

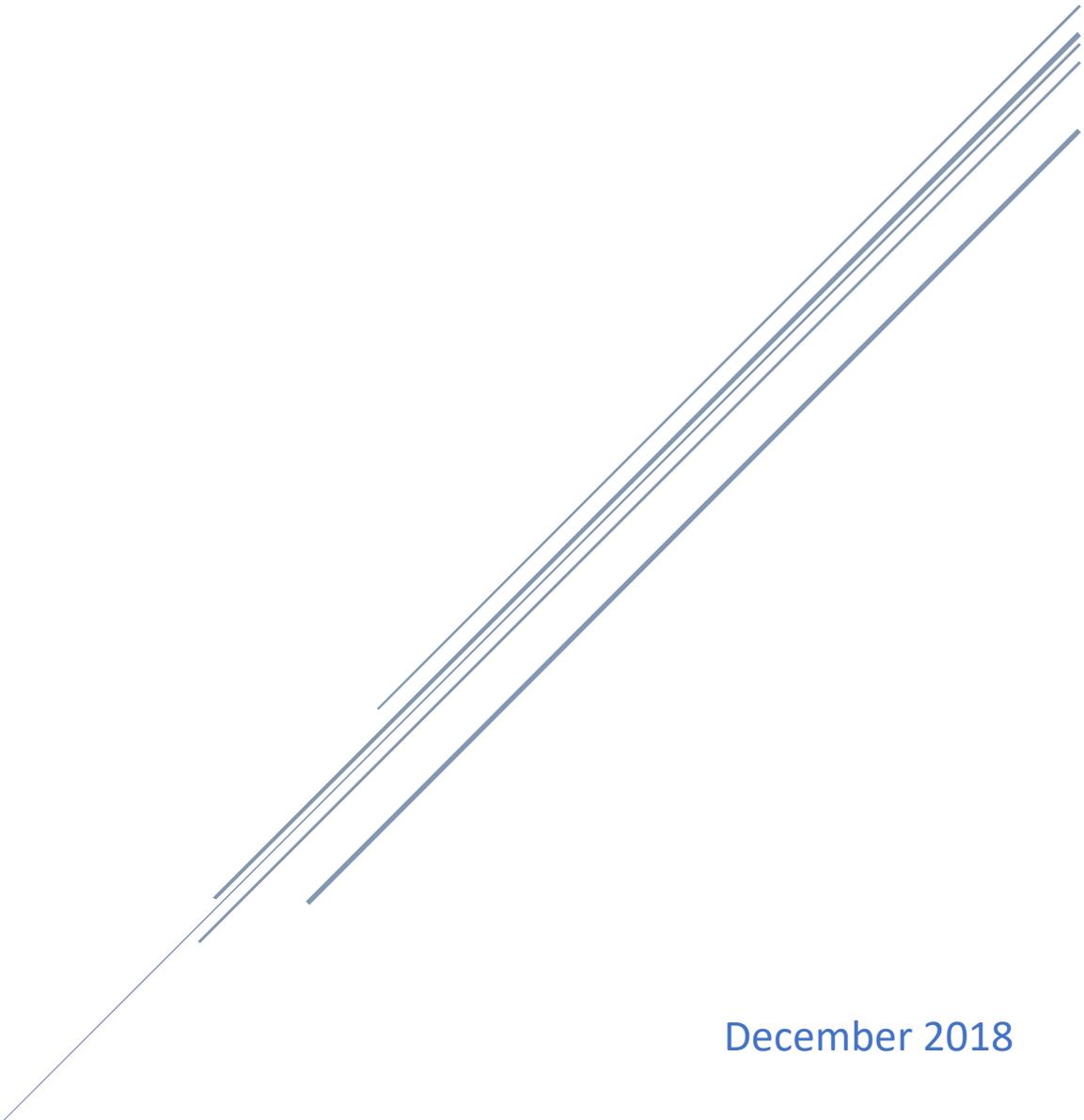


Canadian
Electricity
Association

Association
canadienne
de l'électricité

DESIGNATED OFFICER REGULATIONS

CEA Initial Feedback



December 2018

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Introduction and Context – CEA Input on Proposed Designated Officer Regulations for the Canadian Energy Regulator (CER)

The Canadian Electricity Association (CEA) is appreciative of the opportunity to submit input into the regulatory development process for the proposed *Canadian Energy Regulator Act* (CER); and specifically, *Discussion Paper: Designated Officer Regulations*.

