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Rail *Safety*

Oversight and Expertise

Guideline on Applying for Exemption or Filing of a Notice of Exemption

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Canada

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Note:

Users of this Guideline are reminded that it is not legally binding however it has been prepared in the spirit of collaboration to outline the willingness of the parties to work in an open cooperative fashion with the intent to improve the exemption process. The procedures and forms recommended in this document are provided solely as a guide and should not be quoted or considered as legal authority.

Transport Canada welcomes further comments and input into future revisions of this guidance document as part of the ongoing improvement process with this as well as other publications.

I. INTRODUCTION:

Transport Canada is committed to protecting and advancing the public interest by working with its stakeholders to ensure that its regulatory activities result in the greatest overall benefit to all Canadians by:

- a. promoting and providing for the safety of the public and personnel, and the protection of property and the environment, in the operation of railways;
- b. encouraging the collaboration and participation of interested parties in improving railway safety;
- c. recognizing the responsibility of railway companies in ensuring the safety of their operations; and
- d. facilitating a modern, flexible and efficient regulatory scheme that will ensure the continuing enhancement of railway safety.

In application of the *Railway Safety Act* (RSA), in the spirit of the *Cabinet Directive on Streamlining of Regulations* (CDSR), TC will:

- protect and advance the public interest in health, safety and security, the quality of the environment, and the social and economic well-being of Canadians, as expressed by Parliament in legislation;
- promote a fair and competitive market economy that encourages entrepreneurship, investment, and innovation;
- make decisions based on evidence and the best available knowledge and science in Canada and worldwide, while recognizing that the application of precaution may be necessary when there is an absence of full scientific certainty and a risk of serious or irreversible harm;

II. BACKGROUND:

Subsection 22(4) of the RSA¹ provides railway companies with a mechanism whereby they may apply to the Minister of Transport (the Minister) for an exemption from a specified provision of regulations made under subsections 18(1) or (2.1) or rules in force

¹ More information on the RSA can be found at: <http://laws-lois.justice.gc.ca/eng/acts/R-4.2/index.html>

under sections 19, or 20 of the RSA. The Minister may exempt a railway company, railway equipment or railway work from a rule or regulation if satisfied that the exemption would be in the public interest and not likely to threaten safe railway operations.

Subsection 22.1(1) of the RSA makes provision for railway companies to file a notice of exemption for the purpose of conducting testing related to rail transportation or for an immediate exemption of short duration, in order to be exempted from the application of any provision of standards formulated under section 7, regulations made under subsections 18(1) or (2) or 24(1), or rules in force under sections 19 or 20 of the RSA. The Minister may prevent such an exemption from becoming effective if the Minister is of the opinion that the exemption would not be in the public interest or likely to threaten safety.

When a railway company seeks an exemption under subsection 22(4) of the RSA or files a notice of exemption under subsection 22.1(1) of the RSA, the company should provide the information and documentation necessary to substantiate their application and help the Minister determine whether the exemption would be in the public interest and not likely to threaten safe railway operations.

III. PURPOSE:

The purpose of this guideline is:

- To promote the spirit of collaboration and to confirm the willingness of the parties to work in an open cooperative fashion with the intent to improve the exemption process
- To outline the process to be followed when a railway company applies for an exemption or files a notice of exemption; and,
- To clarify the information and documentation a railway company should provide to substantiate its application or notice and help the Minister to determine whether an exemption is in the public interest and not likely to threaten safe railway operations.

IV. SCOPE:

This guideline applies to all railway companies operating in Canada under the legislative authority of Parliament regarding any application for an exemption filed under subsection 22(4) of the RSA, or a notice of exemption filed under subsection 22.1(1) of the RSA.

V. AUTHORITY:

This guideline is issued under the authority of the Director General, Rail Safety.

VI. DEFINITIONS:

For the purposes of this guideline, the following definitions will apply:

"Exemption" means an exemption under sections 22 or 22.1 of the RSA.

"Minister" means the Minister of Transport, and includes persons designated in writing under section 45 of the RSA to act on the Minister's behalf, as specified in the Transport Canada (TC) Designation Schedule document.

"Railway company" means a railway company operating in Canada under the legislative authority of Parliament, and subject to the provisions of the *Railway Safety Act*.

