Township of Langley

Est. 1873

April 13, 2016

File No: 0400-40-011

Chantal Briand, Regulatory Approaches
National Energy Board
517 Tenth Avenue S.W.
Calgary, AB T2R 0A8

VIA EMAIL: damagepreventionregs@neb-one.gc.ca

Dear Sirs and Mesdames:

Re: 30-Day Comment Period for National Energy Board Proposed Regulations for Pipeline Damage Prevention in *Canada Gazette* Part I (date of publication: March 19th, 2016)

By letter to the National Energy Board dated November 13, 2015 (attached), the Township of Langley set out several of the Township's concerns with respect to the framework overview of the proposed amendments to the National Energy Board's Damage Prevention Regulatory Framework. Unfortunately, those concerns are not addressed or resolved by the Proposed Regulations that are the subject of the present 30-day comment period.

Furthermore, with respect to the text of the Proposed Regulations, the Township of Langley agrees with and shares the additional substantive concerns set out in the letter of the City of Surrey dated April 12, 2016 (attached). The Proposed Regulations do not recognize or provide for fair and efficient mechanisms for municipalities to carry out necessary and routine civic infrastructure maintenance and construction. The Township of Langley is very concerned that, as drafted, these Proposed Regulations place unwarranted and unnecessarily onerous burdens upon municipalities.

The deficiencies set out in the Township's letter of November 13, 2015 and the City of Surrey's letter of April 12, 2016 must be remedied to properly provide for a fair, safe and balanced approach to the practical issues that arise in the interface between municipal infrastructure and National Energy Board regulated pipelines. These issues are not isolated to the Township of Langley—they recur regionally, and nationally, and must be substantively addressed by the regulations.

Yours truly,

Roeland Zwaag, PEng
Director, Public Works Engineering Services

Attach.

Township of Langley

Est. 1873

November 13, 2015

BY EMAIL

NEB Pipeline *Damage Prevention Regulations*
Sheri Young
Secretary of the Board
National Energy Board
517-10th Avenue SW
Calgary, AB T2R 0A8

Email: damagepreventionregs@neb-one.gc.ca

Dear Ms. Young:

Re: Township of Langley Comments on National Energy Board *Damage Prevention Regulatory Framework*

This letter sets out the comments of the Township of Langley on the framework overview of the proposed amendments to the National Energy Board's Damage Prevention Regulatory Framework.

Our specific comments are set out below. As a general framework to our comments, it is important to recognize that the Township of Langley treats pipeline safety within our community as a priority. The development of an efficient system for ensuring pipeline safety that is marked by certainty of obligations is of significant importance to the Township of Langley.

Township of Langley's Recent Experiences with Regulatory Framework

In recent years, the Township of Langley has had to spend unnecessary time and resources in addressing issues arising from one pipeline company, and subsequently the National Energy Board, misapplying the existing pipeline safety regulations and seeking to extend regulatory control beyond the legislated safety zones. The Township of Langley relies upon the standards set out in the *National Energy Board Act* and regulations when planning, authorizing and carrying out municipal infrastructure work. As currently worded, s. 112 of the *Act* states:

> **112.** (1) Subject to subsection (5), no person shall, unless leave is first obtained from the Board, construct a facility across, on, along or under a pipeline or excavate using power-operated equipment or explosives within thirty metres of a pipeline.

To the extent that the language and standards are clear, there is no basis for pipeline company interference with municipal works that fall outside the regulated safety zone. This causes delay and expense to the municipality. To the extent that there is any uncertainty in the regulatory language and standards, the Township of Langley supports legislative efforts to remove that uncertainty.

The National Energy Board has on three occasions of which we are aware supported the pipeline company in its allegations of "unauthorized activity" by the Township of Langley, without providing the Township of Langley an opportunity to respond. In each case, the Township of Langley's view is that the safety regulations were clear, and the Township of Langley was operating well within what is permitted under the law. For context and for your reference, we provide a summary of the incidents here:

1) One ditch cleaning incident that was determined in advance by the Township of Langley to be well outside the 30 meter regulated safety zone established by s. 112(1) of the *Act*. In fact, the cleaning occurred 150 meters away from the pipeline in question. This was confirmed by the pipeline company representative who visited the site. There was no reasonable or legal basis to suggest that the municipality had done anything contrary to the *Act* or regulations, or to jeopardize pipeline safety. Nevertheless the company and subsequently the National Energy Board asserted that the ditch cleaning was "unauthorized activity". Although the NEB appears to have subsequently acceded that there is no factual basis for such an assertion, it has not as far as we have been advised, corrected its records on this incident.