Founded in 1891, CEA represents a broad range of companies that generate, transmit, distribute, and market electricity to industrial, commercial, and residential customers across Canada. With over 80% of Canadian electricity generation non-greenhouse gas emitting and growing, CEA member companies are committed to delivering reliable, affordable, and sustainable electricity to power Canada's economy and to fuel the country's clean energy transition.

Thus, the Canadian electricity sector is an important stakeholder in the CER's regulatory development process. CEA would like to note that not all members are aligned on all feedback and recommendations presented here. This submission was developed in consultation with Alta Link, ENMAX, Hydro One, Hydro Quebec and Manitoba Hydro.

Therefore, this submission should be taken as representative of broad member views only.

Clarity on the scope and intent of the Designated Officers Regulations is critical to CEA members providing NRCAN and the NEB with meaningful input, and as these regulations are given more detail, it will be very important to obtain continuing feedback through the lens of project applicants such as CEA members.

CEA respectfully requests that an industry task group with representation from the electricity sector be commissioned to review and provide a final submission, which includes operational recommendations, to NRCAN and the NEB in regard to these regulations. In particular, CEA recommends that this industry task group be afforded the opportunity to provide feedback and comments in advance of the publication of the proposed regulations in the Canada Gazette for a 30-day comment period. Industry alignment on the proposed regulations prior to publication is the most effective way to ensure a smooth and expedient approval process and thereafter, implementation of the regulations.



CEA Feedback to Discussion Questions

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.

Figure 1: Questions 1-2 Reference this List

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”?

- **CEA’s general feedback:**

The criteria listed above for identifying decisions that are “technical or administrative in nature” contain loose and ambiguous language in some instances, as well as being subjective, which does not provide certainty to the Canadian electricity sector, including applicants. Specific examples are identified below.

Additionally, it is unclear how these criteria will be applied. For instance, does a Designated Officer need to consider all of these criteria, just one, or some combination? And what weight will be attached to each? If utilizing Designated Officers for decision making is to introduce efficiencies and increased effectiveness, this criteria must be clear.

As a result of this uncertainty, CEA members have differing interpretations of the scope and intent of Question #1, and accordingly, different recommendations in some instances.

- **CEA’s feedback on specific criteria:**

- “The decision is unlikely to require weighing competing interests;” – Some CEA members advocate that this criteria is not strong because there is likely to





always be at least one other party involved and thus a possible “competing” interest. Moreover, other CEA members believe it will be difficult for a Designated Officer to accurately and consistently gauge this criteria.

- “The decision involves technical details for a project that has already been approved;” – Having this criteria will be useful as it reduces redundancy and introduces efficiency.
- “There are likely to be few stakeholders directly affected by the decision;” – This criteria is not strong because there is likely to always be at least one other party involved and thus a possible “competing stakeholder” interest.
- “The decision requires in-depth technical knowledge on a specific topic;” - A routine or administrative matter may not always have or require an in-depth technical component and thus there may be unintended consequences of excluding routine or administrative decisions from the Designated Officer decision making process.
- “There are no significant findings of law (e.g. results of court cases) or constitutional considerations;” – This language is unclear, and it is difficult to discern if this is meant to read that the main thrust of the application does not have a constitutional basis or legal challenge? What is significant to one party may not be “significant” to another, therefore CEA finds this to be subjective criteria.
- “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);” - A routine or administrative matter may not always have or require a test or standard. Thus there may be unintended consequences of excluding routine or administrative decisions from the Designated Officer decision making process.
- “The decision does not have industry-wide impacts.” - This criteria is not strong because of the nature of the interconnected bulk electric system, many if not all, decisions will always be of interest to the industry. Decisions may appear to be simple findings of fact of a technical or administrative nature but have very material consequences for an applicant. Also, while a decision may not impact a whole industry, it can be very impactful to an applicant or several applicants.





Some CEA members advocate that scoping language like “significant” should be applied here, otherwise even the most minor decisions could be argued to have an industry-wide impact.

