www.ecojustice.ca
info@ecojustice.ca
1.800.926.7744

December 6, 2016

Randy Christensen
#214 - 131 Water Street
Vancouver, BC V6B 4M3
604-685-5618 xtn. 234
rchristensen@ecojustice.ca
File No: 493

Sent via email: tran@parl.gc.ca

Standing Committee on Transport, Infrastructure and Communities
Sixth Floor, 131 Queen Street
House of Commons
Ottawa, ON K1A 0A6

Attention: Chair and Members of the Standing Committee

Re: Submission to the Standing Committee on Restoration and Modernization of the *Navigation Protection Act*

Enclosed is the submission of Ecojustice Canada providing recommendations for the restoration and modernization of the *Navigation Protection Act.* We would be pleased to answer questions or provide further information on this topic.

Best regards,

Randy Christensen

encl: Ecojustice Canada's submission

Submission to the Standing Committee on Transport, Infrastructure and Communities

Ecojustice Canada

Author: Randy Christensen

Executive Summary[1]

The 2012 amendments to the *Navigable Waters Protection Act* (the "NWPA", now the *Navigation Protection Act* - the "NPA" or "Act") significantly weakened the Act's ability to protect Canada's waterways. Federal protection now extends to a mere fraction of Canadian waterways previously covered. General oversight, as well as potential review under the *Canadian Environmental Assessment Act* (the "CEAA") was severely restricted. In addition, accountability and transparency were impaired by the elimination of public notice and comment requirements. As a result, protection of both navigation and the environment are at greater risk.

Canada must restore and enhance protections of navigable waters to protect the many Canadians who rely on waterways. Businesses such as tourism, fishing, and outdoor activities need not only navigation but also clean bodies of water. Private citizens rely on waterways for various economic and health benefits, especially in Indigenous communities.

To protect these needs, effective regulatory protection is required. Environmental assessment should play a role in approvals under the NPA. While not every approval requires environmental assessment, there are still possible modifications that could be made through the approval process to protect the environment and navigation in some cases. Knowing that proposals will be scrutinized for environmental effects will likely improve many proposed projects. In other cases, environmental assessment will be appropriate. While it is possible that a comprehensive and robust "designated project" list could accomplish this goal, that will be a difficult challenge. Granting decision-makers the ability to require environmental assessment in appropriate cases as part of the approval process should be required until the designated project list is fully functional and effective.

There are interlinkages – both positive and negative – between protection of navigable waters and navigation and impacts on the environmental flows necessary for aquatic ecosystems. Restoration and reform of the NPA and *Fisheries Act* should not be considered separately. While we do not purport to speak on behalf on First Nations, we note that a robust NPA could also enhance protection of aboriginal rights.

Modernization of the NPA needs to be undertaken to ensure robust environmental protection across federal government jurisdiction. Modern concerns such as transparency, public

[1] Thanks to Jason M Worobetz, student at law, University of Ottawa for the research and initial drafting of this submission.

participation, and future climate impacts should be incorporated into decision-making. Our recommendations are:

1) restore protection of all navigable waters;
2) restore environmental assessment requirements in appropriate cases; and
3) protect public rights and public trust.

Each of these recommendations is discussed in greater detail below.

Background and context

In 2012, the federal government amended the NWPA as a culmination of reforms that significantly weakened environmental protection generally (the *Jobs, Growth, and Long-Term Prosperity Act*). The changes eliminated NWPA protections for nearly all previously covered waterways. Federal protection was further impaired by removing the environmental assessment requirements that were triggered under the previous CEAA regime. Together, these changes impaired the ability of government officials to oversee activities on navigable waterways and protect the environment and public rights.

The practical effect was a dangerous deregulation of 99% of Canada's navigable waterways and the weakening of environmental oversight. These changes are even more worrisome given the concurrent weakening of the *Fisheries Act.* This deregulation and lack of oversight effectively relieved project proponents from the obligation to protect the environment in most cases, thereby making it more difficult for Canadians to enforce their public navigation rights. Concerned individuals now must rely on the court system, which comes at significant costs in time, resources and uncertainty for all parties.

Prior to the deregulation of waterways, Canada had inclusive environmental protections for navigable waters. All works needed approval, all navigable waters were regulated, the public notice and comment provision were robust, environmental assessment was automatically triggered, and the Minister of Transport had broad remedial powers to correct violations.