2) One tree removal incident in which the Township of Langley's contractor removed a tree by hand within the regulated safety zone. No power-operated equipment was used. Leave of the Board is not required for excavation by hand (see text of s. 112 above). Nevertheless, the National Energy Board has recorded this as an "unauthorized activity" by the municipality.

3) The NEB recorded municipal crews milling and paving a road to a depth of 75mm within the 30 meter regulated zone as an "unauthorized activity."

    a. The Township of Langley does not understand milling or paving to be an "excavation", which is what is regulated under the *Act*. Existing pavement is merely ground and repaved. Therefore, leave of the Board is not required for that activity: *NEB Act* s. 112(1).

    b. However, even if the Township of Langley is wrong on its interpretation of "excavation" as excluding milling and paving, this activity was well within the depth permitted by the *National Energy Board Pipeline Crossing Regulations, Part 1* SOR/88-528 apply: s. 3 (which apply under the *Act*, s. 112 (1) and (5)). Leave of the Board is not required for excavation below 300mm that will not reduce the overall cover over the pipeline: the 75mm to which the road is milled is far below that threshold, and the repaving replaces the depth of cover.

Comments based on Recent Experiences for Framework Update Process

These experiences lead to the following comments relevant to the update of the NEB's damage prevention regulatory framework:

- First, incidents #1 and #2 above should not have arisen as incidents at all. The Township of Langley was well within the scope of allowed activity under the regulatory framework, and there was no reasonable basis for the pipeline company to interfere with the Township of Langley's activities, nor for the National Energy Board to support the company's position. Such interference is a drain on resources, without any benefit to pipeline safety, which is our shared goal. The revised regulatory framework should leave no ambiguity for pipeline companies, the National Energy Board, and the communities that host pipelines about the boundaries and limits of the regulations.

- With respect to the third incident, the Township of Langley's position is that the existing regulatory language permits, on its face, milling and paving. However, as the word "excavation" will be removed from s. 112 of the Act upon coming in to force (and in so far as there may have been ambiguity or disagreement about the interpretation), then this regulatory update process is an excellent opportunity to eliminate that uncertainty. The Township of Langley will submit below that certain activities, including milling and paving, should be expressly permitted under the new regulations in the same way that "Low Risk Crossings by Agricultural Vehicles" will be permitted under the new regulations.

Comments on NEB's Three Areas to be Updated

The new model of a "positive structure" for regulation, as the NEB describes it, will only be of assistance to the shared goal of pipeline safety if the regulations under s. 112(5) give greater certainty and clarity than the *Act* will provide upon the coming into force of the amendments.

1) **"Ground Disturbance"**: The new negative definition of ground disturbance risks confusion and uncertainty at the implementation stage. In particular, part (c) of the definition will be difficult to implement in practice. That part excludes from the definition of "ground disturbance": "any other activity to a depth of less than 30 cm and that does not result in a reduction of the earth cover over the pipeline to a depth that is less than the cover provided when the pipeline was constructed".

   Natural forces of accretion and erosion of soil and other materials will make it difficult, if not impossible, for the municipality to know whether shallow digging activities (i.e. less than 30 cm) might lessen the original cover of the pipeline. The ongoing relative depth of the pipeline is a matter within the pipeline company's means of knowledge, not the municipality's, however, this definition puts the responsibility on the municipality.

Recommendations:

a) **Grant express permission under s. 112(5) regulations for**:

a. Ditch cleaning

Ditch cleaning will often disturb soil, and may sometimes remove soil, although generally at depths less than 30 cm. Like cultivation and low risk agricultural vehicles, subject to appropriate restrictions, ditch cleaning is a very low risk activity to pipeline safety. To avoid uncertainty arising from the requirement to maintain original depth of soil under (c), it is recommended that ditch cleaning be expressly permitted, similar to the express permission anticipated for cultivation and low risk crossings by agricultural vehicles.

b. Milling, paving and routine highway maintenance

Road milling (and subsequent paving) would on the face of the revised definition of "ground disturbance" appear to be permitted under the *Act*. However uncertainty arises again with respect to the requirement at (c) with respect to original ground cover levels over the pipeline, which is a matter within the company's means of knowledge, not the municipality's. On the same basis that it is proposed that ditch cleaning should be expressly permitted under regulation, the Township of Langley submits that so too should milling and paving, subject to appropriate express conditions which the Township would be pleased to discuss with the NEB in this process.

