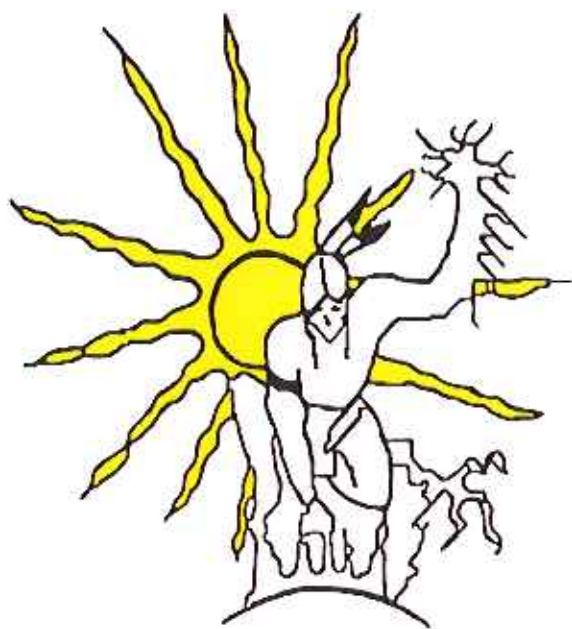


# Navigation Protection Act Review

Biigtigong Nishnaabeg  
December 2, 2016





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## 1.0 Introduction

We are Biigtigong Nishnaabeg. We are an Ojibway community located at the mouth of the Pic River, on the shores of Lake Superior. Our traditional territory extends across 2 million hectares and much of it is composed of lakes, rivers, and streams which we assert aboriginal title over the lands and resources it encompasses. Waterways have played an important role in the lives of our people throughout history, and that continues today. Pic River, or the Biigtig, is the source of life for our people. Not only does it act as our highway for food harvesting and recreation, it provides us with a connection to our culture, our spirituality and our history. The river is deeply rooted to birth and death in our community. To us, water is essential to life.

The protection of navigable waters and navigation is inextricably linked with the protection of our people's rights and interests. We are providing our insights and recommendations regarding the review and renewal of the Navigation Protection Act in order to work towards legislation that more fully and meaningfully respects and promotes our rights, values, and interests.

We conducted a review of the current Act to identify key issues, connect those issues to our people's rights and interests, and to develop recommendations for changes to the Act. This written submission provides a summary of our core review findings.



*\*Chief Duncan Michano  
padding a community  
made canoe on the  
Biigtig (the Pic River).*

### 1.1 Water Based Rights and Occupancy

Water surrounds us and plays a crucial role in our lives. Lake Superior accounts for approximately 20% of our exclusive traditional territory (see Figure 2 – Biigtigong Nishnaabeg Aboriginal Title Area). The mouth of the Pic River has been important site of trade and occupancy for our ancestors and other Indigenous people for thousands of years. The Pic River has long provided an entryway to the north, including a canoe route all the way to James Bay.



