

Minister of Transport



Ministre des Transports

Ottawa, Canada K1A 0N5

JUN 20 2017

Ms. Judy A. Sgro
Chair
Standing Committee on Transport, Infrastructure and Communities
House of Commons
Ottawa ON K1A 0A6

Dear Ms. Sgro:

I am pleased to provide you with a copy, in both official languages, of the Government Response to the report of the Standing Committee on Transport, Infrastructure and Communities (the Committee) entitled: "*A Study of the Navigation Protection Act*", tabled in the House of Commons on March 23, 2017. The Government Response will be tabled in the House of Commons pursuant to Section 109 of the Standing Orders of the House of Commons.

The Government of Canada was pleased to receive the Committee's recommendations concerning the changes to the *Navigation Protection Act*. The resulting recommendations are a valuable contribution to the review of the changes to the *Navigation Protection Act*, and associated policies and programs. These recommendations also inform the ongoing, broader review of environmental and regulatory processes in Canada.

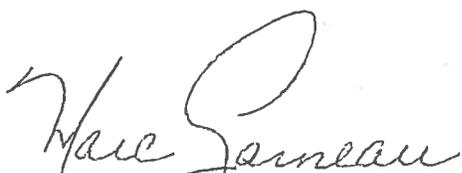
The Government Response acknowledges and supports the Committee's recommendations. In a number of areas, it proposes to go beyond the recommendations to increase participation of Indigenous groups in the process, restore lost protections and effectively protect the public right of navigation. It recognizes the special relationship that Indigenous groups have with the waterways by laying the foundation for an enduring role for them in the administration of the regime, and it seeks to implement an ambitious new standard for transparency and openness. Going forward, the Government will engage with Indigenous groups and stakeholders on options for legislative, policy and program changes that will support this ambitious vision for protecting the public right of navigation in Canada.

The Government of Canada would like to thank the Committee members for their comprehensive study and subsequent report and all those who took the time to participate in the Committee process. I look forward to bringing forth the legislative, policy and program changes required to implement the recommendations of the report.

Canada

Please find enclosed a copy of the Government Response to the recommendations of the Report.

Yours sincerely,

A handwritten signature in black ink, reading "Marc Garneau". The signature is written in a cursive, flowing style with a large loop at the end of the name.

The Honourable Marc Garneau, P.C., M.P.
Minister of Transport

Enclosure

**GOVERNMENT OF CANADA RESPONSE TO THE ELEVENTH REPORT OF THE STANDING
COMMITTEE ON TRANSPORT, INFRASTRUCTURE AND COMMUNITIES: "A STUDY OF THE
NAVIGATION PROTECTION ACT"**

INTRODUCTION

The Government of Canada would like to thank the House of Commons Standing Committee on Transport, Infrastructure and Communities (TRAN) for their comprehensive study and subsequent report entitled "*A Study of the Navigation Protection Act*", tabled in the House of Commons on March 23, 2017.

The TRAN's study allowed for conversations with Canadians about their views on the *Navigation Protection Act* (NPA). The TRAN extended an open invitation for submissions and focused the study on:

- the environmental and sector impacts of the changes;
- the impact of the changes on the long-term viability of commercial and recreational utilization of Canada's waterways;
- the cost, practicality and effectiveness of the changes when gauged against the environmental, business and recreational function of Canada's waterways; and
- the efficiency of the changes when viewed holistically, from a user perspective, with other acts that collectively impact upon users.

To complement the work of the TRAN, Transport Canada (TC) sought the views of Indigenous groups and provided financial assistance to support their participation in the review. Additionally, Canadians were invited to share their views on the changes to the NPA with the Minister of Transport and TC until January 30, 2017.

All of the input provided to both the TRAN and TC has greatly contributed to this response and continues to inform work on the review of the 2012 changes to the NPA, including potential legislative, policy and program changes.

As part of the Government of Canada's commitment to renewing its relationship with Indigenous Peoples based on the recognition of rights, mutual respect, cooperation and partnership, the government will continue working with Indigenous groups to ensure that their input informs potential legislative, policy and program changes.

The Government of Canada is pleased to receive the TRAN's recommendations concerning the changes of the NPA. The resulting recommendations are a valuable contribution to the review of the changes to the NPA, and also to the ongoing, broader review of environmental and regulatory processes in Canada. The Government would like to thank the TRAN members and all those who took the time to participate in the Committee process.