The Township of Langley similarly supports the September 2015 resolution of the Union of BC Municipalities with respect to the filling of potholes and other "Routine Highway Maintenance Over Pipelines":

> WHEREAS timely maintenance of municipal highways is a matter of public safety;
>
> AND WHEREAS Kinder Morgan has taken issue with municipalities filling potholes and performing routine maintenance citing regulations under the National Energy Board Act;
>
> AND WHEREAS the National Energy Board General Order No. 1 Respecting Standard Conditions for Crossings of Pipelines imposes certain conditions which include a condition that a pipeline crossing a highway shall be located so that it will not interfere with highway traffic or maintenance;

AND WHEREAS there is uncertainty and confusion regarding the application of regulations cited by Kinder Morgan, the effect of National Energy Board General Order No. 1 Respecting Standard Conditions for Crossings of Pipelines and conditions that may have been imposed under the earlier enactments of s.108 of the National Energy Board which provides that any certificate approving a pipeline may contain terms and conditions related to pipelines crossing highways and other utilities:

THEREFORE BE IT RESOLVED that UBCM and FCM request the federal Ministry of Natural Resources to revise the regulations under the National Energy Board Act such that the regulations appropriately balance public safety and the continuing need for municipalities to undertake routine highway maintenance without having to first provide notice to or obtain a permit from the owner or operator of the pipeline.

c. Tree removal and replanting

"Cultivation" (part (b) of the definition of ground disturbance) should be defined. It is not clear whether tree planting and removal would be captured under the definition.

In any event, express permission should be given for tree planting and removal where the digging is done without power-operated equipment. As the current regulatory framework recognizes, hand digging for this purpose does not pose a threat to pipeline safety. This would relate to small to medium sized trees whose root systems are not deep enough to be close to pipelines. The planting or removal of larger trees with deep root systems that could approach depths of relevance to a pipeline would not be captured under this express exemption (in part because of the need for power operated equipment for removal of large trees).

b) Impose an express obligation upon pipeline companies to make original depths of pipeline relative to present depths readily available so as to prevent or minimize delay in municipal maintenance and work planning.

2) **"Prescribed Area":** The Township of Langley submits that the existing 60 metre safety zone (that is, 30 m on either side of the pipeline) is an appropriate "prescribed area" for the regulatory framework.

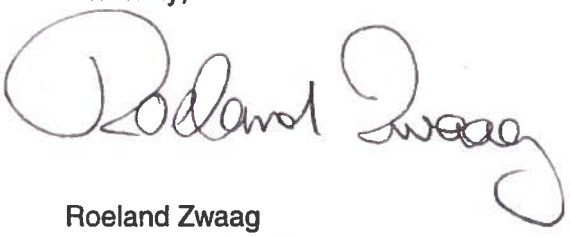
3) **One-call requirements**: Based on the Township of Langley's experience in recent years, as set out above, the Township of Langley submits that it is imperative that any legislated obligation to initiate a one-call request leave no ambiguity as to when such a request must be submitted. The Township of Langley submits that the 60 metre (30 + 30 metre) safety zone provides a sufficient buffer to reasonably protect pipelines. No obligation to call should arise when a contemplated activity is outside the zone of regulated activity (both in terms of distance from the pipeline or depth of disturbance).

4) **Identification of required measures to safe construction, activities and crossings of pipelines**: No measures have been provided for comment at this stage in the regulatory update process. The municipality would welcome the opportunity to review proposed measures and comment from the perspective of municipal works.

As stated above, the Township of Langley would welcome the opportunity to discuss with the appropriate conditions to be attached to the express permissions set out above. Certainty of language and practicality of conditions will be of fundamental importance to a successfully renewed pipeline safety regulatory framework.

If you have any questions, please contact the undersigned at 604.533.6163 or rzwaag@tol.ca .

Sincerely,



Roeland Zwaag
Director, Public Works

CITY OF SURREY

the future lives here.

