SUMAS FIRST NATION

Navigation Protection Act: A Brief from Sumas First Nation (SFN) Submitted to the House of Commons Standing Committee on Transport, Infrastructure and Communities

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1. Background and Significance to Sumas First Nation

Sumas First Nation (SFN) and all Stó:lō people continue to rely on, as we have for millennia, the complex and thriving ecosystems of what is now called the Fraser River, on common fisheries matters. The territory of the Stó:lō extends from the Fraser's marine estuary to the Hell's Gate/Fraser Canyon, including all tributaries, such as the Harrison, Pitt, Stave and Chilliwack river systems (the "Lower Fraser").

The Fraser River supports the highest abundance of salmon in the world within a single river; this is due to its location, length (1600 km), watershed size (223,000 km^2), and lake nursery area (2,500 km^2). Over 50 percent of all salmon production in British Columbia (over 65 percent for sockeye) occurs in the Fraser watershed. Within the Fraser watershed there are hundreds of tributaries, streams, marshes, bogs, swamps, sloughs and lakes.

One common fisheries matter for SFN is fostering the proper understanding and recognition of the exercise of our inherent Aboriginal and Treaty rights and responsibilities related to fish, fish habitat and aquatic resources, including fishing for food, social, and ceremonial purposes. Navigable waters and navigation are deeply important to the ability of SFN to meaningfully exercise and transmit our rights and responsibilities to fish. The mobility of SFN continues to be directly linked with the Fraser River, its feeding tributaries, and its available resources. The Stó:lō People, which translates to "the River People", demonstrates how SFNs' way of life is centered on the river and fishing. Navigable waters influence "all aspects of economy, mobility, settlement patterns, communication, spirituality and family structure…Ties created through marriage strengthened relationships with neighbouring Coast Salish settlements, as well as with other Northwest Coast groups. These ties ensured access to distant resources and contributed towards the movement of (the Stó:lō) throughout the different seasons" (SFU, 2009). Likewise, many Stó:lō reserves are situated near or on the Fraser River and its tributaries. These reserves were located in these places to support the way of life of the Stó:lō, which is inextricably linked to the access and use of waterways.

SFNs' rights and responsibilities to fish necessarily include the right to safely navigate waters in the Lower Fraser and the responsibility to ensure that these waters are not used or developed in a manner that pollutes or threatens the environment. Navigation and navigable waters are inextricably connected to the constitutionally protected rights of SFN, who depend on water-based travel to access the areas within which they practice their fishing rights. Without the ability to access harvesting areas by water, Aboriginal and Treaty rights to fish are infringed. The ability to travel by water to access fishing gathering areas cannot be separated from the health of those waters. Activities that impact navigation will have cascading effects that reverberate through all aspects of fishing (among other) rights, including the spirit and culture of the water, the ability of the water to support aquatic and terrestrial species, the ability of SFN members to pass along cultural and ecological knowledge accumulated over generations, and trading and family relationships among First Nations.

SFN continues to hold and exercise Aboriginal title to our territories, including to the waters within. The waterways of the Lower Fraser are an intrinsic part of these territories. A fundamental component of Aboriginal title is the right to govern and manage how the lands and waters will be used. How the Crown manages or fails to manage the waterways in the Lower Fraser can directly impact and infringe upon the Aboriginal title of SFN and the Stó:lō people.

International law also provides guidance on the protection of rights of Indigenous peoples that are relevant to the *Navigation Protection Act (NPA)*. *UN Declaration on the Rights of Indigenous Peoples* (UNDRIP) recognizes the right of Indigenous peoples to maintain their relationship with their waters and to uphold their responsibilities to those

waters for future generations (Article 25). UNDRIP also confirms the rights of Indigenous peoples to determine priorities and strategies for development of their territories (Article 32). UNDRIP places an obligation on states to obtain the free and informed consent prior to the approval of any project affecting their territories and to provide effective mechanisms to mitigate the impacts of activities on the territories of Indigenous peoples (Article 32).

Due to the linkages between navigable waters and inherent, Aboriginal and Treaty and rights and responsibilities, the regulation of navigable waters is a matter of importance to Canada's path to reconciliation with SFN. Even apart from the growing body of case law supporting principles of reconciliation, federal policies regarding water have linked respect for the special interests in water held by Aboriginal peoples and the relationship between the Crown and Aboriginal communities. For example, the 1987 Federal Water strategy, after explicitly recognizing the concept of "Native Water Rights", identified a number of the actions that need to flow from that recognition to protect the distinctive way of life.

