

Discussion Paper:

DESIGNATED OFFICER REGULATIONS

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Introduction

The *Canadian Energy Regulator Act* (CER Act), proposed through Bill C-69¹, would establish the Canadian Energy Regulator (CER or Regulator), which would include a Commission of independent adjudicators. Through the CER Act, the majority of the CER's powers, duties, and functions would be carried out by the Commission. The CER Act also provides authority for the Government of Canada to create regulations that would specify certain administrative and technical decisions that can be carried out by "designated officers" of the CER. The purpose of this paper is to seek feedback on the approach for the creation of these regulations. The document contains five (5) questions for your consideration and comment.

Context

The CER will provide regulatory oversight over the full lifecycle of federal energy infrastructure including pipelines that cross interprovincial and international borders, international and designated interprovincial power lines, and offshore renewable energy projects.

The CER Act sets out the CER's mandate, which includes:

- adjudicating and overseeing matters relating to the full lifecycle of federally-regulated pipelines and abandoned pipelines, power lines, and offshore renewable energy projects;
- making decisions and overseeing matters relating to traffic, tolls and tariffs;
- overseeing trade in energy products;
- advising and reporting on energy matters; and
- providing alternative dispute resolution processes.

Structure of the Canadian Energy Regulator

Once enacted, the CER Act would create a modern governance structure that separates the CER's adjudicative function from its daily operations. The CER Act would establish an adjudicative arm, the Commission, with a Lead Commissioner. The role of the Commission would be to make recommendations and decisions regarding federally regulated infrastructure projects throughout the project's lifecycle. A Board of Directors would be established to provide for the governance of the Regulator including the provision of strategic direction and advice to the Regulator. A Chief Executive Officer (CEO) would be responsible for the management of the of the Regulator's day-to-day business and affairs.

¹ The proposed CER Act was introduced in February 2018 through Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*. When Bill C-69 receives royal assent, then following coming into force, the CER Act would replace the NEB Act, and establish the Canadian Energy Regulator.

Designated officers in the CER Act

As part of the modern governance structure, the CER Act provides that certain decisions can be carried out by designated officers. It is anticipated that designated officers with the CER would have an important role in the overall regulatory scheme, contributing to the efficient implementation of the CER's responsibilities, due to their technical expertise. Under the CER Act, designated officers are employees of the CER, and the CEO appoints designated officers and apportions their work.

The CER Act specifies that a designated officer may make, condition, vary and rescind orders related to:

- authorizing a person to make contact with, alter or remove an abandoned facility;
- designating a pipeline as an orphan pipeline or an orphaned abandoned pipeline; and
- constructing or working on pipelines located near mining operations, or conducting mining activities near a pipeline.

The CER Act states that both the Commission and designated officers must consider, when making a decision or an order under the CER Act, any adverse effects that the decision or order may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act*, 1982. Both the Commission and designated officers must issue written reasons for the decisions and orders they make, and the decisions and orders must be publicly available. Decisions or orders made by designated officers may be appealed to the Commission.

The CER Act also contains a provision that allows regulations to be made specifying administrative and technical decisions that can be carried out by designated officers:

54. The Governor in Council may make regulations that specify

(a) powers, duties and functions of the Commission that are technical or administrative in nature and may be exercised or performed by designated officers;

(b) any circumstances in which those powers are to be exercised and those duties and functions are to be performed only by designated officers; and

(c) the procedures and practices that apply to the exercise of those powers and the performance of those duties and functions by designated officers.

Under the CER Act, the Commission has a variety of authorities and can make many different types of decisions and recommendations. Some of these decisions are fairly complex, such as assessing the potential benefits and impacts of a proposed large pipeline project. In this situation, a hearing may be held to allow the various interests to be brought forward. This type

of adjudicative function and decision-making occurs less frequently compared to other types of decisions under the CER Act that are more technical, routine, or straightforward.

Developing the designated officer regulations

The CER Act provides that regulations can be made specifying administrative and technical decisions that can be carried out by designated officers. There are many decisions of the Commission under the CER Act that could be considered “technical or administrative in nature”, such as:

- Issuing authorizations or notifications that are administrative in nature. Examples include:
 - issuing a permit to correct minor errors in a registered plan, profile and book of reference (details of the final location of the pipeline) for an approved pipeline project; and
 - issuing a certificate of non-payment for an administrative monetary penalty.
- Providing approvals or orders during the lifecycle of a project that are based on meeting required technical standards. Examples include:
 - providing leave (permission) to open a pipeline for transmission based on the results of continuous pressure tests (e.g. hydrostatic testing); and
 - issuing safety orders against regulated companies when a required technical standard or regulation is not being met.

