



Review of the *NAVIGATION PROTECTION ACT*

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OVERVIEW

- Background – the *Navigable Waters Protection Act*
- Key Changes that came into force in 2014
- The *Navigation Protection Act*
- Review of the NPA



BACKGROUND: THE *NAVIGABLE WATERS PROTECTION ACT*

- The public right of navigation – the right to free and unobstructed passage over navigable waters – is protected under Common Law and can only be modified or extinguished by an authorizing federal statute
- The *Navigable Waters Protection Act (NWPA)*, allowed interferences with the public right of navigation and applied to all navigable waters in Canada
- The intent of the NWPA was to balance the public right to navigate, with the need to construct works (e.g. bridges and dams)
- Over time, the Act was applied to almost all waters, including ditches, brooks and streams

The Navigable Waters Protection Act regulated:

- construction, placement, alteration, repairing and rebuilding of works in, on, over, under, through or across navigable waters
- obstructions to navigation
- depositing or throwing of material such as gravel and mine tailings that risked impacting navigation



2014: KEY CHANGES CAME INTO FORCE

- Amendments to the *Navigable Waters Protection Act* came into force on April 1, 2014, including:
 - Name of Act changed to *Navigation Protection Act*
 - New Schedule lists 162 navigable waterways where people must apply for regulatory authorisation for works that interfere with navigation (previously applied to all waterways in Canada where you could float a canoe)
 - Owners of new works in non-scheduled navigable waters have the opportunity to request to opt-in to the NPA regime
 - Authorizations issued under the NPA not subject to a specific duration unless specified in a term and condition
 - Onus now on owner to notify the Minister if a work causes or is likely to cause a serious and imminent danger to navigation

As of April 1, 2014, Transport Canada operationally applies, for specific provisions, the “aqueous highway test” rather than the “canoe test” to determine whether a waterway is navigable (see Annex)



THE *NAVIGATION PROTECTION ACT*: REGULATION OF WORKS

- Owner provides a Notice of their intention to construct, place, alter, etc., a work (plans, specifications, etc.)
 - TC may request additional information, or have the owner solicit information from the public
 - TC conducts assessment and makes a decision on behalf of the Minister on the level (substantial or not) of interference with navigation
- Owner is advised of the decision and whether TC will be issuing an approval or permitting the work
 - Designated works are allowed to proceed on the owners own assessment
- Act defines emergency works and allows quick turnaround for owners to address the immediate need



REGULATION OF WORKS:

TYPES OF AUTHORIZATION

- **Approved works:** Works approved by the Minister after being assessed as likely to substantially interfere with navigation (section 6)
- **Permitted works:** Works may proceed after being assessed as not likely to substantially interfere with navigation (section 9)
 - Permitted works are compliant with the Act if they are constructed, placed, etc., in accordance with any regulatory requirements and any terms and conditions imposed by the Minister
- **Designated Works:** Works allowed to be built if they meet the criteria for the applicable class of works, as well as specific terms and conditions for construction that are found in the *Minor Works Order* (see Annex)



REGULATION OF WORKS: OPTING IN

- The NPA includes an “opt-in” provision (section 4) that allows the owners of works in non-scheduled navigable waters to ask for assessment and review of their work under the NPA
- The Minister may accept or refuse an opt-in request

Opt-in is a process that allows an owner of a work to request its work be subject to the full regime of the NPA. The Minister sets criteria to consider for the acceptance of an Opt-in request and assesses each request against that criteria. If the assessment is positive, the work becomes permanently subject to the full regime of the NPA. The **WORK** and not the **WATERWAY** becomes subject to the regime.



REGULATION OF WORKS: OPTING OUT

- Owners of works in non-scheduled navigable waters, that were approved under the NWPA, may opt out of the NPA regime **within five years of the NPA coming into force (before April 1, 2019)**
- The decision to opt out of the NPA regime belongs to the owner of the work

Opt-out is a process where an owner of a work that is not on the schedule, may notify the Minister of their decision to withdraw from the full regime of the NPA. This request – when given in the form and manner set by the Minister – is simply accepted. There is no assessment criteria.