Simply put, measures that recognize the linkages between the protection of navigation and Aboriginal and Treaty rights can promote reconciliation. Measures that reduce protection, circumvent the duty to consult and accommodate, and infringe Aboriginal and Treaty rights are harmful to reconciliation. Unfortunately, the changes to the *NPA* under the previous Conservative government have set back progress on reconciliation.

2. Background on the History of the Act

2.1.1 History of *Navigable Waters Protection Act (NWPA)*

The *NWPA* dates back to 1882, and constitutes Canada's oldest federal environmental legislation. This Act has been used to protect navigation rights and activities affecting navigable waterways for over 134 years. The original *NWPA* came to be once a series of related Acts pertaining to work within navigable waters were consolidated. Originally, the *NWPA* was subdivided into the following Acts:

- An Act that governed the building of bridges (*An Act respecting bridges under navigable waters, constructed under the authority of Provincial Acts*, S.C., 1882, c. 37);
- An Act that governed the removal of obstructions from navigable waters (*An Act for the removal of obstructions, by wrecks and like causes, in navigable waters of Canada, and other purposes relative to wrecks*, S.C., 1874, c. 29); and
- An Acts that regulated effluents discharged into navigable waters (*An Act for the better protection of Navigable Streams and Rivers*, S.C., 1873, c. 65).

There was a need and utility for these Acts to be consolidated into an Act dealing with all of these works that relate to navigation and navigable waters, which could then be overseen by the responsible Minister (Ministry of Transport). The consolidation process began with the passage of two consolidated Acts:

- *An Act Respecting Certain Works Constructed in or over Navigable Waters*, S.C. 1886, c. 35, which dealt with any "work" in navigable waters; and
- *An Act Respecting the Protection of Navigable Waters*, S.C. 1886, c. 36, concerning obstruction of navigable waters by wrecks.

S.1 of these *Acts* defined 'works' as: *"...any bridge, boom, dam, aboiteau (clarification: i.e., farming on reclaimed marshland), wharf, dock, pier, or other structure, and the approach or other works necessary of appurtenant thereto…".* This definition of works was more comprehensive in scope than in later iterations of the Act.

In 1906, these two Acts were consolidated into one and given the title: ***Navigable Waters' Protection Act***. Between 1906 and 2009, this Act remained largely unchanged.

In 2009, the *NWPA* was amended by introducing a tiered classification system for waterways, which narrowed the classes of waterways protected. Changes made also allowed the government to make decisions to further exempt certain types of works and waterways from the *NWPA*'s approval process. The 2009 amendment reduced transparency by eliminating the need for public notification and consultation on projects that the government defined as not interfering with navigation.

In 2012, the Conservative government made more far-reaching alterations to the *NWPA.* In this amendment, introduced via Omnibus Bill C-45, the *NWPA* lost a great deal of its protective capacity. In the same year, Bill C-38 was passed, which also altered the *Canadian Environmental Assessment Act (CEAA)*, taking out the *NWPA* as a trigger for EAs. In the next section, we focus on changes in 2012, and their implications.

3. Changes to the *NWPA* in 2012- Why?

Reasons provided by the previous Conservative government for making changes to the *NPA* in 2012 had to do with simplifying the EA process, decreasing costs for industry and governments, and decreasing permitting time. However, an analysis by Winegardner *et al.* 2015 showed that the process triggering EAs for project effects on navigable waters are now more complicated with an increased numbers of scenarios post 2009 changes to the Act. Further, the assumption that the stringency of environmental regulation affects business competitiveness is contested, and a meta-analysis by Iraldo *et al*. 2011 showed the relationship to be more complicated. Finally, a retroactive analysis of completion times showed that *NWPA*-triggered EAs done prior to 2012 did not typically take longer than was mandated in the amended *CEAA* 2012 timelines (one year, with a two-year panel review period) (Winegardner *et al*. 2015). Arguments that the *NWPA* held up simple projects that do not impede navigation were also largely resolved with changes made in 2009. Changes in 2012 appeared to go to the other extreme, requiring very few projects to be permitted or assessed.

3.1 Impacts of Change Made in 2012

The main changes made in 2012 that weakened the protective function of the Act included:

- The Act's name was changed from the *NWPA* to the *Navigation Protection Act* (*NPA*);
- A schedule was added to the *NPA* listing the navigable waters for which regulatory approval is required; this list includes less than 1% of navigable waters in Canada;
- Proponents of works in non-scheduled navigable waters were given the opportunity to opt-in/opt-out of the approval process, rendering their works subject to the Act as a voluntary action;
- The definition of "works" was changed so that certain activities/infrastructure were considered "minor works". These projects could proceed without a Notice to the Minister, First Nations or the public. Examples include pipelines under the bed of navigable waters, dredging, outfalls, intakes, and mooring systems;
- Changes to *CEAA 2012* removed the ability for the *NPA* to trigger an EA, and instead restricted EAs to certain types and sizes of projects.

