



Railway Association
of Canada

Association des chemins
de fer du Canada

**REVIEW OF *THE CANADIAN ENVIRONMENTAL PROTECTION ACT*,
1999**

SUBMISSION TO THE
STANDING COMMITTEE ON ENVIRONMENT AND SUSTAINABLE DEVELOPMENT

BY THE
RAILWAY ASSOCIATION OF CANADA

December 9, 2016



Table of Contents

1.0 Overview..... 3
 1.1 Canada’s railway franchise.....3
2.0 Part 7: Controlling Pollution and Managing Wastes..... 6
3.0 Part 9: Government Operations and Federal and Aboriginal Land 8
4.0 Part 10: Enforcement..... 10
5.0 Closing 11
About the RAC 12

Acronym Table

AMT	Agence métropolitaine de transport
CEPA	Canadian Environmental Protection Act
ECCC	Environment and Climate Change Canada
EDI	Electronic Data Interchange
EIHWHRM	Export and Import of Hazardous Waste and Hazardous Recyclable Materials Regulations
ENVI	Standing Committee on Environment and Sustainable Development
RAC	Railway Association of Canada
U.S.	United States
U.S. EPA	United States Environmental Protection Agency



1.0 Overview

This submission presents the views of the Railway Association of Canada's (RAC) federally-regulated railway members¹ for consideration as part of the Standing Committee on Environment and Sustainable Development's (ENVI) review of the *Canadian Environmental Protection Act, 1999* (CEPA). As federal works and undertakings, these companies are subject to the requirements of CEPA and its regulations.

Our comments focus primarily on three main parts of CEPA and our experience with how they have been implemented in practice:

- Part 7: Controlling Pollution and Managing Wastes
- Part 9: Government Operations and Federal and Aboriginal Land; and
- Part 10: Enforcement

In practice, the principal regulations under CEPA that apply to the railway industry are, but not limited to:

- *Export and Import of Hazardous Waste and Hazardous Recyclable Materials Regulations* (SOR/2005-149)
- *Federal Halocarbon Regulations, 2003* (SOR/2003-289)
- *PCB Regulations* (SOR/2008-273); and the
- *Storage Tank Systems for Petroleum Products and Allied Petroleum Products Regulations* (SOR/2008-197).

1.1 Canada's railway franchise

Canadian railways provide multiple services to more than 10,000 customers each year by using finite resources, including track infrastructure, right of ways, yards, locomotives, and crews. More than 4 million carloads of freight are moved by approximately 2,700 locomotives and 33,200 dedicated railroaders across 43,000 kilometers of track that spans nine provinces, one territory and several points throughout the continental United States (U.S.).

This impressive network consists largely of two Canadian owned and operated Class I railways, U.S. Class I carriers and more than 50 local and regional railways that intersect with multiple transportation service providers including ports, terminal operators, truckers and other logistics providers.

As part of this complex network, Canadian freight railways strive to operate as efficiently as possible by operating 24/7 and 365 days a year. This involves maximizing long-haul movements and train lengths, and consolidating traffic flow, as well as minimizing car handlings, switching and the number of times a car must be handled in a yard.

¹ For a complete list of federally regulated railways visit: <http://www.cta-otc.gc.ca/eng/federal-rail>



Passenger railways reflect services provided predominantly by VIA Rail, GO Transit, Agence métropolitaine de transport (AMT) and West Coast Express. Each year nearly 70 M people in the Vancouver, Greater Toronto, and Montreal areas commute to work by rail and an additional 4 million travel with VIA rail each year.

Figure 1: Canada’s rail franchise



Management of this network results in immediate benefits for all customers who are served by it. These benefits include access to a highly efficient and safe railway network that enables economic competitiveness, and an emission-friendly mode of transportation for travelling and commuting to work for all Canadians.

In fact, Canada’s railways are well-placed to support the Government of Canada’s climate change objectives, with rail being roughly four times more fuel efficient than truck, while one tonne of freight can travel more than 200 kilometers on a single litre of fuel. Moreover if just 15 per cent of truck traffic was transferred to rail, Canada would reduce its emissions by 5.6 megatonnes².

² For additional information, please visit: http://www.railcan.ca/assets/images/news/mediareources/RailCan_infographic_ClimateSolution_rev5.pdf



As operators of long linear corridors with infrastructure and assets located through the country, railways require national standards to be applied consistently across Canada. The industry is therefore supportive of CEPA's purpose and intent to establish nationally consistent standards and regulatory approaches for federally regulated entities, such as rail.

However after more than 15 years from coming into force, we believe that CEPA and its supporting regulatory regime can be strengthened to provide greater assurance to federally regulated entities that environmental aspects and their associated risks are managed effectively and in an effort to produce positive environmental outcomes.