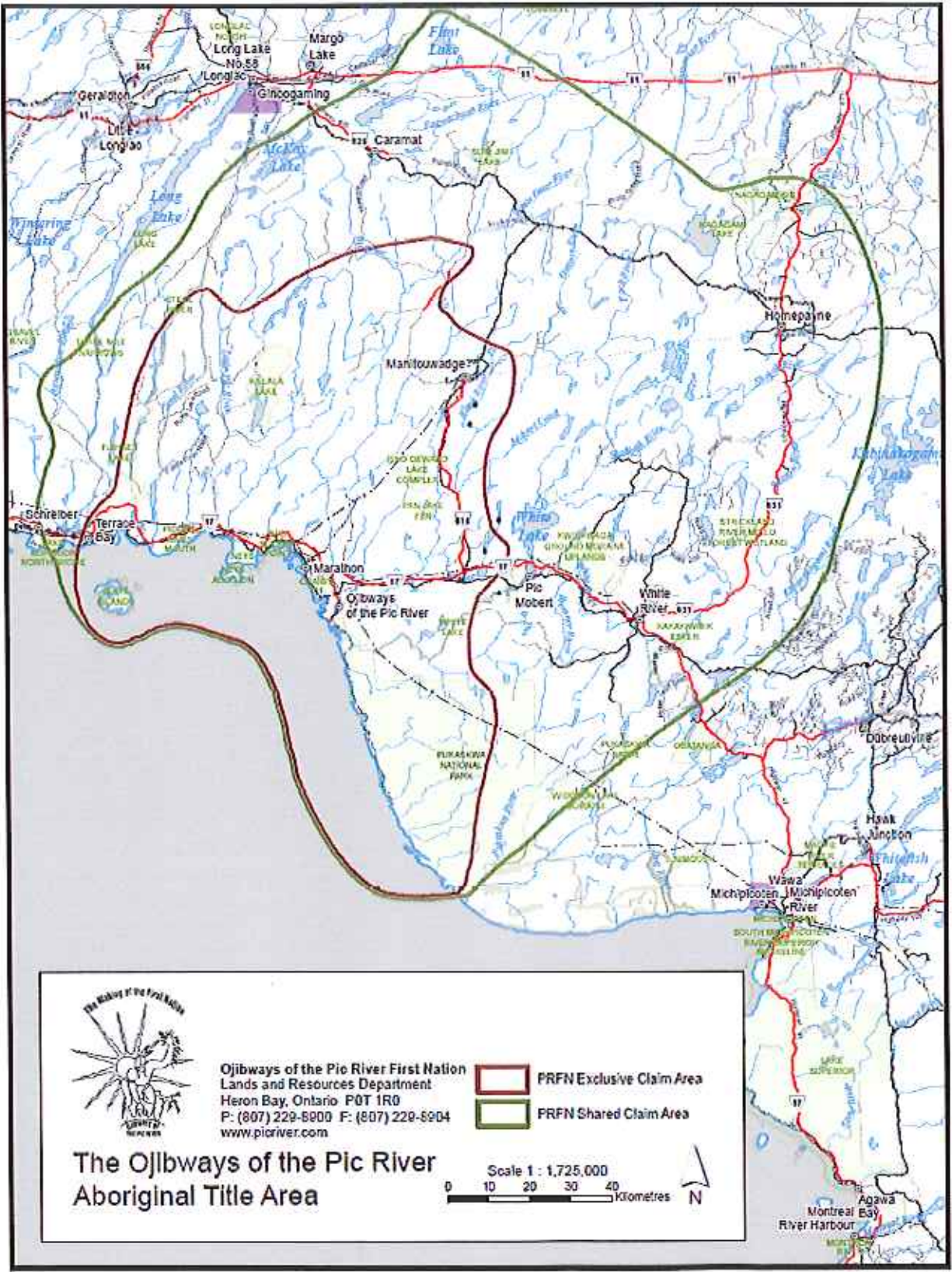


Figure 1: Biigtigong Nishnaabeg Aboriginal Title Area



## 1.2 Historic Occupancy and Use

Our ancestors have been using the waterways of this area since time immemorial. The waterways were an important means of travel. The waterways provided access to our traditional territory by handmade canoes.

Oral tradition and stories passed down through generations of the elders speak to burial grounds, family camps, hunting and trapping areas and medicinal areas. They speak of the family connection as traditional routes would have family members traveling and portaging great distances in the region as far away as James Bay.

The mouth of the Pic River served as native trade route before pre-contact. It was in the late 1700s, these waterways in order to participate in the fur trade. A fur trading post was built at the mouth of the Pic River in the 1780s by the Hudson's Bay Company that connected the local trade routes for many of the First Nation communities in Northwestern Ontario.

The Pic River, which flows beside the reserve base of Biigtigong Nishnaabeg, served as a route for lumbering and log drives starting in the early 1900's for companies such Ontario Paper and the General Timber, up until the 1960's. This also served as an economic opportunity for members of the Biigtigong to acquire work with the paper companies during this time.