Protection of navigation and navigable waters changed from proactive to reactive. Generally, this reactive approach is not preventative and requires damage to have occurred. It is also a costly and long-term process to undergo and neither First Nation's capacity nor the judicial system is well-equipped to deal retroactively with project effects and infringements of Aboriginal title, rights and Treaty rights.

In the following sections, we provide an analysis on what these changes mean for environmental protections and protections of Lower Fraser First Nations' rights and interests.

3.1.1 Distancing from Protecting Navigable Waters: Name Change to *NPA*

The name change in 2012 was proposed to better reflect the intent of the Act (to protect navigation rather than the environment in which it occurs). **However, navigation and the environment are interrelated and previous versions of the Act, as well as case law, suggest that the environment always had a role in the Act's intent**. Prior to 2012, the *NWPA* provided protection to navigation and the environment. When comparing the *NWPA* to the *NPA*, there is evidence for its explicit intent in the *NWPA* for protecting waterways in which navigation occurs. For example, Sections 21 and 22 of the *NWPA* read:

S.*21*. *No person shall throw or deposit or cause suffer, or permit to be thrown or deposited any sawdust, edgings, slabs, bark, or like rubbish or any description whatever that is liable to interfere with navigation in any water, any part of which is navigable or that flows into any navigable water.*

S.22. *No person shall throw or deposit or cause, suffer, or permit to be thrown or deposited any stone, gravel, cinders, ashes, or other material or rubbish that is liable to sink to the bottom in any water, any part of which is navigable or that flows into any navigable water, where there are not at least twenty fathoms of water at all times, but nothing in this section shall be construed so as to permit the throwing or depositing of any substance in any part of a navigable water where that throwing or depositing is prohibited by or under any other Act.* [20 fathoms = 36.6 metres]

Further, the interrelation of navigation and environment was recognized by the Supreme Court of Canada in *Friends of the Oldman River Society v. Canada (Minister of Transport),* [1992] 1 SCR3. In that decision, the Ministry of Transport appealed an Order that they should conduct an EA under the *NWPA* trigger. The Supreme Court upheld the Order requiring the EA:

"....*Parliament has conferred upon one institution (the "initiating department") the responsibility, in the exercise of its decision making authority, for assessing the environmental implications on all areas of federal jurisdiction potentially affected. Here, the Minister of Transport, in his capacity of decision maker under the Navigable Waters Protection Act, is directed to consider the environmental impact of the dam…."* and *"It defies reason to assert that Parliament is constitutionally barred from weighing the broad environmental repercussions, including socioeconomic concerns, when legislating with respect to decisions of the nature. The same can be said for navigation and shipping … The Minister would almost surely have to weigh the advantages and disadvantages resulting from the interference with navigation. This could involve environmental concerns …."*

Most importantly, Canada also has obligations to protect the waters and waterways relied upon by First Nations to meaningfully exercise their Aboriginal title and rights and Treaty rights. For example, in *Claxton v. Saanichton Marina Ltd*, the British Columbia Court of Appeal found incidental rights to the right to fish were protected and included rights to the area surrounding the fishery and travel to the fishery. Similarly, Article 29 of UNDRIP recognizes that First Nations "have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources."

The *NPA* must ensure that decision-makers consider the environmental effects of activities that may impact navigation and restore linkages to federal environmental assessment legislation. This Liberal Government, in setting its election platform, acknowledged that the *NPA* is an environmental statute and promised to restore lost environmental protections and incorporate more modern safeguards (Liberal Party of Canada 2015).

While environmental impacts to navigable waters need to be protected under the *Act,* and reflected in the name, we also have the opportunity modernize environmental considerations in future versions of the Act. Society has changed a great deal since 1882. While the *NWPA* mentioned substances that would float, sink, or cause reduced visibility (e.g., pulp and paper effluent, gravel), additional substances not envisaged in 1882 could cause similar issues today. Today, a diluted bitumen spill could interfere with navigation due to a lengthy clean-up process that would follow and require waterway closures and dredging. **Where the original *NWPA* prohibited the deposition of**

substances that can decrease water depth, a modernization of the Act should also consider new realities affecting water depth and flow, such as climate change and stormwater runoff. Similarly, as vessel technology has changed since 1882, we may wish to restrict or mandate the clean-up of rubbish that, if deposited into water, may interfere with modern boat motors (*e.g.*, old netting, ropes, and plastic webbing, corrosive materials).

