The Canadian Navigable Waters Act (CNWA)
Part 3 of Bill C-69 - Amending the Navigation Protection Act

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

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

Bill C-69 is a result of significant effort to strike a balance that would restore protections eliminated by past amendments to navigable water protections while ensuring the health of Canada’s environment and economy. However, Part 3 of the Bill, the Canadian Navigable Waters Act (CNWA) falls short in restoring the environmental protection that was once granted to all navigable waterways in Canada.

Highlights of Bill C-69, as it pertains to the protection of navigable waters.

1. **Definition:** a new definition broadens coverage of the Act to all waters where there is “...likelihood that it will be used by vessels.”
2. **Federal oversight extended to major works on all navigable waters.** What constitutes a major work will be defined as regulations around the amended Act are developed.
3. **Improved Public engagement:** Rather than going to court to defend navigation rights once a project is well underway, the public will be notified of projects as they are proposed and will have 30 days to comment.
4. **Innovations in data management.** The Bill requires the establishment of a public registry to facilitate access to key information related to projects in review and/or approved under the Act. This new resource has the potential to significantly enhance transparency and improve access to critical information about the cumulative impact of developments on navigable waters.
5. **Indigenous Peoples as Partners:** The Minister must consider traditional knowledge, and any traditional knowledge of the Indigenous peoples of Canada that is provided to the Minister must be kept confidential unless consent is obtained. Further the amendments incorporate the principles of the United Nations Declaration on the Rights of Indigenous Peoples and the definition of navigable waters recognizes the rights of Indigenous Peoples.
6. **Enforcement:** The Minister is granted powers to address obstructions on navigable waters, including increased enforcement powers and greater penalties for violations and offences.

This submission outlines how the proposed Canadian Navigable Waters Act (CNWA) could be further strengthened in 4 key areas:
1. **Ensure a clear and inclusive definition** for what constitutes Navigable Waters.
2. **Require the consideration of environmental impacts** in all approval decisions regarding the impact of the proposed project, as well as in mitigation efforts.
3. **Track the cumulative impact of all projects**, including minor works, via a publicly accessible online registry.

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

Thank you for your Consideration,

Lindsay Telfer,
Project Director, Canadian Freshwater Alliance
lindsay@freshwateralliance.ca
705-770-1331
Section 47 (3) of the Canadian Navigable Waters Act

<table>
<thead>
<tr>
<th>Current Provision</th>
<th>Proposed Amendments</th>
<th>Rationale</th>
</tr>
</thead>
</table>
| **Navigable water** means a body of water, including a canal or any other body of water created or altered as a result of the construction of any work, that is used or where there is a reasonable likelihood that it will be used by vessels, in full or in part, for any part of the year, as a means of transport or travel for commercial or recreational purposes, or as a means of transport or travel for Indigenous peoples of Canada exercising rights recognized and affirmed by section 35 of the Constitution Act, 1982, and (a) there is public access, by land or by water; (b) there is no such public access but there are two or more riparian owners; or (c) Her Majesty in right of | **Amendment Option 1.A**
*Eliminate the definition entirely. Default becomes common law definition.*

**Amendment Option 1.B**

**Navigable water** means a body of water created or altered as a result of the construction of any work, that is used or where there is a reasonable likelihood that it will be used by vessels, with sufficient quantity and quality that is capable of being navigated by any type of floating vessel, in full or in part, for any part of the year or as a means of transport or travel for Indigenous peoples of Canada exercising rights recognized and affirmed by section 35 of the Constitution Act, 1982 and (a) there is public access, by land or by water; | We have 2 key concerns with the definition of navigable waters proposed in the Act. The first being that the definition is reliant upon present day transportation use. We can not possibly know what transportation needs will exist in the future. If a waterway is navigable - i.e. you can navigate a vessel down it - then it is a navigable water whether it is actively in use or not. Activities that we undertake today could very well interfere with the future opportunity for a waterway to become navigable. In other words, we contend that absence of current use is not an argument against the need for protection. A robust and credible Act would protect navigation rights present and possible. Our second concern with the definition, as currently drafted, is in the usability and accessibility criteria. There is concern that limiting access based on land ownership has the potential to significantly restrict access rights. A recent BC Supreme Court decision confirmed public access to waterways surrounded by private lands. Public access is crucial for the enjoyment and use of waterways by all Canadians, including Indigenous peoples who exercise their rights. |
Canada or a province is the only riparian owner. (*eaux navigables*)

(b) there is no such public access but there are two or more riparian owners; or

(b) Her Majesty in right of Canada or a province is the only riparian owner. (*eaux navigables*)

(c) there is cultural, environmental, and historical value to Canada's natural heritage; or

(c) is defined by any of Canada’s Indigenous communities, as important to their historical, current, and future use.

Exclusions: Navigable water does not include minor waters such as artificial irrigation channels and drainage ditches, unless of 3.0 m or more in width or a natural waterbody that has been converted for this purpose.

access to navigable waterways should be celebrated and upheld in the amended *CNWA*.