The RAC and its members believe that the Declaration Text of the Act can be strengthened by including a definition of the precautionary principle in Section 3 so that the interpretation of this term is clear and can be fully embraced by the railway industry. Furthermore, while the Declaration Text of the Act makes reference to the integral role of science and traditional knowledge, the legislation does not provide any guidance for interpreting the results produced by science and traditional knowledge, like it does for the precautionary principle in section 76.1 of the Act.

Recommendation: That the Act is strengthened by including a definition of the precautionary principle and additional guidance for integrating the role of science and traditional knowledge into decision making.

We also believe that the Committee should consider revising the definition of a federal work or undertaking so that the reference to the railway sector is consistent with other legislation such as the *Canada Transportation Act*. CEPA only references a "railway" and does not mention railway operations in subparagraph (b) of the definition of federal work and undertaking in section 3(1).

In comparison, section 87 of the *Canada Transportation Act* has a clearer and more precise definition of a railway that includes various elements of where and how railways operate.

Recommendation: As means to clarifying the definition of a railway under CEPA and to make it more consistent with other federal legislation, subparagraph b) of the definition of a federal works and undertakings in section 3(1) should be modified to read:

- b) railway, as that term is defined in the *Canada Transportation Act*, S.C. 1996, c. 10., canal, telegraph or other work or undertaking connecting one province with another, or extending beyond the limits of a province.



2.0 Part 7: Controlling Pollution and Managing Wastes

Division 8 of Part 7 of CEPA establishes the requirements for controlling the movement of hazardous waste and recyclable material. Among these requirements are those associated with the transboundary movement of wastes (i.e. movement from Canada to other countries). RAC members generate waste railway ties as part of their engineering capital replacement programs each year. The railway ties are treated with federally approved wood treatment chemicals such as creosote and pentachlorophenol.

Approximately two million railway ties are replaced each year, with more than 90 per cent of them sent to co-generation facilities that use the ties as a fuel to create heat and power (waste to energy) or as fuel (instead of coal) for an internal process such as at cement and forest products kilns. The number of facilities currently approved in Canada to accept treated wood waste is limited and as a result our member companies have to identify facilities in the U.S. as an alternative to landfilling ties in Canada. Each year the vast majority of rail ties destined for disposal are shipped to the facilities in the U.S. for co-generation purposes.

The *Export and Import of Hazardous Waste and Hazardous Recyclable Materials Regulations* (EIHWHRM) under CEPA were introduced in large part to implement Canada's international obligations with respect to the movement of hazardous waste and hazardous recyclable material across international boundaries. These obligations include:

- the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1989;
- the Organisation for Economic Co-operation and Development Decision of Council on the Control of Transfrontier Movements of Wastes Destined for Recovery Operations C(92)39/Final, March 1992, Revised C(2001)107/Final; and
- the Canada-USA Agreement Concerning the Transboundary Movement of Hazardous Wastes, 1986, as amended in 1992.

Despite being exempt from provincial hazardous waste regulations as well as the *Transportation of Dangerous Goods Regulations*, railway ties have been captured under the EIHWHRM regulations as a hazardous recyclable material. Thus in order to send the railway ties to facilities in the U.S., railway companies must obtain an export permit from Environment and Climate Change Canada (ECCC) and the U.S. Environmental Protection Agency (U.S. EPA).

Once obtained, the movements must also be accompanied by a six-copy paper movement document similar to the hazardous waste manifest used in many provinces. Our members continue to experience challenges in complying with this particular aspect of the regulations. Shipping documents in the railway sector are managed through electronic data interchange (EDI), a centralized information management system, as opposed to physically carried in the field. However, the regulations specifically require that the shipping papers must accompany the



load. The use of paper movement documents for shipping wastes works well in the trucking industry where the driver and the shipment stay with the truck. However, in the railway sector, movements can be complex where multiple crews are required to deliver a product from origin to destination, which often occurs over exceptionally long-distances. For example, the average length of haul by CN and CP in 2014 was 1,462 kilometers in 2014³. Moreover, a consist of numerous railcars can be separated between the point of origin and destination due to the need for mechanical repair after inspections or for any other reason.

While commercial rail shipping records are updated electronically through the use of wayside equipment scanners that provide real time access to the location of railcars, the regulations rely on the use of a hard copy paper document. In some jurisdictions it is permissible to send the waste manifest by courier to the final destination, particularly if the shipment is transferred to another mode of transportation. Other jurisdictions, such as in the U.S., are moving towards an electronic manifest system, which is expected to come online in 2018⁴.