In conclusion, the removal of the word "waters" from the Act in 2012 did not redirect the Act towards its intent; it attempted to distance it from previous environmental protections and precedent. **We argue that the original environmental scope of the *NWPA* be retained, and modernized, and that the name of the Act be restored.**

3.1.2 Addition of a Schedule

In 2012, a schedule of waterways was added to the *NPA*. The *NPA* refers to either "Scheduled" or "Non-Scheduled" navigable waters to indicate waterways that are or are not listed on the schedule to the Act. This list includes 3 oceans, 97 lakes, and 62 rivers, which represent less than 1% of the navigable waters in Canada. The schedule focus on waterways close to urban areas that support commercial or recreational navigation but excluded many waterways relied on by First Nations for the meaningful exercise of their Aboriginal title, rights and Treaty rights. Waterways NOT listed on the schedule (>99% of all waterways) could be affected by projects (i.e. dam, pipeline, mine, bridge, etc.) and will not be protected under federal law. Instead, provincial or municipal governments will be required to adjudicate such projects. The addition of the schedule also means that developers building on or around most lakes and rivers will not have to notify the Minister, First Nations or the public. As a result, many projects can go forward without notice, and without triggering a federal EA. **This is contrary to the Crown's obligations to First Nations and the rights of First Nations to have free, prior, and informed consent for projects that could affect Aboriginal title, rights and Treaty rights**.

Regionally in the Lower Fraser, the Oceans, Lakes and Rivers included on the Schedule only include: The Pacific Ocean; Pitt Lake; Harrison Lake; The Fraser River; Pitt River; and Harrison River. **The schedule contains obvious gaps when considering waters used by SFN, and demonstrates its unilateral development without First Nations consultation**. Numerous tributaries that feed into the Fraser River are utilized by First Nations for navigation and fishing but are left unprotected by the *NPA*. Section 29(2) of the current Act provide a mechanism for adding additional waterways to the schedule but does not adequately consider and address First Nations' rights to amend the schedule. As it states: "*29(2) The Governor in Council may, by regulation, amend the schedule by adding to it a reference to a navigable water if the Governor in Council is satisfied that the addition: (a) is in the national or regional economic interest; (b) is in the public interest; or (c) was requested by a local authority.*", First Nations' rights is not explicitly mentioned.

Even if First Nations' rights were included, the use of Section 29(2) for adding new waterways to the Schedule, will be time consuming and will involve the weighing of economic interests against fundamental navigational rights every time that new waterways are proposed as an addition to the schedule. We have seen evidence of attempts to fill gaps in the schedule to the *NPA* through this process. In March of 2015, Bill C-662 had its first reading in Parliament. This Bill sought to amend the schedule to the *NPA* by adding two important waterways to First Nations in B.C.; the Brunette River and Coquitlam River (Burrard Inlet was also proposed, but is already included under Pacific Ocean). These waterways have still not been added. Any amendment of the schedule must be done through deep and meaningful consultation with First Nations; this consultation can take years to complete and Schedule will likely be >1500 pages making it unrealistic to complete. In lieu of *NPA* protection, projects like the Kinder Morgan pipeline expansion project could threaten these waterways without due assessment.

3.1.2.1 Opt-In/Opt-Out for Projects on Non-Scheduled Waters

The *NPA* includes an opt-in measure such that project owners on non-scheduled waterways only submit their projects for reviews on a voluntary basis. This opt-in option is not a meaningful remedy for having an incomplete schedule to the *NPA;* project owners cannot be relied upon to be sufficiently informed or motivated to subject their

projects to more regulations by their own volition. **Opt-in option for project approvals and EAs removes transparency to First Nations and the public.** The *NPA* also transitions every work that was formerly approved under the *NWPA* into the *NPA* regime, regardless of location. These works that were subjected to the *NWPA* before the transition would now be deemed "designated works" and terms and conditions imposed on a work order under the previous legislation would remain in effect. However, owners of works that are in non-scheduled navigable waters, as defined by the *NPA*, would now have the option of "opting-out" by April 1, 2019. We suspect it is far more likely that proponents in non-scheduled water will "opt-out" of the Act than for new proponents to opt-in. This again decreases the number waterways protected by the *NPA*.

