



BRIEF submitted to the House of Commons Committee on
Environment and Sustainable Development

Regarding: Bill C-69 - Part 3 - Canadian Navigable Waters Act

The *Canadian Navigable Waters Act* is an opportunity to protect the environmental, social, and cultural value of all navigable waters in Canada.

Federal environmental law reforms in 2009 and 2012, stripped protections from navigable waters in the form of environmental assessment triggers, public input, and federal approval for developments that could obstruct navigation.

The Canadian Freshwater Alliance proposes amendments to Bill C-69 in order to restore and modernize lost protections for navigable waters in a manner that would: broaden protection of all navigable waters; enable the monitoring and regulation of cumulative impacts; and restore public trust.

This document outlines how the proposed *Canadian Navigable Waters Act (CNWA)* could be strengthened in key areas to recognize the public right to free passage and the importance of ecological integrity to navigation, in addition to broader cultural and social values, through the following changes:

1. **Require the consideration of environmental impacts** in all approval decisions regarding the impact of the proposed project, as well as in mitigation efforts.
2. **Require all projects**, non-minor, on all navigable waters **to undergo federal approval**.
3. **Track the cumulative impact of all projects**, including minor works, via a publicly accessible online registry.
4. **Enable shared decision-making** with Canada's First Nations, Inuit and Métis on all navigable waters in or crossing through the traditional territories.

Recommendations follow the order of the Act and include a brief textual rationale. We look forward to any opportunity to discuss these in more detail with members of the committee.

Thank you for your Consideration,

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1) Definition of Navigable Waters

Though we support the inclusion of a clear definition for navigable waters in the Act, we remain concerned that the proposed definition contains elements that are difficult to objectively assess in a consistent and regular fashion. For the past 150 years, the common law definition has offered consistency in defining navigable waters in a clear and easily understood approach - *if the water can float a canoe then it is a navigable water*. Gaining this level of clarity in the definition is essential for the Act to be administered in an efficient and transparent way.

Considering Broader Environmental and Cumulative Impacts

Preserving, protecting and respecting navigation on waterways on traditional aboriginal lands, and across Canada, contributes to the ecological integrity of waterways, rivers, streams and lakes. The right to navigate safely, means that waters are free from physical obstructions, that prevent access, but also free from harmful or deleterious substances that prevent safe access. Thus the protection of navigable waters, contributes to the quality and quantity of the water flows and preserves broader cultural and social values of those waters.

Restoring a requirement for impact, or environmental, assessment would once more recognize the inherent relationship between the flow of water for navigation and the health of environment. Protecting navigable waters has demonstrable downstream effects on drinking water, healthy fisheries, and quality of life.



Cultural Flows and Indigenous Rights

The Standing Committee on Transport, Infrastructure and Communities (TRAN) study of the *Navigation Protection Act* recognized the special relationship that Indigenous communities have with waterways - indeed navigation is tied to travel and their way of life as can be testified by numerous submissions made by representative groups and governments. It is thus encouraging that Bill C-69 requires that the Minister must consider any adverse effects of a decision concerning obstructions to navigation on the rights of Indigenous peoples. However, by imposing a narrow definition with no acknowledgement on the cultural and traditional importance of rivers to Indigenous communities, these rights are not fully honoured.

"For Aboriginal peoples, particularly the Mi'gmaq and Maliseet, the importance placed on navigation is a reflection of identity and cultural interests. As highlighted by the National Water Declaration that the AFN adopted in 2013: "Our traditional activities depend on water for transportation, for drinking, cleaning, sustenance, purification, and provide habitat for the fish, plants and animals that provide medicines and foods." For elders, navigation and water are intimately linked to survival and occupation of the land. For generations, travelling over water has been a meaningful time for contemplating nature."

~Mi'gmaq Maliseet Aboriginal Fisheries Management Association, 2016 submission

Enabling Class Exemptions

To alleviate concerns that the canoe test would capture waterways such as drainage ditches and irrigation canals, with no navigable purposes intended, we believe that a system of class exemptions for works and waterways - as introduced in 2009 amendments to the *Navigable Waters Protection Act* - has merit.

Proposed Amendment to Bill C-69 – Part 3 – Clause 47 (3)

Amendment Option 1.A

Eliminate the definition entirely. Default becomes common law definition.

