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CANADA

A STUDY OF THE *NAVIGATION PROTECTION ACT*

Report of the Standing Committee on Transport, Infrastructure and Communities

**Hon. Judy A. Sgro
Chair**

MARCH 2017

42nd PARLIAMENT, 1st SESSION

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THE STANDING COMMITTEE ON TRANSPORT, INFRASTRUCTURE AND COMMUNITIES

has the honour to present its

ELEVENTH REPORT

Pursuant to its mandate under Standing Order 108(2), the Committee has studied the *Navigation Protection Act* and has agreed to report the following:

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INTRODUCTION

INTRODUCTION

On 20 June 2016, the Minister of Transport, in concert with the Minister of Fisheries, Oceans and the Canadian Coast Guard announced the review of the *Navigation Protection Act* and the *Fisheries Act*.¹ In addition to consultations undertaken by Transport Canada, the Minister of Transport asked the House of Commons Standing Committee on Transport, Infrastructure and Communities (TRAN or the Committee) to undertake a study of the changes made in 2009 and 2012 to the *Navigation Protection Act* (NPA).²

The Committee agreed to undertake the study on 27 September 2016 and announced that the study would focus on:

- the environmental and sector impacts of the changes;
- the impact of the changes on the long-term viability of commercial and recreational utilization of Canada's waterways;
- the cost, practicality and effectiveness of the changes when gauged against the environmental, business and recreational function of Canada's waterways; and
- the efficiency of the changes when viewed holistically, from a user perspective, with other Acts that collectively impact upon users.³

Between October and December 2016, the Committee held six meetings where it heard from 17 witnesses representing a broad cross-section of Canadians with representatives from municipalities, industry groups, recreation associations, environmental protection organizations, the academic community and Indigenous groups all providing their insights on the issues considered in the study. In addition to hearing witnesses, the Committee received 256 written briefs, of which 142 were submitted by individuals, 70 by Indigenous groups and 44 by municipalities, associations and industry groups.

1 Government of Canada, "[Government launches review of environmental and regulatory processes to restore public trust](#)", News Release, 20 June 2016.

2 Government of Canada, Backgrounders, [Navigation Protection](#).

3 House of Commons, Standing Committee on Transport, Infrastructure and Communities (TRAN), [Minutes of Proceedings](#), 42nd Parliament, 1st session, 27 September 2016.

BACKGROUND AND CONTEXT

Historical Context for Navigation Protection

The public right to free and unobstructed passage on Canadian waterways is established under the common law and, in Quebec, under the civil law.⁴ Navigation on Canadian waterways, however, remains within the exclusive jurisdiction of Parliament under the *Constitution Act, 1867*.⁵

Amendments to the *Navigable Waters Protection Act*: 2009

The *Budget Implementation Act, 2009* (BIA 2009)⁶ made the first substantial amendments to the *Navigable Waters Protection Act* (NWPA), as the *Navigation Protection Act*⁷ was then known, in many decades.⁸ At the time, it was the view of the federal government and some stakeholders that the delays and uncertainty created by the existing approval process discouraged public and private sector investments in works in and around navigable waters.⁹

Pursuant to the authority of the amended section 13 of the NWPA, the government was permitted to pre-approve works posing a low risk to navigation.¹⁰ The *Minor Works and Waters (Navigable Waters Protection Act) Order* (Minor works order) came into force in June 2009. Under the Order, certain specified classes of works and waterways are exempted from the approval process; subject to the owners of the works constructing the works to predetermined specifications and standards. Examples of minor works for which no approval process is required include erosion-protection, docks, boathouses and boat ramps, aerial cables, submarine cables, pipelines buried under the bed of a navigable water, dredging and mooring systems.¹¹ Minor waters described in the Order include minor navigable waters, artificial irrigation channels and drainage ditches and small private lakes.

Additionally, the amendments adopted in 2009 eliminated the requirement that all named works require federal approval. Approval requirements apply only to proposed

4 [Civil Code of Quebec](#), 1991, c. 64, s. 920.

5 [Constitution Act, 1867](#), 30 & 31 Victoria, c. 3 (U.K.), s. 91(10).

6 [Budget Implementation Act, 2009](#), S.C. 2009, c. 2.

7 [Navigation Protection Act](#), R.S.C., 1985, c. N-22 (NPA).

8 Senate, Standing Committee on Energy, the Environment and Natural Resources [ENEV], [Report Addressing Bill C-10, Navigable Waters Protection Act](#), 2nd Session, 40th Parliament, June 2009, p. 1.

9 Senate, Standing Committee on Energy, the Environment and Natural Resources, [Summary of evidence for the subject-matter of those elements contained in Divisions 4, 18 and 21 of Part 4 of Bill C-45, A second Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures](#), 5 November 2012, p. 4.

10 [Canada Gazette](#), Part I, Vol. 143, No. 19, 9 May 2009, p. 1403. Transport Canada introduced a policy respecting minor works, but not waters, approximately a year before the Act was amended in 2009.

11 Transport Canada, [“Minor Works,” Navigation Protection Program – Overview](#).

bridges, booms, dams and causeways that are determined to have a substantial impact on navigation.

Amendments to the *Navigable Waters Protection Act*: 2012

Further amendments to the NWPA were brought in 2012 through *A second Act to implement certain provisions of the budget*¹² (BIA 2012). These amendments came into force in 2014.¹³ BIA 2012 changed the name of the NWPA to the *Navigation Protection Act* (NPA) in order to clarify that the intent of the legislation is to protect the public's right to navigation, rather than specifically protecting waterways.¹⁴ The legislation also limited the Act's application to works affecting waterways listed in a new schedule to the Act (Schedule) or, upon the request of the project proponent, to works affecting an unlisted waterway.¹⁵ The Schedule, which can be amended by regulation on request, originally included 162 waterways in Canada, that, according to Transport Canada, represent "navigable waters that support busy commercial or recreation-related navigation [...] [,] are accessible by ports and marinas, and are often close to heavily populated areas."¹⁶

The 2012 amendments to the NWPA expanded the authority of the Minister of Transport to designate any works as minor works and any waters as minor waters in order to permit additional projects considered to pose a low risk to commercial and recreational navigation to be pre-approved. Navigation Protection Program (NPP) officers within Transport Canada were also granted the authority to approve works that would pose no impact on the public's right to navigation.¹⁷ Figure 1, provided as an Appendix to this report, shows the key steps in the process for the approval of proposed works under the NPA.

It is important to note that the added prohibitions concerning the dewatering and depositing of materials into navigable waterways contained in the NPA are applicable to all navigable waterways rather than just scheduled waterways.¹⁸

The *Canadian Environmental Assessment Act, 2012* (CEAA 2012),¹⁹ which replaced the *Canadian Environmental Assessment Act*, does not incorporate the *Law List Regulations* that previously required all approvals for works under the NPP to undergo an environmental assessment. As such, CEAA 2012 requires a federal environmental

12 Bill C-45: [A second Act to implement certain provisions of the budget](#), 1st Session, 41st Parliament, c. 31.

13 [Jobs and Growth Act, 2012](#), S.C. 2012, c. 31.

14 TRAN, [Evidence](#), 42nd Parliament, 1st session, 4 October 2016, 0845 (Hon. Marc Garneau, Minister of Transport). All Evidence hereafter is from the 42nd Parliament, 1st Session unless otherwise noted.

15 The proponent of a work on, in, under, over or through a non-listed waterway might choose to opt in to the federal approval process to reduce the chance of litigation after the work commences.

16 Transport Canada, "[Navigation Protection Act](#)," *Navigation Protection Program – Overview*.

17 ENEV, [Evidence](#), 1 November 2012 (Nathan Gorall, Director General, Navigable Waters Protection Task Force, Transport Canada). Examples of more substantial works with no impact on navigation would include repair or maintenance to the top-side of an existing bridge or other structure.

18 NPA, s. 21-23.

19 [Canadian Environmental Assessment Act, 2012](#), S.C. 2012, c. 19. s. 52.

assessment only for “designated projects” prescribed by regulation²⁰ or for projects that the Minister of the Environment designates by Order.²¹

STAKEHOLDERS’ ASSESSMENT OF THE NAVIGATION PROTECTION ACT

Scope of the *Navigation Protection Act*

Much of the testimony heard in the Committee’s study of the NPA centred on the scope of the legislation and its application to works over a limited number of waterways.²² Where all navigable waterways were covered under the NWPA, only 164 (162 when the Act came into force) of the largest and busiest waterways and their tributaries listed in the Act’s schedule are covered under the NPA.²³ Maps illustrating the waterways covered under the schedule are included as an Appendix to this report.

Based on the testimony heard by the Committee, it appears that the provinces of Saskatchewan and Manitoba and the Yukon and Northwest territories,²⁴ municipalities and the construction industry generally favour an NPA that does not by default require environmental assessments and applies to specific waterways only. According to Mr. Michael Atkinson, President of the Canadian Construction Association, the adoption of an act with a narrower scope than the NWPA and the introduction of the Minor works order has improved project proponents’ ability to manage their projects by creating greater certainty as to when the approval of Transport Canada is required.²⁵ Mr. Raymond Orb, President of the Saskatchewan Association of Rural Municipalities, indicated to the Committee that with the reduction in the number of requests for project approvals sent to Transport Canada, delays in approvals have also been reduced, meaning that projects can be started on a timelier basis.²⁶ According to Mr. Al Kemmere, President of the Alberta Association of Municipal Districts and Counties, the NPA better “balances federal oversight with municipal autonomy” than did the NWPA.²⁷

Groups representing recreational users expressed concerns about the NPA’s narrow scope, for example, Mr. Greg Farrant, spokesperson for the Ontario Federation of Anglers and Hunters (OFAH) told the Committee that the hunting, fishing, trapping and

20 [Prescribed Information for the Description of a Designated Project Regulations](#), SOR/2012-148; [Regulations Designating Physical Activities](#), SOR/2012-147.

