

**Position Paper
Regarding Amendments to the Navigable Waters Protection Act
Contained in Bill C-10: The Budget Implementation Act.**

The Coalition

The Coalition for Equitable Water Flow (CEWF) was formed in August 2006 to represent the interest and concern of residential shoreline property owners on the Reservoir and Flow-Through (RAFT) lakes within the Haliburton sector of the Trent Watershed, Ontario.

The CEWF has the participation of 39 of the 41 reservoir lakes and 11 of the 20 flow-through lakes in the region, representing approximately 40,000 Ontario taxpayers.

Scope of Interest

On behalf of shoreline property owners the Coalition deals with issues of concern in the local watershed relating to water levels, water quality, environmental impact and relevant social, cultural and heritage impacts.

In 2007 we participated in the panel-led process reviewing the future of the Trent-Severn Waterway (TSW) and were heartened that the Panel's March 2008 Report "It's All About the Water" recognized the need for the management of water at the watershed level. In particular we support the recommendation to create a Trent-Severn Heritage Region and an Independent Water Management Agency. The lack of a formal response and implementation plan from the government is a continuing concern for the Coalition.

Lacking an Independent Water Management Agency to deal in a coordinated manner with issues at the watershed level, the amendments to the Navigable Waters Protection Act are of particular concern, in that they appear to remove significant protections that existed previously and allow for arbitrary rulings.

The scope of CEWF's interest thus includes the potential negative impacts of the amended Act on:

- The right of navigation, including: access to 'water-access-only' properties; navigation between lakes; and use of traditional waterways and routes
- Riparian rights
- The Environment
- Property, Social and Community values
- Canadian Culture and Heritage.

Original Purpose and Intent of the Act

A 'Common Law' public right of navigation exists in Canada: if waters are navigable, then the public has the right to navigate. We understand that this right can only be restricted by an Act of Parliament and that the purpose of restrictions in the NWP Act is to ensure a balance between the public right of navigation and the need to build works, such as bridges or dams, in navigable waters.

Position

The CEWF's position is that the amendments to the Act in Bill C-10 effectively removed the 'balance' that is the very purpose of the Act, removed transparency in the decision making process under the Act, and introduced an apparently arbitrary process for regulation and ministerial orders. In short there is very little "Protection" left in the so-called Navigable Waters Protection Act.

Previous Interventions

In our 2007 submission to the Panel on the Future of the Trent Severn Waterway we made reference to the importance of navigation as a fundamental Canadian right. Here's what we said:

All waterfront residents throughout the Trent-Severn watersheds, including those on the RAFT lakes depend on their rights to navigate the waterways adjacent to their homes, and exercise their riparian rights to the flow of the river in many cases. It is the ability to exercise navigational and riparian rights that led current owners to purchase properties in these lakes in the first place, and which in turn fuels local businesses and economies.

The public right to navigate in the RAFT lakes is impeded, however, by the current water management regime in the TSW which does not adequately balance navigational rights in the TSW itself with those exercised in the RAFT lakes. This inadequate and un-integrated water management is leading to escalating problems in the RAFT lakes, including navigational hazards, property damage and infringement of riparian rights for owners to use the flow of the water for domestic purposes.

In June 2008 we raised our concerns with the Standing Committee on Transport, Infrastructure and Communities regarding the then 'proposed' amendments to the NWPA. Here's some of what we said:

Recently we have been given to understand that the proposed revisions to the Navigable Waters protection Act will in fact mean that any and all of our waterways are unprotected from commercial development unless they are specifically nominated for protection. This is the very opposite of the current situation.

We further understand that the definition of navigable water may be restricted to waterways capable of handling vessels having a minimum draft of one metre. This in a country whose heritage of exploration and development was dependent on the canoe! Even today, the draft of typical power-vessels used by waterfront residents is less than a third of the proposed minimum for a navigable waterway and the proposed changes to the Act will potentially disenfranchise a significant proportion of waterfront property owners who are deemed to make use of 'minor waters'.

In addition we are concerned that the proposed changes would reduce the need for environmental impact assessments in a variety of circumstances, including 'minor' waterways that are deemed suitable only for small vessel travel and projects involving dams, bridges and causeways.

Thus it appears that some of the 'most at-risk' areas of our particular watershed environment, especially headwater and flow-through rivers and lakes, will be exempt from an important level of federal environmental protection.

