



November 28, 2018

Designated Officer Regulations Team
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Re: Comments from Pembina Institute and Environmental Defence Canada on the Discussion Paper: Designated Officer Regulation

To whom it may concern:

Thank you for the opportunity to provide written comments on the Government of Canada's *Discussion Paper: Designated Officer Regulation*. We support the changes proposed in the Canadian Energy Regulator Act and the government's efforts to restore public confidence in the laws and processes used to review and regulate major energy and industrial projects.

Over the past two and a half years, Pembina Institute and Environmental Defence Canada (EDC) have been actively engaged in the reform of Canada's environmental laws, undertaking analysis, providing comments and recommendations to government officials, and appearing before the expert review panels and the Standing Committee on Environment and Sustainable Development.

Before responding to the specific questions posed in the discussion paper, we first discuss high-level issues with the approach to the regulation and how to ensure the integrity of the Commission. These provide context to the more detailed responses to questions.

We look forward to the government's response to the *Discussion Paper* and to continuing to engage in the process to design a twenty-first century energy regulator that Canadians can count on to objectively review and regulate energy projects and align Canada's energy infrastructure with its climate commitments.

Sincerely,

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Pembina Institute and Environmental Defence Canada Comments on Discussion Paper: Designated Officer Regulations

Integrity of the Commission

The term “designated officer” is defined in section 2 of the Canadian Energy Regulator Act (CERA) as “an employee of the Regulator designated under section 24.” Section 24 states that: “The Chief Executive Officer may designate employees of the Regulator as designated officers.” Thus, designated officers are essentially authorized by and under the direct control of, the CEO of the Canadian Energy Regulator (CER), rather than the CER’s adjudicative body, the Commission.

This leads to several concerns with the designated officer function that need to be addressed in the designated officer regulation.

First, there is the potential to compromise the independence and integrity of the Commission as an adjudicative body. Having designated officers who can sometimes exercise powers, duties or functions of the Commission but who are chosen, assigned and supervised by the CEO of the CER rather than by the Commission, is at odds with the stated goal¹ of having the Commission be an independent adjudicatory body within CER.

Second, both the authorizing provision for the designated officer regulation, section 54, and the provision that follows it, section 55, potentially interfere with the Commission’s ability to “make rules generally for the carrying out of its work” as stated in section 35. This creates a risk to the integrity and independence of the Commission.

Third, where the CEO is able to exert control over certain Commission decisions by virtue of the fact that, s/he is “is responsible for apportioning among the designated officers any work related to a power, duty or function that is specified in a regulation made under section 54,” an apparent conflict may be created in certain cases in which the Act has empowered the Commission with “full and exclusive jurisdiction” (section 32).

Finally, since designated officers are not subject to the conflict of interest provisions that apply to Commissioners, there is increased potential for a conflict of interest to arise where they are making decisions.

¹ The *Discussion Paper* states that, “[o]nce enacted, the CER Act would create a modern governance structure that separates the CER’s adjudicative function from its daily operations.” The paragraph ends with the statement that “A Chief Executive Officer (CEO) would be responsible for the management of the Regulator’s day-to-day business and affairs.” It stands to reason then, that since the CEO has full control over Designated Officers, the separation between the adjudicative function of the Commission and the CER’s daily operations may be at risk where designated officers are making decisions – even minor decisions – normally reserved for the Commission.

Approach

Some of the high-level concerns indicated above could be minimized by starting with the Commission and considering where it would be appropriate for the Commission to delegate activities. This is different from the approach of the discussion paper that begins with the appropriate responsibilities of the designated officers.

It should also be noted that the proposed regulation does not deal with the activities that designated officers are already prescribed in the legislation. There are 30 existing provisions in the Act on designated officers and their powers, duties, functions, and status and effect of their decisions and orders, although many do not relate to Commission powers. Key among those not connected to the Commission's power are the nine provisions giving designated officers exclusive power² to make orders, decisions, and certain designations concerning abandoned facilities, abandoned and orphan pipelines, and protecting mining operations from pipelines and vice versa. Although the discussion paper does not deal with these provisions, the potential overlap should be noted.

Response to the Discussion Paper's Questions

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” presented at the top of page 4 of the Discussion Paper?

The language used to describe the criteria should be made more precise and avoid terms such as “likely” or “unlikely” since these require judgment calls by the person applying the regulation. If a designated officer rather than a Commissioner is required to make a judgment call regarding their powers, it may result in an unintended or accidental expansion of discretion for the designated officer at the expense of the Commission, and this could affect the integrity of the Commission as an adjudicative body.

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

A preliminary step would be to separate the two kinds of activities – technical and administrative – and determine criteria that are specific to each kind separately. Technical activities are quite distinct from administrative activities, and as such, criteria to identify them are best developed separately. Separate sets of criteria for the two types are likely to be clearer and easier to apply than a “one-size-fits-all” type criteria.

3. What changes, if any, would you suggest to the circumstances listed on the bottom of page 4?

The preferred framing of the list would be circumstances where *decisions should be retained by the Commission rather than delegated to designated officers* as opposed to the existing wording that considers circumstances where decisions “should be referred to the Commission rather than designated officers.”

² See CERA sections 101(2), 243(1), 244, 245(1), 336, 338(1), 338(2), 338(4) and 339.

The discussion paper states “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” (p.3). This implies that designated officers may end up making decisions that are primarily “technical” but that have value-based components or that require interpretation of law or of policy. As such, we recommend that the Commission retain the responsibility for reviewing decisions of designated officers that are made using the authority of section 54.

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

Yes. Anytime the decision to be made could be considered part of the core adjudicative function of the Commission, the decision should not be delegated to a designated officer. This is necessary in order to uphold the integrity of the Commission as an adjudicative body.

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

No. In speaking of powers, duties and functions of the Commission, and inquiring under which circumstances designated officers should exercise those powers, there is no justification for the rule that, by default, such decisions should lie with a designated officer rather than the Commission. The fact that a decision is “technical or administrative” should not determine who should make the decision. Moreover, a blanket rule like the one stated in Question 5 risks taking some decisions away from the Commission that by all rights it should, as an adjudicative body, retain. Again, this default rule is necessary in order to support the integrity of the Commission as an adjudicative branch.