21 [Canadian Environmental Assessment Act, 2012](#), S.C. 2012, c. 19, s. 14(2).

22 For brevity, the term “works over waterways” in this report will include any work that is constructed or placed in, on, over, under, through or across any waterway.

23 NPA, schedule (as of 10 February 2017).

24 See [Saskatchewan Ministry of Highways and Infrastructure](#), brief; [Manitoba Infrastructure](#), brief; [Government of Yukon](#), brief, [Government of Northwest Territories](#), brief.

25 TRAN, [Evidence](#), 20 October 2016, 0945 (Michael Atkinson, President, Canadian Construction Association). All Evidence hereafter is from the 42nd Parliament, 1st Session unless otherwise noted.

26 TRAN, [Evidence](#), 20 October 2016, 0850 (Raymond Orb, President, Saskatchewan Association of Rural Municipalities).

27 TRAN, [Evidence](#), 20 October 2016, 0845 (Al Kemmere, President, Alberta Association of Municipal Districts and Counties).

outfitting industries in Canada provide \$15.2 billion annually to the national economy,²⁸ but that much of this money depends on ensuring access to Canada's lakes, rivers and streams, most of which is on unscheduled waters.²⁹ The Wilderness Canoe Association, in a submission, suggested that even minor waters deserve protection under the Act because even minor waters can provide significant recreational value and once obstructed, there is little chance that they will again be navigable.³⁰

The Council of Canadians, and many individuals who submitted briefs to the Committee, suggested that under the NPA, most waterways have lost the environmental protection that was built into the former NWPA. There was broad support expressed in these submissions for the repeal of the schedule and a reversion back to project approvals being required for all waterways.³¹

Based upon the witness testimony and written submissions received, the Committee recommends:

Recommendation 1

That the government maintain the Schedule but rapidly improve the process of adding waterways to the Schedule by making it easily accessible, easy to use and transparent and that a public awareness campaign be put in place to inform stakeholders of the process.

Additionally, it should be noted that the Council of Canadians, as well as 75 of the briefs submitted to the Committee, suggested that previous authorities to review the construction of interprovincial and international pipelines and electrical transmission lines over navigable waters that had been delegated to the National Energy Board should be returned to Transport Canada and the Canadian Environmental Assessment Agency.³² In the interest of returning responsibility for these project approvals to Transport Canada, the Committee recommends:

Recommendation 2

That the government include Transport Canada in the decision-making process for environmental assessments of pipelines and electrical transmission lines that cross navigable waters.

28 TRAN [Evidence](#), 27 October 2016, 0850 (Greg Farrant, Manager, Government Affairs and Policy, Ontario Federation of Anglers and Hunters).

29 Ibid., 0935.

30 [Wilderness Canoe Association](#), brief, pp 6-10.

31 [Council of Canadians & Environmental Defence](#), brief, 6 December 2016, p. 3. Note: Individual submissions were primarily modeled upon a form letter inspired by the Council of Canadians and Environmental Defence's submission.

32 Ibid.

Navigation and Indigenous groups

Indigenous groups that provided testimony to the Committee and those that submitted written briefs, all voiced concerns that they had not been properly consulted about changes to the NPA,³³ with many suggesting that without full, free and informed consent from Indigenous groups on changes to the NPA, that the Act may violate Indigenous historical treaty and water rights³⁴ and, as suggested to the Committee by Andrea Hoyt of the Nunatsiavut Government, their comprehensive land claims agreements.³⁵ Many Indigenous groups are concerned that their traditional waterways are no longer protected under the Act. They also suggested that it is unclear as to how these waterways could be considered for addition to the Act's schedule,³⁶ particularly as it appears that the NPA excludes Indigenous governments from acting as local authorities that may request the addition of waterways to the schedule.³⁷

Many Indigenous groups also find the narrow scope of the NPA problematic. Several First Nations indicated in their briefs that the NPA does not provide adequate consideration of the requirements of Indigenous peoples, as navigation by water represents a means of subsistence, commerce, transportation and connection to traditional cultural practices. As such, the effects of changes to the navigability of waterways, even changes to smaller waterways, can be significant. The Athabasca Chipewyan First Nation noted in its submission, the injuries sustained by its members on waterways as a result of lowered water levels, which they attributed to the removal of water by the oil and gas industry and the effects of climate change in northern Alberta.³⁸

Concerns were also expressed about the changes to the NPA that appear to remove the requirement for proponents of works that may affect an Indigenous right to navigation, particularly on unscheduled waters, to consult Indigenous groups prior to the construction of these works. Without federal involvement through the NPP application process, some Indigenous groups submitted that it is difficult, if not impossible, for Indigenous groups to know about proposed works over waterways prior to the construction of the works.

Some Indigenous groups also suggested that under the language of some of the treaties concluded with the Crown, access to water and the right to unimpeded navigation

33 TRAN, [Evidence](#), 15 November 2016, 0845 (Nunatsiavut Government), 0855 (Congress of Aboriginal Peoples), 0850 (Métis National Council).

34 [Aamjiwnaang First Nation](#), Brief, 7 December 2016, p.2; [Union of British Columbia Indian Chiefs](#), brief, 7 December 2016, p. 2; [Grand Council of the Crees \(Eeyou Istchee\)/Government of the Cree Nation](#), brief, 9 November 2016, p. 2.

35 TRAN, [Evidence](#), 15 November 2016, 0845 (Andrea Hoyt, Environmental Assessment Manager, Department of Lands and Natural Resources, Nunatsiavut Government).

36 TRAN, [Evidence](#), 15 November 2016, 0845 (Andrea Hoyt, Environmental Assessment Manager, Department of Lands and Natural Resources, Nunatsiavut Government), 0900 (Kim Beaudin, National Vice-Chief, Congress of Aboriginal Peoples), 0855, 0915 (Kyle Vermette, Métis National Council).

37 NPA, s. 29.

38 [Athabasca Chipewyan First Nation](#), brief, pp 1-2.

on their traditional territories are protected. As such, according to them, these rights should have precluded the government from making some of the substantive changes that were included in the navigation protection regime without prior consultation and consent of Indigenous groups.³⁹

Lastly, while the Athabasca Chipewyan First Nation, in its written submission, spoke of benefiting from NPP protections on some of its traditional waterways, it argued that the broad authority conferred to the Minister of Transport to make orders exempting certain classes of works from review short-circuits the legislative and consultative process, removing transparency and predictability in decision-making.⁴⁰ The Athabasca Chipewyan First Nation suggested that the removal of this authority, the holding of public consultations and the promulgation of regulations would resolve this conflict.⁴¹

Given the importance of navigation to Indigenous peoples across Canada, the Committee recommends:

Recommendation 3

That the government examine ways of preserving, protecting and respecting navigation on waterways on traditional aboriginal lands and recognize the special relationship that Indigenous communities have with waterways and impose a requirement that project proponents adequately inform stakeholders of a work before it commences so as to provide opportunities for appropriate consultations to be undertaken.

The “Aqueous Highway Test” and Adding Waterways to the Schedule

One of the complaints heard from industry associations, environmental organizations and Indigenous groups was the lack of clarity of definitions in both the former NWPA and the current NPA. Navigability under the NWPA and preceding legislation was determined by what has been called the “canoe test,” whereby if a canoe could be floated in a body of water, the waterway was considered navigable.⁴² While this test appears simple and clear, it has remained a point of contention as to how manmade culverts, irrigation canals or temporary waterways that may exist for a few days or weeks in a year, but on which a canoe could be floated during that time, should be considered by the test. Provinces and territories, and their municipalities, often sought authorization to build works on navigable waters through the NPP proactively and would face delays stretching to two or more years.⁴³

39 [Cayoose Creek First Nation](#), brief, 30 November 2016, p. 4; [Huron-Wendat First Nation](#), brief, 7 December 2016, pp 6-7; [Stoney Nakoda Nations](#), brief, 28 November 2016, pp 4-5.

40 [Athabasca Chipewyan First Nation](#), brief, pp 4-5.

41 *Ibid.*, p. 8.

42 TRAN, [Evidence](#), 4 October 2016, 0900 (Hon. Marc Garneau, Minister of Transport).

43 TRAN, [Evidence](#), 4 October 2016, 1015 (Catherine Higgins, Assistant Deputy Minister, Programs, Department of Transport).