"Railway work" means a line work or any part thereof, a crossing work or any part thereof, or any combination of the foregoing;²

"Relevant associations and organizations" means an association or organization that has been formed to represent the interests of

1. persons employed by that railway company, or
2. persons owning or leasing railway equipment that is used on lines of railway operated by that railway company

and that is declared by order of the Minister to be a relevant association or organization in relation to that railway company.

"RSA" means *Railway Safety Act*, R.S.C. 1985, c.32 (4th Supp.).

² Definitions of "crossing work" and "line work" can be found at: <http://laws-lois.justice.gc.ca/eng/acts/R-4.2/index.html>

VII. ASSUMPTIONS:

1. This guideline has been developed based on the following assumptions:
2. This guideline is in no way intended to subordinate the RSA, or regulations, rules, standards, orders or directives made under the RSA.
3. Conformity with the requirements identified in this guideline does not of itself guarantee Ministerial approval of an exemption.
4. All parties to an exemption application or filing will respect the timeframes specified in legislation.
5. A railway company seeking an exemption will provide information and documentation necessary to substantiate their proposal and facilitate the Minister's assessment of it at the time it is submitted to the Minister for consideration – such as the “required and recommended information” listed below. The time limit begins when the Minister has received the information and documentation required by the RSA.
6. Views expressed by TC representatives during discussions with a railway company on an exemption application or filing do not necessarily reflect those of the Minister. Such discussions in no way bind the Minister or fetter the powers of the Minister or any authorized delegate under the RSA.
7. A representative from TC will be identified, as required, by the Director, Operations Management and/or Director, Regulatory Affairs, to provide expert functional advice.

Note: Failure to provide necessary information and documentation might result in the application being refused or its processing being delayed.

VIII. REQUIRED AND RECOMMENDED INFORMATION:

When a railway company applies for an exemption or files a notice of exemption, there is particular information and documentation that the railway company is required to provide by the RSA, as well as additional information and documentation that TC recommends that it provide, to substantiate its proposal and facilitate the Minister's assessment of it.

REQUIRED INFORMATION:

With respect to required information, in accordance with the RSA, when applying for an exemption under subsection 22(4) or filing a notice of exemption under 22.1, a railway company **must** provide the Minister with the following information and documentation:

- When filing an **exemption application under subsection 22(4):**

- The application itself; and,
- Copies of all comments received from relevant associations and organizations through consultations (see below for more information on consultations).

- When filing a **notice of exemption under 22.1**:
 - The notice will include a description of either: the testing it wishes to conduct relating to rail transportation; or, the circumstances that require an immediate exemption of short duration.

- In both cases:
 - Identification of the **specific provision of the standard, regulation, or rule** from which the railway is seeking an exemption, and the **section of the RSA** under which the exemption is being sought.
 - As applicable, confirmation that a professional engineer is taking responsibility for any part of the **engineering work** related to an exemption for a railway work.³

Note: Section 11 of the RSA requires the following: “All the engineering work relating to railway works, including design, construction, evaluation or alteration, shall be done in accordance with sound engineering principles. A professional engineer shall take responsibility for the engineering work.”

RECOMMENDED INFORMATION:

With respect to recommended information, to facilitate the Minister’s assessment of whether a proposed exemption is in the public interest and not likely to threaten safe railway operations, it is **strongly recommended** that a railway company provide the Minister, at the time of application or filing, with the following information and documentation:

Description of the proposed exemption

- A description of the specific provision of standard, regulation, or rule from which the railway is seeking an exemption, including how, when, and where the provision applies; and,
- A clear explanation of why the exemption is being sought.

Implementation Details

- A description of how the railway intends to implement the exemption, including:
 - timeline, including phase-in, and expected duration;
 - scope and technical parameters;

³ Refer to the Guideline - Engineering Work Related to Railway Works (Section 11- RSA) available at the following web site <http://www.tc.gc.ca/eng/railsafety/guideline-286.htm>.

- the role of other interested parties in implementing the exemption (e.g. road authorities);
- supervision, training, and/or education and awareness considerations for employees, contractors, other railways, municipalities, private road owners, and/or the public; and,
- short, mid, and/or long term objectives concerning the exemption (e.g. in the case of a testing exemption that may result in a future rule modification).