There are also some decisions of the Commission that may be primarily technical or administrative in nature, depending on the circumstance. For example, approving a variance to a decision can be relatively minor (e.g., changing the length of a pipe in a compressor station from the originally approved design), or it can involve a more complex situation (e.g., a reroute of a pipeline, which may affect several landowners).

Each project, application, and assessment has its own unique facts and circumstances; even primarily “technical” decisions can entail a balancing of competing interests or complex findings of fact and law. For this reason, it will be important that the regulations allow not only for clear decision-making roles, but also a reasonable level of flexibility to allow the CER to adapt to the facts of the decision before it.

Designated officer regulations – foundational considerations

Two foundational areas of consideration for developing the regulations are:

1. What are the criteria for identifying whether a decision of the Commission is “technical or administrative in nature”?
2. Under what circumstances should decisions that are “technical or administrative in nature” be referred to the Commission rather than designated officers?

Suggested criteria and circumstances are provided below.

Criteria for identifying decisions that are “technical or administrative in nature”

The designated officer regulations will set out a list of powers, duties, and functions that are “technical or administrative in nature” that designated officers may perform. Developing a set of criteria to determine what decisions under the CER Act are “technical or administrative in nature” would provide direction and enhance consistency in the drafting of the regulations.

Potential criteria include:

- 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 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 or limited ability to exercise discretion (e.g. assessment against quantitative threshold or legal requirement); and
- The decision does not have industry-wide impacts.

Question 1. What changes, if any, would you suggest to the above 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”?

Circumstances where decisions that are “technical or administrative in nature” should be referred to the Commission rather than designated officers

There may be specific situations where a decision that would normally be made by a designated officer should be made by the Commission. Identifying these circumstances can help provide a predictable process to support clear decision-making roles, while allowing flexibility to adapt to the circumstance.

Potential circumstances where a matter that is “technical or administrative in nature” should be referred to the Commission rather than designated officers include:

- 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; and
- Significant policy or legal issues arise.

Question 3. What changes, if any, would you suggest to the circumstances listed above?

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?

Next Steps

If you have feedback or comments on any of the five (5) questions posed in this Discussion Paper on these regulations that the Government of Canada is responsible for developing, please submit them by email, fax, or mail to the address provided below. The deadline for providing comments is 28 November, 2018.

After the close of the comment period, written comments will be posted here:

<https://www.rncanengagenrcan.ca/en/collections/new-canadian-energy-regulator>. Comments received by the deadline will be reviewed and considered for use in the development of the designated officer regulations. The proposed regulations will then be pre-published in the Canada Gazette, Part I for a 30 day comment period. Information concerning the Canada Gazette, Part I comment period will be provided at a later date. Notice of this opportunity will be posted on this site.

Please visit <https://www.nrcan.gc.ca/21385> for information and updates on the proposed regulations. You may also sign up there to be included in an email distribution list for receiving updates as the regulations are developed, including information on public engagement opportunities.

Contact Information

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Annex A: The CER's Governance Model, Roles and Responsibilities

- The CER Act sets out the following governance framework for the CER:
 - Board of Directors: a body within the CER that would be responsible for the governance of the CER, including providing strategic direction and advice. The Board of Directors would not give directions or provide advice with respect to any particular decision, order or recommendation.
 - Commission: the independent, adjudicative element of the CER, empowered to make all major decisions, orders and recommendations as set out in the CER Act. The Commission, comprised of Commissioners, with a Lead Commissioner, has the powers of a court of record with respect to matters under its jurisdiction, including for example, to hold hearings, inspect documents and enforce its orders.
 - Chief Executive Officer (CEO): the individual responsible for the management of the CER's day-to-day business and affairs, including the supervision of staff and their work, and the provision of technical and administrative support to the Commission and Board of Directors.
 - Designated Officers: a position within the CER with certain authorities under the CER Act and regulations. The CER's CEO is responsible for appointing employees to the designated officer position(s). Designated officers would be appointed based on their expertise and background in specific areas relevant to the Regulator's jurisdiction (e.g. engineering, safety, environment, financial regulation).
 - The Regulator: refers to the entire organization and encompasses all of the above entities.