## 1.3 Current Occupancy and Use

The waterways located in the territory are still highly used today by the community for recreational activities such as fishing, boating, camping, and canoeing and economic development such as hydro electric dams, commercial fishing, and eco-tourism.

Along with traditional methods, the waterways serve as a teaching tool in providing the youth with the traditional ecological and traditional land use teachings. Because of this, the water and the waterways within the territory are highly regarded as a priority for the community in environmental protection as well as a teaching tool for traditional knowledge to be passed down through generations. In the summer of 2016, Chief Duncan Michano led a canoe and portage trip from Longlac, Ontario to the mouth of the Pic River. This



trip took 10 days, included youth members of the community and focused the route on the historical trading route from Longlac.

The community used to draw its drinking water from the Pic River as its sole water source. However, due to contamination of cyanide in the mid 1990's from a local mine, the community had to upgrade their systems and move to communal ground water wells located at the Mouth of the Pic River.

Biigtigong Nishnaabeg have been involved as a proponent in dealing with the *Navigation Protection Act* (*Navigable Waters Protection Act* at the time). We currently have vested interests in several run of the river hydro electric dams located throughout the territory. Under our Energy department, our involvement in hydroelectric development has required us to seek approval from Transport Canada for construction in navigable waters, an important step in ensuring our projects resulted in the least amount of adverse impact on the environment and people in the area. It is our belief that a federal act, done with meaningful involvement with First Nations, could balance the protection of the environment and communities with development and transportation. We do not believe that the current *Navigation Protection Act* succeeds in achieving that balance.



\*Community Fishing Day – Mouth of Pic River (2010)



\*Biigtigong Territory – Lake Superior (Pukaskwa coastline)



## 2.0 Review Findings

Core findings of our review of the *Navigation Protection Act* with respect to the navigability of and accessibility of waterbodies and waterways to Biigtigong Nishnaabeg are presented below. We have structured our findings around specific issues with the current Act, followed by our recommendations for addressing these issues.

### 2.1 Issue One – Inadequate Indigenous Involvement in Screening Process

A mechanism is needed in the Act for Biigtigong Nishnaabeg to comment on a screening decision by the Minister about whether a project is likely to affect navigability in waters not listed in the schedule under the Act. Such a mechanism should provide the Minister the power to require that proposed works be subject to the Act on the basis of comments provided by First Nations people. Additionally, in cases where First Nation jurisdictional authorities are better suited than the Minister to make an assessment of a project's potential to affect navigation, collaboration agreements or substitution should be used to grant those First Nation authorities with the decision making role.

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#### 2.1.1 Recommended Changes to the Act

- The Minister and/or the applicant must notify Biigtigong Nishnaabeg of any application for proposed works which may potentially affect navigability and therefore affect our Aboriginal rights and interests.
- The Minister must provide support and information in order to adequately notify Biigtigong Nishnaabeg regarding these processes.
- The Minister must consider opportunities for a collaboration agreement with Biigtigong Nishnaabeg or full substitution of the assessment of effects on navigability by Biigtigong Nishnaabeg or a First Nation jurisdictional authority that includes Biigtigong Nishnaabeg
- A statutory 45-day comment period must be provided during which Biigtigong Nishnaabeg may provide comment on whether the proposed works may impact us.
- The Minister must be granted the power to require that proposed works be subject to the Act on the basis of Indigenous community comments.

### 2.2 Issue Two - Lack of Consideration of First Nation Uses in Navigability Impact Assessment

In prescribing the scope of the factors the Minister is to consider in assessing a proposal for works in a navigable water and whether they may substantially interfere with navigability, there is no mention of the consideration of current First Nation uses of the navigable water for traditional or other socio-economic and cultural purposes that require and are contingent on navigability. Furthermore, there is no consideration of whether the location of the proposed works occur within or surrounded by lands under the jurisdiction of First Nation peoples, including First Nation communities or harvesting areas. We believe that consideration of proximity to our community, harvesting areas, and traditional territories is crucial since that proximity generally equates to a higher potential for substantial effects on the navigability of waters used by Biigtigong Nishnaabeg.