Risk Assessment

- A description of safety issues and concerns, an evaluation of those issues and concerns by means of a risk assessment and an indication of measures for risk mitigation and control.
- An analysis of the implications for other interested parties (e.g. where co-production, or shared running rights exist).
- As applicable, a description of how potential environmental implications of the exemption would be addressed.

Note: It is recommended that the Canadian Standard Association (CSA) Standard *CAN/CSA-Q850-97 Risk Management Guideline for Decision-Makers*, be used, as amended from time to time. The CSA guideline is intended to assist decision-makers in effectively managing all types of risk issues, including injury or damage to health, property, the environment, or something else of value. Other risk assessment methodologies may also be used.

Consultation

- In the case of an **exemption under subsection 22(4)** of the RSA:
 - a demonstration that the railway company has afforded each relevant association or organization that is likely to be affected by the exemption a reasonable opportunity during a period of sixty days to consult with it, as required by subsection 22(5) of the RSA;
 - copies of all comments received during consultations with relevant associations and organizations; and,
 - where those comments include safety questions, concerns, or objections, an indication of how the railway is responding to those questions, concerns, or objections (e.g. a letter from the railway company to the relevant association or organization, addressing their concerns).
- In the case of an **exemption under subsection 22.1(1)** of the RSA, a demonstration that the railway company has filed the notice of exemption with each relevant association or organization that is likely to be affected by the exemption.
 - Each relevant association and organization may object, on the grounds of safety, to an exemption proposed under subsection 22.1(1) within fourteen days after the notice was filed.

Notes:

- The railway company will contact relevant associations and organizations early in the process of developing the exemption application to initiate dialogue on the proposed exemption.
- A railway company may deliver consultation documents to a relevant association or organization by e-mail, as long as proof of receipt is provided. The relevant association or organization will acknowledge receipt of the e-mail in writing..
- Although, in the case of application made under subsection 22(4), the RSA does not require railway companies to provide the Minister with comments received from relevant associations and organizations after the end of the 60-day assessment period, in the interest of promoting railway safety they may wish to do so in some circumstances (e.g., when new safety information is provided).

IX: CONSIDERATION OF THE APPLICATION OR NOTICE:

Upon receiving an application for an exemption or a notice of exemption, the Minister considers whether, in the Minister's opinion, the exemption would be **in the public interest and not likely to threaten safe railway operations**.

1. In making this determination, the Minister may take into consideration the information provided by the railway (as listed above), and any other factors the Minister considers relevant, such as whether:
2. the requirements of the RSA have been met regarding consultation or filing of notice (failure of a railway company to demonstrate consultation, or the filing of a notice of exemption with relevant associations or organizations as required by the RSA is sufficient to preclude the Minister from considering the application/filing of notice for exemption);
3. the requirements of Section 11 of the RSA have been met regarding engineering work related to railway works;⁴
4. the railway company has ensured that the safety implications of, and/or risks associated with the exemption have been identified and assessed, and whether risk mitigation strategies would be adequate;
5. any safety-related or public interest issues or questions remain outstanding, and whether follow-up action is required;
6. the proposal would affect public confidence in the safety of the rail transportation system, and if so, in what way;

⁴ Refer to the Guideline - Engineering Work Related to Railway Works (Section 11- RSA) available at the following web site (<http://www.tc.gc.ca/eng/railsafety/guideline-286.htm>)

7. objections from parties consulted or notified have been addressed by the railway company (e.g., responding to their concerns by letter); and,
8. an exemption is the appropriate instrument for achieving the desired result.

TC Rail Safety may contact the filing railway company to **discuss its exemption application or notice** after it has been filed (e.g., to request further information or clarification with respect to the proposal or its supporting documentation). If TC Rail Safety determines that it requires further information to evaluate such an application or notice, it shall request that information in a timely manner. A railway company may likewise contact a representative from TC Rail Safety to discuss its proposal after filing it. However, if a railway company chooses to contact TC regarding its proposal, it is advised to complete such discussions at least ten (10) working days before the end of the applicable assessment period; after which time, additional information might not be accepted.