Under the amendments to the navigation legislation that took place in 2012, Transport Canada introduced the “aqueous highway test. A new focus was then placed on protecting navigation on systemically important waterways, through a determination as to whether a waterway had supported significant navigable traffic in the past, at present, or would be reasonably likely to do so in the future. Waterways where Transport Canada had evidence of such traffic were subsequently added to the schedule and fell under the jurisdiction of the NPP.⁴⁴ The original list of proposed waterways for the schedule included 1,070 waterways, which was later reduced to 240 waterways, before reaching the 162 waterways included in the schedule when the Act came into force.⁴⁵ Waterways not added to the schedule have maintained some protections, but in the event a dispute arose, affected parties on unscheduled waters would be required to intervene through the courts.⁴⁶

Many of the witnesses heard by the Committee discussed the need to establish a balance between the “canoe test” and the “aqueous highway test,”⁴⁷ particularly as these stakeholders suggested that the aqueous highway test fails to appreciate the recreational value of smaller waterways. The Ontario Federation of Anglers and Hunters, and the Council of Canadians in passing, spoke in favour of adding an additional 40 waterways identified by Mountain Equipment Co-op to the schedule, while also stressing that additional input into how additional waterways could be added to the schedule would be helpful.⁴⁸

The Committee recognises the need for clearer language in the NPA with respect to the aqueous highway test and therefore recommends:

Recommendation 4

That the government, in consultation with Indigenous communities, provinces, territories and other relevant stakeholders such as landowners, user groups and municipalities, more clearly articulate the criteria for the aqueous highway test.

Another area that witnesses pointed to as a common source of confusion concerns the process for adding waterways to the schedule. In the three years that the NPA changes have been in effect, two waterways have been added to the schedule, although

44 Transport Canada, Follow-up Questions – Part II.

45 Ibid.

46 See for example, NPA, s. 15, where the NPA is restricted to “navigable water [...] listed in the schedule”.

47 Transport Canada has defined the aqueous highway test as a requirement that a body of water be able to support the floating a vessel of any size and that there is evidence of use by the public of the waterway for navigation purposes either currently, historically or sometime in the past, Transport Canada, Responses following appearance on 4 October 2016 – Part II.

48 TRAN, [Evidence](#), 27 October 2016, 0945, 1035 (Emma Lui, Water Campaigner, Council of Canadians), 0955 (Ontario Federation of Anglers and Hunters), Mountain Equipment Co-op, brief submitted to the Standing Senate Committee on energy, the Environment and Natural Resources, November 2012.

anecdotal evidence⁴⁹ suggests that a large number of parties have exhibited an interest in having other bodies of water added to the schedule. There are currently two private members' bills before the House of Commons seeking to add lakes and rivers to the schedule. Eight other private members' bills introduced in the 2nd session of the 41st Parliament that sought to add other waterways to the schedule died on the *Order Paper* following the dissolution of Parliament.⁵⁰

Emma Lui, a Water Campaigner with the Council of Canadians, indicated that she is uncertain as to how to request that a body of water be added to the schedule.⁵¹ Section 29 of the Act indicates that a navigable waters can be added to the Schedule by regulatory amendment, where the Governor in Council is satisfied that the addition:

- a) Is in the national or regional economic interest
- b) Is in the public interest; or
- c) Was requested by a local authority

This appears to have created an impression among some witnesses that the only way a waterway can be added to the schedule is by a the request to “local authorities” (defined as “the government of a municipality, any other government constituted under the laws of a province or a department of a provincial government”⁵²). In fact, there appears to be nothing preventing any group or individual from requesting a waterway be added on the basis of (a) and/or (b) of the above-listed criteria.

In their brief, the Federation of Canadian Municipalities recommended a balanced approach to navigation protection, with a greater role for municipalities in extending the NPP to additional waterways and moving enforcement to local authorities.⁵³

In light of a lack of clarity as to the NPP's procedure for adding waterways to its schedule, the Committee recommends:

Recommendation 5

That the government update the Schedule in consultation with Indigenous communities, provinces, territories and other relevant stakeholders to determine which waterways should be included in the Schedule and that the addition of waterways be accompanied by increased resources to deal with applications.

49 TRAN, [Evidence](#), 27 October 2016, 0955 (Ontario Federation of Anglers and Hunters); [Evidence](#), 15 November 2016, 0845 (Andrea Hoyt, Environmental Assessment Manager, Department of Lands and Natural Resources, Nunatsiavut Government), 0900 (Kim Beaudin, National Vice-Chief, Congress of Aboriginal Peoples), 0855, 0915 (Kyle Vermette, Métis National Council).

50 Parliament of Canada, [LEGISinfo search “Navigation Protection Act”](#).

51 TRAN, [Evidence](#), 27 October 2016, 1035 (Council of Canadians).

52 NPA, s. 29.

53 *Ibid.*, p. 3.

Recommendation 6

That the government provide Indigenous communities, provinces, territories and other relevant stakeholders with clarification about who can ask for a waterway to be added to the List of Scheduled Navigable Waters and on what grounds.

Recommendation 7

That the government require that Transport Canada provide reasons why a waterway is or is not added to the schedule.

Regulatory Certainty and Transparency in Decision-Making

As noted above, many witnesses found the lack of timeliness and consistency of decision-making from the NPP troubling, as it caused increased costs for projects, while decreasing confidence in the federal government to properly regulate navigation. Industry groups advocated the need for regulatory certainty and approval processes that better match the administrative burden with the size and risk of projects. Mr. Chris Bloomer, President of the Canadian Energy Pipeline Association, testified that an “effective and efficient regulatory framework for all stakeholders [...] should be science and fact based, be conducted by the best-placed regulator, avoid duplication, outline clear accountabilities, contain transparent rules and processes, [and] allow for meaningful participation of those who have valuable contributions to make”.⁵⁴

Mr. David Marshall from the Fraser Basin Council provided insights into what types of activities should be considered when determining navigability and the importance of bringing interested groups together early when seeking to plan for the future management of a waterway.⁵⁵

The spokesperson from the Métis National Council, Mr. Kyle Vermette, reiterated this point of view in advocating for “ensuring that whoever is responsible for that decision-making [in navigation protection and environmental assessment] is competent, experienced, transparent, and is viewed as capable”.⁵⁶

The Council of B.C. Yacht Clubs, in their written submissions, mirrored this position in identifying that the NPA placed no positive obligation on the Minister of Transport to inform the public of its decisions concerning proposed works over navigable waters. Additionally, the authority to exempt minor works through ministerial orders, rather than by regulation circumvents parliamentary review and oversight.⁵⁷ Accordingly, the Committee recommends:

54 TRAN, [Evidence](#), 20 October 2016, 0950 (Chris Bloomer, President and Chief Executive Officer, Canadian Energy Pipeline Association).

55 TRAN, [Evidence](#), 25 October 2016, 0920, 0910 (David Marshall, Executive Director, Fraser Basin Council).

56 TRAN, [Evidence](#), 15 November 2016, 1005 (National Métis Council).

57 [Council of B.C. Yacht Clubs](#), brief, November 2016, pp 2, 4.

Recommendation 8

That the government impose a requirement that project proponents adequately inform stakeholders of a work before it commences so as to provide opportunities for appropriate consultations to be undertaken.

Dispute Resolution Concerning Waterways Not Subject to the *Navigation Protection Act*

As mentioned above, one of the notable changes to the NPA, in moving to focus on the protection of scheduled waters, was the decision to defer complaints on the common law right to navigation on unscheduled waterways to the courts.⁵⁸ As identified by the West Coast Environmental Law Association, not only is court action “exceptionally expensive” in seeking to remove an obstruction, it also remains unclear whether an individual could sue on behalf of the public.⁵⁹

Mr. Marshall from the Fraser Basin Council, in his testimony before the Committee, pointed out the value of bringing people together early to resolve disputes, before court intervention is necessary, and how that approach has proven to be important in the management of the Fraser Basin in British Columbia. Through ongoing discussions with Indigenous groups, the shipping industry, local government and environmental organizations, the Fraser Basin Council has acted as a catalyst for the collaborative management of resources on the waterway and avoided the need for lengthy court challenges.⁶⁰

The West Coast Environmental Law Association also discussed how important it is in the case of a dispute that involves the public’s right to navigation that the process for members of the public be fair, whether it concerns a large waterway on the schedule, but especially for smaller waterways.⁶¹ It was argued to be unfair that the protection of the right to navigate Canada’s major waterways, where advocates for shipping companies, recreational users and the public are already heard, should have access to government resources through the NPP, where smaller waterways would not. While the number of affected parties on smaller waterways may be less, the likelihood that obstructions on these smaller waterways would permanently obstruct navigation are no doubt greater.

In order to provide an administrative solution to navigation disputes the Committee recommends:

Recommendation 9

That the government create an efficient administrative complaint mechanism, within Transport Canada, to assist the public with

58 [West Coast Environmental Law Association](#), brief, p. 6.

59 Ibid.

60 TRAN, [Evidence](#), 25 October 2016, 0920 (Fraser Basin Council).

61 [West Coast Environmental Law](#), brief, 9 November 2016, pp 6, 8.

the resolution of possible impediments to navigation on all of the country's inland waterways, including those not listed in the Schedule, so that clear provisions are in place for communities and other relevant stakeholder to be able to oppose projects they consider threatening the waterways.

Recommendation 10

That the government consider the restoration of the ability of officers of Transport Canada's Navigation Protection Program to accept and address public complaints regarding the right to navigation as part of a larger and more comprehensive complaint resolution process.

CONSULTATIONS BEFORE AMENDING THE *NAVIGATION PROTECTION ACT*

The majority of the recommendations proposed by the Council of Canadians and by many of the individuals who submitted written briefs concerned holding additional consultations in order to strengthen the protections found in the NPA and other legislation that protects waterways, to properly consult with Indigenous communities and to foster a sense of collaboration with the public, Indigenous groups, industry, government and regulatory agencies.⁶² To many concerned parties, the changes made to navigation protection legislation in 2009 and 2012 were completed without adequately addressing the concerns of the public at large, as well as many of the stakeholder groups.⁶³

As discussed earlier in the report, many Indigenous groups also felt that they had not been fully consulted prior to the changes to navigation protection legislation being adopted. Given many Indigenous groups' reliance on navigation for transportation, commerce and subsistence, changes to the NPA would disproportionately affect Indigenous people.

