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May 14, 2009

Standing Committee on Energy, Environment and Natural Resources
c/o Lynn Gordon, Clerk of the Committee
via email: eenr-eern@sen.parl.gc.ca

Re: Clause-by-clause analysis of amendments to the *Navigable Waters Protection Act*

Dear Ms. Gordon,

Please find enclosed Ecojustice's submission on the above-mentioned matter, prepared for the presentation before the Senate Committee on May 14, 2009.

If you have any questions or comments, please do not hesitate to contact me anytime at (613) 562-5800 ext. 3378.

Yours truly,

Will Amos,
Staff Lawyer

NAVIGABLE WATERS PROTECTION ACT AMENDMENTS

CLAUSE BY CLAUSE ANALYSIS

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1.	<p>Section 2: New definition of “work”</p> <p>The previous definition of “work” consisted of four parts. The first three parts enumerated specific examples (bridge, boom, dam, wharf, dock, pier, tunnel, pipe, telegraph, power cable or wire, dumping of fill, excavation of materials from the bed of a navigable water) and considered these “works” under the NWPA whether or not they interfered with navigation. The fourth part was a general clause to include any other structure, device or thing that may interfere with navigation. The new definition of “work” removes most of the enumerated list, retaining only the “dumping of fill” or “excavation of material”. The general clause of “any structure, device or thing” has been retained, but this clause has been narrowed by the limiting term “man-made.” The most notable change is that the new definition includes only those works that “may interfere with navigation.”</p> <p>The new definition accords with the general trend of the new NWPA to narrow the class of works to which the NWPA applies. However, this narrowing may not be appropriate in the definition section of the Act. Doing so leaves it unclear who is responsible for determining if a work “may interfere with navigation” and therefore, whether the Act applies. The definition could be interpreted to mean that an owner or project proponent can make this determination, a obviously inappropriate proposition which would shift the onus onto the community to prove the impacts of proposed works and defend their own right to navigation. The previous definition clearly enumerated specific works for which interference with navigation could be presumed due to the nature of the works and thus, a proponent of these works was required to consult with the Minister to assess its effect on navigation. Section 5(2) of the previous Act then appropriately empowered the Minister to determine whether a work did “not substantially interfere with navigation” and thus exempt the work from the Act at that stage.</p> <p><i>Recommendation: Reinstate the previous definition of “work” <u>and</u> the Ministerial exemption clause (s. 5(2) of the repealed NWPA).</i></p>	
	REPEALED VERSION	NEW AMENDED VERSION
	<p>“work” includes</p> <p>(a) any bridge, boom, dam, wharf, dock, pier, tunnel or pipe and the approaches or other works necessary or appurtenant thereto,</p> <p>(b) any dumping of fill or excavation of materials from the bed of a navigable water,</p> <p>(c) any telegraph or power cable or wire, or</p> <p>(d) any structure, device or thing, whether similar in character to anything referred to in this definition or not, that may interfere with navigation.</p>	<p>“work” includes</p> <p>(a) any man-made structure, device or thing, whether temporary or permanent, that may interfere with navigation; and</p> <p>(b) any dumping of fill in any navigable water, or any excavation of materials from the bed of any navigable water, that may interfere with navigation.</p>
2.	<p>Section 3(2): Ministerial power to combine related works for consideration under the NWPA</p>	

Section 3(2) is an entirely new provision aimed at streamlining the approval process by allowing the Minister to combine related works for single consideration under the NWPA. Combining works for consideration can be appropriate when there are several similar crossings over the same waterway or over waterways with substantially the same characteristics.

This provision will likely be used for approval of works at mining and forestry sites as well as for large-scale projects like the Mackenzie Gas Pipeline Project. This provision could be useful to ensure that the cumulative effect of works and cumulative value of waterways is properly considered. For example, the Minister may find that a work does not interfere with navigation at certain crossings but does substantially interfere at other crossings. In this case, the approval of the entire project should be subject to the proponent meeting the terms and conditions at those crossings with interference to navigation. Care should be taken to ensure that this provision should not be used to assume similarities not actually present and allow NWPA approvals to ignore site-specific navigation issues.

Recommendation: Support new provision as appropriate effort to streamline approval process, but recommend guidelines to ensure that site-specific navigation issues are not ignored.

REPEALED VERSION

NEW AMENDED VERSION

N/A

Related works

3. (2) If the Minister considers that two or more works are related, the Minister may, for the purposes of this Part, deem them to be a single work.