Protection of the environment and human health are two of the greatest challenges of our time. These cannot be accomplished by individual pieces of legislation nor by one level of government acting alone. Parliament is reviewing a broad range of legislation with the goals of restoring previous protection and modernizing environmental protection. "Modern" environmental laws enshrine several key principles:

1) Recognition of the right to a healthy environment for all Canadians, which ensures an equitable sharing of all environmental burdens and benefits;
2) Reliance on strong, binding standards that apply nationally and are equal to or better than other industrialized countries;
3) Recognition of the polluter pays principle, including incorporating the costs of environmental externalities in prices;
4) Incorporation of the precautionary principle; and
5) Substitution of environmental hazards with safer alternatives.

This submission, along with Ecojustice's submissions on reforming the *Canadian Environmental Protection Act*, CEAA, the *Fisheries Act*, and the National Energy Board, discusses incorporating these important principles into federal legislation.

Recommendation 1: Restore protection of all navigable waters

Renaming the *Navigable Waters Protection Act* the *Navigation Protection Act* revealed a disappointing change of focus from protecting navigable waters and the public's right of navigation to merely protecting some current navigational activities. Protection under the NPA, now found in a schedule to the Act, lists only three oceans, ninety-four lakes, and sixty-two rivers.[2] Prior to the amendments, approximately 40,000 lakes and over 2,000,000 rivers had been protected. This means that over 99% of Canada's waterways are no longer subject to regulation and oversight under the NPA.[3]

These changes significantly impact the lives of every day Canadians and especially those in Indigenous communities. The first court case to examine these changes highlights this risk. The Mikisew peoples challenged the 2012 amendments alleging a breach of the duty to consult. The Mikisew rely on a series of waterways for activities protected by treaty, including fishing, trapping, and navigation.[4] The Honourable Mr. Justice Hughes of the Federal Court of Canada found that any reasonable person would expect that a reduction in the number of protected waterways carried the potential risk of harm to the fishing and trapping rights of the Mikisew, thereby triggering the duty to consult.[5]

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[2] *Navigation Protection Act*, RSC 1985, c N-22, Schedule.
[3] Denis Kirchhoff & Leonard JS Tsuji, "Reading between the lines of the 'Responsible Resource Development' rhetoric: the omnibus bill to 'streamline' Canadian environmental legislation" (2014) 32:2 IAIA 108 at 111.
[4] *Courtoreille v Canada (Aboriginal Affairs and Northern Development)*, 2014 FC 1244 at para 13.
[5] *Ibid* at para 101.

This case highlights the real and harmful effects of the shift in focus from navigable waters to navigation. Prime Minister Justin Trudeau recognized these impacts and mandated restoration and modernization of lost protections.[6] Prime Minister Trudeau was also emphatic that "no relationship is more important to [him] than the one with Indigenous Peoples."[7] Both of the Prime Minister's goals can be accomplished by refocusing the Act on the protection of navigable waters, eliminating the Schedule of protected bodies, and restoring the ability of the Minister of Transport to exercise his remedial authority on any navigable waterway. The Act should adopt the common law definition of navigable waters as summarized *Canoe Ontario v Reed.*[8]

Recommendation 2: Restore requirements under the *Canadian Environmental Assessment Act* in appropriate cases

Navigation and the environment are two highly interconnected areas. Permitting works that can impact navigation quite often results in environmental impacts (e.g., works in waterbodies, crossings, dams, etc.). The enactment of the CEAA addressed this relationship explicitly by structuring a link between the two statutes. Under the former CEAA, proposed projects defined as "work" under the NWPA requiring approvals triggered environmental assessment.[9] Effectively, this resulted in environmental review for nearly all waterway projects in Canada posing significant risks to navigation or the environment.[10]

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[6] Canada, Office of the Prime Minister, "Minister of Transport Mandate Letter" (Ottawa: Office of the Prime Minister, n.d.) at para 14 [Transport Mandate].
[7] *Ibid* at para 7.
[8] *Canoe Ontario v Reed*, 69 OR (2d) 494, [1989] OJ No 1293 at para 25:

a. Navigability in law requires that the waterway be navigable in fact. It must be capable in its natural state of being traversed by large or small crafts of some sort;
b. Navigable also means floatable in the sense that the river or stream is used or is capable of use for floating log or log rafts or booms;
c. A river may be navigable over part of its course and not navigable over other parts;
d. To be navigable, a river need not in fact be used for navigation so long as it is realistically capable of being use;
e. A river is not navigable if it is used only for private purposes or if it is used for purposes which do not require transportation along the river;
f. Navigation need not be continuous but may fluctuate with the seasons; and
g. Where a proprietary interest asserted depends on a Crown grant, navigability is initially to be determined as at the date of the Crown grants.