In conclusion the CEWF believes that to diminish the common law right of public navigation is to diminish our Canadian heritage. Similarly, it is important to consider impacts on navigation as part of a robust environmental assessment process for development taking place on or adjacent to ALL waterways both major and 'minor'. Our view is that the Navigable Waters Protection Act needs to be strengthened not weakened: yet it would appear that the proposed changes amount to removing the word 'Protection' from the Act.

From our perspective the consultations on the proposed changes appear to have been hasty and incomplete. A more fulsome public consultation is called for.

In February and March 2009 we expressed our dismay to both House and Senate Committees regarding the proposed amendments to the NWPA that were buried on page 144 of the Budget Plan and on page 291 of Bill C-10 the Budget Implementation Act. In the opinion of the CEWF this 'omnibus' approach to legislation undermines the democratic process and does not lead to good lawmaking.

More important however were the actual amendments themselves that (Section 5) leave essentially all decisions to future regulation or Ministerial order, with the clear provision for classes of navigable waters to be established. Our experience with the operation of the Trent-Severn Waterway make it clear that a more robust NWPA is needed, not one that capitulates to narrow or special interests.

Consideration Requested

The CEWF respectfully requests that the process of developing Regulations under the amended Act be transparent and involve consultation that is open to all interested parties.

We are particularly concerned that a clear framework and principles be established for the protection of navigable waters and that this include consideration of impacts at the watershed level in order to avoid arbitrary decisions lacking broad awareness of socio-economic and environmental issues.

We are also fundamentally opposed to the notion of 'classes' of waterway that will deny protection to so-called 'minor' waterways regardless of the scale of the resulting impact. It is all the more reprehensible that these classifications may be made by the Cabinet in secrecy, with no public consultation, scientific basis, or opportunity for appeal.

We are a collegial organization that continues to be ready to work with our government; we ask that we be given a chance to do so.

Select Abstracts from Reference Materials

1. Transport Canada website

What is the purpose of the Navigable Waters Protection Act (NWPA)?

A public right of navigation exists in Canada. This right is not written anywhere; it is a Common Law right. If the waters are navigable, then the public has the right to navigate. This right can only be restricted by an Act of Parliament. The NWPA is one of these Acts. It ensures a balance between the public right of navigation and the need to build works, such as bridges, dams or docks for example, in navigable waters. The NWPA provides for the prohibition to build works in navigable waters, unless the work, its site and plans have been approved by the Minister of Transport on such terms and conditions as he deems fit. In addition, the Act provides for measures regarding removal of wreck or other obstacles to navigation and for the prohibition to throw or deposit any material in navigable waters.

What are Navigable Waters?

Defined as including any body of water capable of being navigated by any type of floating vessel for the purpose of transportation, recreation or commerce.

2. Canada's Economic Action Plan / Budget Plan (page 144)

Efficiencies will be introduced through legislative amendments to the Navigable Waters Protection Act, which has not been substantially amended since 1886. The proposed amendments reflect the recommendations that were made in June 2008 by the Standing Committee on Transport, Infrastructure and Communities after an exhaustive review of the Act.

3. Budget Implementation Act (Bill C-10) – Part 7 (page 291 et seq)

Section 5.1: Despite section 5, a work may be built or placed in, on, over, under, through or across any navigable water without meeting the requirements of that section if the work falls within a class of works, or the navigable water falls within a class of navigable waters, established by regulation or under section 13.

Section 13: For the purposes of section 5.1, the Minister may, by order,
(a) establish classes of works or navigable waters; and
(b) impose any terms and conditions with respect to the placement, construction, maintenance, operation, safety, use and removal of those classes of works or works that are built or placed in, on, over, under, through or across those classes of navigable waters.

4. Standing Committee Report (June 2008)

In its [Transport Canada's] appearance before the Committee, the officials set forth a series of seven items that could be addressed in the short term to improve the current legislation. These include:

- Amending the definition of “navigable waters” to exclude “minor waters”;
- Amending the definition of “work” to explicitly exclude “minor works”;
- Deleting the reference to the four “named” works in the Act;
- Adjusting the amount of the current fines in the Act;
- The removal of wrecks and derelict vessels;
- The definition of inspection powers; and
- A five year review of the amended *Navigable Waters Protection Act*.