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### 2.2.1 Recommended Changes to the Act

- Current First Nation uses of navigable waters for traditional or other socio-economic and cultural purposes that require and are contingent on navigability are taken into consideration when assessing proposed works in navigable waters.
- The proximity of proposed works in navigable waters to our community, traditional territory, and harvesting areas are taken into consideration when assessing proposed works in navigable waters.

## 2.3 Issue Three – Limited Scope of the Legislation with respect to Navigable Waters

The schedule of navigable waters in the current version of the Act is woefully inadequate in protecting the navigability of many waters which are currently used by Biigtigong Nishnaabeg for traditional purposes such as trapping, hunting, fishing, and gathering, and other socio-economic and cultural uses. It is critical that additional waterbodies be added to this schedule, or the schedule be removed and a principle-based definition of navigability be used in the Act to ensure that the exercise of such uses and their related rights are protected by the Crown. Currently, a principle-based assessment is already applied by Transport Canada's Navigation Protection Program, which should be sufficient in addressing this comment if also included as the basis for defining navigability under the Act:

- Can a vessel physically navigate in the waterway?
- Is the waterway being used by people for navigation, or has it been used for navigation in the past?
- Do people have rights to access the navigable water for navigation and or travel purposes?
- Is the waterway part of an "aqueous highway" (an established route or part of a network)?

If the Crown chooses to maintain a schedule of navigable waters in the *Navigation Protection Act*, the threshold for inclusion in the schedule must be based on the potential for small motorized or unmotorized craft to navigate a waterway, regardless of the current intensity of use, and at a minimum should include the list of waterbodies included in [Appendix B](#) which is based on (but not limited to) current Biigtigong Nishnaabeg use for traditional, socio-economic and cultural purposes.

Any Crown decision on such a schedule must, of course, include meaningful and properly resourced First Nation consultation and appropriate accommodation.

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### 2.3.1 Recommended Changes to the Act

- All waterbodies that can accommodate navigation by any type of motorized or unmotorized craft are included in the schedule of navigable waters.
- If all such water bodies are not added to the schedule, then the schedule is removed and a principle-based definition of navigability (that already used by the Navigation Protection Program) is used to determine navigability of waterbodies.

## 2.4 Issue Four - Limited Scope of the Legislation with respect to Project Types

Interprovincial and international pipelines are not currently subject to the *Navigation Protection Act*, only to the *National Energy Board Act*. Pipelines buried under the bed of a navigable water and pipelines attached to existing works also do not require approval under the *Navigation Protection Act* since they



are designated or minor works. This omission is a serious concern, since all types of pipelines can have serious implications for the health of our waterways and our ability to use them for navigation purposes.

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#### 2.4.1 Recommended Changes to the Act

- All pipelines are subject to the *Navigation Protection Act* and require approval from the Minister
- Consultation with Biigtigong Nishnaabeg is required for the assessment of any pipelines located within our traditional territory

### 2.5 Issue Five – Inappropriate Powers Granted to Minister

It is not appropriate for the Minister to have the power to unilaterally downgrade the status of waters defined as navigable in the Act to “minor waters” as is currently provided for in Section 28(2). The Minister does not have a sufficient understanding of uses of all waters to make such decisions without input from the people who use the waters. There must be a meaningful consultation process with our community or with affected Indigenous communities for any such change. It must also be subject to a Governor-in-Council (GIC) decision that such a change is in the public interest and consistent with the principles and process of reconciliation with First Nations in Canada. By moving this decision to the GIC it would bring consistency in the application of the legislation between the downgrading of a navigable water, and the addition of a navigable water to the schedule of such waters under the Act (Section 29(2)).