3.	<p>Section 4(1): NWPA amendments applicable to new construction only and all repairs, rebuilds and alterations</p> <p>The previous Section 4 exempted works that were constructed under the authority of Her Majesty in right of Canada, a province and the Territories before those regions became part of the Dominion of Canada. The new Section 4.(1) maintains the exemption for these historical works as well as all works constructed before the coming into force of the amendments on March 12, 2009. The new NWPA thus applies only to the construction of works commenced after the amendments passed and the rebuilding, repairing or altering of all works, historical and current.</p> <p><i>Recommendation: Support new provision as properly making the new Act applicable only to new works and modifications.</i></p>	
	REPEALED VERSION	NEW AMENDED VERSION
	<p><i>Extent to which inapplicable to statutory works</i></p> <p>4. Except the provisions of this Part that relate to rebuilding, repairing or altering any lawful work, nothing in this Part applies to any work constructed under the authority of an Act of Parliament or of the legislature of the former Province of Canada, or of the legislature of any province now forming part of Canada passed before that province became a part thereof.</p>	<p><i>Application – works under Acts or orders</i></p> <p>4. (1) Except for this section and the provisions of this Part that relate to rebuilding, repairing or altering any lawful work, nothing in this Part applies to any work constructed under the authority of</p> <ul style="list-style-type: none"> (a) an Act of Parliament or an order of the Governor in Council, if the work was constructed before the coming into force of this subsection; (b) an Act of the legislature of a province or an order of the lieutenant governor in council of a province, if the work was constructed before the coming into force of this subsection; (c) an Act of the legislature of a colony of Great Britain of which at least some portion now forms part of Canada; or (d) Her Majesty in respect of such a colony.

4.	<p>Section 2.1 and 4(2): Amnesty for Existing Crown Works</p> <p>Sections 2.1 and 4.(2) are new sections that clarifies that the Act applies to Crown works and “grandfathers” existing works currently or previously Crown-owned works. This section was included to clarify previous confusion about whether the Act applied to Crown works and deal with the repercussions of the Supreme Court of Canada decision that it does. Prior to the 1992 Supreme Court of Canada decision, <i>Friends of the Oldman River Society v. Canada (Minister of Transport)</i>, the Crown assumed that it was not subject to the NWPA for works it constructed. The Court held that this interpretation was incorrect and found that the NWPA was applicable to Crown-constructed works retroactively back to the Act’s inception in 1882. Since then, modifications of existing Crown works for which no NWPA approval had been sought required an approval for the existing work prior to the submission of a subsequent application for the modification being considered. This new provision gives <i>de facto</i> NWPA approvals to existing Crown works which currently lack NWPA approvals (due to the Crown’s misinterpretation of the Act). In effect, the provision is intended to expedite the approval process for the modification of Crown works by providing an “amnesty” for Crown works that were constructed without consideration of NWPA requirements.</p> <p>Transport Canada admits that “there are multitudes of Crown works that have never received NWPA approval”, meaning that the impact of these works on the public right to navigation has never been assessed. This “amnesty” clause will perpetuate the diminished protection of the public right to navigation. Admittedly, requiring immediate NWPA approval of the multitudes of Crown works without NWPA approval would be onerous. A reasonable compromise would be to maintain the requirement to assess Crown works for their risk to navigation whenever the need for modification of the work arises. This provision requires an assessment focused solely on the modification, removing the opportunity to assess and mitigate any damage to navigation rights caused by the original work.</p> <p><i>Recommendation: Remove this amnesty for existing Crown works (which do not have NWPA approval) so that the Crown is required, at a minimum, to assess the effect on navigation caused by its existing works when it decides to modify.</i></p>	
	REPEALED VERSION	NEW AMENDED VERSION
	N/A	<p>Binding on Her Majesty</p> <p>2.1 This Act is binding on Her Majesty in right of Canada or a province.</p>
	N/A	<p><i>Application – works owned or transferred</i></p> <p>4. (2) Except for this section and the provisions of this Part that relate to rebuilding, repairing or altering any lawful work, nothing in this Part applies to</p> <p>(a) works that are owned by Her Majesty in right of Canada or a province on the day on which this subsection comes into force; or</p> <p>(b) works whose ownership was transferred before the day on which this subsection comes into force to another person by Her Majesty in right of Canada or a province or in respect of a colony of Great Britain of which at least some portion now forms part of Canada.</p>

4. Section 5: Tiered approval for construction of works

Section 5 of the previous Act required approval under the NWPA for four named works (bridges, booms, dams and causeways) and all other works that interfered with navigation. One approval process, requiring an assessment of the impact on navigation, environmental assessment and public consultation, applied to all works. The clause contained an exemption for works, other than the four named works, that the Minister considered did not “interfere substantially with navigation.” These four named works were assumed to generally always affect navigation and thus, the Minister should review the plans before construction of these works.

The new Section 5 abolishes the “blanket” approval requirement for the four named works and creates a tiered approach to the approval process for all works. Tier 1 consists of works that “substantially interfere with navigation” and are subject to the same conditions as all works in the previous Act. Tier 2 consists of works that “interfere, other than substantially, with navigation” and are subject to the relaxed approval requirements and construction timelines (at the Minister’s discretion). Tier 3 consists of exempted works, and is no longer explicitly outlined in Section 5, as the exemption clause has been moved to the definition of “works” at the beginning of the amended Act. In addition, a new class of exemptions has been created by Sections 12 and 13 which allows the Cabinet and Minister, respectively, to exempt classes of works and waterways. No approval under the NWPA is required for these Tier 3 “exempted” works.

