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Response to the Government of Canada Designated Officer Regulations Discussion Paper

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PREPARED BY: CANADIAN ENERGY PIPELINE ASSOCIATION

The Canadian Energy Pipeline Association (CEPA) represents Canada's major transmission pipeline companies that transport 97 percent of Canada's daily natural gas and onshore crude oil production.

CEPA supports the Government's intent in s. 54 of the proposed *Canadian Energy Regulator Act* to enable regulations that will delegate certain administrative and technical decisions to a Designated Officer of the Canadian Energy Regulator ("CER"). CEPA supported modernization of the National Energy Board to create a modern governance structure, part of which is a structure that authorizes decision-making to those with the greatest level of technical expertise.

In developing regulations under s. 54, it is important to set a framework that will lead to more certainty and predictability. It is also important that decisions of a technical nature be administered by those with specific expertise required to ensure that pipelines are designed, constructed, maintained and operated safely. This is why it makes sense to have technical and administrative decisions handled by a Designated Officer. This is especially the case for a wide range of decisions made throughout the life-cycle of a pipeline, including facilities applications, construction, commissioning, operations & maintenance activities as well as any deactivation, decommissioning & abandonment activities. We recommend that Designated Officers have decision-making authority for as many administrative and technical activities as reasonably possible.

However, CEPA is concerned with the Discussion Paper's focus on a "criteria-based" approach to identify types of decisions to delegate to a Designated Officer as well decisions to escalate up to the Commission. Instead, CEPA would encourage development of a list of activities or decisions that Designated Officers are authorized to make, rather than providing general criteria to guide that on a case by case basis.

CEPA sees two fundamental problems with a criteria-based approach: (1) subjective and undefined terminology; and (2) the potential for frivolous public intervention on routine technical and administrative matters in an attempt to establish "significant interest", "significant policy issues", etc. to escalate decision-making from a Designated Officer up to the Commission. The impact would ultimately expose existing infrastructure as well as routine facility applications to additional regulatory burden and corresponding legal risk.

CEPA believes that regulations should provide more certainty. Rather than relying on a criteria test, we believe that developing an activity list would be more helpful. This would involve creating a detailed list of specific types of decisions or activities for a Designated Officer. The criteria noted in the Discussion paper could be used to establish that list, but it must not be left to develop decision paths on a case by case basis. CEPA acknowledges that there could be unique circumstances where decision-making becomes more complicated or where broad public and national interest determinations are needed and should be referred by a Designated Officer to the Commission. This should be the exception and there should be narrow circumstances for doing so.

The Designated Officer activity list could include technical and administrative decision-making for route variances, technical specification changes, leave to open applications, engineering assessments, etc. This would provide for regulatory process efficiencies.

Once a decision-making activity list is developed, CEPA would encourage the CER to develop service standards for Designated Officer decisions to have a predictable timeline and to enhance certainty.

CEPA would appreciate an opportunity to facilitate further dialogue with CEPA member companies and the government to discuss what activities and decisions are suitable for decision-making by a Designated Officer. A proposed list of specific activities is attached as Schedule A.

The remaining comments are meant to address the 5 questions in the Discussion Paper.

Question 1 – What changes, if any, would you suggest to the [proposed] criteria for identifying decisions in the CER Act that are “technical or administrative in nature”?

Question 2 – Are there any other criteria that could be used to identify decisions that are “technical or administrative in nature”?

Identified criteria for identifying potential decisions for a Designated Officer:

- The decision is unlikely to require weighing competing interests
- The decision involves technical details for a project that has already been approved
- There are likely to be a few stakeholders directly affected by the decision
- The decision requires in-depth technical knowledge on a specific topic
- There are no significant findings of law (e.g. results of court cases) or constitutional considerations
- There is a “test” or standard to be applied with no limited ability to exercise discretion (e.g. assessment against quantitative threshold or legal requirement)
- The decision does not have industry-wide impacts

Without a list type of approach, CEPA believes that the criteria listed are too subjective and lend to multiple interpretations. Instead, CEPA recommends that a detailed listing of potential activities for decision-making by a Designated Officer should be developed. This can be developed based on the above criteria. But without a clearly defined and understood list, a criteria test is likely to lead to increased uncertainty and regulatory delays.