The TRAN's report and the majority of the input received by TC support the need to restore protections that were lost as part of the 2012 amendments to the NPA, and affirm that the

legislation, policies and program should be modernized and updated to reflect the needs of navigable water users and of proponents of works on Canada's navigable waters.

In general, the Government of Canada supports the TRAN's recommendations and in a number of areas, proposes to go further to define concrete and ambitious ways to increase Indigenous participation, restore lost protections and introduce modern safeguards to the NPA regime. This summer, TC will be engaging Indigenous groups, other levels of government and key stakeholders on options for legislative, program and policy changes to implement changes in the following key areas:

- i) Restoring protections on unscheduled navigable waters;
- ii) Enhancing the role of Indigenous groups in the implementation of the NPA;
- iii) Enhancing transparency; and
- iv) Improve the navigation protection regime through complementary measures.

Many partners and stakeholders, including federal departments, provincial and territorial governments, Indigenous groups, recreational waterway users, environment and conservation organizations and industry groups, share a common interest in the protection of navigation. TC is keen to work with these parties to effectively balance the need to protect the public right of navigation with a recognition of the special relationship that Indigenous groups have with the waterways while supporting the economic potential of Canada's marine transportation system.

RESPONSES TO TRAN RECOMMENDATIONS

Recommendation 1: That the government maintain the Schedule but rapidly improve the process of adding waterways to the Schedule by making it easily accessible, easy to use and transparent and that a public awareness campaign be put in place to inform stakeholders of the process.

Response: The Government of Canada supports this recommendation. The TRAN's report, as well as feedback provided to TC by Indigenous groups and stakeholders, indicated a need for improvement and clarity of the process and the criteria used to add navigable waters to the Schedule.

TC will engage Indigenous groups, other levels of government and key stakeholders on options for legislative, policy and program changes to improve the process of adding navigable waters to the Schedule and provide clarity around the process and criteria used in decision-making. This engagement will include discussions on how the process to add navigable waters to the Schedule can be made transparent, accessible and easy-to-use. It will also explore options for a tailored process for Indigenous groups seeking to add waterways in their traditional territory. This recommendation is being considered under the themes of Restoring protections on unscheduled navigable waters and Enhancing transparency.

Once the changes have been approved, TC would implement a communications strategy aimed at educating the public on the new process for adding navigable waters to the Schedule, along with the criteria used in related decision-making.

Recommendation 2: That the government include TC in the decision-making process for environmental assessments of pipelines and electrical transmission lines that cross navigable waters.

Response: The Government of Canada supports this recommendation in principle. TC is the federal centre of expertise for the assessment of impacts on navigation and is well-placed to continue to provide an advisory function in the decision-making process for the federal environmental assessment of a work that crosses a navigable water. However, the final approach to including TC in decision-making will be dependent on the Government's approach to the ongoing review of Environmental Assessment processes (led by Minister of Environment and Climate Change) and the modernization of the National Energy Board (led by Minister of Natural Resources). The National Energy Board is currently the responsible authority for environmental assessments of interprovincial and international pipelines and electrical transmission lines. This recommendation is being considered under the theme of Complementary measures to improve the navigation protection regime.

Recommendation 3: That the government examine ways of preserving, protecting and respecting navigation on waterways on traditional aboriginal lands and recognize the special relationship that Indigenous communities have with waterways and impose a requirement that project proponents adequately inform stakeholders of a work before it commences so as to provide opportunities for appropriate consultations to be undertaken.

Response: The Government of Canada supports this recommendation. Concerns have been expressed by Indigenous groups that a narrower scope of navigable waters subject to the NPA has led to decreased availability of information and fewer opportunities for consultation on proposed works within Indigenous traditional territories. TC recognizes the special relationship that Indigenous communities have with waterways and recommends that Indigenous communities have opportunities under the NPA to play an increased role in the protection of navigation on waterways on their traditional lands. TC is keen to explore opportunities with Indigenous groups on increasing their role in the implementation of the NPA on traditional lands and will be engaging Indigenous groups over the summer of 2017 on how the NPA can be revised so as to better recognize and take into consideration the important role of navigation in the lives of Indigenous peoples. This recommendation is being considered under the theme of Enhancing the role of Indigenous groups in the implementation of the NPA.