The previous Section 5 recognized that the four named works generally impact navigation and placed the onus on the owner to prove its lack of impact on navigation. It also provided an exemption clause, allowing the Minister to exempt works that do not interfere substantially with navigation. The new Section 5 removes the onus on the owner and the Minister and shifts the onus onto the community to prove the impact of proposed works, works for which they will often not receive any notice of or ability to comment on (see Section 9).

Recommendation: Reinstate the four named works, in recognition that these works generally impact navigation. Reinstate the Ministerial power to exempt works that do not substantially interfere with navigation, rather than embedding this exemption in the new definition of “work.” These changes would correct the shifts in onus onto the community to prove the impact on navigation of a proposed work for which it may never been given notice of or ability to comment on.

REPEALED VERSION

Construction of works in navigable waters

5. (1) No work shall be built or placed in, on, over, under, through or across any navigable water unless

(a) the work and the site and plans thereof have been approved by the Minister, on such terms and conditions as the Minister deems fit, prior to commencement of construction;

(b) the construction of the work is commenced within six months

NEW AMENDED VERSION

Approval of Works

5. (1) No work shall be built or placed in, on, over, under, through or across any navigable water without the Minister’s prior approval of the work, its site and the plans for it.

Terms and conditions – substantial interference

(2) If the Minister considers that the work would substantially interfere with navigation, the Minister may impose any terms and conditions on the approval that the Minister considers appropriate,

<p>and completed within three years after the approval referred to in paragraph (a) or within such further period as the Minister may fix; and</p> <p>(c) the work is built, placed and maintained in accordance with the plans, the regulations and the terms and conditions set out in the approval referred to in paragraph (a).</p> <p><i>Exceptions</i> (2) Except in the case of a bridge, boom, dam or causeway, this section does not apply to any work that, in the opinion of the Minister, does not interfere substantially with navigation.</p>	<p>including requiring that construction of the work be started within six months and finished within three years of the day on which approval is granted or within any other period that the Minister may fix.</p> <hr/> <p><i>Terms and conditions – other interference</i> (3) If the Minister considers that the work would interfere, other than substantially, with navigation, the Minister may impose any terms and conditions on the approval that the Minister considers appropriate, including requiring that construction of the work be started and finished within the period fixed by the Minister.</p> <hr/> <p><i>Extension of period</i> (4) The Minister may, at any time, extend the period by changing the day on which construction of the work shall be started or finished.</p> <hr/> <p><i>Compliance with plans, regulations, and terms and conditions</i> <input type="checkbox"/> (5) The work shall be built, placed, maintained, operated, used and removed in accordance with the plans and the regulations and with the terms and conditions in the approval.</p>
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6.	Section 5.1: Class Exemptions through Regulation or Ministerial Order	
<p>Section 5(2) of the previous Act allowed the Minister to exempt works that did “not interfere substantially with navigation” except in the four named works. Section 5.1 is a new section that allows exemptions to the Act to be defined for certain classes of works and classes of waterways. The class exemptions are established by Cabinet regulation (Section 12) or ministerial order (Section 13). These classes are subject only to the general terms and conditions specified in the regulation or ministerial order. They are exempt from the approval process, fees, environmental assessment and public notification requirements in the Act. This provision allows the works to which the Act applies to be narrowed through Cabinet regulation and ministerial order rather than the Parliamentary process.</p> <p><i>Recommendation: Abolish the class exemptions as an unnecessary provision. The previous Act already created exemptions for works that did not interfere substantially with navigation.</i></p>		
REPEALED VERSION		NEW AMENDED VERSION
<p><i>Construction of works in navigable waters</i></p> <p>5. (1) No work shall be built or placed in, on, over, under, through or across any navigable water unless</p> <p>...</p> <p>(2) Except in the case of a bridge, boom, dam or causeway, this section does not apply to any work that, in the opinion of the Minister, does not interfere substantially with navigation.</p>		<p>Classes of works and navigable waters</p> <p>5.1 (1) Despite section 5, a work may be built or placed in, on, over, under, through or across any navigable water without meeting the requirements of that section if the work falls within a class of works, or the navigable water falls within a class of navigable waters, established by regulation or under section 13.</p> <p>Compliance</p> <p>(2) The work shall be built, placed, maintained, operated, used and removed in accordance with the regulations or with the terms and conditions imposed under section 13.</p> <p>Non-application</p> <p>(3) Sections 6 to 11.1 do not apply to works referred to in subsection (1) unless there is a contravention of subsection (2).</p>

6.	Section 6(4): Approval after commencement of construction	
	Section 6.(4) permits the Minister to approve a work after construction has commenced. The amendments add the ability to impose terms and conditions on the approval.	
	<i>Recommendation: Support the amendment.</i>	
	REPEALED VERSION	NEW AMENDED VERSION
	<i>Approval after construction commenced</i> 6. (4) The Minister may, subject to deposit and advertisement as in the case of a proposed work, approve a work and the plans and site of the work after the commencement of its construction and the approval has the same effect as if given prior to commencement of the construction of the work.	<i>Approval after construction started</i> 6. (4) The Minister may, subject to deposit and notice as in the case of a proposed work, approve a work, its site and the plans for it and impose any terms and conditions on the approval that the Minister considers appropriate after the start of its construction. The approval has the same effect as if it was given before the start of construction.

