitute a debt due to Her Majesty in right of Canada as per section 151(1) of the NEB regulations. Although the NEB oversees the collection of penalties, all payments received are remitted to the Receiver General of Canada and managed as Public Money. There is no plan to put the AMPs into a fund used to cover costs in accidents that are unrecoverable from responsible companies. Furthermore, such a policy would have to originate from the Federal government since it is not in the present mandate of the NEB.

## **Appendix 4: A New Approach to Federal Environmental Reviews**

In January 2016, the Liberal government released a broad outline of its plans to start changing the way environmental assessments are carried out before major projects like pipelines are approved to help facilitate increased public input, notably by Aboriginal groups.

The ministers of the Environment and of Natural Resources, Ms McKenna and Mr. Carr, announced what they called “an interim approach” to federal environmental reviews – an approach that will have an immediate effect on the evaluation of two major pipeline projects: the Energy East pipeline project and the Trans Mountain Expansion Project.

For Trans Mountain, Mr. Carr has sought an extension on the legislated time limit for the government’s decision on the project. The NEB decision is still pending. If approved, the federal government will have seven, rather than four, months to make a final decision. That extension will allow the government to participate in more consultations with First Nations communities and assess additional greenhouse gas emissions that could be associated with the project.

On Energy East, the government says it will seek an extension on two fronts. First, it will extend the legislated review time for the NEB by six months (to 21 months total) and then also extend the time Ottawa is given to make a final decision by three months (six in total). If so, that would mean Energy East likely won’t have a firm answer until late 2018, 27 months after the NEB starts its assessment process, which may not happen until the summer.

The guiding “principles” and plans released are designed to act as interim measures until a full review and overhaul of the federal environmental assessment process can take place, an overhaul that could, according to Ms. McKenna, take “a number of years” The interim principles announced are:

- No project proponent will be asked to return to the starting line – project reviews will continue within the current legislative framework and in accordance with treaty provisions, under the auspices of relevant responsible authorities and Northern regulatory boards;
- Decisions will be based on science, traditional knowledge of Indigenous peoples and other relevant evidence;



- The views of the public and affected communities will be sought and considered;
- Indigenous peoples will be meaningfully consulted, and where appropriate, impacts on their rights and interests will be accommodated for;
- Direct and upstream greenhouse gas emissions linked to the projects under review will be assessed (while it remains unclear what level of greenhouse gas emissions would eventually kill a project).

## **Appendix 5 – Bill C-46 Legislative Process – Witnesses Heard**

### **1. Proceedings of the Commons' Standing Natural Resources Committee**

Second Session, Forty-first Parliament

Clerk of the Committee, Mr. Rémi Bourgault

#### **March 24, 2015**

Jeff Labonté, Director General, Energy Safety and Security Branch, Energy Sector,  
Department of Natural Resources

Joseph McHattie, Legal Counsel, Department of Natural Resources

Terence Hubbard, Director General, Petroleum Resources Branch, Energy Sector,  
Department of Natural Resources

#### **March 26, 2015**

Josée Touchette, Chief Operating Officer, National Energy Board

Jonathan Timlin, Director, Regulatory Approaches, National Energy Board

Robert Steedman, Chief Environment Officer, National Energy Board

#### **March 31, 2015**

Jim Donihee, Acting Chief Executive Officer, Canadian Energy Pipeline Association

Martin Olszynski, University of Calgary, Faculty of Law, As an Individual

Ian Miron, Barrister and Solicitor, Ecojustice Canada

Robert Blakely, Canadian Operating Officer, Canada's Building Trades Unions

#### **April 23, 2015**

Jeff Labonté, Director General, Energy Safety and Security Branch, Energy Sector,  
Department of Natural Resources

Joseph McHattie, Legal Counsel, Department of Natural Resources

## **2. Proceedings of the Standing Senate Committee on Energy, the Environment and Natural Resources**

Second Session, Forty-first Parliament

Chair: The Honourable Richard Neufeld

### **Tuesday, May 26, 2015**

Natural Resources Canada

Jeff Labonté, Director General, Energy Safety and Security Branch, Energy Sector;  
Terence Hubbard, Director General, Petroleum Resources Branch, Energy Sector;  
Christine Siminowski, Director, Energy Safety and Security Branch, Energy Sector;  
Joseph McHattie, Legal Counsel.

National Energy Board of Canada (by video conference)

Robert Steedman, Chief Environment Officer;  
Jonathan Timlin, Director, Regulatory Approaches.

### **Thursday, May 28, 2015**

Canada's Building Trades Unions

Robert Blakely, Canadian Operating Officer.

Canadian Energy Pipeline Association: (by video conference)

Brenda Kenny, President and Chief Executive Officer;  
Jim Donihee, Chief Operating Officer.