Legal Services
CRAIG MacFARLANE, City Solicitor
MAUREEN ST. CYR, Assistant City Solicitor
KELLY RAYTER, Assistant City Solicitor
ANTHONY CAPUCCINELLO, Assistant City Solicitor
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HUGH CAMPBELL, Assistant City Solicitor

Our File: 5500-01/ #1
2430-20-591
Direct Line: (604) 591-4188

VIA EMAIL: damagepreventionregs@neb-one.gc.ca

April 12, 2016

Chantal Briand, Regulatory Approaches
National Energy Board
517 Tenth Avenue S.W.
Calgary, AB T2R 0A8

Dear Sirs and Mesdames:

Re: 30-Day Comment Period for National Energy Board Proposed Regulations for Pipeline Damage Prevention in *Canada Gazette* Part I (date of publication: March 19th, 2016)

In light of the brief period available for comment, the focus of this letter is limited to highlighting deficiencies in the proposed regulations that from a preliminary review alone are glaringly obvious. The fact that other provisions have not been commented on should not be construed as the City of Surrey's endorsement of those provisions, nor should one infer that Surrey does not have concerns with them. Unfortunately, in the absence of direct consultation with the City of Surrey (one of the municipalities most impacted by federal pipelines) and other impacted municipalities and without a meaningful comment period, this letter is all that time permits.

Firstly, the general tenor of the proposed regulations is that they unfairly shift burdens, obligations, costs and liabilities to municipalities and continue to frustrate and delay the ability of municipalities to undertake even the most routine services. Sadly, one cannot avoid being left with the impression that the draft regulations were written by pipeline company representatives.

Secondly, a glaring deficiency of the draft regulations is that they do not address the pipeline crossing issues raised by the City of Surrey and other municipalities (including the City of Coquitlam, the City of Abbotsford, the Township of Langley and the City of Edmonton) in the recent National Energy Board Hearing related to Kinder Morgan's Trans Mountain Pipeline Expansion Project (Board File: OF-Fac-Oil-T260-2013-03 02). The imperative to impose a cost allocation formula and provisions related to the issues and necessary requirements captured in the *Joint Municipal Conditions* (which are set out on p.180 to p.182 of the enclosed Written Argument) have been ignored by the drafters of the proposed regulations. Also ignored is the fact that pipeline companies do not compensate municipalities for their pipelines occupying and crossing municipal highways and that municipalities incur extraordinary present and future costs

as a consequence of such occupation and crossings. The City of Surrey and other municipalities requested that these "*Joint Municipal Conditions*" be imposed because, in part, the following issues and necessary requirements they address are not dealt with in legislation and continue to remain unaddressed in the proposed regulations:

- The allocation of present and future costs to the pipeline company arising as a consequence of the pipeline occupying or crossing highways and impacting utilities including, but not limited to:

    (i) costs to realign, raise or lower the pipeline;
    (ii) costs to excavate material from around the pipeline;
    (iii) costs to add casing or other appurtenances for the protection of the pipeline; and
    (iv) costs to accommodate future construction projects including, but not limited to, the construction, upgrading, maintenance, renewal, widening and/or replacement of any improvements, infrastructure, utilities and/or highway that occurs across, under, over or in proximity to the pipeline;

- The obligation of the pipeline company to provide necessary consent and obtain necessary consent from other interest holders in the pipeline company's statutory right of way/easement to enable municipalities and the Province to dedicate required land for highway/road;

- Fixed timing of pipeline work to be performed by the pipeline company to accommodate highway, utility, infrastructure and improvement projects so as not to delay municipal projects;

- Prohibiting the pipeline company from including certain terms in its consents or permits such as terms requiring municipalities to release and indemnify the pipeline company and assume liabilities and pay costs;

- Requiring the pipeline company to release and indemnify municipalities from any and all liabilities, damages, claims, suits and actions arising out of the pipeline company's operations and/or the construction, installation or placement of its infrastructure, including but not limited to, the pipeline, across, under, over or within the highway or in proximity to municipal utilities other than liabilities, damages, claims, suits and actions resulting the gross negligence or willful misconduct of the municipality; and

- Requiring the pipeline company to enter into agreements related to impacted utilities including highway occupation and crossings with each affected municipality and affected Provincial highway authorities prior to construction, failing which terms shall be imposed by the NEB.