- **Specific CEA recommendations:**

- On the conference call held with NEB and NRCan staff held on November 7, 2018, NEB staff confirmed that the regulations will list some specific decisions that would be exercised by Designated Officers and that the NEB has already itemized the list of decisions it is considering. This orientation should be held and an industry task group created to consider this list of specific decisions as well as a more detailed draft of the regulations prior to publication of the final proposed regulations in the Canadian Gazette.
- The regulations must not list subjective criteria that will be used to identify such decisions, otherwise this opens up each decision to being challenged, thus resulting in delay issues. If criteria for decisions must be used, there needs to be specific resolution criteria for when differences of interpretation of the criteria arise.
- Absent clarification on the scope and intent of the criteria, some CEA members advocate that more specific and narrowed alternative criteria could include the following; however, it should be stipulated that for a Designated Officer to make the decision, at least one of the following criteria must be met.”:
 - A decision that does not impact the overall project function and form.
 - A decision that results in a modified method but does not impact a result.
 - A decision that does not change the impacts on stakeholders or for which there are technical details in which stakeholder(s) are not affected.
 - A decision for which the physical form remains unchanged when stakeholder(s) are generally not affected.
 - The decision is one in which strong precedents have been set by the Commission already.
 - A decision that is procedural in nature only and does not adversely impact procedural rights in natural justice.
 - Decisions with respect to follow-up on compliance with permit or certificate conditions.



- There are no stakeholders directly affected by the decision, other than the applicant.
- There are no findings of law.
- Applications below a certain monetary threshold.

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

- CEA’s general feedback:

As mentioned above, CEA advises that the criteria used to determine decisions that are technical or administrative in nature, if used at all, be limited. In the case that qualifying criteria is used, the parameters must be specific and objective in order to ensure efficiency and effectiveness. The criteria must clear so that the amount of challenges to technical or administrative decision designations is limited. CEA recommends that more details be provided to CEA members on the scope and intent of the concept of “technical or administrative in nature” so that CEA members can adequately consider and provide input on this question.

- CEA members have differing suggestions for alternate criteria as set out above.

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.

Figure 2: Questions 3-4 Reference this List





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

- **CEA's general feedback:**

Similar to the comments above, CEA recommends that ambiguous and subjective wording be removed from the circumstances listed that can trigger decisions "technical or administrative in nature" to be referred to the Commission rather than the Designated Officers. Related to this, clear parameters must be established around all triggers, in order to maximise procedural efficiency and effectiveness, and to ensure that decisions are not inappropriately challenged for transfer to the Commission.

CEA recommends that more details be provided to CEA members on the scope and intent of the concept of "technical or administrative in nature" so that CEA members can adequately consider and provide input on this question. As mentioned in our opening remarks, because of the regulatory impact of removing decisions that are "technical or administrative in nature" from the Designated Officer purview, CEA strongly recommends that an industry task group with representation from the electricity sector be commissioned to review and provide a final submission on these proposed final regulations, once more details and clarification is obtained on scope and intent of same.

- **CEA members have differing feedback on specific circumstances proposed, where decisions "technical or administrative in nature" should be considered by the Commission, rather than Designated Officers, as follows:**

- "A decision is required as part of a larger application that is being considered by the Commission;" – What is meant by a "larger application"? Is there a threshold that defines "large"?
- There is significant interest shown in the application by Indigenous groups, nongovernmental organizations, government officials, and the public;" – The term "significant" is ambiguous and could erode effectiveness and efficiency as the looseness of the term could result in challenges to nearly every decision. Therefore, CEA recommends that this criteria only be allowed if precedents have not already been set.
- "The designated officer requests that the matter be considered by the Commission;" – There needs to be parameters set around this in order to provide certainty on when, and for what reason, Designated Officers can defer decisions.





- “The decision requires a balancing of various interests;” - This criteria is not strong because given the interconnected nature of the bulk electric system there is likely to always be at least one other party involved, and thus, a possible “competing” interest.
 - “Significant policy or legal issues arise.” - This is unclear as policy or legal issues can be subjective. There needs to be clarity around how “significant policy or legal issue (s)” are defined and interpreted. If this is not done, efficiency and effectiveness will be severely effected, as interveners could inappropriately frame issues in order that they be made by the Commission. Also, timelines are needed for utilizing such criteria. For instance, could this be triggered half way through a process if it is suddenly asserted that “significant policy or legal issues” have arisen? For this reason, CEA asserts that the criteria should apply per application/process.
- **CEA members have differing recommendations which include:**
1. Self-Reference – Some CEA members advocate that an applicant could choose to have a decision made by a Designated Officer. This would act as a screening process by the applicant in determining whether a decision has an impact material or not to forgo a tribunal process.
 2. Administrative or Technical Self-reference – Some CEA members advocate that applicants should also be able to select decisions “administrative or technical in nature” for consideration by a Designated Officer.
 3. Clarification regarding appeals – Some CEA members advocate that the regulations should clarify that when decisions “administrative or technical in nature” are referred to the Commission, this is appealable; provided it meets the appeal criteria. CEA is concerned that S. 54(b) might be argued to preclude such an appeal, notwithstanding S. 71.