In order to ensure that any changes to the NPA do not negatively affect stakeholders, taking into account their perspective, the Committee recommends:

Recommendation 11

That the government ensure that the interests and concerns of stakeholders such as farmers and municipalities are considered when any changes to the NPA are enacted.

CONCLUSION

During its study of navigation protection legislation, one of the overarching themes that the Committee heard was the value of the shared cultural heritage of traversing

62 Ibid., pp 6-9.

63 [Council of Canadians & Environmental Defence](#), brief, 6 December 2016, p. 3. Note: a majority of individual submissions were modeled upon a form letter inspired by the Council of Canadians and Environmental Defence's submission, for example, [Laurie Cassel](#), Brief, [Bob Gardiner](#), brief, [Marnie Hare](#), brief, [Teresa Lee Walker](#), brief.

Canada's oceans, lakes, rivers and streams. Although the goals of industry, government, Indigenous groups, conservation associations and other stakeholders may diverge as to how development surrounding Canada's waterways takes place, representatives of these groups told the Committee of the need for clarity, transparency and expedience in processes that protect navigation and in dispute resolution. The maintenance of an ongoing dialogue among the various stakeholders remains paramount to ensuring that future iterations of the *Navigation Protection Act* are responsive to the needs of Canadians from sea to sea to sea.

LIST OF RECOMMENDATIONS

Recommendation 1

That the government maintain the Schedule but rapidly improve the process of adding waterways to the Schedule by making it easily accessible, easy to use and transparent and that a public awareness campaign be put in place to inform stakeholders of the process..... 5

Recommendation 2

That the government include Transport Canada in the decision-making process for environmental assessments of pipelines and electrical transmission lines that cross navigable waters..... 5

Recommendation 3

That the government examine ways of preserving, protecting and respecting navigation on waterways on traditional aboriginal lands and recognize the special relationship that Indigenous communities have with waterways and impose a requirement that project proponents adequately inform stakeholders of a work before it commences so as to provide opportunities for appropriate consultations to be undertaken. 7

Recommendation 4

That the government, in consultation with Indigenous communities, provinces, territories and other relevant stakeholders such as landowners, user groups and municipalities, more clearly articulate the criteria for the aqueous highway test..... 8

Recommendation 5

That the government update the Schedule in consultation with Indigenous communities, provinces, territories and other relevant stakeholders to determine which waterways should be included in the Schedule and that the addition of waterways be accompanied by increased resources to deal with applications. 9

Recommendation 6

That the government provide Indigenous communities, provinces, territories and other relevant stakeholders with clarification about who can ask for a waterway to be added to the List of Scheduled Navigable Waters and on what grounds..... 10

Recommendation 7

That the government require that Transport Canada provide reasons why a waterway is or is not added to the schedule..... 10

Recommendation 8

That the government impose a requirement that project proponents adequately inform stakeholders of a work before it commences so as to provide opportunities for appropriate consultations to be undertaken. 11

Recommendation 9

That the government create an efficient administrative complaint mechanism, within Transport Canada, to assist the public with the resolution of possible impediments to navigation on all of the country's inland waterways, including those not listed in the Schedule, so that clear provisions are in place for communities and other relevant stakeholder to be able to oppose projects they consider threatening the waterways..... 11

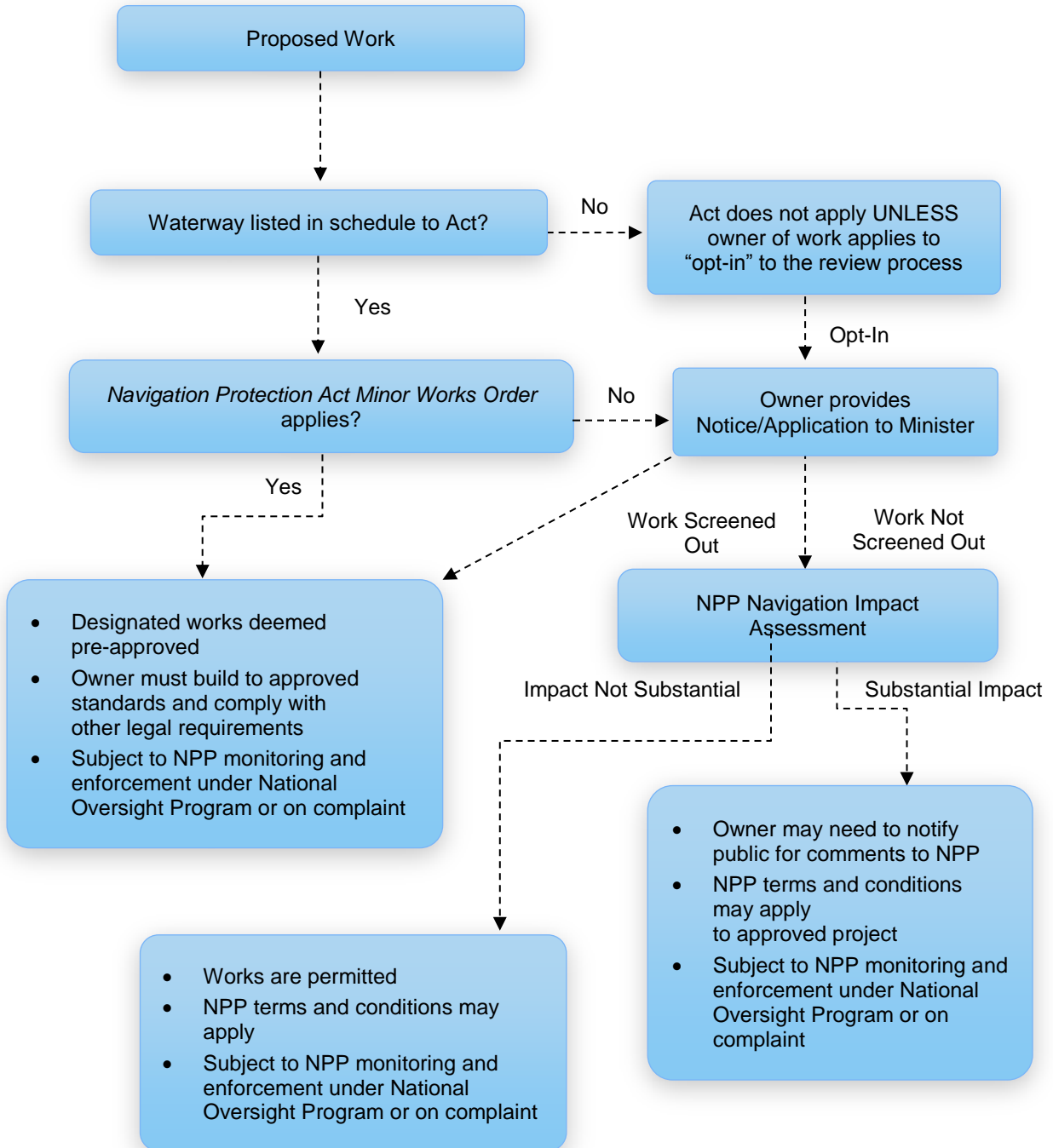
Recommendation 10

That the government consider the restoration of the ability of officers of Transport Canada's Navigation Protection Program to accept and address public complaints regarding the right to navigation as part of a larger and more comprehensive complaint resolution process. 12