Additionally, under the theme of Enhancing transparency, Indigenous groups and stakeholders have indicated a need for increased transparency regarding the activities carried out under the NPA. TC recognizes that meaningful and effective public disclosure and participation would provide vital information to Indigenous groups and strengthen the effectiveness of the NPA. As part of the summer engagement, TC will explore establishing requirements for a new process for project proponents to inform Indigenous groups and stakeholders of a work before it

commences so as to provide opportunities for appropriate consultations. Options could explore the establishment of a publicly-accessible registry of proposed works subject to the NPA.

Recommendation 4: That the government, in consultation with Indigenous communities, provinces, territories and other relevant stakeholders such as landowners, user groups and municipalities, more clearly articulate the criteria for the aqueous highway test.

Response: The Government of Canada supports this recommendation. TC will engage Indigenous groups and stakeholders on the articulation of the criteria used for determining whether a waterway is navigable, including the criteria for “the aqueous highway test”. This engagement will also include discussions on how decision-making related to the aqueous highway test can be made transparent. This recommendation is being considered under the theme Enhancing transparency.

Recommendation 5: That the government update the Schedule in consultation with Indigenous communities, provinces, territories and other relevant stakeholders to determine which waterways should be included in the Schedule and that the addition of waterways be accompanied by increased resources to deal with applications.

Response: The Government of Canada supports this recommendation. TC will undertake engagement activities with Indigenous groups and stakeholders over the summer of 2017 on options for legislative, policy and program changes, including the articulation of the criteria used to determine which navigable waters should be added to the Schedule. These actions will lay out a clear and updated framework for parties to seek the addition of navigable waters to the Schedule. Through these discussions, TC will also seek views on whether there are priority navigable waters that should be added to the Schedule in advance of any new process coming into effect. This recommendation is being considered under the theme of Restoring protections on unscheduled navigable waters.

With regard to ensuring the availability of sufficient resources to implement and enforce the increased scope of navigation protections in the NPA, TC will be looking at cost recovery measures to ensure that it is equipped with adequate financial resources to deliver its navigation protection program.

Recommendation 6: That the government provide Indigenous communities, provinces, territories and other relevant stakeholders with clarification about who can ask for a waterway to be added to the List of Scheduled Navigable Waters and on what grounds.

Response: The Government of Canada supports this recommendation. TC will engage Indigenous groups and stakeholders on options to improve the process of adding navigable waters to the Schedule, including clarifying who can request that a navigable water be added to the Schedule. This engagement will include discussions on how the process to add navigable waters to the Schedule can be made transparent, accessible and easy-to-use. This recommendation is being considered under the theme of Restoring protections on unscheduled navigable waters.

Recommendation 7: That the government require that TC provide reasons why a waterway is or is not added to the schedule.

Response: The Government of Canada supports this recommendation. It is consistent with the Government's commitment to an open and transparent government. As part of the review of the process for adding a navigable water to the Schedule and the articulation of the criteria upon which this decision is made, TC will look to establish a complementary process to provide publicly-accessible information on each decision made to add or not add a navigable water to the Schedule, accompanied by the rationale and criteria used in making this decision. This recommendation is being considered under the theme of Enhancing transparency.

Recommendation 8: That the government impose a requirement that project proponents adequately inform stakeholders of a work before it commences so as to provide opportunities for appropriate consultations to be undertaken.

Response: The Government of Canada supports this recommendation. Indigenous groups and stakeholders have indicated a need for increased transparency regarding the activities carried out under the NPA. Under the theme of Enhancing transparency, TC recognizes that meaningful and effective public disclosure and participation can provide vital information and strengthen the effectiveness of the NPA. As part of the summer engagement, TC will explore establishing requirements for project proponents to inform Indigenous groups and stakeholders of a work before it commences so as to provide opportunities for appropriate consultations. Options could explore the establishment of a publicly-accessible listing of proposed works subject to the NPA.

Recommendation 9: That the government create an efficient administrative complaint mechanism, within TC, to assist the public with the resolution of possible impediments to navigation on all of the country's inland waterways, including those not listed in the Schedule, so that clear provisions are in place for communities and other relevant stakeholder to be able to oppose projects they consider threatening the waterways.