Amendment Option 1.B

Amend the definition to include mention of sufficient quality and quantity of water capable of being navigated by any floating vessel; the cultural, environmental, and historical value to Canada's natural heritage; and of importance to the historical, current, and future use of Canada's indigenous communities as defined by impacted nations.

Amendment 2

Define an exemption order to exclude minor waters such as artificial irrigation channels and drainage ditches, unless of 3.0m or more in width or a natural waterbody that has been converted for this purpose.



2) Purpose Statement

The current wording of Bill C-69 lacks a Purpose section. The addition of a clear and inclusive Purpose section, as is included in proposed amendments to the Fisheries Act in C-68, would better reflect of the outcomes the law is intended to deliver as well as the government's legacy.

The proposed change in title of the *Canadian Navigable Waters Act* better reflects the revised scope of the Act. A broadened focus would clarify its importance in advancing the right to navigation but also in supporting the role that navigable waters play to the cultural, social, commercial, and environmental fabric of Canada.

Proposed Amendment to Bill C-69 – Part 3

Amendment Option 1

Amend Part 3 of the Act to include the purposes of the Act, including (but not necessarily limited to) the importance of the Act in advancing sustainability, enabling the precautionary principle, protecting navigation rights and in advancing the important role that navigable waters have to the social, cultural, economic and environmental fabric of the country.

3) Monitor and Regulate Cumulative Impacts

Decisions authorizing interference with navigation must be formed with the consideration of the full spectrum of positive and negative social, health, environmental and economic effects.

In order to ensure due diligence in advancing the purposes of the Act and in ensuring federal oversight over expected impacts, the Act must:

- **Require all projects**, non-minor, on all navigable waters **to undergo a federal approval process.**
- **Enable the tracking of projects**, including minor works, via a publicly accessible online registry.
- **Require the consideration of environmental and cultural impacts** in all approval decisions regarding the impact of the proposed project as well as any defined mitigation measures.

Works Requiring Approval

The proposed Act broadens protections by requiring the Minister of Transportation to approve obstructions caused by major works in all navigable waters. We certainly support this amendment in the Act. Our concerns rest with the uncertainty created by the new intermediate class of works - and specifically for those works taking place on unscheduled waters. For the purposes of our review, we have assumed this new class of works could include projects such as secondary bridges, some dams, weirs etc.

A Personal Allegory About a Small Dam

The Temagami River in Northern Ontario is a popular paddling river for recreational water users. In 2015, a small dam project (500km) was proposed on the river. The project would pose a significant imposition to navigation. Under the amended system, assuming it is not considered a major project and, it would not be required to attain an approval under the new CNWA. In this case, the Temagami River is an unscheduled waterway, and so the proponents would need to notify the public of their intent to proceed with the project.



Freshwater Alliance Director Lindsay Teller paddling on the Temagami River in Summer of 2014.

I am a paddler, who loves the Temagami River, but like many, I do not live in or near the navigable waters in which I recreate. Am I now expected to track potential developments on all the waterways to which I may wish to paddle, to ensure my interests (and those of other paddlers) are accommodated?

As the above story illustrates, shifting the responsibility to track and respond to potential developments onto paddlers and water enthusiasts, is an inappropriate burden to place solely in the hands of the public. It is an abdication of government's responsibility to oversee and ensure mitigation of projects on behalf of the public it serves. Though we fully support the opportunity for public input and engagement, project approval should not be tied to the responsibility of the public to track and voice concern on every project impacting waters important to them.

Streamlining the approval process for all works with the potential to make a significant impact on navigation would reduce the burden placed on the public to monitor and contest developments on unscheduled navigable waters.

We, therefore, recommend that all works, not minor, on all navigable waters that stand to impact navigation require an approval.

Proposed Amendment to Bill C-69 – Part 3 - s. 5(1)

Amendment 1

Simplify the approvals process and provide clarity by amending s.5(1) to apply to all works, other than a minor work, in any navigable water.

Amendment 2

Authorize minor works via regulation. Require an automatic permit for minor works that is tied to a registry.



Factors Minister Should Consider

When 2012 amendments to the Navigable Waters Protection Act were made, all connection to environmental considerations under the act were severed. In order to restore lost protections, it is necessary for the new Canadian Navigable Waters Act to assert the Acts importance as an item of environmental, cultural and economic legislation.

