

May 30, 2017

Sent by email: consultations@otc-cta.gc.ca

Canadian Transportation Agency
15 Eddy Street
Gatineau, Quebec J8X 4B3

Re: Response to call for comments on the Proposed Guide on Applying for Approval to Construct a Railway Line and Proposed Indigenous Engagement Framework for Railway Line Construction

VIA Rail Canada Inc. (**VIA Rail**) is pleased to contribute to the public consultation process initiated by the Canada Transportation Agency (the **Agency**) with respect to the *Proposed Guide on Applying for Approval to Construct a Railway Line* (the **Proposed Approval Guide**) and the *Proposed Indigenous Engagement Framework for Railway Line Construction* (the **Proposed Indigenous Engagement Framework**).

Canada is seeing record levels of investment in passenger railway infrastructure as a key strategy to combat climate change and support economic growth. As Canada's national passenger rail service provider, VIA Rail is particularly cognizant of current railway network congestion, which prevents it from increasing frequencies to better serve Canadians. VIA Rail has therefore proposed constructing new track in an underutilized rail right-of-way between Toronto, Ottawa, Montreal and Quebec City as part of VIA Rail's High Frequency Rail (**HFR**) project.

HFR will bring significant economic and environmental benefits to Canada. These include:

- Up to 13.9 million tonnes of greenhouse gas emissions reduced over 30 years;
- 50,000 person-years of construction-related jobs;
- 334,400 permanent person-years of jobs from resulting productivity and wider economic impacts across Canada over 30 years; and
- Financial self-sufficiency for VIA Rail's Corridor services, saving \$150 million in annual government subsidies and carrying nearly 10 million passengers per year by 2030.

VIA Rail is not the only passenger rail service provider facing track capacity bottlenecks requiring new railway line construction. Across Canada, passenger commuter rail expansion projects involving new railway infrastructure are being proposed to reduce emissions and facilitate economic growth, such as:

- GO Transit's "freight bypass" enabling service expansion between Toronto-Kitchener;
- Montreal's Réseau Électrique Métropolitain, providing electric commuter train project in Montreal;
- Halifax's propose commuter rail service between downtown and Windsor, Nova Scotia; and
- Ottawa Light Rail Transit Project.

These initiatives reflect the public importance of establishing a more predictable and efficient process for the Agency to approve the constructing of new railway lines across Canada. Greater predictability and efficiency will ensure the economic and environmental benefits of these projects are realized sooner and benefit Canadians faster. VIA Rail respectfully submits the following overarching comments regarding the Proposed Approval Guide and Proposed Indigenous Engagement Framework followed by more specific comments.



1. **Embed flexibility as a foundational principle of the Proposed Approval Guide and Proposed Indigenous Engagement Framework.** VIA Rail understands this is the intention and is representative of Agency practice in considering such applications.
2. **Clarify the definition of “affected localities” and related “concerns”.** To ensure the process is efficient, VIA Rail respectfully suggests the Agency include language regarding *reasonableness* and *feasibility* in the Proposed Approval Guide.
3. **Clarify that environmental concerns remain under the jurisdiction of the Canadian Environmental Assessment Agency (CEAA).** VIA Rail respectfully suggests that it be clarified that all environmental concerns remain under the authority of the Environmental Agency and that the Agency rely upon all CEAA decisions, including the decision not to subject a project to an environmental assessment.
4. **Consideration of Indigenous law issues currently before the Supreme Court of Canada and establish Agency assistance to project proponents.** VIA Rail respectfully suggests that the Agency incorporate the principles to be established by these decisions in the Proposed Approval Guide and Proposed Indigenous Engagement Framework. VIA Rail also suggests that the Agency give consideration to ways in which project proponents may be provided with additional governmental support and guidance.
5. **Harmonize the French and English versions of the Proposed Approval Guide to ensure the language is consistent.** Presently, certain discrepancies exist between the French and English versions of the Proposed Approval Guide so VIA Rail suggests that further revisions to the language be considered to ensure consistency and therefore clarity.
6. **Clarify the exemptions for discontinued rights-of-way.** More specifically, articulate that section 98 does not apply to rehabilitation of discontinued or abandoned rights-of-way.

Further details on these items are provided below. We thank you for the opportunity to contribute to the consultation process. If you have any questions about the foregoing, we would be pleased to discuss this further with you.