Additionally, the Minister must not be given the power to unilaterally decide that projects will not interfere with navigability. Public consultation must be mandatory, including consultation with First Nation’s communities whose traditional territories overlap with the area where the proposed project is to take place.

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#### 2.5.1 Recommended Changes to the Act:

- The downgrading of a navigable water becomes subject to a GIC decision.
- Consultation of potentially affected First Nation communities is mandatory prior to a GIC decision on the downgrading of navigable water.
- Consultation of potentially affected First Nation communities is mandatory prior to decision making regarding whether a project will interfere with navigability.

### 2.6 Issue Six – Inadequate Consideration of First Nation Use in Assessment of Schedule Additions

In determining whether a waterway should be added to the schedule of navigable waters under Section 29(2) of the Act, there is no requirement that the GIC consider current use of such waters by Indigenous peoples for traditional purposes or other socio-economic or cultural purposes. Furthermore, there is no consideration of whether the potential navigable waters occur within or surrounded by lands under our jurisdiction or the jurisdiction of other First Nations, including First Nations Reserve lands, lands managed by a First Nation under the *First Nations Land Management Act*, and First Nation harvesting areas and cultural sites accessed via waterways.



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### 2.6.1 Recommended Changes to the Act:

- The use of waterways by First Nation peoples for traditional purposes or other socio-economic or cultural purposes is clearly listed as a criterion for the GIC to consider when determining whether a water should be added to the schedule of navigable waters

## 2.7 Issue Seven - Inadequate Incorporation of Environmental Protection and Cumulative Effects

Prior to 2012 amendments, environmental protection played a larger role in the Act. Any interference with navigation was treated as a “trigger” for consideration of environmental impacts, and in some cases for a full environmental assessment. There also used to be more of a focus on protecting navigable waters, as opposed to simply protecting navigation. This change is short-sighted since we must protect navigable waters if we are to protect navigation in the long-term. In order to sustain the use of navigable waterways, environmental impacts must be considered under the Act and environmental sustainability must be a clearly stated objective of the Act.

A serious shortcoming in the Act’s consideration both of the environment and of sustaining the use is the absence of cumulative effects assessment. While the Act only focuses on proposed works on an individual basis, waterways can be compromised in terms of their health and their utility for navigation by a combination of projects, activities and other factors. The exclusion of most Canadian waterways from the Schedule of waters is another serious shortcoming with respect to environmental protection and long-term sustainability of navigation.

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### 2.7.1 Recommended Changes to the Act:

- Environmental sustainability must be clearly stated as a goal of the Act.
- Cumulative effects assessment must be integrated into the process for assessing a proposed project’s potential impacts on navigation and navigable waters.
- Biigtigong Nishnaabeg and other First Nation communities and organizations must be engaged in developing the wording around “environmental sustainability” as an objective of the Act along with accompanying changes to the Act to better protect the environment.
- Biigtigong Nishnaabeg and other First Nation’s communities and organizations must be engaged in developing a process for assessing cumulative effects on navigable waters and navigation.

## 2.8 Issue Eight – Inadequate Protection of First Nation’s Rights & Interests

The *Navigation Protection Act* does very little to protect and sustain First Nation’s rights related to navigable waters. We believe that our rights should not only be acknowledged by this Act, but also carefully considered and promoted. Canada has a fiduciary duty to consult and if necessary accommodate Indigenous peoples if there is the potential to infringe Section 35 constitutional rights. The Supreme Court has made it clear that we must be engaged with when decisions are being made about lands and resources.

Biigtigong Nishnaabeg continues to access and use the lands and waters of our traditional territory for traditional purposes, including fishing, hunting, trapping, gathering, and for other socio-economic and



cultural purposes. It is critical to the continued exercise of our rights with respect to such activities that these current uses for traditional and other socio-economic and cultural purposes are included in the fundamental scope of legislation to assess and regulate navigability.