Science based, transparent, decision-making leads to good projects with an improved long term economic and environmental impact. A welcome addition is the set of factors that the Minister must consider before making a decision to issue an approval. However, while section 7 (7) *Assessment Factors the Minister shall consider before issuing approval* does include reference to traditional knowledge, there is currently no specific mention of the use of western scientific knowledge. Nor is there a mention of the cultural, social, and environmental values associated with navigable waters. Decisions regarding impacts of the work, including cumulative impact, are subject to whether the Minister has in his or her possession, information relating to that impact - requiring that this information be provided would better inform the Minister's decisions. These factors need to be strengthened and broadened if the impact of the project on the use and value of navigable waters is fully understood and factored, rightfully, into decision-making.

The case for Environmental Consideration

It is often stated that the CNWA need not address environmental considerations, as those are adequately addressed in other environmental legislations such as the Fisheries Act or the Impact Assessment Act. If impacts to fisheries were the only environmental concern then we might agree that this is true. However, the quantity and quality of water are closely linked. Water quality is informed by the temperature, state, and concentration of components in the water. Equally important is variation in water flow to freshwater ecosystems - it influences the transport and cycling of nutrients, oxygen, and carbon throughout the environment.¹

The physical, biological, and chemical importance of flows aside, the Fisheries Act, will only be triggered in fish bearing streams. As it stands, the current regime would limit consideration of other environmental, social and economic values of navigable waters that would be impacted by a proposed project obstructing navigation.

The small dam analogy, offers an important example of gaps in consideration. If a small dam is proposed on a waterway that is not considered to be fish bearing - it would not trigger a review under the Fisheries Act. Further assuming that the project is of a small enough size, then it would not be covered in the forthcoming Project List of the Impact Assessment Act. When considering federal jurisdiction and policy, it is clear that a significant gap would be created by omitting oversight for the environmental, commercial, and recreational values of navigable waters.

¹ Nilsson, C., and B. Malm Renöfält. 2008. Linking flow regime and water quality in rivers: a challenge to adaptive catchment management. *Ecology and Society* 13(2): 18. [online] URL: <http://www.ecologyandsociety.org/vol13/iss2/art18/>



The narrow focus on navigation alone creates an unbalanced list of considerations. If environmental (and for that matter social and cultural values) are not considered then the decision-maker is left weighing the economic and social value of the proposed hydro project against the navigation rights of a few kayakers. It is an unbalanced assessment before it even begins whereby the proponent advances proposed public value-add by their project but whereby the full value of navigable waters is not considered. By broadening the assessment factors, a decision-maker has a full picture by which to value impacts to free flowing waters. These navigable waters contribute to the movement of people and goods but also to the social, environmental and cultural uses and values of the waterways.

Proposed Amendment to Bill C-69 – Part 3 - s. 7 (7)

Apply assessment factors to all works, non-minor, on navigable waters and amend s. 7(7) to:

- *Strengthen assessment of cumulative factors including the related social, cultural, economic and environmental values of navigable waters;*
- *Ensure consideration of the impact of the proposed work on the aforementioned values; and*
- *Require the consideration of scientific information, including if applicable, an impact assessment.*

Restore Environmental Assessment Requirements

Restoring science-based decision-making would require that approvals for works with an anticipated impact to the use and value of navigable waters would only be issued, under the *Canadian Navigable Waters Act*, after the new impact assessment is complete. Such an approach would also ensure that the incidental and cumulative impacts of projects are considered and mitigated during the early stages of planning works. There is a need to link Part 1 and Part 3 of Bill C-69. This could be done by establishing criteria for works in areas of federal jurisdiction that would trigger an impact assessment and by focussing on the anticipated impact of proposed works.

Proposed Amendment to Bill C-69 – Part 1 & Part 3

Amendment 1

Require all major works on navigable waters to undergo a full impact assessment by amending Part 1 s.2 of the proposed Impact Assessment Act.

Amendment 2

Restoring science-based decision-making would require that approvals for major projects on any navigable water, under the Canadian Navigable Waters Act, would only be issued after an impact assessment. Amend Part 3 s. 6 and s. 7 to require that decisions regarding interference to navigation are informed by an impact assessment.