In conclusion, over 99% of navigable waterbodies are now excluded from federal law around navigation and navigable waters and amendments to the Schedule require an onerous and time consuming process that currently does not adequately address First Nation's Aboriginal title, rights and Treaty rights. The addition of the schedule enables projects to go forward without permitting, notifications, EAs or First Nation and public input; and relying on proponents to voluntarily opt-in to be regulated on non-scheduled waters is flawed logic. **The intent of the act shifted from protective to permissive with the addition of the schedule and the schedule should be removed**.

3.1.3 Creation of Categories for "Works"

When the *NPA* was updated, certain projects were designated as "Minor Works". The Minor Works Order was established to enable works to be built if they meet the criteria for the applicable class of works, as well as the terms and conditions for construction. Minor Works, by this definition, are considered to be "designated work". In other words, under the *NPA* such works can proceed without a Notice to the Minister as long as they comply with legal requirements. Under this framework, it is also the responsibility of the project owner to assess the work to ensure that it meets the criteria established for the class of work being done, and to ensure that legal requirements are met. Minor Works include: erosion-protection works; construction of docks and boathouses, boat ramps, slipways, and launch ramps; aerial cables for power and telecommunication; pipelines buried under navigable waterways; pipelines and power or communication cables attached to existing works; works with a boomed-off area upstream or downstream of an existing work for water control; outfalls and water intakes; dredging; and mooring systems. **This list includes projects that can impact navigation and the environment that should not be exempted from approvals or assessments based on the minor works list.** The ways in which some of the works on the "minor works" list could affect navigation and navigable waters are outlined in the Table below.

Works	Potential Impact on Navigation/Navigable Waters
Pipelines buried under the bed of navigable waters	Even if pipelines are constructed using horizontal directional drilling to tunnel under a waterway, and municipal setbacks are followed to minimize erosion, a spill or rupture in a pipeline containing heavy oil may also require a long clean up procedure, including dredging of sunken oil, which can limit access to navigation and impact waterways for years. See recommendation in section 3.5 for more details.
Pipelines attached to existing works	As most modern pipelines will be attached to existing works at some point, the inclusion of this item as a minor works may allow pipeline crossings of navigable waters to be undertaken with no federal oversight or EA.
Works within a boomed-off area	Booms fail for many reasons. Categorizing such works as minor means that the public, First Nations, and Minister will not be given notice prior to the works being undertaken and will have no warning about emergency risks, if they occur. Even for emergency/malfunction management, allowing works behind booms to occur in a self-regulated and managed fashion, and without federal oversight is ill-advised.
Outfalls and water intakes	Outfalls are discharge points of a waste stream into a body of water or it may be the outlet of a river, drain or a sewer where it discharges into a water body. Water intakes are structures used for collecting water from the surface of water sources and conveying it elsewhere. Proponents are advised to avoid interfering with river traffic when constructing these types of facilities; however, by including them as Minor Works, there is a dangerous reliance on the owner to make this determination independently.

Dredging	Dredging directly affects navigation and the quality of water. Dredging can be used to deepen waterways for the use by larger ships, and for clean-up of heavy oil that spills into a waterway and sinks (See Section 3.5). Dredging also increases suspended sediment loads, which may be carried downstream and deposited in quiescent waters, potentially creating barriers to navigation over time. Only assessing dredging when it is tied to designated projects under *CEAA* 2012 is insufficient; all dredging activities need to be assessed under the revised Act.
Other "Minor" Works	While boat ramps, slipways, launch ramps, and mooring systems are also listed as minor works, sizes are not provided. Mooring, ramp, and dock systems for large ships are obviously much different than for small personal crafts, and should not be neglected under this Act.

In conclusion, many projects can be built and operated, even within scheduled waterways, under the *NPA*, and they will not require federal oversight or a notification to the Minister. Without this, the Federal Government is avoiding consultation on projects which could have significant impacts on the environment and on SFN. It will prevent the Crown from learning what projects are having direct and cumulative impacts and will prevent the Crown and Industry from either creating better projects which avoid or mitigate impacts, or from learning why certain projects should not proceed. First Nations will not be allowed to exercise their rights to free, prior and informed consent prior to project approvals, due to projects being classified as "minor works".