1. Flexibility as a Foundational Principle of the Proposed Approval Guide and Proposed Indigenous Engagement Framework

VIA Rail understands that the Proposed Approval Guide is intended to be a flexible framework rather than a rigid set of regulations applied in a formulaic manner in every application pursuant to Section 98 of the *Canada Transportation Act, 2002* (the **CTA, 2002**). This is representative of Agency practice in considering such applications. Each of the suggested elements set out in the Proposed Approval Guide may not necessarily apply to every application. For instance, an application involving construction of a railway line on undeveloped land may engage more environmental issues than one involving construction on decommissioned rights-of-way. In the former example, the Agency may expect a project proponent to submit a broader array of technical reports than in the latter case. VIA Rail understands this to be consistent with the Agency’s practice, but respectfully suggests that the Agency explicitly incorporate the notion of flexibility into the Proposed Approval Guide as an overarching principle.

The inclusion of an explicit statement regarding flexibility will be especially helpful in light of ongoing legislative reviews and two outstanding Supreme Court appeals heard November 30, 2016 that may impact the legal frameworks for consultation and technical studies related to assessing environmental impacts. These include:

- The ongoing review of the *Canadian Environmental Assessment Act, 2012*;
- The Supreme Court of Canada decision regarding *Chippewas of the Thames First Nations v. Enbridge Pipelines* (File 36776); and

- The Supreme Court of Canada decision regarding *Clyde River Hamlet v. Petroleum Geoservices* (File 36692).

It is likely that the upcoming decisions of the Supreme Court will have an impact on the role of the Agency in respect of the duty to consult and, therefore, on the Proposed Indigenous Engagement Framework and the proponent's engagement responsibilities. The review of the *CEAA, 2012*, may also have a direct bearing on environmental assessment requirements.

These court cases and legislative review reflect the ongoing evolution of consultative and environmental review practices in Canada, underscoring the need for a flexible approval process that can remain current with best practices and up-to-date jurisprudence. Flexibility will help to ensure the Agency's railway line construction approval process remains reflective of emerging best practices and legal precedents. VIA Rail believes this will enhance the ability for proponents under Section 98 of the *CTA, 2002* to engage in successful consultation processes and efficiently develop the requisite technical studies that will accelerate the delivery of passenger rail services in Canada.

VIA Rail respectfully suggests that a statement regarding flexibility could be inserted adjacent to the Disclaimer on page 1.

2. Clarify definition of “affected localities” and related “concerns”.

VIA Rail notes that the Proposed Approval Guide includes numerous references to soliciting comments and concerns raised by “localities” affected by the location of a proposed railway line project. In particular, the Proposed Approval Guide provides that a proponent must take such concerns into account, address them as part of its consultations, and implement measures to address identified concerns and conflicts (see, for instance, page 5 of the Proposed Approval Guide). As currently drafted, the Proposed Approval Guide may be subject to an overly broad interpretation that requires a proponent to account for and address “any” concern raised by “any” locality.

VIA Rail respectfully suggests that the Proposed Approval Guide be amended to include wording which states that a proponent must only demonstrate that it has considered or identified plans to address concerns that are reasonable and which are advanced by localities which will be seriously affected by the location of a proposed railway line project.

VIA Rail further respectfully suggests that the Proposed Approval Guide include a provision that a proponent's obligation is to consider implementing measures to assuage concerns with respect to the location of the proposed railway line which are feasible, proportional to the nature and scope of the proposed railway project, and which would not adversely impact or hinder the proposed railway project. Otherwise, a proponent may be faced with attempting to address unreasonable and frivolous requests made by localities which have no connection to the location of a proposed railway line project. VIA Rail suggests that such an approach is inconsistent with the intent and spirit of the legislation and does not accord with the Agency's practice in assessing such applications.

VIA Rail believes the Proposed Approval Guide will be improved by clarifying this component of the process to conform with the intent and spirit of the legislation of Section 98 of the *CTA, 2002*. As an example, the Proposed Approval Guide could be amended at page 16, numbered paragraph 5, to state that a proponent will articulate “plans for addressing [reasonable] concerns, and any outstanding unaddressed [reasonable] concerns [of localities which will be seriously affected by the location of the railway line].”