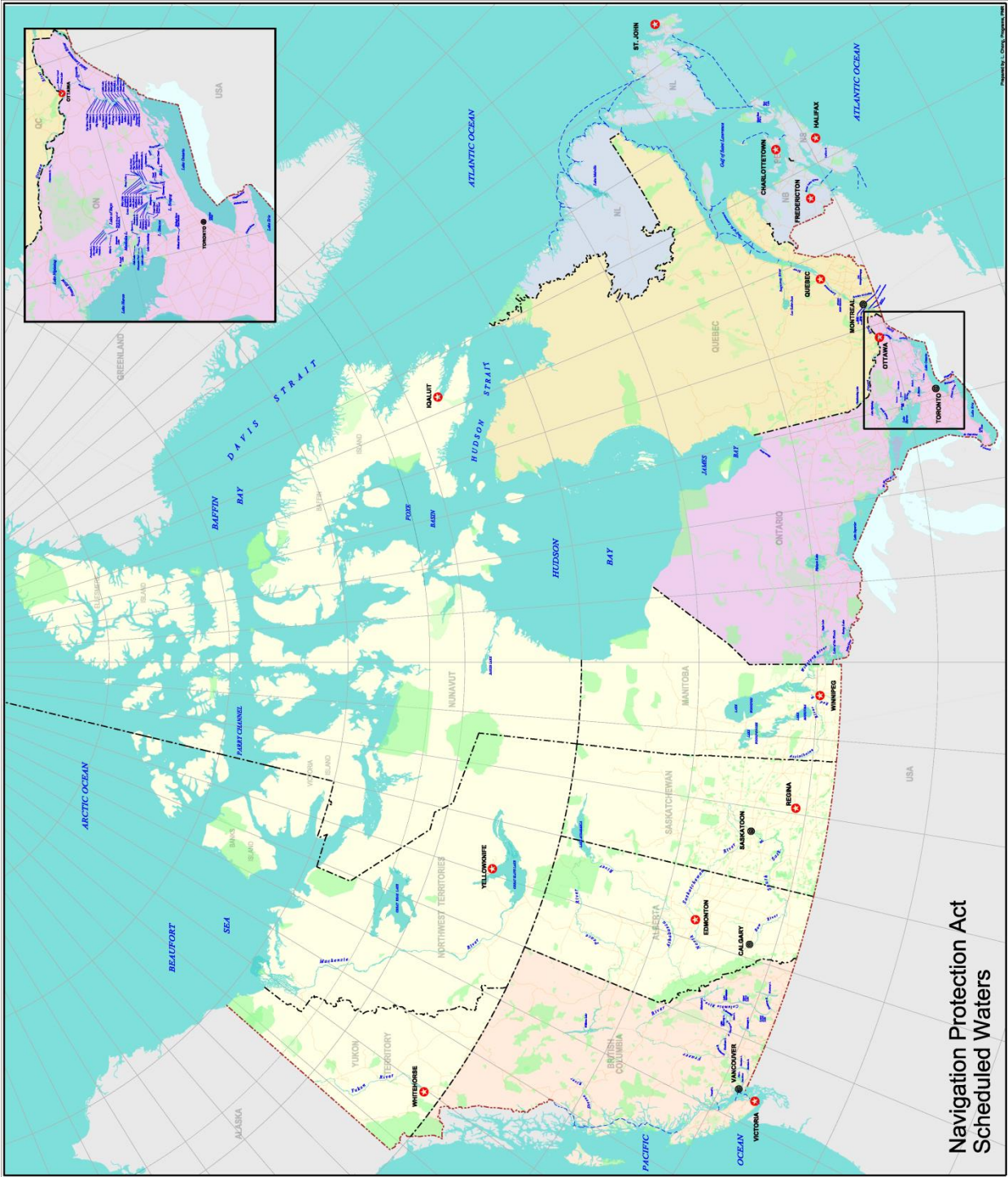
Recommendation 11

That the government ensure that the interests and concerns of stakeholders such as farmers and municipalities are considered when any changes to the NPA are enacted..... 12

Figure 1 – Navigation Protection Act Process for Works, 2014–Present



APPENDIX B SCHEDULED WATERS MAPS



LISTS OF SCHEDULED WATERS

Navigation Protection Act Map

Pacific Ocean	Océan Pacifique
British Columbia	Colombie-Britannique
Skeena River	Rivière Skeena
Williston Lake	Lac Williston
Fraser River	Fleuve Fraser
Victoria	Victoria
Vancouver	Vancouver
Powell L.	Lac Powell
Pitt L.	Lac Pitt
Pitt River	Rivière Pitt
Harrison L.	Lac Harrison
Harrison R.	Rivière Harrison
Thompson R.	Rivière Thompson
Kamloops L.	Lac Kamloops
S. Thompson R.	Rivière Thompson Sud
Little Shuswap L.	Petit lac Shuswap
Shuswap L.	Lac Shuswap
Mara L.	Lac Mara
Kinbasket L.	Lac Kinbasket
Columbia River	Fleuve Columbia
Lake Revelstoke	Lac Revelstoke
Upper Arrow Lake	Lac Arrow supérieur
Lower Arrow Lake	Lac Arrow inférieur
Kootenay R.	Rivière Kootenay
Kootenay L.	Lac Kootenay
Okanagan L.	Lac Okanagan
Yukon Territory	Yukon
Whitehorse	Whitehorse
Yukon River	Fleuve Yukon
Alaska	Alaska
Beaufort Sea	Mer de Beaufort
Northwest Territories	Territoires du Nord-Ouest
Yellowknife	Yellowknife
Mackenzie River	Fleuve Mackenzie
Great Slave Lake	Grand lac des Esclaves
Great Bear Lake	Grand lac de l'Ours
Alberta	Alberta
Edmonton	Edmonton
Calgary	Calgary
Peace River	Rivière de la Paix
Athabasca River	Rivière Athabasca
Lake Athabasca	Lac Athabasca

North Saskatchewan River	Rivière Saskatchewan Nord
Bow River	Rivière Bow
Saskatchewan	Saskatchewan
Saskatoon	Saskatoon
Regina	Regina
South Sask. R.	Rivière Saskatchewan Sud
Banks Island	Île Banks
Parry Channel	Chenal Parry
Victoria Island	Île Victoria
Arctic Ocean	Océan Arctique
Nunavut	Nunavut
Iqaluit	Iqaluit
Baker Lake	Lac Baker
Baffin Bay	Baie Baffin
Davis Strait	Détroit de Davis
Ellesmere Island	Île d'Ellesmere
Baffin Island	Île de Baffin
Hudson Strait	Détroit d'Hudson
Foxe Basin	Bassin de Foxe
Hudson Bay	Baie d'Hudson
James Bay	Baie James
Manitoba	Manitoba
Winnipeg	Winnipeg
Lake Winnipeg	Lac Winnipeg
Lake Winnipegosis	Lac Winnipegosis
Lake Manitoba	Lac Manitoba
Assiniboine River	Rivière Assiniboine
Red R.	Rivière Rouge
Winnipeg River	Rivière Winnipeg
Ontario	Ontario
Toronto	Toronto
Ottawa	Ottawa
Lake of the Woods	Lac des Bois
Rainy River	Rivière à la Pluie
Rainy Lake	Lac à la Pluie
Eagle Lake	Lac Eagle
Lake Superior	Lac Supérieur
Nipigon Lake	Lac Nipigon
Moose River	Rivière Moose
St. Marys River	Rivière Ste-Marie
Lake Huron	Lac Huron
St. Clair River	Rivière Sainte-Claire
Lake St. Clair	Lac Sainte-Claire
Detroit River	Rivière Détroit
Lake Erie	Lac Érié

Grand River	Rivière Grand
Welland C.	Canal Welland
Niagara R.	Rivière Niagara
Lake Ontario	Lac Ontario
L. Scugog	Lac Scugog
L. Simcoe	Lac Simcoe
Balsam L.	Lac Balsam
Severn R.	Rivière Severn
Muskoka L.	Lac Muskoka
Lake Huron	Lac Huron
St. Joseph Lake	Lac St-Joseph
Rosseau L.	Lac Rosseau
Vernon L.	Lac Vernon
Lake of Bays	Lac des Baies
French River	Rivière des Français
Lake Nipissing	Lac Nipissing
Cataraqui R.	Rivière Cataraqui
Ottawa River	Rivière des Outaouais
Rideau River	Rivière Rideau
Timiskaming Lake	Lac Témiscamingue
Quebec	Québec
Montreal	Montréal
Quebec	Québec
Canal de Beauharnois	Canal de Beauharnois
Lac des Deux Montagnes	Lac des Deux Montagnes
Lachine Canal	Canal de Lachine
Rivière Richelieu	Rivière Richelieu
Lac Memphrémagog	Lac Memphrémagog
Rivière des Prairies	Rivière des Prairies
Rivière des Mille-Iles	Rivière des Mille-Îles
Rivière Saint-Maurice	Rivière Saint-Maurice
Lawrence River	Fleuve Saint-Laurent
Lac Saint-Jean	Lac Saint-Jean
Saguenay River	Rivière Saguenay
Gulf of St. Lawrence	Golfe du Saint-Laurent
NB	N.-B.
Fredericton	Fredericton
Saint John River	Fleuve Saint-Jean
PEI	Î.-P.-É.
Charlottetown	Charlottetown
NS	N.-É.
Halifax	Halifax
LaHave R.	Rivière LaHave
Great Bras d'Or L.	Grand lac Bras d'Or
Bras d'Or Lake	Lac Bras d'Or

Atlantic Ocean	Océan Atlantique
NL	T.-N.-L.
St. John	St. John
Lake Melville	Lac Melville
Greenland	Groenland

Ontario Inset Map

Lake Huron	Lac Huron
French River	Rivière des Français
Lake Nipissing	Lac Nipissing
Cain Lake	Lac Cain
Gloucester Pool	Bassin Gloucester
Little Lake	Lac Little
St. Joseph Lake	Lac St-Joseph
Muskoka L.	Lac Muskoka
Peninsula L.	Lac Peninsula
The Canal	The Canal
Fairy L.	Lac Fairy
Vernon L.	Lac Vernon
Mary L.	Lac Mary
Rosseau Lake	Lac Rosseau
Severn R.	Rivière Severn
Lake Couchiching	Lac Couchiching
Holland River	Rivière Holland
Holland River East Branch	Bras est de la rivière Holland
ON	Ontario
Lake of Bays	Lac des Baies
North Branch of Muskoka R.	Bras nord de la rivière Muskoka
Sparrow L.	Lac Sparrow
Fenelon R.	Rivière Fenelon
Rosedale R.	Rivière Rosedale
Balsam L.	Lac Balsam
Cameron L.	Lac Cameron
Mitchell L.	Lac Mitchell
Canal. L.	Lac Canal
L. Simcoe	Lac Simcoe
Toronto	Toronto
Humber River	Rivière Humber
Grand River	Rivière Grand
Lake Erie	Lac Érié
Welland Canal	Canal Welland
Niagara River	Rivière Niagara
Lake Ontario	Lac Ontario
Lovesick L.	Lac Lovesick
Lower Buckhorn L.	Lac Lower Buckhorn

