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Ecojustice Memorandum

Re: Proposed amendments to the *Navigable Waters Protection Act* and the erosion of public navigation rights on Canadian waterways

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SUMMARY:

The *Budget Implementation Act, 2009*¹, an omnibus bill tabled by the Conservative Government on Friday, February 6, 2009, proposes a radical transformation of the regime that protects the navigability of Canada's rivers and streams. The proposed amendments to the *Navigable Waters Protection Act*² (NWPA) would create a "tiered" or "class system" for Canadian navigable waterways, granting the Government a discretionary authority to identify waterways deemed worthy and unworthy of federal protection. Those waterways that are declassified would not be subject to the existing NWPA requirement that all works impacting navigable waters undergo an approval process. This approval process, which includes public notification and which triggers a federal environmental assessment, is at the core of the federal government's clear constitutional jurisdiction over navigation and pursuant to s. 91(10) of the *Constitution Act, 1867*. The amendments are intended to limit the applicability of the Act and hasten the approval process for works that interfere with the right of navigation. In the opinion of the author, these changes are an unnecessary form of deregulation that would undermine the government's public trust duty to protect Canadians' right to navigate waterways in a fair and transparent manner.

These proposed NWPA amendments will:

- **Limit navigation rights** by impacting the long-standing right to navigate and enjoy free access to Canada's waterways;
- **Deregulate the protection of navigable waterways** by significantly narrowing the classes of waterways protected under the Act, and by granting both the

¹ Budget Implementation Act, 2009, ss. 317 – 341.

² Navigable Waters Protection Act (R.S., 1985, c. N-22)



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Cabinet and the Transport Minister unfettered discretion to further exempt certain “classes of works” and “classes of waterways” from the approvals process under the Act;

- **Reduce transparency and accountability** by eliminating the need for public notification and consultation on all projects that the Government determines not to “substantially” interfere with navigation.

DISCUSSION:

- A) The purpose of the NWPA is to protect the long-standing public right of navigation under Canadian law. Weakening the federal approval process in the NWPA would reduce Canadians’ right to navigate and freely access clean, unobstructed waterways.***

Despite the fact that the NWPA articulates no statutory objective or purpose, and has no preamble through which an objective or purpose might be inferred, it is plain from the full title of the law (*An Act respecting the protection of navigable waters*) that the primary purpose of the NWPA is to protect the public right of navigation. Although the public right of navigation is protected more generally at common law, the NWPA is the most comprehensive articulation of this right and of the government’s responsibility to protect this right.

Navigable waters are not fully defined by the Act, but the Government has adopted a very broad definition for the purposes of administering the Act:

Navigable Waters include any body of water capable, in its natural state, of being navigated by floating vessels of any description for the purpose of transportation, recreation or commerce; it also includes a canal and any other body of water created or altered for public use, as well as any waterway where the public right of navigation exists by dedication of the waterway for public purposes, or by the public having acquired the right to navigate through long use.³

³ “Navigable Water Protection Act”, Fisheries and Oceans Canada, online:

<http://www.marinfo.gc.ca/en/Services/ppen_loi.asp>. Note that this definition reflects the fact that the right to navigation is long-standing right rooted in the Roman and Anglo-Saxon legal doctrine of the “public trust”. Broadly speaking, the public trust doctrine articulates the government’s responsibility to preserve the collective interest of the people of Canada in the quality/availability of the environment for the benefit of present and future generations. The amendments to the NWPA proposed in the *Budget Implementation Act*, however, compromise this public trust by allowing the Minister to approve works that would damage waterways and diminish free access to our natural environment without consulting the very public it is entrusted to protect.