6.	Section 7(1): Approval Fees (for construction of new works)	
	Section 7.(1) specifies that the fee and time frame for validity of the approval is prescribed by regulations. The previous Act imposed fees for all approvals to construct works. The amended Act fees imposes fees only on Tier 1 works (Section 5(2)) and approvals obtained after construction has commenced (Section 6(4)).	
	<i>Recommendation: Support the amendment.</i>	
	REPEALED VERSION	NEW AMENDED VERSION
	<i>Fee payable by person applying for approval</i> 7. (1) Where a person applies for an approval referred to in paragraph 5(1)(a) or subsection 6(4), the person shall pay a fee therefor prescribed by the regulations. <i>Approval valid for period prescribed by regulations</i> (2) Where the Minister has approved a work, the approval is valid for a period of time prescribed by the regulations.	Fee payable by person applying for approval 7. (1) A person who applies for approval of a work referred to in subsection 5(2) or 6(4) shall pay the fee prescribed by the regulations. <small>Approval valid for period prescribed by regulations</small> (2) The approval of a work under section 5 is valid for the period prescribed by the regulations.

5.	<p>Section 9: Tiered Public Notification Requirements</p> <p>Section 9 of the previous Act specified a single set of notification requirements for all works considered under the NWPA. The proponent was required to deposit the plans and site description with the Minister and at a publicly accessible location (land titles office or registrar of deeds) and notify the public through advertisement in the <i>Canada Gazette</i> and two newspapers for at least one month. This process ensured that the public was notified about all proposed works that could affect navigation and allowed to comment on the plans.</p> <p>The amended Section 9 creates a tiered approach to public notification. Tier 1 works (substantial interference) require public notification of the work plan and site description similar to the previous Act (except that publication is required in one, rather than two, newspapers). Tier 2 works (other interference) do not require any public notification unless directed by the Minister. Tier 3 works (exempted) never require public notification under the Act. Public notification now occurs only when the Minister determines the work substantially interferes with navigation or when the Minister exercises the discretion for works that interfere, other than substantially. In these cases, the Minister will accept written submissions only (not oral) for 30 days after public notification. The provision grants the Minister a new discretionary power to require proponents to deposit the plans for the management and operation for Tier 1 works only.</p> <p>The amendment creates a situation where the public will never be notified of the majority of works approved under the Act. Combined with the shift in onus to the community to prove whether a work “may” interfere with navigation (due to the new definition of “work”), this results in a situation where many impacts on navigation may occur unnoticed or at best, noticed after-the-fact. The amended Act attempts to mitigate the increased risk brought on by the relaxed approval process and reduced public notification by establishing increased enforcement powers (Sections 4(3), 11(1)(1), 33 to 40) but these powers are after-the-fact efforts triggered only when damage to navigation rights is imminent or already occurring. Transport Canada admits that it relies on the community to identify contraventions of the Act, and the public will be able to carry out its role in the protection of navigation rights only if it is given reasonable notice of the works approved under the Act.</p> <p><i>Recommendation: Restore public notification requirements for all Tier 1 and 2 works to ensure that the community can properly assist the Ministry in ensuring reasonable protection of the right to navigation.</i></p>	
	REPEALED VERSION	NEW AMENDED VERSION
	<p><i>Deposit of plans and description</i></p> <p>9. (1) A local authority, company or person proposing to construct, in navigable waters, any work for which no sufficient sanction otherwise exists may deposit the plans thereof and a description of the proposed site with the Minister, and a duplicate of each in the office of the registrar of deeds or the land titles office for the district, county or province in which the work is proposed to be constructed, and may apply to the Minister for approval thereof.</p>	<p><i>Notice and deposit of plans</i></p> <p>9. (1) A local authority, company or individual proposing to construct any work in navigable waters may apply to the Minister for approval by depositing the plans for its design and construction and a description of the proposed site with the Minister.</p> <hr style="border-top: 1px dotted black;"/> <p><i>Plans for management and operation</i></p> <p>(2) If the Minister considers that the work would substantially interfere</p>