REGULATION OF OBSTRUCTIONS

- Obstructions defined as: ***“a vessel, or part of one, that is wrecked, sunk, partially sunk, lying ashore or grounded, or any thing, that obstructs or impedes navigation or renders it more difficult or dangerous, but does not include a thing of natural origin unless a person causes the thing of natural origin to obstruct or impede navigation or to render it more difficult or dangerous”***
- Minister has authority to address obstructions on a scheduled waterway
- Minister has authority to address vessels on Federal Property – on scheduled or non-scheduled waters
- Minister may authorize a person to take a vessel that has been abandoned in scheduled waters





THROWING, DEPOSITING AND DEWATERING: EXEMPTIONS TO PROHIBITIONS

- **Governor in Council** has the authority to exempt **navigable waters** from the application of the prohibitions, but it requires an Order in Council
 - Throwing or depositing of material liable to interfere with navigation continues to be a prohibited activity under the Act for all navigable waters (sections 21 & 22)
 - A new prohibition was introduced in 2012 against dewatering any navigable water (section 23)
- Prohibitions apply to all navigable waters, not just those listed on the Schedule
- To determine whether a waterway is navigable, TC operationally applies the “aqueous highway test” rather than the “canoe test”



RELEVANT REGULATIONS AND ORDERS

Navigation Protection Act



- *Minor Works and Waters Order*
- *Navigable Waters Works Regulations*
- *Ferry Cable Regulations*
- *Navigable Waters Bridges Regulations*



REVIEW OF THE *NAVIGATION PROTECTION ACT*

- On June 20, 2016, the Government of Canada announced the approach to the review of environmental and regulatory processes that apply to resource development and infrastructure investment
 - The broad review will rebuild trust in environmental assessment processes, modernize the National Energy Board, and restore lost protections and introduce modern safeguards to the *Fisheries Act* and the *Navigation Protection Act*
- Minister of Transport mandated to work with Minister of Fisheries, Oceans and the Canadian Coast Guard to review the changes to the *Fisheries Act* and the *Navigable Waters Protection Act*
- Standing Committee on Transport, Infrastructure and Communities (SCOTIC) requested to conduct review of the Changes to the *Navigable Waters Protection Act* and to work collaboratively with Standing Committee on Fisheries and Oceans (SCOFO) in its review of Changes to the *Fisheries Act*

Review likely to focus on the 2014 changes to the NWPA as well as the types of interferences to navigation that should be regulated or prohibited, and how to best implement these under the legislation



REVIEW OF THE *NAVIGATION PROTECTION ACT*

- The NPA Review is expected to commence in Fall 2016 and report on outcomes in early 2017
- Review to provide opportunities for Canadians to provide feedback
 - All Canadians are encouraged to provide views, following Committee guidelines, directly to the Committee –
<http://www.parl.gc.ca/About/House/WitnessesGuides/guide-brief-e.htm>
 - If preferred, Canadians may submit any concerns or suggested improvements to the NPA review team at NPPHQ-PPNAC@tc.gc.ca
 - More information is available at www.Canada.ca/environmentalreviews
 - Departmental officials will support the review with additional opportunities (e.g. on-line consultation, speaking engagements, meetings)
 - Funding is available to Indigenous groups to support participation
- Consultation will be a key element of this review to ensure the views of Canadians are heard



DISCUSSION



ANNEX:

DETERMINING NAVIGABILITY (SECTIONS 4, 21 TO 23, AND ADDING A WATERWAY TO THE SCHEDULE)

- During the assessment phase, TC officials must determine whether the subject waterway is considered navigable
- Navigability framework objectives are:
 - To ensure that the NPA is properly applied
 - To align with the relevant court decisions
 - To provide a process for determining whether a waterway is navigable for the purposes of the NPA
- Navigability framework considers the following:
 - Aqueous highway and public use
 - Historic use
 - Reasonable likelihood of future use



ANNEX: ***MINOR WORKS AND WATERS ORDER***

- Establishes a class of works that does not require an Application/Notice or Authorization through the NPA because they are “minor” in nature
- Specific design and placement criteria for each defined Minor Work is outlined in the Ministerial Order. Failure to construct the work in accordance with the criteria outlined in the Order may result in enforcement action
- A revised Order was published in the *Canada Gazette*, Part I, on April 19, 2014