[9] Amanda K Winegardner, Emma E Hodgson, & Adirenne M Davidson, "Reductions in federal oversight of aquatic systems in Canada: implications of the new Navigation Protection Act" (2014) 72 Can J Fish Aquat Sci 602 at 602.
[10] Denis Kirchhoff, Holly L Gardner, & Leonard JS Tsuji, "The Canadian Environmental Assessment Act, 2012 and Associated Policy: Implications for Aboriginal Peoples" (2013) 4:3 Intl Indigenous Pol'y J 1 at 7 [Kirchhoff].

Under the NPA, approvals no longer trigger any federal assessment for any work, weakening this previously strong regime. Additionally, none of the criteria for adding to the Schedule of protected bodies explicitly incorporate sustainability or environmental protection. The amendments also expand the list of minor works that can be done, which allows for the pre-approval of works that are of low risk but may have cumulative effects.[11]

These changes were made as a move against a perceived over-expansion of the NWPA beyond its original purpose for navigation.[12] However, environmental assessment is not just limited to legislation where the underlying goal is environmental protection but is broader and exists to mitigate both incidental and cumulative effects. Experts assert that one of the principal failures of environmental law today is a disregard for cumulative impacts, which can be attributed to design flaws in legislation such as the NPA.[13] The critical flaw is the narrow focus on preventing significant or major harms while ignoring the potential impacts of smaller scale projects. As an example, the NPA expanded the pre-approval of minor works and focuses only on major projects in a small number of waterways. This failure is exacerbated by the fact that many potential harms outside the scope of protected bodies are difficult – if not impossible – to detect without the expertise and resources of Parliament.[14]

With the opportunity to revisit environmental assessment and navigation, it is important that the new requirements be effective, efficient, and fair. This can be accomplished if it is applied to all potentially significant undertakings.[15] To do so, all major projects should be subject to Ministerial approval and automatic assessment regardless of which body of water they take place on. The amendments should also ensure effectively integrated attention to biophysical, social, and economic considerations, which can be accomplished by subjecting projects to a public review process where all issues can come to light.[16] Any requirements should be triggered at the outset of project planning so as to inform all decisions, and the legislation should establish clear requirements and predictable process expectations.[17] This will be accomplished if an

[11] Richard F Southcott et al, "Canadian Maritime Law Update: 2013" (2013) 44:4 J Mar L & Com 501 at 506.
[12] Denis Lebel (Speaking notes delivered at the National Press Theatre, October 18, 2012), online: <http://news.gc.ca/web/article-en.do?nid=815389>. [Lebel].
[13] Martin ZP Olszynski, "Ancient Maxim, Modern Problems: *De Minimis*, Cumulative Environmental Effects and Risk-Based Regulation" (2015) 40:2 Queen's LJ 705 at 706.
[14] *Ibid* at 735.
[15] Kirchhoff, *supra* note 10 at 4.
[16] *Ibid.*
[17] *Ibid.*

assessment is triggered automatically as soon as a proposal is submitted. While focus should be placed on the most significant undertakings, it is important to aim for avoidance or mitigation of adverse effects that are incidental to the projects, which can only truly be accomplished by a principled consideration of the need for environmental assessment in all cases and the requirement of environmental assessment in appropriate cases.[18] Finally, review in appropriate cases, public participation, and Ministerial oversight will promote engagement, transparency, integration, and enforcement, all of which are important to environmental assessment.[19]

Recommendation 3: Protection of public rights and the public trust

The public trust doctrine is a legal concept that holds that certain natural resources are so crucial that they cannot be privately owned and are instead held by the government in trust for the benefit of the public and future generations.[20] While it has not achieved robust recognition in the Canadian common law, the public trust doctrine has the potential to be used as a tool for environmental management and can strengthen government functioning by placing obligations on agencies to act transparently while also allowing citizens to have their voices heard. Public rights such as navigation are central to the public trust doctrine.[21] There has been judicial recognition of these public rights as they have deep roots in the common law.[22] The right of navigation is one of the supported rights and is paramount to private interests, as owners of the waterbed who interfere with public navigation to a substantial degree may be subject to public nuisance claims.[23]