<p>(2) [Repealed, 1993, c. 41, s. 8]</p> <p>(3) The local authority, company or person referred to in subsection (1) shall give one month's notice of the deposit of plans and application by advertisement in the <i>Canada Gazette</i>, and in two newspapers published in or near the locality where the work is to be constructed.</p>	<p>with navigation, the Minister may also require that the local authority, company or individual deposit the plans for the management and operation related to the work.</p> <p><i>Deposit and notice — substantial interference</i></p> <p>(3) If the Minister considers that the work would substantially interfere with navigation, the Minister shall direct the local authority, company or individual to</p> <p>(a) deposit all plans in the local land registry or land titles office or any other place specified by the Minister; and</p> <p>(b) provide notice of the proposed construction and the deposit of the plans by advertising in the <i>Canada Gazette</i> and in one or more newspapers that are published in or near the place where the work is to be constructed. The plans shall be deposited and notice shall be provided in the form and manner specified by the Minister.</p> <p><i>Deposit and notice — other interference</i></p> <p>(4) If the Minister considers that the work would interfere, other than substantially, with navigation, the Minister may direct the local authority, company or individual to deposit the plans in the local land registry or land titles office or any other place specified by the Minister, and to provide notice of the proposed construction and the deposit of the plans as the Minister considers appropriate.</p> <p><i>Comments</i></p> <p>(5) Interested persons may provide written comments to the Minister within 30 days after the publication of the last notice referred to in subsection (3) or (4).</p>
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6.	<p>Section 12: Cabinet power to exempt classes of works and navigable waters</p> <p>Section 12 of the previous Act granted the Cabinet powers to prescribe orders deemed expedient for navigation purposes. These powers specifically included the power to prescribe application fees and the period of time that an approval is valid. The Cabinet could specify a penalty for a contravention of its orders or regulations of a fine (max \$500) and/or imprisonment (max six months).</p> <p>The amended Section 12 greatly expands the powers of the Cabinet, adding five new prescribed powers. The most notable addition is Section 12.(1)(e) which permits the Cabinet to exempt classes or works or navigable waters for exemption from NWPA approval. This provision does not specify any criteria to guide the exercise of this power, thereby granting the Cabinet unfettered power to create exemptions to the Act at its sole discretion without notification or consultation of its stakeholders. The only limits on these Cabinet powers are imposed by the <i>Statutory Instruments Act</i>, which specifies that the regulation must be published in the <i>Canada Gazette</i> 23 days after it is registered and is subject to Parliamentary review. Cabinet decisions are not always subject to Access to Information requests or judicial review.</p> <p><i>Recommendation: Establish criteria to guide the exercise of this sweeping Cabinet power to exempt classes or works and waterways from application of the Act and require meaningful public consultation to ensure all potential impacts on the right to navigation are considered prior to the registration of the exemption regulation.</i></p>	
	REPEALED VERSION	NEW AMENDED VERSION
	<p><i>Orders and regulations by Governor in Council</i></p> <p>12. (1) The Governor in Council may make such orders or regulations as the Governor in Council deems expedient for navigation purposes respecting any work to which this Part applies or that is approved or the plans and site of which are approved under any Act of Parliament and, without restricting the generality of the foregoing, may make regulations</p> <p>(a) prescribing the fees payable to the Minister on an application for an approval; and</p> <p>(b) prescribing, for the purpose of subsection 7(2), the period of time for which an approval of a work is valid.</p> <p><i>Punishment for contravening order or regulation</i></p> <p>(2) Any order or regulation made under this section may prescribe therein the punishment to be imposed on summary conviction for any contravention thereof but that punishment shall not exceed a</p>	<p><i>Orders and regulations by Governor in Council</i></p> <p>12. (1) The Governor in Council may make any orders or regulations that the Governor in Council deems expedient for navigation purposes respecting any work to which this Part applies or that is approved or the plans and site of which are approved under any Act of Parliament or order of the Governor in Council, and may make regulations</p> <p>(a) prescribing the fees payable to the Minister on an application for an approval under this Part;</p> <p>(b) respecting the grant, amendment, renewal, suspension and cancellation of approvals under this Part;</p> <p>(c) prescribing the period for which an approval under this Part is valid;</p> <p>(d) respecting notification requirements for a change in ownership in a work;</p> <p>(e) establishing classes of works or navigable waters for the</p>

<p>fine of five hundred dollars or imprisonment for a term of six months or both.</p> <p><i>Who is subject to orders or regulations</i></p> <p>(3) A local authority, company or person constructing, owning or in possession of any work referred to in subsection (1) is subject to orders or regulations made under this section.</p>	<p>purposes of subsection 5.1(1); □□□</p> <p>(f) respecting the placement, construction, maintenance, operation, safety, use and removal of works; and</p> <p>(g) for carrying out the purposes and provisions of this Part.</p> <p><i>Related works</i></p> <p>(2) If the Governor in Council considers that two or more works are related, the Governor in Council may, for the purposes of subsection (1), deem them to be a single work.</p> <p><i>Incorporation by reference</i></p> <p>(2.1) The regulations may incorporate any material by reference, regardless of its source, either as it exists on a particular date or as amended from time to time.</p> <p><i>Incorporated material not a regulation</i></p> <p>(2.2) Material does not become a regulation for the purposes of the <i>Statutory Instruments Act</i> because it is incorporated by reference.</p>
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7.	Section 13: Bridges over the St. Lawrence River now under NWPA jurisdiction	
	<p>Section 13 of the previous NWPA required that all bridges constructed over the St. Lawrence River receive formal Parliamentary approval. This section was repealed in the amended Act, enabling these works to be approved under the NWPA. This provision expedites the approval process for bridges over this River.</p> <p><i>Recommendation: Support the provision as a reasonable effort to streamline projects on the St. Lawrence River.</i></p>	
	REPEALED VERSION	NEW AMENDED VERSION
	<p><i>No approval of St. Lawrence bridges</i></p> <p>13. No approval of the site or plans of any bridge over the St. Lawrence River shall be given under this Part.</p>	N/A