In the case of an **application for an exemption** under subsection 22(4), the Minister has a period of 60 days to consider the application and provide the applicant notice of the Minister's decision. However, the Minister may, for any reason (e.g., to provide a railway company additional time to provide further information requested by TC Rail Safety), **extend the 60-day period for granting an application** for an additional period of up to 60 days.

The **Minister's decision** with respect to an application for an exemption under subsection 22(4) will be conveyed to the applicant railway company in the form of a notice.

If the **Minister decides to grant the application**, the notice may specify terms or conditions upon which the exemption application is being granted. When considering conditions, TC will identify the risks to safety and public concerns that need to be addressed. Prior to issuing conditions, TC will consult with the applicant in a timely manner to provide an opportunity to discuss the identified safety risks, the costs associated with implementation of contemplated conditions and potential alternate solutions. Terms and conditions so specified are binding on the railway company in the implementation of the particular exemption.

If the **Minister decides to refuse the application**, because the application is not in the public interest or is likely to threaten safe railway operations, the notice will provide reasons for said refusal based on evidence and the best available knowledge. Where there is an absence of certainty that may threaten safe railway operations, the application of precaution may be necessary.

In the case of a **notice of exemption** filed by a railway company under subsection 22.1(1), the exemption is effective only if within 21 days after filing the notice with the Minister and each relevant association and organization likely to be affected by it: the company receives a response from the Minister and each of those associations and

organizations indicating that they do not object to the exemption; or, no objections are either confirmed or made by the Minister.

Each relevant association and organization may object, on the grounds of safety, to an exemption proposed under subsection 22.1(1) within fourteen days after the notice was filed. The Minister may: confirm such an objection within seven days of it being filed; or, object to the proposed exemption if the Minister is of the opinion that it would not be in the public interest or that it is likely to threaten safety.

X. ADMINISTRATIVE PROCEDURAL COMMITMENTS

In addition to the TC commitments identified in Section I – Introduction, the following commitments have also been agreed to by TC, railway companies, the Railway Association of Canada (RAC) and relevant associations to facilitate the administrative aspects of filing an exemption application or notice with the Minister:

1. Before filing its exemption application or notice, and at its earliest convenience, the railway company will contact TC Rail Safety to initiate dialogue on the exemption. In the case of a region or location-specific exemption, the first point of contact would most appropriately be the TC regional office involved.
2. An application for an exemption or a notice of exemption should be addressed to the Minister with a copy to the Director General, Rail Safety. When a proposed exemption is region or location-specific, it should also be copied to the Regional Director - Surface for the TC region involved.⁵
3. If the application is submitted electronically, acknowledgement of receipt must be provided. “Acknowledgement of receipt” means a response, in writing, from the addressee confirming that the e-mail was received.
4. The application or notice should make clear that individuals, such as railway company employees or third parties, acting on behalf of a railway company (e.g., to file a notice, conduct required consultations, etc), have the appropriate corporate or legal authority, as applicable, to do so (e.g., by providing a Power of Attorney document, if appropriate).
5. Copies of correspondence between the railway company and relevant associations and organizations, or other interested parties (that could reasonably be expected to be affected by the exemption) concerning an exemption application or filing, should be included with the documentation submitted to the Minister.
6. In addition to consulting or filing a notice with “relevant associations and organizations”, railway companies should communicate with other interested parties that could reasonably be expected to be affected by the proposed exemption (e.g., other railways with running rights on the trackage of the applicant railway, municipalities, road authorities, private road owners, etc).
7. The railway company will ensure that it communicates internally with its employees that are likely to be affected by the exemption.

⁵ The list of Rail Safety offices is found in Appendix I

8. When filing an application for, or notice of exemption, the railway company will identify an official who TC Rail Safety employees may contact to discuss the proposed exemption – in particular its technical aspects. Likewise, upon receiving an application for, or notice of an exemption, TC will identify a representative from Rail Safety who railway companies can contact to discuss the proposed exemption – in particular its technical aspects.