4. Simultaneous Changes to *CEAA*

While a review of *CEAA 2012* is outside of the scope of this brief, **it is important to recognize that the *NWPA* was not altered in a vacuum**. The *CEAA* was changed in the same year, which altered requirements for federal EAs. In *CEAA 2012*. Importantly, the *NWPA* was removed as a trigger to conduct a federal EA, instead utilizing a "designated project list", wherein the project type and scope of work determined the requirement for an EA. *CEAA 2012* also removed certain project from requiring an EA, such as pipelines (other than offshore) and electrical transmission lines not regulated by the NEB; industrial facilities (e.g., pulp and paper mills, smelters, facilities for the manufacture of chemicals, chemical explosives, lead-acid batteries); heavy oil and oil sands processing facilities; groundwater extraction facilities; potash mines and other industrial mineral mines. Thresholds regarding project sizes requiring an EA were also established for tidal power generation, liquefied natural gas storage, rare earth mines, mine expansions, offshore mines, quarries, dam and dyke expansions, expansion of facilities for treatment, incineration, disposal and recycling of hazardous waste, National Defence expansions, and NEB-regulated pipelines.

Overall, *CEAA 2012* eliminated thousands of screening-type EAs conducted each year under the former Act. The environmental effects considered by EAs under *CEAA 2012* are also limited to those within areas of federal jurisdiction, such as: fish and fish habitat, species at risk, migratory birds, federal lands, trans boundary effects, and effects that impact Aboriginal people. **The combined effects of changes to the *CEAA* and the *NWPA* in 2012 mean that far more projects are decided on without the assistance of an EA and without First Nation consultation.** Winegardner *et al*. (2015) examined 2,426 EAs published prior to 2012 and estimated that 58% projects approved under the former *NWPA* would not have any federal oversight under the *NPA*, and very few would trigger an EA (unless the project type and size required an EA under *CEAA 2012*). **While a stated goal of the 2012 changes were to streamline the EA process, these authors showed that changes increased the number of permitting scenarios, which increases permitting complexity**.

5. Summary of Recommendations

5.1 Return Name of the Act to Original (*NWPA*)

The *NWPA* previously pertained to both navigation and the environment in which navigation occurs, as the two are interrelated. The name should reflect its original intent and the precedent established through case law which recognized the interrelationships between the environment and navigation.

5.2 Remove Schedule and Restore Default Protection to all Navigable Waters

Protections needs to be restored to all lakes, rivers, and waterways so they are clearly protected by the *NPA*. The *NPA* schedule should be abolished, with the definition of navigable waters broadened to include all which the common law would include as navigable. Amendment of the Schedule at this point is not realistic. Any amendments must be done through deep and meaningful consultation with First Nations. Amendment can take years to complete and Schedule will likely be >1500 pages. In time, after consultation with First Nations and the public, it may be possible to develop criteria, including the exercise of s.35(1) rights, that could determine whether waters were included under the *NPA. The* Act needs to be protective of waterways rather than permissive.

5.3 Remove Minor Works Category, Tiered Project List

SFN recommends removing the tiered project list and the minor works category, requiring the screening of each project for its potential impacts to navigation and navigable waters, which should include collaboration with First Nations as part of that screening process.

5.4 Reinstate the *NWPA* as a Trigger for a *CEAA* EA

If a project has the potential to significantly affect navigation or navigable waters, either through construction, operations, decommissioning, or via spills and malfunctions, an EA should be conducted to understand the potential costs of the project, interference with First Nations navigation routes, loss of access to traditional activities, and other related issues. Such factors need to be considered when deciding whether a project should be accepted, and how it should go forward (e.g., mitigation), and a decision to consider such effects should not be based solely on the type and size of a project, but on a project's potential for causing the effect evaluated (i.e., a small project may cause a big effect, and a big project may cause a small effect).

5.5 Require UNDRIP Compliance

The Act must recognize and respect Aboriginal title, rights and Treaty rights related to water and comply with UNDRIP. In particular, free, prior and informed consent must be obtained from First Nations on any changes to the *NWPA*, relevant regulations and all applications that are submitted under the Act. Requiring compliance with UNDRIP in the implementation of the Act will also serve to respect First Nations' Aboriginal title, rights and Treaty rights related to water, which includes the right to decide how waters will be used and how they will be managed for the benefit of present and future generations.

5.6 Hold consultations and use independent expert panels to incorporate feedback to strengthen the *NWPA*

As protection of navigable waters affects First Nations and other Canadians, we recommend that public consultations and an independent expert panel (including consultations with mutually agreed upon First Nation representatives) should also be integrated into the *NPA* review. We also recommend that the government provide all interveners submitting written recommendations with a response to their concerns, detailing how each will be dealt with, or providing an explanation as to why not. Broader considerations should also include how these expert panels can assist the processes to ensure the achievement of free, prior and informed consent from First Nations.

5.7 Establish Co-Management Mechanism & Increase First Nations Capacity

The Act should be amended to expressly provide the Minister with authority to enter into co-management agreements with First Nations on navigation related issues, including decision-making, project review and assessment, monitoring and enforcement, First Nations management plans and objectives, and consultation processes. Funding should also be provided to SFN such that capacity can be developed to apply, manage and enforce the Act.