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The most important mechanism through which this navigation right is protected is through the mandatory approval process that is required before any work is “built or placed in, on, over, under, through or across any navigable water” pursuant to section 5(1) of the existing NWPA. Thus, structures that interfere with navigation (e.g. dams, bridges and piers) require formal approvals from the Minister of Transport, pursuant to Order in Council 2004-0322 dated March 29, 2004.⁴

From an environmental perspective, the NWPA approval process is significant because it triggers a federal environmental assessment (EA) pursuant to s. 5(1)(d) of the *Canadian Environmental Assessment Act* (CEAA).⁵ Any work considered for approval under the NWPA triggers a requirement for an EA when the federal authority (Transport Canada) exercises a regulatory duty in relation to a project by issuing a permit or license that is included in the *Law List Regulations*. The relevant sections of the NWPA are listed in Schedule 1, Part I, Item 11 of the CEAA *Law List Regulations*. Thus, while there are no specific provisions in the NWPA that relate to environmental assessments, the existence of an NWPA approval process is what opens the door to a federal EA.

It should also be noted that, despite the fact that the purpose of the NWPA is not to achieve environmental protection *per se*, the stated aim of Navigable Waters Protection Program on Transport Canada’s website is the “protection of the environment”.⁶ Certainly, there is no denying the fact that the protection of navigation rights has historically served as an indirect federal tool to achieve environmental protection. Indeed, as noted environmental law scholar, Professor Jamie Benedickson points out, the public right of navigation served as the justificatory vehicle to achieve the protection of Canada’s rivers from the obstruction and pollution by debris (sawdust) during 19th and early 20th C industrial logging operations.⁷ The interrelationship between navigation and the environment is such that the protection of the former consistently promotes the health of the latter.

B) The proposed amendments compromise the right of navigation by vesting exceptionally broad discretionary authority in the Minister or Cabinet to exclude certain classes of “works” and to exclude certain classes of navigable waterways from the approval process, without subjecting such

⁴ “Policy; Transportation in Canada 2003”, Transport Canada, online: <http://www.tc.gc.ca/pol/en/report/anre2004/5_e.htm>.

⁵ Canadian Environmental Assessment Act (1992, c. 37, C-15.2), sections 5(1)(d), 59, and *Law List Regulations* s. 11(a).

⁶ See online: <<http://www.tc.gc.ca/marinesafety/oep/nwpp/menu.htm>>

⁷ Benedickson, Jamie. *The Culture of Flushing: A Social and Legal History of Sewage*, UBC Press, 2007.



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exclusion decisions to any objective criteria, environmental assessment and/or public notification and consultation.

As mentioned above, the current NWPA requires approvals for any “work”, defined in s. 3 as including bridges, booms, dams, wharfs, docks, piers, tunnels, pipes, telegraph or power cables, etc. and other similar projects that may interfere with navigation. The proposed amendments establish a new definition of a “work” which is limited to only those projects that “interfere with navigation” (*BIA* s. 317). The Minister decides which projects will not interfere with navigation and will fall outside the scope of the NWPA approval process.

It is important to note that this new definition is unnecessary because the current act provides an exemption for works that do not “interfere substantially with navigation” (*NWPA*, s. 5(2)). This exemption power is limited insofar as there can be no exemptions for bridges, booms, dams or causeways. This limited exemption power is appropriate because such works will always have a significant impact on navigation rights.

The proposed exemption powers that have been integrated within the *Budget Implementation Act* (*BIA* s. 321) significantly broaden the discretionary authority of both the Transport Minister and the Cabinet. The Cabinet (by regulation) or Minister (by order) would be empowered to exempt “classes or works” (e.g. small dams) or “classes of navigable waters” (e.g. small creeks) from the approval requirement (*BIA* ss. 327-328). Unlike the existing NWPA, these amendments do not establish any criteria or public interest limitations on this exemption power. Bluntly put, with the stroke of a pen, federal politicians will have unfettered discretion to identify and exempt projects with adverse impacts on navigation rights (and concomitant environmental damage), and to allow these projects to proceed without a modicum of civil service oversight. Even if a work or obstacle completely obstructs a waterway, if it falls within a class defined by the Minister’s own criteria, no approval will be required, no environmental assessment will be triggered, and the public will not be consulted.

