

# Comments on Government of Canada Discussion Paper: Designated Officer Regulations

**Submitted by Enbridge**

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## **About Enbridge Inc.**

*At Enbridge, we connect people to the energy they need to fuel their quality of life, and we've done it safely and reliably for more than 65 years. A North American leader in delivering energy, Enbridge has been ranked on the Global 100 Most Sustainable Corporations index for the past nine years. Enbridge operates the world's longest crude oil and liquids transportation system. Enbridge transports 28% of the crude oil produced in North America, and moves about 23% of all natural gas consumed in the United States. We're also a North American leader in the gathering, transportation, processing and storage of natural gas, and we have an increasing involvement in power transmission. Enbridge is Canada's largest natural gas distribution provider, with about 3.7 million retail customers in Ontario, Quebec, New Brunswick and New York State. Enbridge has interests in about 1,750 MW of net renewable generation capacity, based on projects in operation or under construction.*

*Life takes energy and Enbridge exists to fuel people's quality of life. For more information, visit [www.enbridge.com](http://www.enbridge.com).*

## General Comments

Enbridge appreciates the opportunity to provide comments on the Government of Canada's *Discussion Paper: Designated Officer Regulations* (Discussion Paper). Through its nearly 70 years of operation, Enbridge has acquired extensive experience working within the regulatory frameworks for energy infrastructure, particularly in Canada and the United States. Accordingly, we are well-placed to provide comments and recommendations to inform the *Designated Officer Regulations* (Regulations), as well as other regulations and guidance documents related to Bill C-69.

Enbridge supports the Government of Canada's efforts to implement a modern governance structure for the proposed Canadian Energy Regulator (CER), including developing regulations that empower Designated Officers to make technical and administrative decisions. The Designated Offer Regulations have the potential to contribute to improved efficiency and use of regulatory resources and enhance the overall competitiveness of Canada's energy sector.

As a project proponent, Enbridge requires clarity and certainty in order to plan good projects that benefit all Canadians. The Discussion Paper does not specify whether the criteria for identifying decisions that are "technical or administrative in nature" will be used to develop a clear list of decisions or functions that Designated Officers would be empowered to carry out or if the Regulations would simply provide criteria for making that determination on a case-by-case basis. In order to reduce process and timeline uncertainty, Enbridge strongly recommends that the criteria be used in order to develop a clear list of the decisions that Designated Officers are empowered to make, rather than providing general criteria to guide that determination on a case-by-case basis. Enbridge is concerned that implementing a criteria-based (rather than a list-based) approach would lead to uncertainty, delays, and legal challenges.

This submission provides Enbridge's responses to the five questions in the Discussion Paper, together with some general comments and recommendations. As a member of the Canadian Energy Pipeline Association (CEPA), we also agree with and support CEPA's submission on the Discussion Paper.

## Recommendations

Enbridge makes the following recommendations for consideration in development of the Regulations:

- Include, as a schedule to the Regulations, a clear list of decisions that will, by default, be made by Designated Officers.
- Develop timelines or service standards for Designated Officer decisions – in order to enhance certainty for all stakeholders.
- Prior to finalizing the Regulations, consult with proponents and affected stakeholders, through a series of working meetings, to explore scenarios and discuss details.
- Develop guidance notes, with illustrative examples, to assist proponents and affected stakeholders in understanding the Regulations and their application.
- Ensure the Regulations specify the qualifications and training that a Designated Officer must have, together with maintenance and governance provisions (similar to the Designated Officers program implemented by the Canadian Nuclear Safety Commission).

## Responses to Questions for Discussion

### 1. What changes, if any, would you suggest to the criteria for identifying decisions in the CER Act that are “technical or administrative in nature”?

There is a lack of clarity regarding some of the potential criteria outlined in the Discussion Paper. Enbridge recommends the following proposed changes to the criteria to be applied in developing the list of decisions that would be made by a Designated Officer.