4) Restoring Public Trust

In 2012, amendments were made to the former Navigable Waters Protection Act and public trust was eroded when millions of waterways lost the protections being afforded now to a list of 164 waterbodies, known in the Navigation Protection Act as the *Schedule*. Communities across the country felt the value and use of their local and recreational waterways was not being acknowledged by the federal government and that those waterways were thus at greater threat to unregulated impact. In order to restore lost protections, public trust must be regained by ensuring any project that could impact the use and value of navigable waters is duly assessed and reviewed before being allowed to proceed. This can be done by amending the Act to:

- **Track the cumulative impact of all projects**, including minor works, via a publicly accessible online registry.
- **Enable shared decision-making** with Canada's First Nations, Inuit and Métis on all navigable waters in or crossing through traditional territories.

Public Registry

The requirement that the Minister establish a public registry affording public access to records related to the *Canadian Navigable Waters Act* is welcome modernization. Its inclusion will be critical to acting on cumulative impacts, the precautionary approach and a science-based approach, all of which depend on robust, comprehensive and accessible knowledge and information.

For this information to be accurate and complete, all works, undertakings and activities with the *potential* to impact navigation should be included in the public registry. Rather than exempting minor works from this process, their approval could be automated following an entry to the registry. Such an approach would encourage an understanding of the cumulative impact of projects, including the number of minor works taking place on water bodies. This is a critical component of science based decision making. If we do not track all works, then we have no way of testing whether the cumulative impact of each structure, or barrier, really is "minor".

Furthermore it is unclear, what information would be posted. Specific information should be required to best enable transparency, including: project details, geographic location, proponent, link to Impact Assessment, the decision outcome, as well as key factors that determined decision.

Complaints Mechanism

Bill C-69 includes provisions around public notification, dispute resolution and the establishment of a public registry. Notification is to be made before a major or "medium" project starts and interested persons have 30-days to submit comments to the Minister. A new conflict resolution mechanisms exists in place of approvals for "medium" works in navigable waters not listed in the Schedule. The community and proponents would have 45-days to mediate interests and if no resolution is found they can ask the Minister of Transportation to decide on the need for an approval. However, this tiered system could create confusion causing some works to bypass approvals. Furthermore, it places the responsibility on the public to monitor and respond to projects on unscheduled waters (see our detailed discussion on this on page 4 above).



For all projects regulated under the Act, we would like to see a process that would require public notification, opportunity for input, and a process by which input can be submitted. This allows the public and engaged groups to contribute information that would inform the Minister's decision on a project. It would simultaneously reduce the burden on the public to contest to ensure adequate oversight of a project with potential impact to the value and use of navigable waters.

Proposed Amendment to Bill C-69 – Part 3

Amendment 1:

Track the cumulative impact of all projects, including minor works, via a publicly accessible online registry by amending s. 27.2 (1) to include the details of all works, undertaking, and activities with the potential to interfere with navigable waters.

Amendment 2:

Ensure that adequate information is available to the public by amending s.27.2 (3) to require the documentation of: works (description of the work, geographic location, anticipated impact, and proponent); whether approval is required; the outcome of a decision (including a rationale which accounts for the assessment factors considered); and any amendments to reference to navigable waters.

5) Conclusions

Thank you for the opportunity to review and offer feedback on proposed amendments to the *Navigable Waters Act*. We have focused our input on identifying key remaining gaps to restore lost protects and regaining public trust on the oversight of navigable waters in Canada. We would like to echo the concerns of our First Nations, Inuit and Métis colleagues on the need for amendments to meaningfully and concretely implement the United Nations Declaration on the Rights of Indigenous Peoples, to which Canada is a signatory. To that end, we support the advancement of co-governance and the respect for Indigenous peoples of Canada and for their rights by means of amendments which enable shared decision-making. While we can not speak on behalf of this constituency, we would advise that amendments be made with the interest of strengthening acknowledgement of Indigenous rights including (but not limited to) links to the Impact Assessment Act which provides more opportunities for cooperation.

The amendments that we recommend within this brief have three specific goals:

- To return lost protections;
- To restore public trust in the regulation of navigable waters; and
- To modernize the Act to enable an approach to regulation that respects the multi-faceted value and use of navigable waters across the country.

The restoration and modernization of the Navigable Waters Protection Act will require that environmental impacts are assessed and mitigated, and that broader social, environmental, and cultural values are balanced with economic uses of navigable waters in the approval process.