The Navigation Protection Program's "A Guide to the Navigation Protection Program's Notification, Application and Review Requirements" states that the federal government will notify proponents if First Nation's consultation is required. However, that would only apply to non-designated or major works projects that are to occur within scheduled waters, or projects for which the proponent has opted in to the *Navigation Protection Act* regime. Therefore, there may be many cases where projects are likely to interfere with navigation in ways that infringe on First Nation's rights and interests, but where First Nation consultation will not take place because there is no mechanism for the federal government to advise proponents to do so.

In some cases, we want far more than consultation. In some cases, Biigtigong Nishnaabeg and other First Nation jurisdictional authorities are better suited than the Minister to be assessing the potential impacts of a proposed project on navigation and navigable waters within their respective areas. In these cases we believe that the Minister must work with us to explore possibilities for collaborative decision making processes for meaningful consultation to occur on a nation to nation basis.

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#### 2.8.1 Recommended Changes to the Act:

- The protection and promotion of First Nation's rights and interests as they relate to navigation and navigable waters are clearly defined as key objectives of the *Navigation Protection Act*.
- Free, prior and informed consent of First Nations is required for all projects and legislation that have the potential to impact waterways within First Nation's traditional territories.
- The Minister must consider opportunities for a collaboration agreement with or full substitution by First Nation jurisdictional authorities
- The Minister must reach out directly to any Indigenous communities located near the proposed work, and provide adequate support and guidance to facilitate the submission of input from these communities.
- A statutory 45-day comment period is provided whereby First Nation communities may provide comment on whether the proposed works may affect them.

### 3.0 Summary

Water and our uses of the water are of deep importance to Biigtigong Nishnaabeg. The protection of navigation, of navigable waters, and of our rights and interests as they relate to navigable waters is only possible through strengthened legislation and enforcement. Additionally, meaningful protection and promotion of our rights and interests as they relate to navigation and navigable waters should represent a key piece of the federal government's efforts towards nation-to-nation relationship building and reconciliation. We have a long history of experience with navigation, a wealth of knowledge about navigable waters, and the right to be part of any decision making that relates to waters and navigation within our traditional territory.

We wish to work respectfully and collaboratively with the federal government to develop a strong and effective Act that will protect and promote Biigtigong Nishnaabeg rights, claims, and interests. We look forward to reading the Standing Committee's recommendations to the Minister, and to participating in ongoing opportunities to work collaboratively on the renewal of this important Act.



### 3.1 Appendix B: List of waterways of current or historic use by Biigtigong Nishnaabeg\*

Lakes	Creeks	Rivers	Harbours	Other
Lake Superior	Cedar Creek	Pic River	Playtor Harbour	Mouth of the Pic River
Killala Lake	Oiseau Creek	Little Pic River	Pulpwood Harbour	Oiseau Bay
Gowan Lake	Gulliver Creek	Black River	Fish Harbour	Prospect Cove
Ruffle Lake	Vein Creek	Little Black River	McKellar Harbour	Heron Bay Wharf
Bamoos Lake	Lacobeer Creek	Steel River	Port Coldwell	Hattie Cove
Hare Lake	Angler Creek	Big Pic River	Happy Harbour	
Cedar Lake	Amwri Creek	Kenogami River	Peninsula Harbour	
Lunam Lake	Swede Creek	Aguasubon River	Picture Rock Harbour	
Louis Lake	Spruce Creek	White River		
Campfire Lake	Gowan Creek	Willow River		
Herrick Lake		Prairie River		
Rous Lake		Pukaskwa River		
Owl Lake		Kagiano River		
Steel Lake		White Gravel River		
Prairie Lake		Swallow River		
Islington Lake		Cascade River		
Vein Lake		Pukaskwa River		
Santoy Lake		White Otter		
Little Santoy Lake				
Foxtrap Lake				
Harriet Lake				
Kagiano Lake				
Long Lake				
McLeod Lake				
Cache Lake				

\*This list can be amended by Biigtigong Nishnaabeg as required