Potential criteria outlined in Discussion Paper	Clarity required / suggested revisions
The decision is unlikely to require weighing competing interests	<p>“Unlikely to” is not clear. The key question to consider is whether an adjudicative decision is required in order to determine rights and obligations as between affected parties.</p> <p>Suggested revision: “The decision <del>is unlikely to</del> <u>does not require weighing competing or conflicting interests, or resolving any significant issues of fact in dispute.</u>”</p> <p>Examples would help to illustrate how this would apply. For instance, in the case where a landowner objects to a proponent’s request for approval to reroute the pipeline – this would require the decision maker to make a determination affecting the rights of the parties (proponent vs landowner); therefore, it would be more appropriate for a Commissioner. If, on the other hand, the landowner does not object to the reroute, there would be no competing or conflicting interests to weigh, and the decision could be made by a Designated Officer.</p>
The decision involves technical details for a project that has already been approved	<p>It is not clear what is meant by “technical details” or what kind of decision this would apply to. Enbridge submits that once a determination on the public interest has been made in an Order or Certificate approving a project, any technical or administrative decisions related to that project can and should be made by Designated Officers.</p> <p>Examples would provide more clarity. Examples may include:</p> <ul style="list-style-type: none"> <li>• proposed changes to pipe length, grade, diameter, wall thickness, etc.</li> <li>• condition compliance filings, where Board approval is not required</li> <li>• varying conditions of Orders and Certificates</li> <li>• route deviations</li> <li>• acquisition of additional temporary workspace</li> </ul>
There are likely to be few stakeholders directly affected by the decision	<p>Recommend removing this as a criterion. The number of stakeholders directly affected by the decision is not relevant. The more appropriate question is whether there are competing or conflicting interests that must be weighed (see criterion #1).</p> <p>For example, in a routine toll filing, arguably, all shippers could be directly affected. However, if no shippers object to the filing, there are no competing or conflicting interests that must be weighed, and the decision could be made by a Designated Officer.</p>
The decision requires in-depth	Examples would provide more clarity. Potential examples:

Potential criteria outlined in Discussion Paper	Clarity required / suggested revisions
technical knowledge on a specific topic	<ul style="list-style-type: none"> <li>• Leave to open applications</li> <li>• Class location changes</li> <li>• Engineering assessments</li> <li>• Reactivation applications</li> <li>• Exemptions from technical standards (e.g. CSA Z662)</li> <li>• Uncontested tolls and tariff applications</li> <li>• Import / export orders</li> </ul>
There are no significant findings of law (e.g. results of court cases) or constitutional considerations	This is unclear as worded. Suggested revision: <u>“The decision does not require determination of an issue of law or jurisdiction. There are no significant findings of law (e.g. results of court cases) or constitutional considerations.”</u>
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)	Examples would provide more clarity.
The decision does not have industry-wide impacts	Examples would provide more clarity. For instance, if process changes are being contemplated to the O&M Guidelines (similar to the recent changes regarding temporary workspace and critical habitat), this could impact all companies who are subject to those Guidelines. In such cases, the CER should provide an opportunity for companies to comment prior to finalizing revised Guidelines.

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

An additional criterion could be whether the decision is process-related, for example, application completeness decisions.

**3. What changes, if any, would you suggest to the circumstances listed where decisions that are “technical or administrative in nature” should be referred to the Commission rather than Designated Officers?**

As stated above, Enbridge’s recommendation is that the Regulations include, as a schedule, a list of decisions that will, by default, be made by Designated Officers. In exceptional circumstances, decisions could be elevated to the Commission by applying the appeal provision in section 71 of the proposed *CER Act*. This would ensure that decisions are not evaluated on a case-by-case basis while allowing flexibility to adapt to the facts of a particular decision. However, should the Regulations include provisions allowing Designated Officers to refer matters to the Commission, it should be by exception only, based on a set of narrow and clearly defined criteria.