The legal basis, need, rationale and evidence relied upon for the inclusion of provisions addressing these issues and necessary requirements is set out in section 2.0 of the enclosed Written Argument (p.2 to 10). We also suggest that you listen to the City of Surrey's presentation to the NEB in order to appreciate their significance. The presentation can be viewed using the following link: http://neb.isilive.net/TMPULC/2016-01-19/video-english.html.

Finally, as for specific provisions of the proposed regulations, we offer the following additional comments:

National Energy Board Pipeline Damage Prevention Regulations - Authorizations

s.4 - Duty to Inform - This exposes municipalities to extraordinary potential liability particularly in light of the joint and several liability provisions set out in section 16 of the *Pipeline Safety Act*, SC 2015, c.21, which amends the *National Energy Board Act* by adding s.48.12 to that *Act*. The addition of s.48.12 unfairly shifts liability to municipalities and arguably has the effect of nullifying the existing protection under s.86(2)(d)(ii) of the *National Energy Board Act* which Surrey and other municipalities have requested the NEB to clearly provide applies to municipalities as the owner of highways. Not only is it virtually impossible to prove that someone has been informed, but municipalities would have no reasonable means, nor can they be reasonably expected to know what subcontractors, if any, have been engaged. Also, keep in mind, that the duty to inform is far more difficult to satisfy than a duty to notify.

s.7(1)(c), s. 10(1)(c) - This improperly puts the onus on municipalities to be satisfied that they have obtained the information referred to in paragraphs 6(1)(a) and (c) of the regulation. The most municipalities can do is request said information and assume that the information the pipeline company provides is in fact all of the information s.6(1)(a) and (c) describes. It should not be left to the municipalities to assess the completeness and accuracy of the information provided by the pipeline company in response to a municipality's request.

s.7(3), s. 9(2), s.10(3) - The mandatory language "*must*" should be qualified with language similar to "*Unless otherwise ordered by the Board or consented to by the pipeline company, any person...*". On an application to the Board for a crossing, the NEB may relieve municipalities and others of some of these obligations.

s.7(3)(a), s.10(3)(a) - The language "*and that have been accepted by the pipeline company*", should be deleted. The pipeline company has either consented or it has not. This language creates uncertainty and arguably suggests that you need more than just consent but that you also need evidence of acceptance as well.

s.8(a) - The phrase "*compatible with the pipeline's safety and security*" should be deleted. Municipalities are not pipeline experts. Once the crossing is approved, it is enough that the facility (which includes "*highways*") is properly maintained in a good state of repair.

s.8(b) - This provision provides too much power to the pipeline company. What if the municipality does not agree that there is any "*deterioration*"? Keep in mind "*facility*" includes "*highways*".

s.8(d) - This provision puts a ridiculously uncertain onus on municipalities with the word "*could*". Why should municipalities be obligated to "*remove or alter the facility*"? One should also be mindful of the added exposure to municipalities created by the new liability provisions set out in the new s.48.12 of the *National Energy Board Act* (soon to be in force) added through section 16 of the *Pipeline Safety Act* which was enacted without municipal consultation and without regard to the unfair burden and additional liability it places on municipalities. Instead, the regulations should provide that the pipeline company shall undertake all necessary work to protect the pipeline at its expense. Again, one should not lose sight of the fact that pipeline companies do not compensate municipalities for their pipelines occupying and crossing municipal highways and

that municipalities incur extraordinary present and future costs as a consequence of such occupation and crossings.

s.10 - The incorporation of the definition of "*ground disturbance*" is problematic as the definition itself is unworkable. How could municipalities possibly prove there has been no "*reduction of the earth cover over the pipeline to a depth that is less than the cover provided when the pipeline was constructed*"? The obvious problems that result from such an unworkable definition are described in the letter from the Township of Langley dated November 13, 2015 which is enclosed with this letter.

Moreover, how are municipalities able to rely on the exception set out subparagraph (c) of the definition of "*ground disturbance*" in the *Pipeline Safety Act* without having any knowledge or reasonable means of ascertaining the depth of cover over the pipeline when the pipeline was constructed? The federally regulated Trans Mountain pipeline that traverses the City of Surrey was constructed in 1953 and we suspect that not even the NEB has the required information related to depth of cover. Also, in some cases, the depth of cover may have changed from the time of construction with the consent of the pipeline company or by order of the Board.