8.	<p>Section 13(1): Ministerial power to exempt classes of works and waterways</p> <p>Section 13(.1) of the previous Act allowed ministerial orders to be used only when immediate action was required to deal with significant risks to safety or security. The orders were intended to be temporary, remaining in effect for a maximum of 14 days unless approved by Cabinet. These “interim orders” were to be tabled in Parliament within 15 days and published in the <i>Canada Gazette</i> within 23 days.</p> <p>The new amendments greatly expand the scope of the ministerial orders. The previous authorization to use orders to deal with significant safety and security risks has been removed. It is replaced with the ministerial power to establish classes of works or navigable waters to be exempt from NWPAA approval (similar to the Cabinet power in Section 12). Like Section 12, there are no criteria to guide the exercise of this power, thereby granting an unfettered power for the Minister to exempt works at its sole discretion without notification or consultation of the public. The only notification requirement is after-the-fact publication in the <i>Canada Gazette</i>, which does not provide any opportunity for public comment. Orders have no time limit unlike the previous Act. Most extraordinary is the fact that these Orders are exempt from the <i>Statutory Instruments Act</i>, shielding it from Parliamentary review. The Cabinet power to exempt works is not exempt from the SIA, and it is unclear how this exemption from Parliamentary review assists the Minister in carrying out the Act’s purpose to protect the public right to navigation. In effect, Section 13.(1) grants unfettered power to the Minister to exempt works from the NWPAA without consultation with the public or Parliament both before and after issuance of the order.</p> <p><i>Recommendation: Abolish this unfettered ministerial power to exempt works without guiding criteria or public and Parliamentary oversight. Class exemptions would still be possible through the Cabinet whose orders are at a minimum subject to Parliamentary review. In the alternative, establish criteria to guide the exercise of this sweeping ministerial power to exempt classes or works and waterways from application of the Act and require meaningful public consultation to ensure all potential impacts on the right to navigation are considered prior to the registration of the exemption regulation.</i></p>	
	REPEALED VERSION	NEW AMENDED VERSION
	<p><i>Interim orders</i> 13.1 (1) The Minister may make an interim order that contains any provision that may be contained in a regulation made under this Part if the Minister believes that immediate action is required to deal with a significant risk, direct or indirect, to safety or security.</p> <p><i>Cessation of effect</i> (2) An interim order has effect from the time that it is made but ceases to have effect on the earliest of (a) 14 days after it is made, unless it is approved by the Governor in Council,</p>	<p><i>Orders</i> 13. (1) For the purposes of section 5.1, the Minister may, by order, (a) establish classes of works or navigable waters; and (b) impose any terms and conditions with respect to the placement, construction, maintenance, operation, safety, use and removal of those classes of works or works that are built or placed in, on, over, under, through or across those classes of navigable waters.</p> <p><i>Exemption from Statutory Instruments Act</i> (2) An order under subsection (1) (a) is not a statutory instrument within the meaning of the <i>Statutory</i></p>

(b) the day on which it is repealed,
 (c) the day on which a regulation made under this Part, that has the same effect as the interim order, comes into force, and
 (d) one year after the interim order is made or any shorter period that may be specified in the interim order.

Contravention of unpublished order

(3) No person shall be convicted of an offence consisting of a contravention of an interim order that, at the time of the alleged contravention, had not been published in the *Canada Gazette* unless it is proved that, at the time of the alleged contravention, the person had been notified of the interim order or reasonable steps had been taken to bring the purport of the interim order to the notice of those persons likely to be affected by it.

Exemption from Statutory Instruments Act

(4) An interim order
 (a) is exempt from the application of sections 3, 5 and 11 of the *Statutory Instruments Act*; and
 (b) shall be published in the *Canada Gazette* within 23 days after it is made.

Deeming

(5) For the purpose of any provision of this Part other than this section, any reference to regulations made under this Act is deemed to include interim orders, and any reference to a regulation made under a specified provision of this Act is deemed to include a reference to the portion of an interim order containing any provision that may be contained in a regulation made under the specified provision.

Tabling of order

(6) A copy of each interim order must be tabled in each House of Parliament within 15 days after it is made.

House not sitting

(7) In order to comply with subsection (6), the interim order may be sent to the Clerk of the House if the House is not sitting.

Instruments Act; and
 (b) shall be published in the *Canada Gazette* within 23 days after the day on which it is made.

Incorporation by reference

(3) An order may incorporate any material by reference, regardless of its source, either as it exists on a particular date or as amended from time to time.