Big Bald L.	Lac Big Bald
Little Bald L.	Lac Little Bald
Buckhorn L.	Lac Buckhorn
Pigeon L.	Lac Pigeon
Pigeon R.	Rivière Pigeon
Sturgeon L.	Lac Sturgeon
Trent Canal	Canal Trent
Talbot R. / Trent Canal	Rivière Talbot/Canal Trent
L. Scugog	Lac Scugog
Scugog R.	Rivière Scugog
Ottawa River	Rivière des Outaouais
Petawawa R.	Rivière Petawawa
Stony Lake	Lac Stony
Duck Pond	Étang Duck
Big Duck Pond	Étang Big Duck
Upper Chemong L.	Lac Upper Chemong
Clear Lake	Lac Clair
Katchewanooka L.	Lac Katchewanooka
Otonabee River	Rivière Otonabee
Chemong L.	Lac Chemong
Trent Canal	Canal Trent
Rice L.	Lac Rice
Trent R./ C.	Rivière/canal Trent
Seymour L.	Lac Seymour
Trent River/Canal	Rivière/canal Trent
Murray Canal	Canal Murray
Tay River/Canal	Rivière/canal Tay
Lower Rideau L.	Lac Rideau inférieur
Adams L.	Lac Adams
Big Rideau L.	Grand lac Rideau
Lost L.	Lac Caché
Long Island L.	Lac Long Island
Upper Rideau L.	Lac Rideau supérieur
Stevens Cr.	Ruisseau Stevens
Pollywog L.	Lac Pollywog
Loon L.	Lac Loon
Mosquito L.	Lac Mosquito
Benson L.	Lac Benson
Indian L.	Lac Indian
Opinicon L.	Lac Opinicon
Cranesnest L.	Lac Cranesnest
Dog L.	Lac Dog
Cataraqui L.	Lac Cataraqui
Colonel By L.	Lac Colonel By
Ottawa	Ottawa

Rideau Canal	Canal Rideau
Dows Lake	Lac Dow
QC	Québec
Rideau River	Rivière Rideau
Kemptville Cr.	Ruisseau Kemptville
Little Lake	Lac Little
Newboro L.	Lac Newboro
Clear Lake	Lac Clair
Sand Lake	Lac Sand
Whitefish L.	Lac Whitefish
Little Cranberry L.	Lac Little Cranberry
Cranberry L.	Lac Cranberry
River Styx	Rivière Styx
Saint Lawrence River	Fleuve Saint-Laurent
USA	États-Unis

APPENDIX C LIST OF WITNESSES

Organizations and Individuals	Date	Meeting
<p>Department of Transport Hon. Marc Garneau, P.C., M.P., Minister of Transport Catherine Higgs, Assistant Deputy Minister, Programs Nancy Harris, Executive Director, Regulatory Stewardship and Aboriginal Affairs</p>	2016/10/04	25
<p>Alberta Association of Municipal Districts and Counties Al Kemmere, President</p>	2016/10/20	27
<p>Canadian Construction Association Michael Atkinson, President</p>		
<p>Canadian Energy Pipeline Association Chris J. Bloomer</p>		
<p>Fédération québécoise des municipalités Scott Pearce, Administrator</p>		
<p>Municipalité régionale du Comté d'Argenteuil Agnès Grondin, Environmental Advisor</p>		
<p>Saskatchewan Association of Rural Municipalities Raymond Orb, President</p>		
<p>Fraser Basin Council David Marshall, Executive Director</p>	2016/10/25	28
<p>Council of Canadians Emma Lui, Water Campaigner</p>	2016/10/27	29
<p>Ontario Federation of Anglers and Hunters Greg Farrant, Manager, Government Affairs and Policy</p>		
<p>Paddle Canada Jay Morrison, Director, Quebec Branch</p>		
<p>Congress of Aboriginal Peoples Kim Beaudin, National Vice-Chief</p>	2016/11/15	32
<p>Métis National Council Kyle Vermette</p>		

Organizations and Individuals	Date	Meeting
Nunatsiavut Government	2016/11/15	32
Andrea Hoyt, Environmental Assessment Manager, Department of Lands and Natural Resources		
Council of Canadians	2016/12/08	39
Emma Lui, Water Campaigner		
As an individual		
Adrienne Davidson, Fulbright Visiting Researcher, Center for Canadian Studies at Johns Hopkins School of Advanced International Studies		

APPENDIX D LIST OF BRIEFS

Organizations and Individuals

Aamjiwnaang First Nation

Abénakis Band Council of Odanak

Abénakis Band Council of Wôlinak

Agence Mamu Innu Kaikusseht

Alberta Association of Municipal Districts and Counties

Altmann, Alexander

Anderman, Christina

Andrighetti, Laura

Assembly of Manitoba Chiefs

Assembly of Nova Scotia Mi'kmaq Chiefs

Athabasca Chipewyan First Nation

Atherton, Alison

Atherton, Ian

Badger, Austin

Baker, Kelsey

Bassett, Theran

Beam, Chloe

Becker, Justin

Biigtigong Nishnaabeg

Black Lake Denesuline First Nation

Bliedung, Heidi A.E.

Blueberry River First Nations

Organizations and Individuals

Boudreau, Carmen

Bourassa and family, Lawna

Broderick, Dan

Brunet, Al

Bruyere, Ronald

Buchanan, Maureen

Burningham, Jeremy

Burton-Roche, Marlie

Cameco Corporation

Canadian Association of Petroleum Producers

Canadian Bar Association - Maritime Law Section

Canadian Energy Pipeline Association

Canoe Kayak Nova Scotia

Cass, Robert

Cassell, Laurie

Cavallin, Alivia

Cayoose Creek Indian Band

City of Calgary

Clifford, Ann H.

Colbeck, Lucas

Cold Lake First Nations

Conklin Métis Local 193

Conte, Angelina

Cornwell, Betsy

Organizations and Individuals

Council of B.C. Yacht Clubs

Council of Canadians

Council of Canadians - Campbell River Chapter

Council of Canadians - Comox Valley Chapter

Council of Canadians - Kent County NB Chapter

Council of Canadians - Northwest Territories Chapters

Council of Canadians - Saint John Chapter

Council of Canadians - South Shore Chapter

Council of Canadians - Williams Lake Chapter

Council of the Haida Nation

Council of the Innu First Nation of Essipit

Council of the Innu First Nation of Nutashkuan

Crookall, Sarah

Cunningham, Arctica

Dale, Chelsea

Day, R. Chadwick

Deegan, G.

Degagne, Leah

DeLorey, Rebecca

Dene Tha First Nation

Desorcy, Gloria

Devauld, Krystal

Dowell, Carolyn

Easton, Linda

Organizations and Individuals

Ecojustice Canada

Elford, Dale

Evans, Lorna Doreen Elizabeth

Fan, Ming Sam

Fast, Heather

Federation of Canadian Municipalities

Federation of Sovereign Indigenous Nations

Ferguson, Adam

Fields, Sandra

First Nations Fisheries Council of British Columbia

Fitzpatrick, Patricia

Fond du Lac Denesuline First Nation

Forest Products Association of Canada

Forhan, Tigan

Fort Chipewyan Métis Local No 125

Fort McKay First Nation

Fort McKay Métis Local No 63

Fort McMurray Métis Local No 1935

Fox, Patricia

Gardiner, Barb

Gardner, Victoria

Gerry, Graham

Girvan, Scott

Gitxaala Nation

Organizations and Individuals

Glawdecki, Teresa

Goalder, Don G.

Goldenberg, Trudy

Government of the Northwest Territories

Government of Yukon

Graham, Julie

Grand Council of the Crees (Eeyou Istchee)

Grand Council Treaty No. 3

Grant, Eleanor

Gutwillinger, Danielle

Gwich'in Tribal Council

Hahn, D.

Hall, Sharon

Hare, Marnie

Harms, Petra

Hartman, Ruth

Hatchet Lake Denesuline First Nation

Hay, Marilyn

Hazan, Ariel

Heiltsuk Nation

Hunter, Latham

Huron-Wendat First Nation Council

Hutchinson, David

Imperial Oil Limited

Organizations and Individuals

Inuit of Nunavik

James Bay Advisory Committee on the Environment

Javid, Mavaddat

Jonah, Amy

Jones, Brad

Jones, Laura

Juurlink, Bernard H.J.

Kebaowek First Nation

Keirstead, John

Kitasoo/Xai'xais First Nation

Kitsumkalum Indian Band

Klaue, Rudy

Kozachenko, Chantel

Lake Ontario Waterkeeper

Lake Winnipeg Indigenous Collective

Laporte, Bob

Leach, John

Lee, Johnny

Lennon, Aleyah Erin

L'Heureux, Johanne

Listuguj Mi'gmaq Government

Little Campbell Watershed Society

Lower Fraser Fisheries Alliance

Luutkudziiwus

Organizations and Individuals

Lyackson First Nation

Maas, Katherine

MacDougall, Julia

MacGillivray, Leah

Mackenzie, Rosemary

Maliseet Nation of New Brunswick

Manitoba Infrastructure

Manitoba Metis Federation Inc.

Marion, Monique

May, Elizabeth

Mayes, Nigel

McColl, Jeff

McGregor, Brian

McKay, Sarah

McKee, Jake

McLeod, Ezekiel

Métis Nation British Columbia

Métis Nation of Ontario

Mi'gmaq Maliseet Aboriginal Fisheries Management Association

Migmawe'I Tplu'taqnn

Mikisew Cree First Nation

Mi'kmaq Confederacy of Prince Edward Island

Mining Watch Canada

Mohawk Council of Kahnawake

Organizations and Individuals

Morrison, Ron

Mushkegowuk Council

Musqueam Indian Band

Nagy, Mike

Naskapi Nation of Kawawachikamach

Nayler, Michael S.