C) The amendments will allow the Minister to “rush through” development projects on navigable waters without public consultation

The current NWPA requires that the public be notified of all proposed works seeking approval by advertisement in the *Canada Gazette* and a minimum of two newspapers (s. 9(3)). Copies of the plans and site description must be deposited in the office of the registrar of deeds or the land titles office to allow public access. However, the proposed amendments significantly narrow the requirement for public notification to



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only those works that substantially interfere with navigation (BIA, s. 324). In addition, for these works that are deemed to substantially interfere with navigation, it will be sufficient to advertise in a single newspaper.

Therefore, under the proposed new regime, it is quite possible that the majority of works affecting navigable waterways will be exempt from any public consultation even though they admittedly interfere with navigation. As a result of the exemption powers related to approvals, the classes of navigable waterways and works that trigger public consultation will be at the sole discretion of the Minister.

It is important to recognize that the proposed amendments would allow for a radical use of ministerial orders, never before considered in the NWPA. The current Act allows ministerial orders to be used only in situations where immediate action is required to deal with a significant risk, direct or indirect, to safety and security. The interim orders remain in effect for a limited duration, must be tabled in each House of Parliament within 15 days, and are meant to be replaced by a regulation to the same effect if it is intended as a longer-term measure (after public consultation). In recognition of the transitory nature of these orders, the relevant section in the Act is titled “Interim Orders.”

The proposed amendments would eliminate the existing “Interim Orders” section and replace it with a section broadly entitled “Ministerial Orders”. Such ministerial orders would allow the Transport Minister to specify “classes of waterways” and “classes of works” so as to exempt them from the approval process. The procedural protections are also removed, such that the amendments specify no limits to the duration of the order and require no notification of each House of Parliament.

The use of Ministerial orders for such important decisions such as creating exemptions for particular works and waterways is problematic in itself. In practice, it is much easier to make an order than it is to make a regulation. The amendments (BIA, s. 328) would exempt any ministerial order from the requirements of the *Statutory Instruments Act*. By contrast, Cabinet regulations must be pre-published in the Canada Gazette a minimum of 30 days before passing to allow for public consultation. It is therefore likely that exemptions for particular classes of works or waterways will be achieved by ministerial order, without public or Parliamentary oversight.

D) The amendments change the attitude towards protection of Canada’s waterways from proactive to reactive.



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The proposed amendments would allow the Minister to amend, suspend and cancel an approval by ministerial order for specified reasons including the public interest with 30 days notice to the owner (*BIA* s. 326, also s. 321). The Minister would be granted broad investigative powers to verify compliance with the terms and conditions of the approval (*BIA*, s. 340). Injunctions could be issued to prevent an infraction although parties would be given 48 hours notice unless the situation is urgent and service would not be in the public interest.

In reality, these provisions represent an after-the-fact attitude to managing Canada's navigable waters. In the interests of streamlining the process, the proposed amendments would reduce the number of required approvals on our navigable waters without public consultation. Without an approval, the aforementioned remedial powers would be of no force or effect.

CONCLUSION

The author concludes that the proposed NWPA amendment will negatively impact the free access of Canadians to navigable waterways, and will lessen the degree of federal oversight on projects that impact this area of federal jurisdiction. Furthermore, by reducing requirements for federal approvals of works that interfere substantially with navigation, the streams and creeks (capillaries and veins) of our lakes, wetlands and rivers will be negatively impacted.

Although the purpose of the NWPA is the protection of public navigation rights, this important objective indirectly contributes to the protection of Canada's environment through the triggering of the *Canadian Environmental Assessment Act* (when an NWPA approval is required). The net result is less navigational and environmental protection, less accountability, and less consultation. Such changes are inappropriately achieved through omnibus budgetary legislation, and ought to be debated in a fulsome manner before Parliament and appropriate standing committees.