9.	<p>Sections 4(3), 6(1) and 11.1 Ministerial power to amend approvals</p> <p>Section 6(1) grants the Minister the power to order the removal or alteration, or to stop construction of unauthorized works and works constructed or maintained contrary to the terms and conditions of approval. This provision exists in both the previous and amended Act.</p> <p>New provisions, Sections 4(3) [historical and existing Crown works] and 11(1)(1) [works with NWPA approval] create powers for the Minister to revoke NWPA approval even if the work is being constructed and maintained according to the approved plans. These sections allow the Minister to order the alteration or removal of approved works if satisfied that the work has become a danger to or interference with navigation due to time and changing navigational conditions. The Minister may suspend or cancel an approval if it was obtained by fraudulent means or the owner/work is in contravention of the Act. The Minister may also issue these orders “in the public interest.”</p> <p>This is a broad ministerial power that forms part of the new increased “after-the-fact” enforcement powers created by the amendments. These powers appear to be intended to mitigate the increased risks undertaken due to the more relaxed approval process and reduced public consultation. These powers are reactive rather than preventative, allowing action only after the work “<u>has</u> become” a danger or interference, hence only once the damage is done. This provision provides poor protection to the right to navigation, acting contrary to the purpose of the legislation. Resources invested into a reactive enforcement effort may be better allocated to reinstating the original approval process with its increased requirements and public consultation. Alternatively, this section could be improved by triggering these enforcement powers when the work <u>may</u>, rather than <u>has</u>, become a danger or interference to ensure it has some prescriptive powers.</p> <p><i>Recommendation: Replace “may” for “have” in the provision to allow more timely protection of navigation rights.</i></p>	
	REPEALED VERSION	NEW AMENDED VERSION
	N/A	<p><i>Ministerial order (for historical works and Crown works without previous NWPA approval)</i></p> <p>4. (3) The Minister may order an owner of a work referred to in subsection (1) or (2) to alter or remove the work or to comply with any terms and conditions that the Minister, as he or she considers appropriate, may impose if the Minister is satisfied that</p> <p>(a) the work has become a danger to or an interference with navigation by reason of the passage of time and changing conditions in navigation of the navigable waters concerned; or</p> <p>(b) the alteration or removal or the terms and conditions are in the public interest.</p> <p><i>Minister’s power</i></p>

		<p>(4) If the owner of the work fails to comply with an order given under subsection (3), the Minister may remove and destroy the work and sell, give away or otherwise dispose of the materials contained in the work.</p> <p><i>Costs of removal, destruction or disposal</i></p> <p>(5) If the Minister removes, destroys or disposes of a work under subsection (4), the costs of and incidental to the removal, destruction or disposal, after deducting any sum that may be realized by sale or otherwise, are recoverable with costs in the name of Her Majesty in right of Canada from the owner.</p>
	<p><i>Ministerial orders respecting unauthorized works</i></p> <p>6. (1) <u>Where</u> any work to which this Part applies is built or placed without having been approved <u>by the Minister</u>, is built or placed on a site not approved <u>by the Minister</u>, is not built or placed in accordance with plans so approved or, having been so built or placed, is not maintained in accordance with those plans the Minister may</p> <p>(a) order the owner of the work to remove or alter the work;</p> <p>(b) where the owner of the work fails forthwith to comply with an order made pursuant to paragraph (a), remove and destroy the work and sell, give away or otherwise dispose of the materials contained in the work; and</p> <p>(c) order any person to refrain from proceeding with the construction of the work where, in the opinion of the Minister, the work interferes or would interfere with navigation or is being constructed contrary to this Act.</p>	<p><i>Ministerial orders respecting unauthorized works</i></p> <p>6. (1) <u>If</u> any work to which this Part applies is built or placed without having been approved <u>under this Act</u>, is built or placed on a site not approved <u>under this Act</u>, is not built or placed in accordance with the approved plans <u>and terms and conditions and with the regulations</u> or, having been built or placed <u>as approved</u>, is not maintained, <u>operated, used or removed</u> in accordance with those plans, <u>those terms and conditions</u> and the regulations, the Minister may</p> <p>(a) order the owner of the work to remove or alter the work;</p> <p>(b) where the owner of the work fails forthwith to comply with an order made pursuant to paragraph (a), remove and destroy the work and sell, give away or otherwise dispose of the materials contained in the work; and</p> <p>(c) order any person to refrain from proceeding with the construction of the work where, in the opinion of the Minister, the work interferes or would interfere with navigation or is being constructed contrary to this Act.</p>
	<p>N/A</p>	<p><i>Amendment of approval (for works with NWPA approval)</i></p> <p>11.1 (1) Subject to subsection (3), the Minister may amend an approval of a work if he or she is satisfied that</p> <p>(a) the work has become a danger to or an interference with navigation by reason of the passage of time and changing conditions in navigation of the navigable waters concerned; or</p> <p>(b) the amendment is in the public interest.</p>