Neilsen, Janet

Norman, Kyle

Northern Secwepemc te Qelmucw

NunatuKavut Community Council

Oakes, Nancy

Okanagan Nation Alliance

Ontario Rivers Alliance

Ottawa Field-Naturalists' Club

Panet, John

Poon, David

Pratt, Bethany

Qu'Appelle Valley Environmental Association

Quetico Foundation

Q'ul-Lhanumutsun Aquatic Resources Society

Racey, Kate

Ransom, Peggy

Rebner, Edwin

Rebordosa, Linda

Organizations and Individuals

Reid, Travis

Reist, Addison

Rilk, Antje

Rivershed Society of British Columbia

Robson, Sharon

Rogers, Kasey

Rowson, Mackenzie

Ruttan, Anna

Sacco, Sandrina

Sahtu Renewable Resources Board

Santos, Joshua

Saskatchewan Association of Rural Municipalities

Saskatchewan Ministry of Highways and Infrastructure

Scull, John

Sharpe, Emma

Six Nations of the Grand River

Southern Chiefs' Organization Inc.

Squamish First Nation

Stevenson, Sheila

Stoney Nakoda First Nation

Stswecem'c Xgat'tem First Nation

Suffling, Roger

Sumas First Nation

Sunshine, Rafe

Organizations and Individuals

Taykwa Tagamou Nation

Te'mexw Treaty Association

Terry, Susan

Thompson, Leigh

Tlicho Government

Tobiasz, Anna

Treloar, Grant

Truyens, Ann

Tsai, Anthony

Tsilhqot'in National Government

Tsleil-Waututh Nation

Union of British Columbia Indian Chiefs

Varga, Dianne

Wabauskang First Nation

Waldie, Matthew

Walker, Teresa Lee

Waterloo Region Nature

Watershed Watch Salmon Society

West Coast Environmental Law

Wet'suwet'en

White, Eleanor E.

White, Erinne

Wilderness Canoe Association

Wilderness Committee

Organizations and Individuals

Wimbush, Jackie

Windrim, Mike

Wolf Lake First Nation

Woodley, Kathie

Woychesko, Louise

Xaxli'p First Nation

Ya'thi Néné Lands and Resource Office

Yuan, Jiachen

Yukon Conservation Society

REQUEST FOR GOVERNMENT RESPONSE

Pursuant to Standing Order 109, the Committee requests that the government table a comprehensive response to this Report.

A copy of the relevant Minutes of Proceedings ([Meetings Nos. 25, 26, 27, 29, 32, 39, 42, 49 and 50](#)) is tabled.

Respectfully submitted,

Hon. Judy A. Sgro
Chair

The Conservative Party Members of the Standing Committee on Transport, Infrastructure and Communities unequivocally do not support the committee report on the review of the Navigation Protection Act.

This dissenting report will outline how the study came about, Transport Canada's interference in the committee process, what evidence was heard, and the contradictory recommendations that do not draw their inspiration from any of the evidence that the committee heard.

How this study came about

From its inception, the review of the Navigation Protection Act was disingenuous. The committee was asked to consider future amendments to the Navigation Protection Act without being told what those future amendments would be.

A number of witnesses, including the Métis National Council, noted with concern the structural problem of being asked to comment on changes to legislation that have not yet been announced. They remarked that "the opportunity to comment doesn't occur before something happens, but after the fact."

The outcome of the committee's review of the Navigation Protection Act is already pre-determined and the actions the Minister of Transport will take have been set in stone long before the committee even began its study. Even the timeline for this entire review has been tightly scripted.

On June 20th 2016, the Minister of Transport and the Minister of Fisheries and Oceans wrote to TRAN requesting that the committee study the Navigation Protection Act. This study was to contribute to the Minister's mandate letter commitment concerning the Navigation Protection Act to "*restore lost protections and incorporate modern safeguards*".

In order to fulfill the Liberal timeline, it was asked that the study be completed by early 2017.

There was no ambiguity in these instructions.

Even before the committee met to discuss whether it would conduct a review of the Navigation Protection Act, the media reported that the then Parliamentary Secretary, Kate Young, indicated that the Committee would undertake this review and a Transport Canada Official stated that the committee would report back to Transport Canada by early spring 2017.

Not only did the Government dictate what the committee should do, but it gave the committee a compressed timeline to report back. This compressed timeline became the

source of complaint from many stakeholder who wanted to participate, but could not under the timelines set by the government.

This entire exercise was a screen for the Minister to make unilateral changes to the legislation under the guise of having consulted Parliament.

Transport Canada's interference in the committee process

Beyond dictating the terms of the study, this committee study was also exceptional in that Transport Canada directly intervened in the committee process by directing witnesses to submit briefs to the committee, and provided them with funding to do so.

In a letter to the Hiltuk First Nations, Transport Canada Deputy Minister encouraged them to provide testimony to the committee and indicated that his department would encourage the committee to listen.

"We will contact and encourage the committee to listen to what the Coastal First Nations and the Hiltuk First Nation have to say. A member from your organization could still take the opportunity to reiterate your interest in giving testimony before the committee."

This is important. It is not for Transport Canada to determine or influence what witnesses the committee hears from. That responsibility belongs to the Members who sit on that committee.

Furthermore, many of these submissions to the committee were contingent on approval of participant funding from Transport Canada's participant funding programs.

Typically, committee members choose what witnesses they want to hear from and do not under any circumstances pay for witness testimony beyond reasonable expenses for travel and accommodation.

The government had a major role in determining what evidence the committee received because groups that were approved for Transport Canada Participant funding were more likely to submit evidence.

As Transport Canada was running a parallel review of the Navigation Protection Act, it is a normal practice for them to be disbursing participant funding to encourage the participation of groups that are unlikely to come forward to share their opinions as part of their review process.

But because it is critical that Parliament remain independent from government, participant funding from a government department has never been used to facilitate participation in the work of a parliamentary committee.

In the long term, the precedent the government has set with its complete disregard for the independence of a parliamentary committee, whether by dictating a committee's agenda or by choosing what witnesses the committee hears from may have a long term negative impact once this review is complete.

What the committee heard

The Navigation Protection Act was amended for the first time in several decades in June 2009 because project proponents, whether rural municipalities or cottagers, faced increased costs, project delays, and unnecessary red tape when planning, designing, and constructing critical infrastructure projects near and around bodies of water.

These amendments gave the government the authority to pre-approve certain types of works in order to streamline the construction of important works.

The *Navigable Waters Protection Act* was amended again in 2012 to remove the federal requirement to accommodate non-existent public water travel on waterways such as flooded fields, seasonal streams, and other smaller bodies of water that have never historically seen navigation.

This requirement to protect every single body of water for navigation made some sense in 1882 when the act was created but over time, as the means for transportation have evolved, the need for ensuring the passage of canoes has decreased.

Prior to the 2012 amendments, all 17,000 named waterways and thousands of unnamed waterways in Canada were subject to the Navigable Waters Protection Act. In effect, this meant that Transport Canada first had to verify that the construction of any work would not affect the navigability of the waterway, even if that waterway had never seen navigation.

As a consequence, municipalities and other project proponents were told by Transport Canada to redesign and alter their projects to win regulatory approval, which resulted in delays, and increased costs, regardless of whether the potentially affected body of water was used or would ever be used for navigation.

The NWPA was so vast in scope that it was impossible for Transport Canada to give its approval for projects within reasonable timelines, as was testified by Transport Canada officials: "it was virtually impossible for the department to implement the act for such a broad scope."

The 2012 changes to the Navigable Waters Protection Act introduced a schedule of waterways that would be protected for navigation. This schedule was drafted taking into consideration historical shipping data and future population trends so that navigation would be protected.

Seasonal streams and flooded fields were not included in the schedule as these had not and never will be used for navigation.

If a waterway that was not listed in the schedule began to see navigation – the Governor in Council could add any waterway to the schedule through the Canada Gazette.

Subsection 29(2) of the Act is very clear:

The Governor in Council may, by regulation, amend the schedule by adding to it a reference to a navigable water if the Governor in Council is satisfied that the addition

- *(a) is in the national or regional economic interest;*
- *(b) is in the public interest; or*
- *(c) was requested by a local authority.*

These changes were sound policy that sped up project approvals while ensuring that the common law right to navigation was protected.

Throughout the committee's work – not one witness could name a single waterway where navigation was no longer possible because of the 2012 changes to the Act.

So why the government is steadfast in its determination to gut these practical modernizations to the act remains a mystery.

Recommendations

The committee's recommendations are contradictory. They are not based on any testimony that the committee heard. For all intents and purposes, the majority on the committee synthesized what they wished witnesses has said, and made that the basis for the report.

Recommendation #1 recommends that the government maintain the schedule, while recommendation #9 recommends the creation of an administrative tribunal within Transport Canada to adjudicate complaints related to all waterways, regardless of whether they are on the schedule or not.

Therefore recommendation #9 is basically a backdoor way of getting rid of the schedule by making it irrelevant.

This administrative tribunal would further muddy the waters because the tribunal would be able to order a project proponent to stop construction upon receipt of a complaint.

Under this recommended system– a municipality looking to build a work near a waterway, that is presently on the schedule, would first have to get approval from

Transport Canada to begin construction, and then hope that no opponent of the project files a complaint to the tribunal to stop it.

This would duplicate processes for both Transport Canada and project proponents.