XI. REVIEW:

- Guideline: TC Rail Safety will review this guideline periodically to assess and ensure its accuracy, relevancy and effectiveness as a tool for facilitating the exemption process.
- Exemptions: TC Rail Safety and railway companies may review exemptions made under the RSA and the implementation of such exemptions periodically, to assess and ensure their clarity, relevancy and effectiveness as instruments for promoting safe railway operations. Such reviews may be carried out independently or collaboratively.

XII. CONTACT:

Questions or comments concerning, or suggestions on improving or amending, this guideline should be directed to the office indicated below. Any issues of non-consensus are also to be directed to the same office for discussion and resolution. Any changes to the guideline will be referred to the Advisory Council on Rail Safety.

Railway companies seeking to initiate dialogue on a proposed rule or provide an advance copy of a proposed rule should also contact this office.

Susan Archer
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Transport Canada, Rail Safety
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14th Floor, Suite 1410
427 Laurier Avenue West
Ottawa, Ontario, K1A 0N5
Telephone: 613-990-8690
Fax: 613-990-7767
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APPENDIX I: Rail Safety – Contact Information

Regional Offices:	
<p>Atlantic Regional Director Heritage Place 95 Foundry Street, Suite 418 Moncton NB E1C 5H7 Phone: 506-851-7040 Fax: 506-851-7042</p>	<p>Ontario Regional Director 4900 Yonge Street, 3rd Floor North York ON M2N 6A5 Phone: 416-973-9820 Fax: 416-973-9907</p>
<p>Pacific Regional Director 225-625 Agnes Street New Westminster BC V3M 5Y4 Phone: 604-666-0011 Fax: 604-666-7747</p>	<p>Québec Regional Director 800 René-Lévesque West 6th Floor, Suite 638 Montréal QC H3B 1X9 Phone: 514-283-5722 Fax: 514-283-8234</p>
<p>Prairie & Northern Regional Director 344 Edmonton Street, 4th Floor P.O. Box 8550 Winnipeg MB R3C 0P6 Phone: 204-983-4214 Fax: 204-983-8992</p>	
Headquarters:	
<p>Director, Regulatory Affairs Enterprise Building, Minto Place 427 Laurier Avenue West, 14th Floor Ottawa ON K1A 0N5 Phone: 613-990-8690 Fax: 613-990-7767</p>	

APPENDIX II: Summary of Relevant *Railway Safety Act* Provisions⁶

Guide to Exemptions of Section 22 to 24 ⁷			
RSA Reference	Actioned how:	Exempt who/what:	From what:
Section 22: Exemptions			
22(1)(a)	Governor in Council (GIC) may exempt	- specified railway company; - specified railway equipment; or - specified railway work	- regulations per 18(1) or 18(2.1) - rules per 19 or 20
22(1)(b)	GIC may exempt	- specified person	- regulations per 18(2)
22(2)(a)	Minister may exempt	- specified railway company; - specified railway equipment; or - specified railway work	- regulations per 18(1) or 18(2.1) - rules per 19 or 20
22(2)(b)	Minister may exempt	- specified person	- regulations per 18(2)
22(4)	Railway may apply to Minister for exemption	-	- regulations per 18(1), (2), or (2.1) - rules per 19 or 20
Section 22.1: Exemptions for testing purposes, or immediate exemptions of short duration			
22.1(1)	Railway proposes exemption for testing, or short duration & files notice with Minister & relevant associations & organizations	-	- standards per 7 - regulations per 18(1) or (2) - regulations per 24(1) - rules per 19 or 20
Section 24: Exemptions from regulations respecting non-railway operations			
24(1.1)	Minister may exempt	- any railway company; or - other person	- regulations per 24(1)

⁶ For more detailed information see: <http://laws-lois.justice.gc.ca/eng/acts/R-4.2/index.html>

⁷ **NOTES:** RSA 7: respecting engineering standards governing the construction or alteration of railway works

RSA 18(1): regulations respecting: operation or maintenance of line works; design, construction, alteration, operation and maintenance of railway equipment; and, concerning safety critical positions (i.e., jobs) in railway companies

RSA 18(2): regulations respecting crossing works

RSA 18(2.1): regulations respecting security

RSA 19 & 20: rules respecting any matter referenced in 18(1) or (2.1)

RSA 24(1): regulations respecting "non-railway operations affecting railway safety"

Railway work: includes line work and/or crossing work