5.8 No Maximum Fine and Proportional Penalties for Violations

Currently, Section 39 (3) states that: "*The maximum penalty for a violation is $5,000, in the case of an individual, and $40,000 in any other case*". We suggest that there should be no maximum fine values, and that fines should be established over a more refined scale system that will dissuade each type of company from violating the Act. A scaled approach, calculated based on the value of a company, is recommended. A multi-billion-dollar company may feel little to no impact from a $40,000 fine and may violate the Act if complying is deemed to be more expensive in terms of time and money. Licenses of activity or project should also be revoked if damage is significant.

5.9 Change s.16(1) on "Minister's Powers" and Removal of Obstructions

Under the new *NPA*, the Minister lacks the authority to cause those who have left or created an obstruction to remove the obstructions from a waterway if it is not on the scheduled list. Section 16 (1) is worded as: "*The Minister may order the person in charge of an obstruction or potential obstruction in a navigable water — other than a minor water — that is listed in the schedule to secure, remove or destroy it...".* The underlined section adds uncertainty, as it restricts the power of the Minister to only remove obstructions in <1% of navigable waters. The Minister should be able to compel a party to remove an obstruction no matter where it occurs, as there are dangers in leaving them in place (e.g., they may leak toxic substances (e.g., fuel) or create navigation hazards). This clause should be changed so that the Minister's power to compel removal is extended to all navigable waters.

5.10 Reversion of Dumping Places (s.26) and Retaining Dewatering (s.23)

The Minister should not be allowed discretion on exemptions to dumping and dewatering provisions. Currently, s.26 of the *NPA* reads: "*The Minister may designate places in any navigable water that is not within the jurisdiction of any person referred to in s.25, where stone, gravel, earth, cinders, ashes or other material may be deposited even if the minimum depth of water at that place may be less than 36 metres, and the Minister may make rules respecting the deposit of the materials*." We recommend revising this section to read as it did in s.22 of the *NWPA* (see Section 1.1.4). However, retain s.23 of the current *NPA* that states that "no person shall dewater any navigable waters".

5.11 Modernize List of Environmental Considerations

Environmental considerations listed in the original *NWPA* needs to be included but also updated to include others that may affect navigation in current society. Additional considerations should include, but not limited to, reconciliation with Indigenous peoples; best available information, including Indigenous traditional knowledge; effluents and spills affecting navigation; climate change; cumulative effects; storm water runoff; and types of rubbish. Government needs to work with First Nations and an expert panel to arrive at a mutually accepted list of environmental considerations for the next version of the Act.

5.12 Add Clause Requiring Potential Spills be Considered for Navigation Impacts

The government has obligations to consider how potential projects will impact or infringe on the exercise of s.35(1) rights, including the right to access and fish in preferred locations using preferred means. The Federal government also has international obligations when recognizing human rights with regard to water, one of which is preventing third parties from interfering with the enjoyment of water (UN Resolution 64/292, 2010). When evaluating projects such as the Kinder Morgan Expansion pipeline, the permitting and EA process should necessitate the consideration of whether potential spills could impact the enjoyment of navigation. As shown by the Kalamazoo River spill in 2010 (where ca. 4,000 m^3 of diluted bitumen spilled from a pipeline into the river), there is great difficulty in cleaning up heavy crude oil after it sinks in water. After this spill, sections of the Kalamazoo River and Morrow Lake remained closed to boating for almost two years, and some sections of the river remained closed for dredging of submerged

diluted bitumen for more than three years. Therefore, there can be impacts of spills on navigation and a clause demanding a consideration or assessment of such risk should be added to the next Act and the *CEAA*.

5.13 Require More Information on Navigation in Project Descriptions

Project descriptions and permit applications submitted under the *NWPA* and the *CEAA* should require the proponent to include information on a project's risks to navigation. Mandated information should include: a description of potential effects of the project on navigable waters; a description of potential effects of the project on human health (e.g. air emissions, noise) that would limit use of a waterway for navigation; a description of historic and current uses of the waterway by First Nations; a description of the name, width, and depth of any waterway affected by the proposed project (and how those dimensions may be affected); and, a description of accidents and malfunctions that could occur, as well as remedial activities (e.g., spill response) that could affect navigation, and including how long the effect could last.