Furthermore, the governing party has consistently misunderstood that the Minister has the power to add any waterway he/she chooses to the schedule as highlighted by the following recommendations to:

“Rapidly improve the process of adding waterways to the schedule” as recommendation #1 states or “update the schedule in consultation with First Nations, provinces, territories and other relevant stakeholders” as is stated in recommendation #5. This makes no sense as the Governor in Council already has the power to add as many waterways as it chooses through regulation.

The criteria that Cabinet must consider before adding a waterway to the schedule is quite broad and not an impediment should the government see a public policy justification for increasing the number of waterways included in the schedule.

Recommendations #1 and #5 also contradict testimony made by then Parliamentary Secretary to the Minister of Transport, Kate Young, who stated that adding more waterways to the schedule in the manner described by these recommendations was unwise: “I think one of the concerns would be that to be put in a position to just add rivers, streams, or whatever on an ad hoc basis probably isn't the best way to handle such an important act”.

Conclusion

In conclusion, none of the recommendations made by the governing party will improve the NPA. If implemented, these recommendations will simply add additional layers of bureaucratic red tape to an already challenging process of building works near waterways.

It is the hope of the Conservative Party that the Government will note the testimony of numerous witnesses who indicated that there has been no proof of navigation on waterways being impeded; only a better more efficient process for approving works.

The goal of the *Act* is, and should remain to protect navigation, while avoiding any unnecessary negative economic impacts on municipalities and other proponents of works being built near waterways.

NDP Dissenting Opinion

Conservative legacy

When it adopted Bill C-45, the previous conservative government introduced various disastrous changes to the *Navigable Waters Protection Act* (NWPA). Passing this bill was part of the Conservative agenda to weaken environmental protection measures with a view to fostering the accelerated development of the fossil fuel sector.

The stated objective of these changes is to refocus the process of approving work on navigable waters to projects that are likely to have a greater impact on navigation activities. By eliminating the automatic triggering of environmental assessments of affected structures, navigable waters, the new regime focuses solely on the protection of navigation. This objective is reflected in the name change of the NWPA, which is now called the Protection of Navigation Act (PNA).

Under the new regime, environmental and regulatory protections were stripped from 99% of navigable waterways in Canada. For example, building a bridge over a navigable waterway no longer requires an environmental assessment. In addition, the project proponent no longer has to notify the government if the project will impede navigation. Furthermore, the project proponent is no longer required to obtain authorization from the Minister of Transport before beginning construction.

The other alarming change introduced by the Conservatives was to remove the automatic trigger for an environmental assessment if a project interfered with navigable waters. In addition to the works designated by the Minister and pipelines assessed by the National Energy Board (NEB), all other infrastructure projects affecting navigable waters are exempted from an environmental assessment.

New Democrats were vehemently opposed to these changes and took action, calling for these protections to be reinstated.

At the time, the Liberals also criticized the Conservatives' policy. The now-President of the Treasury Board, Scott Brison, said that these changes were "*catastrophic*" and that "*the Conservatives are imperilling the health of our lakes and rivers.*" MP Francis Scarpaleggia, former Liberal Critic for "Water Policy", said that, "*as an MP from Quebec, he was disappointed to learn that only four lakes in Quebec would be protected under this new legislation.*"

Another broken Liberal promise

Despite their opposition to the Conservative policies and a campaign promise to reinstate the protection measures, the Liberals have once again shown they cannot be trusted. We were disappointed to see that the Liberal MPs are recommending that the federal government maintain the schedule, which will keep 99% of lakes and rivers unprotected. In addition, the Liberals are refusing to reinstate the environmental assessment requirement for infrastructure projects that affect these waterways by refusing to restart the automatic triggering of environmental assessments.

By recommending that the list of scheduled waters be maintained and improved, the Liberals are breaking their promise but do not clearly support their recommendation on testimony heard by the Committee. The evidence heard during the study highlights two distinct positions. On the one hand, witnesses called for the deletion of the schedule and reinstatement of the protections eliminated while others advocated maintaining the current legislation. The Liberal's so-called consensual recommendations are, in fact, a smokescreen of all the progressives who believed in their electoral commitment to protect our navigable.

The Liberals' broken promise also affects the rights of First Nations. Kim Beaudin, National Vice-Chief of the Congress of Aboriginal Peoples, said that "*the Navigation Protection Act changes are important to indigenous people because they leave millions of water bodies essentially unregulated. With the majority of navigational waters removed from the purview of the act, there is no government involvement in most development projects, and therefore nothing to trigger a duty to consult.*"

NDP Recommendations

Recommendation 1: We recommend that the federal government delete the minor works and waters order.

In 2009, the Liberals and the Conservatives joined forces to push through the first measures that would weaken the *Navigable Waters Protection Act*. Supposedly these changes were made in a bid to revitalize public and private investment in works on navigable waterways: the government and some stakeholders said that the delays and uncertainties resulting from the existing approvals process would discourage public and private investment in structures on navigable waters.

However, the findings of Prof. Adrienne Davidson's research did not support the conclusion favoured by the Liberals and the Conservatives. Ms. Davidson cited her study "*Reducing Federal Monitoring of Aquatic Systems in Canada: Implications of New Navigational Protection*": "*With respect to reducing red tape, this was one of the pieces we were quite interested in looking at in our research projects. It was part of the rationale utilized in the dialogue around the discussions of the NPA [Navigation Protection Act] changes. I think it is*

important to note that the number of NWPA-triggered EAs [Environmental Assessments] accounts for only approximately 5.8% of all of the federal EAs in that 10-year period.” According to this study, 53% of the environmental assessments initiated under the Navigable Waters Protection Act were completed within six months. Therefore, these environmental assessments did not require much time and were overwhelmingly approved for projects.

Recommendation 2: We recommend that the federal government restore all of the protections eliminated to navigable waters abolished under the 2012 budget implementation bills.

Once the Conservatives had a majority government, they continued their efforts and almost entirely eliminated protections for navigable waters. Later, in 2011, we learned that a group of industry representatives from the energy sector had been calling on the Harper government to make changes to legislation that protected waterways. One year later, the Conservatives stripped 99% of navigable waterways of their regulatory and environmental protection measures. The Liberal government now has the opportunity to clean up the mess caused by the Conservatives, but it is choosing to continue catering to these same lobbyists instead of protecting First Nations and environmental rights. That is why the NDP is calling on the federal government to remove the schedule to the *Navigable Waters Protection Act* and to reinstate all of the protection measures that were eliminated.

According to Ms. Andrea Hoyt, Nunatsiavut Government Environmental Assessment Manager, *“The Labrador Inuit land claims agreement states that the precautionary principle will be used to make resource management decisions. Removing protection from 99.99% of our waters does not reflect the precautionary principle or responsible environmental management. The Nunatsiavut Government asks that the Government of Canada restore all lost protections to waters in Canada, including navigable waters in Nunatsiavut, and that if any changes are proposed to that regime—the regime of 2005 under which our land claims agreement was signed—that the Government of Canada then consult with Inuit on those changes and accommodate the rights of Inuit”*.

Recommendation 3 : We recommend that the federal government include Transport Canada in the decision-making process for environmental assessments for pipelines that cross navigable waterways.

A number of briefs and witnesses mentioned the National Energy Board’s lack of credibility as regards the environmental assessments it provides for pipelines that cross navigable waters. Emma Lui said that *“it’s no secret that there are a lot of concerns about the National Energy Board and its being possibly co-opted by the energy industry, which raises questions and concerns about its actual independence.”*

That is why we are recommending that the federal government include Transport Canada in the pipeline approvals process when it affects navigable waters. Emma Lui said *“I think the federal government really does have the responsibility to do this and really needs to think about how navigable waterways are impacted. I would hate to see the department not have a role or responsibility in protecting these waterways.”* By including Transport Canada in the decision-making process, the Minister of Transport will be involved in the environmental assessment process and will be accountable. In addition, we believe that, through its Navigation Protection Program, Transport Canada has the expertise required to assess the environmental impact that pipelines would have on navigable waterways.

Recommendation 4: We recommend that the federal government expand the mandate of Transport Canada’s Navigation Protection Program so that officers are once again responsible for accepting and dealing with complaints from the public on issues involving the right to navigate and environmental protection.

By establishing a list of “protected” waterways, the Harper government passed on the responsibility to enforce the right to navigate to provinces, municipalities and the general public. If a bridge or a dam would affect a citizen’s kayak school on a river, it is up to the citizen to go before the court and ask to have that waterway protected. Most citizens do not have the means to pay the costs associated with taking a large project proponent to court. According to Greg Farrant, the Manager of Government Affairs and Policy for the Ontario Federation of Anglers and Hunters, *“It is burdensome for an individual to get these issues before the courts. Again, I stress the fact that in going to court on an issue like this, you’re going to court on something that has already occurred as opposed to trying to have something that might occur be stopped or reviewed or looked at again.”* On this basis, we believe it is time for the federal government to fulfill its responsibilities to protect the right to navigate so that citizens are not left to take the project proponents to court on their own.

Conclusion

In summary, the NDP recommends that the federal government eliminate the secondary works and waters order so that all projects are assessed. In addition, we recommend the suppression of the Schedule to the Protection of Navigation Act to ensure that all navigable waters are protected.

We also propose to include Transport Canada in the assessment of pipelines affecting navigable waters so that the Minister of Transport is accountable.

We propose to the federal government to re-establish Transport Canada's mandate to deal with public complaints about the protection of the right to navigation.