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?

- **CEA’s general feedback and differing CEA member recommendations**
Following from above, CEA recommends that certainty and predictability be a key focus of the regulations. Some CEA members deem it logical that Designated Officers should not make policy decisions or legal findings, whether deemed “significant” or not.





However for other CEA members, what encompasses a “policy decision” or a “legal finding” is not clear. Additionally, the word “significant” is highly ambiguous. Therefore, CEA recommends that absent clarity (and a further opportunity for CEA members to comment), this criteria be removed.

Some CEA members also recommend that projects with budgets exceeding a certain cost threshold (\$20 MM is reasonable) be referred to the Commission rather than the Designated Officers. However, for other CEA members, more clarity is required on some previously identified potential circumstances where the Commission is involved at the first instance, such as *“A decision is required as part of a larger application that is being considered by the Commission”*.

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

- **CEA’s general feedback and differing CEA member recommendations**

CEA advises against the using the word “always”. This adds unnecessary rigidity, especially since it is important that instances are appealable, where decisions that are “technical or administrative in nature” are referred to the Commission. Reference is made to the CEA’s earlier comments in this submission on the need for clarification regarding appeals. (See page 7.)

That being said, in the name of efficiency, and presuming that Designated Officers may make more timely decisions; decisions in which timeliness are critical to safety or environmental protection should be conducted by the Designated Officer.

In addition, as many decisions “administrative or technical in nature” as possible should be referred to the Designated Officer, especially since the allocation of these decisions are appealable to the Commission. However, as maintained above, the criteria and circumstances for allocating these decisions to Designated Officers must be clear and unambiguous. Absent this clarity, CEA members were unable to develop a consensus on specific criteria that should “always” render a decision “technical or administrative in nature” and thus be made by a Designated Officer.

Concluding Remarks

CEA thanks the NEB and NRCan for the opportunity to comment on the proposed Designated Officer Regulations for the CER. CEA stresses that these regulations must not contain ambiguity. A lack of clarity could result in delays in the CER decision-making and decision-allocation



processes and have unintended consequences for the approval and decision-making processes associated with federally regulated electricity infrastructure. It is important that this be avoided, especially as electricity infrastructure will become central in Canada's transition to a clean growth economy.

One of the ways to contribute to ensuring that projects receive timely and fair review is to ensure that the role of Designated Officers carries operational certainty. Criteria for decisions "administrative or technical in nature" to be made by Designated Officers must be clear and unambiguous, as should instances where these decisions are transferred to the Commission.

This certainty will help to mitigate against unnecessary or unwarranted decision delays, that could result from applications inappropriately being transferred from Designated Officers to the Commission. This would also help to limit the costs of such delays to applicants.

CEA has specific concerns regarding a Designated Officer's ability to send decisions to the Commission at their own discretion. It is CEA's view that wherever possible, the cyclical transfer of NEB decision-making authority should be avoided. Thus, CEA is concerned that there is the possibility that it could become commonplace for Designated Officers to defer seemingly routine decisions to the Commission. The regulations must avoid this.

CEA also strongly recommends that the Designated Officer should be subject to the same conflict of interest restrictions and obligations as the Commission, especially given the ability for both, under these regulations, to make decisions.

Thus, to reiterate, CEA respectfully requests that an industry task group with representation from the electricity sector be commissioned to review and provide a final submission, which includes operational recommendations, to NRCAN and the NEB in regard to these regulations.

In particular, CEA recommends that this industry task group be afforded the opportunity to provide feedback and comments in advance of the publication of the proposed regulations in the Canada Gazette for a 30-day comment period. Industry alignment on the proposed regulations prior to publication is the most effective way to ensure a smooth and expedient approval process and thereafter, implementation of the regulations.

Sincerely,
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