5. Submission to Standing Committee from Alberta Municipalities – April 2008

Currently the term “navigable waters” is very poorly defined and is generally interpreted as being any body of water on which a canoe can be floated. This broad definition leads to significant and, in our opinion, unreasonable impediments to legitimate and necessary undertakings by municipalities. As such, we recommend the following elements be included in a revised definition of navigable waters for the NWPA.

A navigable water is a water body designated by a government authority as a navigable water for the purposes of managing development over, under, and adjacent to it in a manner that will reasonably protect the navigable water for transportation, commercial, or recreational uses.

For further clarity, a navigable water:

- (a) must be, for at least three consecutive months of the year, capable of supporting typical transportation, commercial, or recreational type floating vessels that draw a draft of at least one metre;
- (b) must be at least two kilometres in length and contain no fixed and permanent restrictions for floating vessels referred to earlier, and may include a single body of water, or only a specific section of a water body—for example, a continuous two-kilometre stretch of a stream—which is in total five kilometres long, or a two-kilometre continuous stretch of connected water bodies—for example, a lake plus a river plus another lake;

6. Lake Ontario Waterkeeper “Research Document”

Specific concerns with the legislation

- The new *Navigable Waters Protection Act* (NWPA) eliminates environmental assessments for development projects on Canadian waterways, with very few exceptions.
- The new NWPA means decisions about Canada’s waterways will be based on politics and financial clout rather than science or long-term socio-economic needs.
- The new NWPA divides Canada’s rivers into those worth protecting and those not worth protecting.
- The “class” lists may be drafted by the Cabinet in secrecy, with no public consultation, scientific basis, or opportunity for appeal.

Bigger picture concerns:

- The legislation fails to recognize that navigation is a public right, stemming from both Aboriginal and European history. The new NWPA mistakenly presumes that the Government of Canada and its friends, rather than Canadians, own and control our rivers.
- The legislation is part of an ongoing attack on science, transparency, and fairness when it comes to making decisions that affect Canada’s environment. We are seeing similar efforts to gut the *Fisheries Act*, environmental assessment legislation, and the *Environmental Bill of Rights* among others. This attack blames “red tape” for standing in the way of progress. In reality, these laws are the only things standing between citizens and a massive sell-off of our waterways from coast-to-coast, be it through pollution, development, or diversion.

Recommendations:

- Restore the environmental assessment trigger.
- Remove the Minister’s discretion when it comes to major projects, such as the four named works in the existing legislation: bridge, boom, dam or causeway.
- Eliminate the system for dividing up Canada’s rivers or classifying different types of “works”. In the alternative, create these classes only after significant public consultation and scientific review, allow for exemptions in special cases, and explicitly maintain the existing common law and traditional right to use navigable waters.

7. Lake Ontario Waterkeeper “Comparison Document”

The New Act allows the Cabinet (Governor in Council) to make orders approving works. It maintains the previous ability of the Governor in Council to make orders or regulations it deems expedient for navigation, but the amendment would allow this to be done where the work was initially approved by the Governor in Council as well. This gives more discretion to the Governor in Council, since it could both approve a work via an order, then make additional orders or regulations it deems expedient to navigation. This is an important change, since Cabinet decisions are not always subject to Access to Information laws or judicial review.

The New Act allows Cabinet to establish classes of works or waters that are exempt from requiring Ministerial approval.

8. Lake Ontario Waterkeeper May 2008 Submission

RE: Proposal to amend the definition of “navigable waters” to exclude “minor waters”

According to Transport Canada, “navigable” is defined as, “any body of water which is capable, in its natural state, of being navigated by floating vessels of any description for any purpose of transportation, recreation or commerce, and includes a canal or any other body of water created or altered for public use, as a result of the construction of any work.” It is not desirable to exclude “minor waters” from this definition for two reasons:

First, such an amendment is unnecessary.

The *Act* applies only to those waters that are navigable. Waters that might be considered “minor” from the perspective of navigation (i.e., non-navigable waters) are, by definition, already excluded.

Second, such an amendment could undermine the very purpose of the Act.

In the event that this amendment seeks to exclude certain navigable waterways from the protections of the *Act*, the very purpose of the *Act* itself changes. No longer would the *Navigable Waters Protection Act* protect all navigable waterways in Canada; rather, the *Act* would protect only some waterways and thus only some communities’ right to free passage. If the Government of Canada is proposing to limit a public right that is older than the country itself, Waterkeeper respectfully submits that significant public consultation and study be conducted. In particular, Waterkeeper recommends that clarity be sought regarding the new status of the common law right to free passage.