Further clarity is required regarding some of the potential circumstances outlined in the Discussion Paper. Enbridge recommends the following proposed changes to the list of potential circumstances to be applied in developing the list of decisions that should be made by the Commission rather than a Designated Officer.

Potential circumstances outlined in Discussion Paper	Clarity required / suggested revisions
A decision is required as part of a larger application that is being considered by the Commission	<p>Recommend removing this as a potential circumstance. Whether a decision is required as part of a larger application is not relevant to whether the decision should be made by a Commissioner.</p> <p>This is analogous to interlocutory applications in a court case – the trial judge does not necessarily need to determine procedural matters.</p> <p>Other mechanisms could be implemented to ensure the appropriate communication channels are maintained. One alternative would be for the Commission to specifically delegate procedural matters to Designated Officers where there is no other need for a Commissioner to be involved.</p>
There is significant interest shown in the application by Indigenous groups, non-governmental organizations, government officials, and the public	<p>Recommend removing this as a potential circumstance. Whether there is significant interest shown in the application is not relevant to whether the decision should be made by a Commissioner. The more appropriate question is whether there are competing or conflicting interests that must be weighed and balanced (which is already a criteria outlined in the Discussion Paper).</p>
The designated officer requests that the matter be considered by the Commission	<p>As indicated above, the Regulations should include a list of decisions that will by default, be made by Designated Officers. In exceptional circumstances, matters could be elevated to the Commission by applying the appeal provision in section 71 of the proposed <i>CER Act</i>.</p> <p>Should the Regulations include provisions allowing Designated Officers to refer matters to the Commission, it should be by exception only, based on narrow and clearly defined criteria. This would support clarity and certainty.</p>
The decision requires a balancing of various interests	<p>This circumstance should mirror the criteria outlined in the previous list of criteria. Suggested revision: “The decision requires a balancing <u>or weighing of various competing or conflicting interests, or the resolution of significant issues of fact in dispute.</u>”</p>
Significant policy or legal issues arise	<p>This is unclear as worded. This circumstance should mirror the criteria outlined in the previous list. Of criteria Also, the Commission’s role is not to resolve policy issues, but to apply established policy. Suggested revision: “<u>The decision requires determination of an issue of law or jurisdiction.</u>”</p>

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

None identified

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

As noted above, Enbridge recommends that the Regulations include, as a schedule, a list of decisions that will, by default, be made by Designated Officers. Applying the criteria outlined in the Discussion Paper, as revised above, the following is a sample list of decisions that could, by default, be made by Designated Officers. The Regulations should also include a provision allowing the proponent to submit a request to the Commission that a decision, not otherwise listed, be delegated to a Designated Officer.

### Designated Officer Decision-Making Authorities

- Changes to technical specifications (pipe length, grade, diameter, wall thickness, etc.)
- Approval of condition compliance filings, where Commissioner approval is not required
- Varying conditions of Orders and Certificates
- Route deviations
- Acquisition of additional temporary workspace or access
- Leave to open applications
- Engineering assessments
- Class location changes
- Deactivation applications (OPR, section 44)
- Reactivation applications (OPR, section 45)
- Applications for change of service or increase in maximum operating pressure (OPR, section 43)
- All matters related to technical standards (e.g. application for exemption from CSA Z662)
- Uncontested tolls and tariff applications
- Import / export orders
- Inspection and safety orders
- Stop work / return to work orders
- Authorization to resume operations, following an event (including conditions for return to service)
- Complaint / issue resolution / alternate dispute resolutions (where compensation is not at issue)

## Conclusion

Enbridge supports the development of the Designated Officer Regulations as an opportunity to enhance certainty, efficiency and overall competitiveness. In order to ensure that this opportunity is realized, Enbridge recommends that the Regulations include a clear list outlining the authorities of Designated Officers.

We thank you for the opportunity to make this submission and welcome the opportunity to discuss these issues further.