The NPA negatively affects these public rights and the conception of a public trust by removing the public's voice from the process via the scaling back of protection and assessment. Environmental assessment has historically been one of the most important instruments to provide a venue for meaningful public participation as the public is notified and given a chance to respond.[24] The amendments to the NWPA decreased accountability, transparency, and public

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[18] *Ibid.*
[19] *Ibid.*
[20] EcoJustice, "Water, the public trust and Ontario" (24 April 2013) *EcoJustice*, online: <http://www.ecojustice.ca/water-the-public-trust-and-ontario/>.
[21] Joseph L Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention" (1970) 68 Mich L Rev 471 at 484-485.
[22] *British Columbia v Canadian Forest Products Ltd*, 2004 SCC 38 at 74, [2004] 2 SCR 74.
[23] Conservation Council of New Brunswick, *Keeping Public Resources in Public Hands: Advancing the Public Trust Doctrine in Canada* (Fredericton: CCNB, 2006) at 10.
[24] Kirchhoff, *supra* note 10 at 9.

participation by removing ministerial orders and public participation. The Minister is able to delegate responsibilities to any person or organization, raising questions about capacity as non-elected and non-representative bodies are making crucial decisions regarding public rights in navigation. Further, by allowing for an opt-in regime, the Act places decisions of application in the hands of the proponent who lacks the requisite capacity and impartiality.

Transport Canada has been open about shifting the responsibilities of environmental protection and protection of navigation to the public. Its website explains that the public would be forced to rely on the common law as a safety net.[25] A Transport Canada briefing note also delegates the determination of navigability to the courts.[26] Concerns with this approach are beyond the scope of a single brief, but they include: forcing private citizens to undergo a costly process to enforce public rights, uncertainty, inequality in the protection provided to Canadians (between those using waters on the NPA *Schedule* and those using other waters), and being reactive in a field that requires proactive measures to prevent irremediable harms.

Public rights are not the only rights that have been harmed by the NPA. Aboriginal rights are also vulnerable as there is no duty to consult for private entities, so removing government conduct from the scope of the legislation also removes this duty. This streamlining has severe implications on Indigenous participation in the assessment and review process of projects affecting their traditional lands.[27] Further, reduced timelines make it burdensome on remote or isolated communities to fully participate when given the opportunity.[28] On a broader level, a reduction in the number of protected waterways results in a reduction of protection for the bodies that Indigenous communities depend on for their livelihood.[29] All of these issues impede reconciliation.

Prime Minister Trudeau has sought to restore a high bar of openness and transparency in a government that is accountable to Canadians.[30] In terms of these reforms, Parliament should enshrine and protect the public trust language in legislation, much like the environmental acts in

[25] Transport Canada, "Navigation Protection Act" (15 December 2014), online: <https://www.tc.gc.ca/eng/programs-632.html>.
[26] Canada, Transport Canada "Transport Canada's Revised Approach for Determining Navigability Under the Amended *Navigable Waters Protection Act*", Briefing Note RDIMS #8819780 (Ottawa: Transport Canada, October 18, 2013).
[27] Kirchhoff, *supra* note 10 at 5-6.
[28] *Ibid* at 6.
[29] *Ibid* at 8.
[30] Transport Mandate, *supra* note 6 at para 19.

some territories.[31] This step forward will ensure that current and future governments at all levels continue to promote the values expressed by Prime Minister Trudeau.

Conclusion

Parliament must undertake a series of reforms to the NPA. These reforms should focus on restoring protections to 99% of Canadian waterways by re-shifting the focus to navigable waters rather than navigation and adopting the common law test. They should seek to reconnect the NPA with the CEAA to ensure robust environmental assessment and public participation in decision-making. Public rights should be protected by restoring government oversight, and steps should be taken to establish a public trust in navigable waters. Canadians need protection of navigable waters to preserve their businesses, health, and future.

[31] See generally *Environment Act*, RSY 2000, c 76 & *Environmental Rights Act*, RSNWT 1988, c 83.