At a minimum, if this definition is to remain, then the regulation should clearly provide that certain activities are permitted to a depth of 30 cm without the added requirement that there be no reduction of the earth cover over the pipeline. There should also be a requirement that the pipeline company provide the depth of cover information required.

s.10(a) (see comments related to s.3(2) of the proposed *National Energy Board Pipeline Damage Prevention Regulations – Obligations of Pipeline Companies*) - There must be limitations imposed on the terms and conditions that can be imposed in a consent. While s.3(2) of the *National Energy Board Pipeline Damage Prevention Regulations – Obligations of Pipeline Companies* states that the conditions must relate to "*... conditions necessary for the protection of property and the environment, the safety and security of the public and of the company's employees or the pipeline's safety and security*", the pipeline company practice has been to include conditions imposing indemnities, releases and other provisions related to liability all in favour the pipeline company which have the effect of nullifying existing protections under the *National Energy Board Act* (such as those set out in s.86(2)(d)(ii) of the *National Energy Board Act*) as well as eliminating common law and other statutory defences available to municipalities. Unless a prohibition is expressly included in the regulations that has the effect of prohibiting such terms and conditions from being added then this pipeline company practice will undoubtedly continue.

s.10(3)(c) - By incorporating the definition of "*ground disturbance*" in this provision, the same concerns expressed above in relation to s.10 generally apply.

s. 10(3)(c) (ii) - Also, the 60 cm depth differential requirement is too large. An acceptable municipal standard is 30 cm clearance. The imposition of a 60 cm depth differential practically sterilizes otherwise usable portions of highway and utility corridors (which are already constrained for space) by effectively requiring municipalities and other utilities to place all facilities beneath the pipeline at tremendous expense. These facilities would include municipal and third party utilities that are typically placed very shallow in highways for access and construction cost reasons and include streetlighting, water lines and mains, catch basins, gas lines and mains, and electrical and telecommunication conduit, etc.

s.12 - When read in conjunction with the new section 112(2) of *National Energy Board Act* enacted by s.34 of the *Pipeline Safety Act* which will be in force shortly, section 12 of the proposed regulation does not go far enough. The ambit of varied routine municipal activities that must be undertaken with a vehicle or mobile equipment such as ditch cleaning, arguably cannot under the current language of the draft regulation be undertaken without the pipeline company's consent. The exemption for vehicles and equipment operated within "*the travelled portion of a highway or road*" set out in section 112(2)(b) is not helpful or workable because of the uncertainty of what constitutes the "*travelled portion of a highway or road*". At a minimum, s.12 of the regulation should be expanded to clearly provide that the operation a vehicle or mobile equipment for the purposes of undertaking certain routine municipal activities are permitted across a pipeline without the pipeline company's consent.

National Energy Board Pipeline Damage Prevention Regulations – Obligations of Pipeline Companies

s.3(2) - There must be limitations imposed on the terms and conditions that can be imposed in a consent. While s.3(2) of the *National Energy Board Pipeline Damage Prevention Regulations – Obligations of Pipeline Companies* states that the conditions must relate to "*... conditions necessary for the protection of property and the environment, the safety and security of the public and of the company's employees or the pipeline's safety and security*", the pipeline company practice has been to include conditions imposing indemnities, releases and other provisions related to liability all in favour the pipeline company which have the effect of nullifying existing protections under the *National Energy Board Act* (such as those set out in s.86(2)(d)(ii) of the *National Energy Board Act*) as well as eliminating common law and other statutory defences available to municipalities. Unless a prohibition is expressly stated that has the effect of prohibiting such terms and conditions from being added then this pipeline company practice will undoubtedly continue.

In light of the above, we trust that you will take necessary action and revise the draft regulations to address the concerns raised and the deficiencies identified in this letter.

Yours truly,

ANTHONY CAPUCCINELLO
Assistant City Solicitor

AC:kls
Enclosures:
- Written Argument of the City of Surrey dated January 12, 2016 (excluding Appendix "B" and Appendix "C")
- Township of Langley Letter dated November 13, 2015

c.c. Federation of Canadian Municipalities (Via Email)
Scott Neuman, Manager, Design & Construction

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