5.14 Include Clause Requiring Commercial Shipping Projects to Assess Impacts on Other Forms of Navigation

Commercial shipping traffic affects other forms of navigation (i.e., smaller/personal vessels). A clause requiring commercial shipping projects to be assessed for impacts on other forms of navigation is needed. Projects recently approved or proposed in the Lower Fraser region include: a new shipping terminal, which will add 70 to 120 tankers and barges carrying jet fuel annually; a new coal port was approved for the Fraser Surrey Docks in 2012, which could facilitate over 600 open barges per year, containing US powder resin basin coal; and a LNG terminal in Delta, BC, which would add up to 120 tankers and 90 barges annually. SFN is concerned about the cumulative effects of existing and approved or proposed shipping projects for the lower Fraser River and delta on all forms of navigation.

5.15 Include Purpose Section in the Act

The Act lacks a purpose section to guide the overall interpretation and implementation of the Act. A purpose section should be included in the Act which explicitly states that protection of the environment and reconciliation with Indigenous peoples are objects of the Act.

6. Description of Organization Providing Brief

Sumas First Nation (SFN) is a Stó:lō community of 200 people living in the Lower Fraser watershed, where we have existed for millennia and continue to live in a close relationship with the land and waterways, and exercise our unextinguished Indigenous rights and title over our Territory. We are a signatory to the Lower Fraser Fisheries Alliance (LFFA). We have witnessed vast changes to our Territory and way of life since European contact and are actively working in a spirit of reconciliation with all governments in order to protect and promote our culture.

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An Act Respecting the Protection of Navigable Waters, S.C. 1886, c. 36, concerning obstruction of navigable waters by wrecks.

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Summary

Sumas First Nation (SFN) prepared this brief regarding the *Navigation Protection Act* (*NPA*) to enable the federal government to hear views from SFN. Navigation and navigable waters are inextricably connected to the constitutionally protected rights of SFN in many ways.

We outline how changes to the Act, along with changes to the *Canadian Environmental Assessment Act* (*CEAA*), created a paucity of federal oversight for most projects affecting navigable waters. The Act's name was changed from the *Navigable Waters Protection Act* (*NWPA*) to the *NPA*, removing the reference to water. However, previous versions of the Act dating back to 1882, along with case law, recognized the need for the protection of the environment in which navigation occurs. In 2012, a schedule was also added to the *NPA* which listed navigable waters requiring regulatory approval; this list includes less than 1% of navigable waters in Canada and removed many waterways (*i.e.* Chilliwack River, Camp Slough, Hope Slough) from federal protection which are held and used by First Nations in exercising their Aboriginal title and rights and Treaty rights.

Tiered "works" categories were also introduced, and those classified as "minor works" could proceed without a Notice to the Minister, First Nations, or the public. The list includes projects that present clear risks to navigation and navigable waters and their inclusion is ill-advised. Changes to *CEAA* also removed *NPA*'s ability to trigger EAs. Individual projects are no longer individually screened for potential effects on navigation or navigable waters, rather EAs are restricted to certain types and sizes of projects. The collective effects of these changes are that the majority of projects potentially affecting navigation and navigable waters can proceed without permitting or notice, and far fewer will trigger an EA. Developments on navigable waters are dangerously reliant on self-regulation and lack transparency, and the decision-making process is no longer science-based for a large proportion of projects going forward.

Importantly, the *NPA* fails to provide the appropriate standard for triggering reviews that the Crown must do in order to meet constitutional obligations to First Nations. Because the Crown must meaningfully consult and accommodate First Nations as it relates to potential impacts and infringements to the exercise of rights constitutionally protected under s.35(1) of the *Constitution Act,* 1982 and has committed to implementing the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), the *NPA* must be changed.

SFN makes 15 recommendations: (1) Return name of the Act to *NWPA*; (2) Remove Schedule and restore default protection to all navigable waters; (3) Remove Minor Works category and the Tiered Project List; (4) Reinstate the *NWPA* as a trigger for *CEAA* EA; (5) Require compliance with UNDRIP; (6) Hold consultations and use independent expert panel to incorporate feedback to strengthen the *NWPA;* (7) Establish co-management mechanism and Increase First Nations capacity for monitoring and enforcement; (8) No maximum fine and proportional penalties for Act violations; (9) Change s.16(1) on Minister's powers and removal of obstructions; (10) Reversion of Dumping Places (s.26) and retaining Dewatering (s.23); (11) Modernize list of environmental considerations; (12) Add clause requiring potential spills be considered for navigation impacts; (13) Require more information on navigation in project descriptions; (14) Include clause requiring commercial shipping projects to assess impacts on other forms of navigation; and (15) Include Purpose Section in the Act.