Question 3 – What changes, if any, would you suggest to the circumstances [where a matter that is “technical or administrative in nature” should be referred to the Commission rather than Designated Officers]?

Question 4 – Are there any other circumstances that could apply for when a decision should be made by the Commission and not a designated officer?

Question 5 – Are there any circumstances where a decision that is “technical or administrative in nature” should always be made by a designated officer?

Proposed criteria for decisions that are normally considered “technical or administrative in nature” to be elevated to the Commission are:

- A decision is required as part of a larger application that is being considered by the Commission
- There is significant interest shown in the application by Indigenous groups, non-governmental organizations, government officials and the public
- The designated officer requests that the matter be considered by the Commission
- The decision requires a balancing of various interests
- Significant policy or legal issues arise

CEPA’s primary concern is that a criteria-based approach such as outlined above will result in decisions that are primarily technical or administrative being escalated to the Commissioner on a too common basis. CEPA recommends developing a list of specific decisions that Designated Officers can make. There

also should be flexibility for the CEO of the CER to re-assign the decision-making task to the Commission on an exception basis. This should be based on those unique situations where a broad public and national interest determination is required and should be considered only in exceptional circumstances.

Conclusion

From the outset of the NEB Modernization consultations, CEPA has recommended that matters of a routine nature be delegated to technical experts within the NEB (to become the CER with enactment of Bill C-69). We appreciate the substantial efforts the government has made by proposing s. 54 to the CER Act, with the potential to lead to greater efficiency and more decisions based on science and technical expertise. We welcome opportunities for further input and collaboration with CEPA member companies and look forward to future dialogue.

SCHEDULE A
Designated Officer Decision-Making Authorities

Chief Executive Officer delegates decision-making authority to Designated Officer
<p>Hearing Project Decisions – Construction & Commissioning</p> <ul style="list-style-type: none">• All minor route variances or temporary work space (TWS) for pipeline or roadway access• All compressor station, pump station, meter station and tank piping changes and changes to technical specifications• All Certificate compliance conditions requiring Approval of the Designated Officer (DO)• Issue Information Requests• Issue Inspection and Safety Orders• Leave to Open (LTO) for new pipelines, compressor stations, pump stations, meter stations and tanks• All landowner, Indigenous and stakeholder complaints• All stop work / return to work orders• All matters related to CSA Z662 and other technical standards
<p>Non-Hearing Project Decisions – Construction & Commissioning</p> <ul style="list-style-type: none">• All minor route variances or TWS for pipeline or roadway access• All compressor station, pump station, meter station or tank piping changes or technical specification changes• Leave to Open for non-hearing pipelines, compressor stations, pump stations, meter stations and tanks• Issue Inspection and Safety Orders• All landowner, Indigenous and stakeholder complaints• All stop work / return to work orders• All matters related to CSA Z662 and other technical standards
<p>Operations & Maintenance Decisions</p> <ul style="list-style-type: none">• All compliance conditions requiring Approval of the DO• Authorize return to flow status at appropriate operating pressure following an event or incident• Integrity and engineering assessments• Issue Information Requests• Issue Inspection and Safety Orders• All landowner, Indigenous and stakeholder complaints• All stop work / return to work orders• All matters related to CSA Z662 and other technical standards
<p>Deactivation, Decommissioning & Abandonment Decisions</p> <ul style="list-style-type: none">• If no hearing, DO review and decision on Order• All condition compliance decisions requiring Approval of the DO• Reactivations and s.43 OPR decisions (increase in licensed MOP or change in service)• Issue Information Requests• Issue Inspection and Safety Orders• All landowner, Indigenous and stakeholder complaints• All stop work / return to work orders• All matters related to CSA Z662 and other technical standards