This approach is encouraging as it will allow the rail industry to work with their existing EDI systems. It is unclear at this point, to what extent ECCC intends to move to an electronic movement document system. There is a clear need to modernize the documentation requirements under this regulation so that electronic documentation systems can be leveraged to monitor the movement of rail ties by railways. This transition can also improve the efficiency of regulatory reporting under various CEPA regulations.

Because the large majority of transboundary movements of waste are between Canada and the U.S., there is likely an opportunity within the *Agreement between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste* to streamline the use of EDI systems for transportation of railway ties in Canada and the U.S.

Recommendation: Expedite the development of an electronic documentation system to facilitate the application and dissemination of movement documents associated with railway ties as per the information and documentation requirements referenced in the *Export and Import of Hazardous Waste and Hazardous Recyclable Materials Regulations*.

ECCC has expressed its intent to revise the *Interprovincial Movement of Hazardous Waste Regulations* to mirror the EIHWHRM regulations which will potentially increase the administrative requirements for transporting railway ties in Canada (as a result of introducing permitting requirements for interprovincial movements). The rail industry is deeply concerned with these potential revisions as additional requirements at the inter-provincial level threaten to increase the

³ Railway Association of Canada. Rail Trends 2015, pg.8.

⁴ For additional information see: <https://www.epa.gov/hwgenerators/hazardous-waste-electronic-manifest-system-e-manifest>



administrative burden to a point that will diminish the railways' ability to identify innovative solutions for re-using railway ties and diverting them from landfills.

We believe that incorporating the use of waste movement documents for the movement of recyclable materials will not produce any environmental benefits. In summary, replicating international requirements for the inter-provincial movements of rail ties should be avoided.

Recommendation: In order to ensure that used railway ties can be diverted from landfills and continue to be used for innovative energy production purposes, ECCC should ensure that the international requirements reflected in the regulations referenced above are not applied at the inter-provincial level.

3.0 Part 9: Government Operations and Federal and Aboriginal Land

Provincial environmental laws do not generally apply to the Federal House, of which federal works and undertakings such as railways are included. The authority for the federal government to address this gap in regulation is set out in Part 9 of CEPA.

Under CEPA, Regulations have been developed to address a number of issues for federal works and undertakings which for railways principally relates to the management of halocarbons, PCBs, and petroleum storage tank systems. These Regulations (as referenced in Section 1.0 of this report) have generally been effective in establishing federal pre-emption and consistency for our members.

However, our members continue to experience increasing pressure from provincial governments to comply with their requirements (or standards) for effluents and emissions, herbicide use within the railway right of way, and waste management. These areas have not been adequately addressed under CEPA, and in lieu of federal requirements to reference, federally regulated railways continue to be forced to obtain provincial approvals or risk regulatory action.

Because requirements vary from province to province, this creates a patchwork of regulation across the country and leads to instances of jurisdictional confusion. For railways operating a network that spans the country, this has become highly problematic. For example, herbicides are used to treat vegetation on the rail ballast section and at crossings for safety reasons such as the need to inspect track infrastructure and for improved sightlines at rail crossings. In the absence of a federal regulation for these applications, provincial governments continue to attempt to assert control over these activities which has resulted in differences across the country in terms of: the herbicides rail companies are able to use (despite them being federally approved herbicides); setbacks from waterways; and requirements for pre-application notifications and permits.



This jurisdictional overlap also exists at a technical level where linear companies such as railways rely on certified service providers to provide assurance that their assets are installed, maintained, and decommissioned in compliance with federal regulations. For example, under the *Storage Tank Systems for Petroleum Products and Allied Petroleum Products Regulations*, there is a requirement for federal entities to use provincially-certified individuals for certain tasks such as the installation and decommissioning of storage tank systems. These individuals are typically trained and have experience with provincial requirements which may include the need for provincial installation permits or other local requirements that do not apply to federally regulated railways.

Under these circumstances, railways are continuously put in a position where they need to explain and educate service providers about the differences between federal and provincial requirements for managing environmental aspects. In some cases, this has resulted in improper installations and even outright refusal by provincially-certified service providers to perform the work.

In the May 2016 Discussion Paper: CEPA 1999 – Issues and Possible Approaches, there is a reference to incorporate provincial regimes (by reference) as a means to eliminating the regulatory gap for members of the Federal House. The railway industry is not supportive of this approach as it is clear that the introduction of additional and varying regulatory requirements for specific environmental aspects will introduce confusion and a level of inconsistency for our federally regulated members who maintain operations in multiple provinces.

Recommendation: That the Minister of ECCC creates a task force to review the application of provincial environmental regulations to federally regulated entities such as railways.