<table>
<thead>
<tr>
<th>s. 7 (7)</th>
<th>Assessment — factors</th>
</tr>
</thead>
<tbody>
<tr>
<td>(7) In determining whether to issue the approval, the Minister must consider the following:</td>
<td>(7) In determining whether to issue the approval, the Minister must consider the following:</td>
</tr>
<tr>
<td>(a) the characteristics of the navigable water in question;</td>
<td>(a) the characteristics of the navigable water in question;</td>
</tr>
</tbody>
</table>

The 7 factors offer a much clearer and robust criteria for assessing the inclusion of a waterway on the Schedule. There remains a significant oversight however, in excluding *environmental value* in the 7 factors. Having healthy navigable waters is essential to supporting healthy navigation. And determining the health of navigable waters and their ability to sustain navigation presently and into the
Submission to the Senate Committee on the Environment re: Part 3 Bill C-69

| (b) the safety of navigation in that navigable water; |
| (c) the current or anticipated navigation in that navigable water; |
| (d) the impact of the work on navigation, including as a result of its construction, placement, alteration, rebuilding, removal, decommissioning, repair, maintenance, operation or use; |
| (e) the impact of the work, in combination with other works, on navigation, including as a result of its construction, placement, alteration, rebuilding, removal, decommissioning, repair, maintenance, operation or use; |
| (f) any Indigenous knowledge that has been provided to the Minister; |
| (g) any comments that he or she receives from interested persons within the period provided for under subsection (4); |
| (h) the record of compliance of the owner under this Act; and |
| (i) any other information or factor |

未来应该是一个优先考虑的事项，在保护航行权利的立法中。为了强调这一包括的重要性，我们已经举了三个例子，说明环境因素，当它们与其他可能阻碍航行的项目同时出现时，如何影响航行权利和可航行水域：气候变化；地下水；水质量。

**Climate Change**: 我们知道气候变化已经影响到我们现有可航行水域的水位。例如，德国伊尔河上的水位如此之低，以至于由于气候引起的干旱，从六月到十月期间船只无法航行。项目可能改变或抑制这些水域的流动，增加未来干旱情景的可能性，促使我们考虑这些影响，当审查我们如何最好保护水道未来的影响时。

**Groundwater Impacts**: 水文影响：众所周知，渗入地下蓄水层的水会最终流入地表水道。含水层存储量低，因此无法对连续几年的低地下水补给序列提供缓冲能力。从含水层中开采的地下水最终会影响溪流的水流量，从而干扰可航行性，特别是在干旱季节。含水层对流量的贡献（基流）在流域位置不同，并且根据位置而变化。2 项目可能改变或抑制这些水域的流动，增加未来干旱情景的可能性，促使我们考虑这些影响，当审查我们如何最好保护水道未来的影响时。

未来应该是一个优先考虑的事项，在保护航行权利的立法中。为了强调这一包括的重要性，我们已经举了三个例子，说明环境因素，当它们与其他可能阻碍航行的项目同时出现时，如何影响航行权利和可航行水域：气候变化；地下水；水质量。

catchment characteristics. The base-flow contribution to streams through groundwater discharge varies throughout the year, with base-flow contribution greater during winter and spring thereby increasing water levels. A recent ruling in the U.S. found that the groundwater connection to navigable waters is sufficient to warrant a citizen lawsuit against polluters.\(^3\) Noting this, the hydrological link to groundwater should be recognized as a criteria to be considered as part of the assessment factors used to expand the Schedule of Navigable Waters.

**Water Quality & Health Impacts:** When water levels are reduced, concentrations of pesticides and other toxins increase due to lower volumes of water thereby impacting recreational water quality and posing health concerns. Water quality issues can also arise when flows remain at a steady low volume. For example, constant low flows cause periphyton (a complex mixture of algae, cyanobacteria, heterotrophic microbes) to accumulate in thick layers, trapping sediment and organic matter that can degrade water quality by lowering dissolved oxygen levels and changing pH levels. To minimise this effect, base flow releases should be varied by as much as 50\% around the recommended volume. Although within the jurisdiction of the Department of Fisheries and Oceans, low-water levels would also impact fish habitat and health. It is our contention that healthy waters are vitally important to healthy and safe recreational navigation and therefore

---

\(^3\)The Fourth Circuit Court of Appeals held that environmental groups could bring a citizen suit under the Clean Water Act ("CWA") against the owner of a ruptured gasoline pipeline where the spill entered groundwater and nearby surface waters regulated by the CWA as "navigable waters"

Submission to the Senate Committee on the Environment re: Part 3 Bill C-69

S27.2 (1) The Minister must establish and maintain a registry in which information that he or she specifies is deposited.

27.2 (1) The Minister must establish and maintain a registry in which information about intended, proposed, and approved projects that he or she specifies is deposited.

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

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

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

<table>
<thead>
<tr>
<th>S27.2 (1)</th>
<th>Types of documents in registry</th>
</tr>
</thead>
<tbody>
<tr>
<td>The registry must contain only records or parts of a record: (a) that are publicly available; or (b) that the Minister determines would be disclosed to the public in accordance with the <em>Access to Information Act</em> if a request were made in respect of that record under that Act, including any record that would be disclosed in the public interest under subsection 20(6) of that Act.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Types of documents in registry</th>
</tr>
</thead>
<tbody>
<tr>
<td>(3) The registry must contain only records or parts of a record: (a) that are publicly available; and (b) detailing information about the work, including: description of the work, geographic location, anticipated impact, and proponent; whether approval is required; and the outcome of a decision (including a rationale which accounts for the assessment factors considered).</td>
</tr>
</tbody>
</table>

| (c) that the Minister determines would be disclosed to the public in accordance with the *Access to Information Act* if a request were made in respect of that record under that Act, including any record that |
would be disclosed in the public interest under subsection 20(6) of that Act.