Response: The Government of Canada generally supports this recommendation. An issue raised in the TRAN report was the lack of recourse under the NPA for persons or groups whose right to navigate unscheduled navigable waters had been adversely affected. Concerns were raised that aggrieved persons and groups could be subject to lengthy and expensive litigation in the courts to resolve their disputes over navigation of unscheduled navigable waters.

The Government agrees that it is appropriate for the NPA to include a complaint process with respect to significant impediments to navigation on unscheduled navigable waters. TC recognizes that a new complaint process under the NPA would need to effectively balance the need to protect the public right of navigation with a recognition of the special relationship that Indigenous groups have with the waterways while supporting the economic potential of Canada's marine transportation system.

As part of engagement activities this summer, TC will discuss options with Indigenous groups and stakeholders for a new complaints procedure that could include such elements as:

- a proponent requirement to notify and consult with potentially affected users and communities in advance of a proposed work on a navigable water;
- an opportunity for persons to notify the Minister (and the proponent) if issues are not resolved to their satisfaction through proponent-led consultations;
- a process through which the Minister could determine, after considering input from both the notifying party and the proponent, whether navigation issues raised warrant being made subject to the NPA; and
- a new authority in the NPA that would allow the Minister to regulate a work on an unscheduled navigable water where he determines it is warranted.

In addition to a new complaints process, TC may go beyond this recommendation to explore other risk-based options of restoring navigation protections on unscheduled navigable waters where there is a higher risk of interference with navigation. This could include requiring certain classes of works, such as dams, to be subject to the NPA on all navigable waters in Canada. This recommendation is being considered under the theme of Restoring protections on unscheduled navigable waters.

Recommendation 10: That the government consider the restoration of the ability of officers of TC's Navigation Protection Program to accept and address public complaints regarding the right to navigation as part of a larger and more comprehensive complaint resolution process.

Response: The Government of Canada supports this recommendation. In engaging with Indigenous groups and stakeholders on the design of a new complaints process under the NPA, discussion on the role of TC's Navigation Protection Program officers in the complaint process will be undertaken. This recommendation is being considered under the theme of Restoring protections on unscheduled navigable waters.

Recommendation 11: That the government ensure that the interests and concerns of stakeholders such as farmers and municipalities are considered when any changes to the NPA are enacted.

Response: The Government of Canada supports this recommendation. TC will undertake engagement activities over the summer of 2017 on options for legislative, policy and program changes to implement the TRAN's recommendations. This engagement will allow TC to hear from the various groups, such as farmers and municipalities, who will be affected by changes to the implementation of the NPA and to consider their interests and concerns in the development of changes to the NPA. This recommendation is being considered under the theme of Complementary measures to improve the navigation protection regime.

OTHER PROPOSED CHANGES TO IMPROVE THE NAVIGATION PROTECTION REGIME

In addition to engaging Indigenous groups and stakeholders on how best to implement the TRAN recommendations, TC will also seek feedback and input on other proposed complementary measures to modernize the Act, improve the efficiency and effectiveness of the Act, and address administrative issues, such as a potential change to the title of the NPA to better reflect its revised scope of navigation protection.

Additional legislative changes to the NPA may also be required to account for other TC initiatives. For example, under the Oceans Protection Plan, the Government announced a comprehensive strategy to address abandoned, derelict and wrecked vessels (vessels of concern), including new legislation that will strengthen vessel owner responsibility and liability for their vessels, and increase powers for the Government to take actions on these problem vessels. Currently, the NPA includes a provision that permits the Minister to transfer possession of an abandoned or wrecked vessel on a scheduled navigable water to an interested third party for the purposes of removal and disposal. Any legislative changes to the NPA will be reviewed in consideration of new legislation to deal with problem vessels to ensure that NPA provisions are adjusted appropriately.

CONCLUSION

The Government of Canada's review of environmental and regulatory processes includes restoring lost protections and incorporating modern safeguards into the NPA. TC will continue to work with other departments, including Fisheries and Oceans Canada, the Canadian Environmental Assessment Agency, and Natural Resources Canada, as part of this review.

We would like to thank the TRAN for the study of the changes to the NPA, those that participated as witnesses, and those that provided input into the study. We will continue to engage partners and stakeholders in reviewing the NPA and proposing ways to restore lost protections and incorporate modern safeguards for the protection of the public right of navigation in Canada.