VIA Rail further notes that, throughout the Proposed Approval Guide, the Agency has discussed the concept of localities “affected by the railway line” in different ways. In most instances, the

language mirrors the *CTA, 2002* and refers to “localities that ‘will be affected’”. This is identical to Section 98 of the *CTA, 2002* which provides, in part, that:

98(2) The Agency may, on application by the railway company, grant the approval if it considers that the location of the railway line is reasonable, taking into consideration requirements for railway operations and services and the interests of the localities that will be affected by the line.

However, the Proposed Approval Guide also includes the phrase “may be affected,” which deviates from Section 98 of the *CTA, 2002* and has a broader connotation. For instance, at page 4 of the Proposed Approval Guide under the heading entitled “Identify localities affected by the railway line”¹, both phrases are used, which has the potential for creating some ambiguity. Likewise, the French version of the Proposed Approval Guide should also be adjusted in order to ensure consistency with the French version of Section 98 of the *CTA, 2002* which refers to the concept of “localités qui seront touchées par celle-ci”.

VIA Rail understands the Agency to be referring to a process whereby proponents are to identify localities that are to be consulted (localities that will be affected) by initially considering localities that may be affected by the location of the proposed railway line. VIA Rail respectfully suggests that this be more clearly delineate in the Proposed Approval Guide.

3. Clarify that environmental concerns remain under the jurisdiction of the Canadian Environmental Assessment Agency (CEAA)

An environmental assessment as described by the *CEAA, 2012* is only required under certain circumstances in order for an application under Section 98 of the *CTA, 2002* to receive Agency approval. This limitation is a departure from previous legislation prior to *CEAA, 2012* coming into effect, when all applications to the Agency for Section 98 approval required an Environmental Assessment.

In such circumstances where an environmental assessment is required under the current *CEAA, 2012*, there is potential duplication of requirements between the *CEAA, 2012* and the Proposed Approval Guide. For instance, there is a potential requirement for a railway line application to undergo two separate consultation processes with affected localities – those mandated by the *CEAA* and those described in the Proposed Approval Guide. Other items set out in the Proposed Approval Guide also appear to be potentially duplicative of obligations in the *CEAA, 2012*. In particular, items described under “Conduct technical studies” (pg. 5, Proposed Approval Guide) and “Provide consultation materials” (pg. 7, Proposed Approval Guide) regarding surface and groundwater impacts, noise and vibration, soil erosion, etc.

VIA Rail believes that most, if not all, of these studies and materials are part of the CEAA’s jurisdiction. Not only is there potential duplication of processes and steps, there is also the potential for contradictions in the conclusions that could be rendered by the CEAA and the Agency.

VIA Rail submits that once the CEAA has ruled regarding environmental concerns and authorities (by deciding whether a project must undergo an environmental assessment or not, and subsequently, by authorizing a project once the environmental assessment is completed), the

¹ **Identify localities affected by the railway line**

The localities affected by the railway line will depend on the nature and scope of the proposed construction and operational activities and the location of the railway line. A locality’s proximity to the proposed railway line is an important consideration in identifying those localities that may be affected by the railway line and who should be consulted.

In addition to municipalities and communities, the applicant should also identify landowners, businesses and other persons or organizations that will be affected by the railway line.

Agency should not reassess the environmental components of the same project nor perform any kind of environment assessment in the case where the CEAA has ruled not to submit a project to an environmental assessment. All environmental conclusions rendered by the CEAA should be considered comprehensive, with the Agency limiting its assessment to the location of the proposed railway project, as prescribed by Section 98 (2) of the *CTA, 2002*.

4. Directly support Indigenous consultation to ensure use of best practices.

Crown Duty to Consult

VIA Rail understands that the Agency, as an independent quasi-judicial tribunal, has a mandate to ensure, before authorizing a railway line project, that consultations with aboriginal groups and, where appropriate, proposed accommodations for aboriginal people be adequate (see Decision No. 341-R-2015, at para. 74).

The Agency may be aware that on November 30, 2016, the Supreme Court of Canada heard the appeal of aboriginal groups in two cases (*Chippewas of the Thames First Nations v. Enbridge Pipelines*, File 36776, *Clyde River Hamlet v. Petroleum Geo-Services*, File 36692), cases which involved the question of whether a board or administrative tribunal has an obligation to determine whether the Crown has complied with its legal duty to consult. The Supreme Court of Canada has also considered whether the Crown could rely on the regulatory process of the National Energy Board to assist it in fulfilling its duty to consult.