Canada's railways embrace environmental stewardship as an important part of their corporate commitment to sustainability, and make significant investments every year in new technologies aimed at reducing their environmental impact. In order to support these investments and to ensure the economic success of our members, it is critical to have a consistent and clear national set of environmental requirements. Such an approach has been established in the U.S. where the U.S. EPA establishes national requirements for areas such as air and water pollution and waste management.

The RAC encourages the Committee to recognize this need for consistency as part of their review. The path forward needs to ensure a better reconciliation between provincial and federal requirements for railways in order to ensure both have improved environmental protection and economic success.



4.0 Part 10: Enforcement

Compliance promotion for requirements under CEPA has typically been achieved through information sessions in advance of regulatory development and/or prior to implementation. This approach has proven useful to our members in terms of understanding the overall nature of what is being proposed and enables them to provide input to regulatory decision makers. However, outside of enforcement activities, railway companies have limited opportunities to engage with departmental officials to provide feedback after a regulation has come into force. This is critical to address the more subjective elements of regulatory instruments, particularly as they relate to the interpretation of regulatory requirements at the enforcement level.

In practice, it is after a regulation has been in force for some time that affected entities have a chance to identify areas of concern or potential opportunities for improvement. However, at this point there are limited opportunities for industry to engage with ECCC to address concerns or discuss any inconsistencies with the interpretation of CEPA or its supporting regulations. As a result the regulated community is left to interpret aspects of the regulations, until they are subject to an inspection or when an issue is challenged in court.

We believe that more needs to be done to address this problem. In our experience, the U.S. provides some potential approaches for improvement. The first is the practice of publishing correspondence between the U.S. EPA and an interested party with regards to questions on how rules apply or overall interpretation. This helps other members of the regulated community to understand how the agency is applying the rule in practice.

The second approach is the use of inspection guidance documents. One example is the *SPCC Guidance for Regional Inspectors*⁵ document which assists regional inspectors in reviewing facility's implementation of the Spill Prevention, Control and Countermeasure Rule. This document is also available to the regulated community, which as a result, helps ensure that SPCC requirements are interpreted and enforced consistently across the U.S. We believe that certain regulations such as the *Storage Tank Systems for Petroleum Products and Allied Petroleum Products Regulations* could benefit from this approach.

As an industry we have experienced numerous instances where aspects of CEPA and its regulations have been subject to interpretation by different enforcement officers. Interpretations have differed with the original understanding as communicated during compliance promotion sessions.

⁵ For additional information visit: <https://www.epa.gov/oil-spills-prevention-and-preparedness-regulations/spcc-guidance-regional-inspectors>



Recommendation: The Minister of ECCC should work with industry to identify the opportunities for providing regional enforcement officers with improved guidance so that expectations for the regulators and regulated community are clearer and applied consistently across Canada.

Furthermore, the use of unannounced inspections by environmental enforcement staff is another area of concern for the railway industry. First and foremost, railways are concerned with the safety of the inspector and their employees. Prior to entering a railway yard or facility, inspectors must be provided with a health and safety briefing and railway staff need to be aware of the inspector's presence on site in the case of an emergency or the need to evacuate. Second, we have also experienced instances where an inspector questions employees on site simply because they are present but that have no knowledge of the particular item being reviewed. This is often raised in enforcement correspondence afterwards.

With knowledge of the visit, railways can ensure that the correct staff are available to speak with the inspector while they are on site to eliminate this issue.

Recommendation: That there is a greater appreciation for conducting enforcement inspections in safety sensitive environments such as railway yards, and that a protocol is developed to provide greater assurance for the safety of enforcement officers and railway employees.

Lastly, documentation and record keeping requirements under CEPA need to be modernized so that they recognize the use of centralized electronic data management systems. This is particularly relevant in the railway sector where environmental compliance data is maintained at a primary business location rather than in hardcopy form at regional rail facilities. For example, a railway company may have a storage tank or air conditioner in a remote location which is not staffed on a regular basis or it is staffed by individuals without a direct responsibility for this asset. In these cases, it is not sensible for a railway company to have to maintain records on site.

Recommendation: That various regulatory documentation and record keeping requirements become more flexible and recognize the role of electronic and centralized record keeping capacity.

5.0 Closing

The RAC and its members appreciate the opportunity to provide comments to ENVI as part of their review of CEPA. If you have any questions or comments, please contact Michael Gullo, Director Policy, Economic and Environmental Affairs for the Railway Association of Canada at 613 564 8103 or mgullo@railcan.ca.



About the RAC

The Railway Association of Canada (RAC) represents more than 50 freight and passenger railway companies that move 75 million people and more than \$250 billion worth of goods in Canada each year. As the voice of Canada's railway industry, RAC advocates on behalf of its members and associate members to ensure that the rail sector remains globally competitive, sustainable, and most importantly, safe.