As an individual

Martin Olszynski (by video conference).

Union des producteurs agricoles

Martin Caron, Second Vice-president, Corporate;  
Stéphane Forest, Counsel, Legal Affairs Branch;  
Isabelle Bouffard, Economic and Trade Coordinator, Agriculture Policy and Research Branch.

**Tuesday, June 2, 2015**

Assembly of First Nations:

Cameron Alexis, Alberta Regional Chief;

Stuart Wuttke, General Counsel.

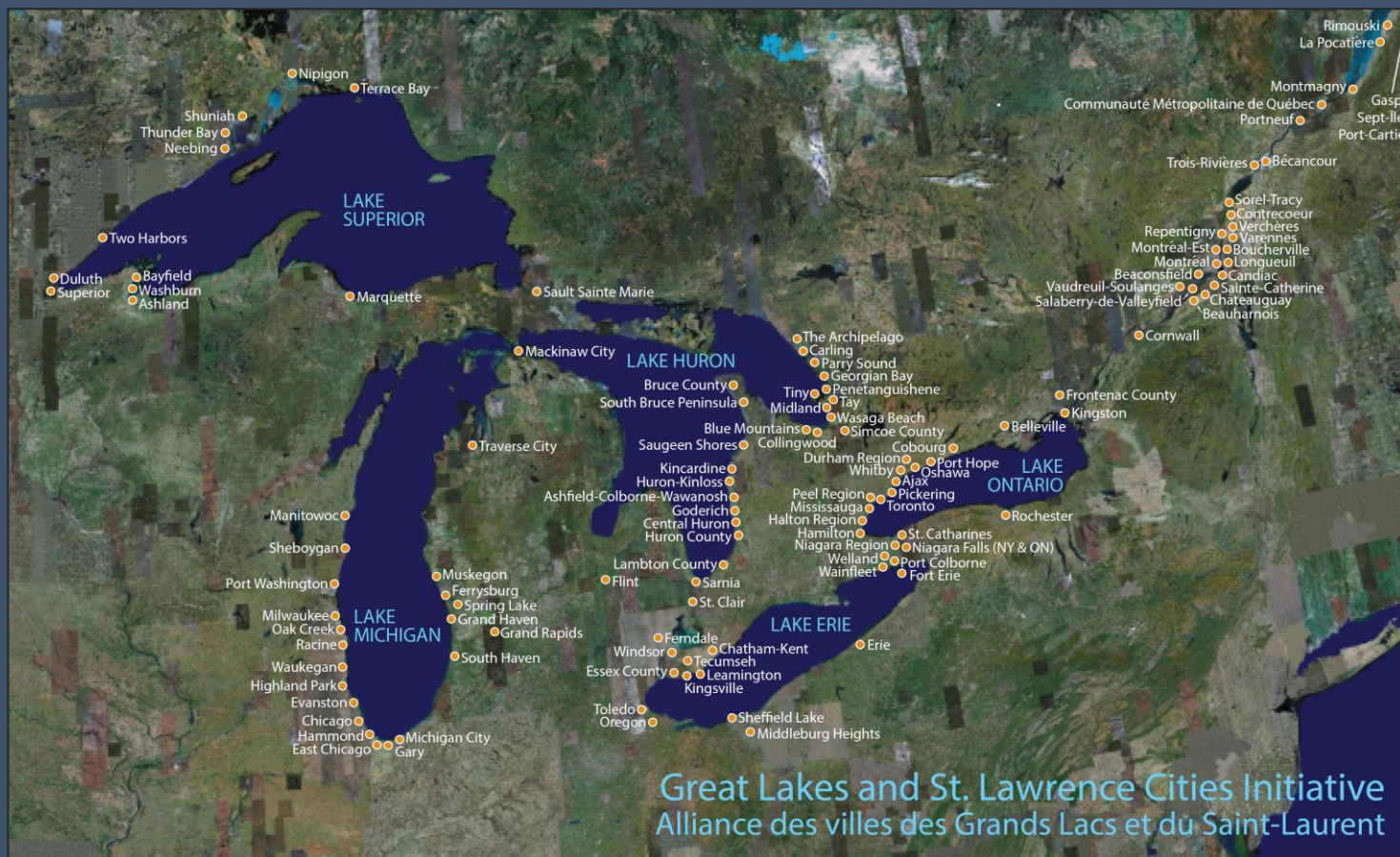
**Thursday, June 4, 2015**

Natural Resources Canada:

Jeff Labonté, Director General, Energy Safety and Security Branch, Energy Sector.

# Great Lakes and St. Lawrence Cities Initiative

## Members



Great Lakes and St. Lawrence Cities Initiative  
Alliance des villes des Grands Lacs et du Saint-Laurent

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