The Supreme Court of Canada has not yet issued decisions in these cases and therefore their result is presently unknown. However, both have the potential to impact the Agency's role in the duty to consult with Indigenous peoples. Therefore, VIA Rail suggests that the Agency incorporate the principles to be established by these decisions in its Proposed Approval Guide and Proposed Indigenous Engagement Framework.

Agency Support

VIA Rail recognizes the importance of ensuring that efficient and effective engagement with all affected Indigenous communities is done as part of the section 98 approval process. The Proposed Approval Guide directs applicants to make use of the Government of Canada's web-based Aboriginal and Treaty Rights Information System. However, owing to the importance of this specific aspect of the engagement process, VIA Rail respectfully suggests that the Agency give consideration to ways in which project proponents may be provided with additional governmental support and guidance to better ensure that affected Indigenous communities are properly identified and consulted in a meaningful manner.

In order to ensure that the overarching intent of the Proposed Indigenous Engagement Framework, which is efficient and effective consultation with affected Indigenous communities, is achieved, VIA Rail suggests that the Agency consider providing for a mechanism through which additional guidance and resources may be made available to project proponents.

Ideally, such guidance would include support from appropriate government officials who VIA Rail suggests may best positioned to facilitate successful engagement processes, including from within Indigenous and Northern Affairs Canada. A precedent for such an approach exists under *CEAA, 2012*, where input regarding a proposed project submitted to the Canadian Environmental Assessment Agency is solicited and experts within the department provide guidance on identifying affected Indigenous communities to be consulted. VIA Rail respectfully suggests that a similar process be established to provide proponents of section 98 applications with access to such additional expertise and resources that would assist in the identification of affected Indigenous communities and the implementation of meaningful consultation.

5. Harmonize the French and English versions of the Proposed Approval Guide to ensure the language is consistent

In VIA Rail's review of the Proposed Approval Guide, some discrepancies between the French and English versions has been noted. Such differences can create ambiguity and VIA Rail therefore respectfully suggests that the Agency conduct a review and make changes to ensure that the Proposed Approval Guide is consistent in both languages.

Further, in determining which words to use in both versions of the Proposed Approval Guide, VIA Rail notes that some words have specific legal connotations that should be considered. For instance, in the English version, there is a reference to "Indigenous Engagement" or "Engagement activities", while in the French version, the words "Consultation des autochtones" or "Activités de consultation" are used. Consultation is a concept with defined legal meaning in Canada while engagement is a more general term that does not share the same legal implications. VIA Rail suggests that the Agency consider this in its word choice in the French and English versions of the Proposed Approval Guide.

6. Clarify the exemptions for discontinued rights-of-way

As noted in the Proposed Approval Guide, section 98 does not apply to projects within the right-of-way of an existing railway line/right of way (the **Existing Right-of-Way Exemption**).

The Existing Right-of-Way Exemption is, in VIA Rail's view, an effective means of leveraging existing infrastructure. This is particularly true for passenger rail operators seeking to expand service in urban areas where obtaining new land can be highly disruptive to localities and can have a much broader range of environmental and social impacts. Existing rights-of-ways, which often remain fully segregated from adjacent neighbourhoods even in very dense environments, can therefore present the least disruptive and most cost-effective means for constructing new transport infrastructure in urban areas. As a result, constructing new railway tracks on existing rights-of-way is a central feature of many passenger rail expansion plans across Canada.

VIA Rail respectfully suggests that the Agency also articulate in the Proposed Approval Guide that the section 98 does not apply to projects on discontinued or abandoned rights-of-way (**Rehabilitation Projects**).

Indeed, Rehabilitation Projects differ significantly from greenfield projects in that the proposed location existed and operated as an active railway line for a period of time. While the use of such discontinued/abandoned rights-of-way may have to some degree changed since discontinuance/abandonment to include such things as pathways, it will still be the case that cleared and leveled land exists throughout the proposed route along with historical infrastructure such as road crossings, culverts, embankments and, in some cases, bridges. Even more significantly, issues arising from Rehabilitation Projects are likely fewer in number and seriousness than greenfield projects, as Rehabilitation projects would likely improve already impacted land. In contrast, greenfield project impacts are typically either neutral or somewhat negative.

We thank you for the opportunity to contribute to the consultation process.

VIA Rail Canada Inc.