	<p><i>Suspension or cancellation</i> (2) Subject to subsection (3), the Minister may suspend or cancel an approval if he or she is satisfied that</p> <ul style="list-style-type: none">(a) the work is not being or has not been built, placed, maintained, operated, used or removed in accordance with the plans, the regulations or with any terms and conditions in the approval;(b) the approval was obtained by a fraudulent or improper means or a misrepresentation of a material fact;(c) the owner of the work has not paid a fine imposed under this Act;(d) the owner of the work has contravened a provision of this Act or the regulations; or(e) the suspension or cancellation is in the public interest, including that it is warranted by the record of compliance of the owner or of a principal of the owner under this Act. <p><i>Notice</i> (3) Before amending, suspending or cancelling an approval of a work, the Minister shall give the owner 30 days' notice setting out the grounds on which the Minister relies for the amendment, suspension or cancellation.</p> <p><i>Not a statutory instrument</i> 11.2 For greater certainty, an order given under subsection 4(3) or paragraph 6(1)(a) or (c) is not a statutory instrument within the meaning of the <i>Statutory Instruments Act</i>.</p>
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10.	<p>Sections 33-39: New Inspection and Enforcement Powers</p> <p>The previous Act did not contain any inspection powers. The amended Act creates new expansive enforcement powers. The Minister may designate officials to administer and enforce the Act. The Act grants the designation official sweeping powers to investigate compliance with the Act including powers to enter places, direct persons to act or cease to act, copy, record and examine records and data. The official can obtain a warrant to enter a private residence when entry has been previously refused. The Act creates a legal duty for persons to assist the official in carrying out the investigation and creates an offence of providing false or misleading information or otherwise hindering the investigation. The designated official can obtain an injunction to order a person to act or refrain from acting when it is suspected that the person is about to or likely to commit an offence under the Act.</p> <p>These enforcement powers are desirable in principle but combined with the less stringent approval requirements they represent an after-the-fact approach to the protection of the right to navigation. The Act as a whole sets up a regime where works are approved with minimal assessment. The reduced scrutiny is supposedly mitigated by the increased enforcement powers. First, it is not clear that these extensive investigative powers are in accordance with Charter principles related to search and seizure. The effectiveness of this enforcement regime will depend on its implementation. To be effective, the Ministry would have to create a national enforcement team tasked with reviewing the ongoing compliance of works being constructed and operating pursuant to NWPA approvals. However, this would be a resource-intensive task force that would not accord with Transport Canada’s efforts to streamline the NWPA program. In fact, Transport Canada has confirmed that it does not plan to create a new enforcement task force but will continue to rely on reports from the public and their own navigation officers. The Ministry depends on community reporting to identify contraventions, placing another onus on the community to “police” NWPA violations and protect their own right to navigation. This onus is onerous in light of the fact that the new amendments ensure that the majority of works will proceed without public notification. Thus, the community will not be aware of the projects that require inspection.</p> <p><i>Recommendation: Support the new enforcement provisions but to ensure that these powers are meaningful, reinstate the public notification requirements of the previous Act to ensure the public is aware of works requiring monitoring. Alternatively, recommend the establishment of a national enforcement team tasked with monitoring compliance.</i></p>	
	REPEALED VERSION	NEW AMENDED VERSION
	N/A	<p>DESIGNATION</p> <p>33. For the purposes of the administration and enforcement of this Act and any regulation or order, the Minister may designate persons or classes of persons to exercise powers in relation to any matter referred to in the designation.</p>
	N/A	<p>POWERS</p> <p><i>Authority to enter</i></p> <p>34. (1) A person who is designated to verify compliance or prevent non-compliance with this Act and any regulation or order may, for that purpose, at any reasonable time, enter a work, vessel or swing or draw bridge, or</p>

enter any other place in which they have reasonable grounds to believe the following items are located:

- (a) a work or anything related to a work;
- (b) a wreck, vessel, part of a vessel or other thing that obstructs or impedes navigation or renders it more difficult or dangerous, or that is likely to do so;
- (c) a ferry cable or swing or draw bridge, or anything related to one.

Certification

(2) On entering a place, the designated person shall, on request, produce to the person in charge of the place a certification in the form established by the Minister attesting to the designation.

Powers

- (3) The designated person may, for the purposes referred to in subsection (1),
- (a) examine anything that is found in the place;
 - (b) remove any document or other thing from the place for examination or, in the case of a document, copying;
 - (c) direct any person to put into operation or cease operating any work, vessel or other conveyance, machinery or equipment in the place;
 - (d) prohibit or limit access to the place for as long as specified;
 - (e) take photographs and make video recordings and sketches;
 - (f) use or cause to be used any computer system or data processing system at the place to examine any data contained in, or available to, the system;
 - (g) reproduce any record, or cause it to be reproduced from the data, in the form of a printout or other intelligible output and remove the printout or other output for examination or copying; and
 - (h) use or cause to be used any copying equipment at the place to make copies of any books, records, electronic data or other documents.

Entry — private property

(4) The designated person, in carrying out their functions under this section, and a person accompanying them may enter on and pass through or over private property without being liable for doing so.

Duty to assist

35. The owner or person who is in charge of a place that is entered under subsection 34(1) and every person who is in the place shall

- (a) give a designated person who is carrying out their functions under section 34 all reasonable assistance; and
- (b) provide them with any information that they may reasonably require.

Warrant for dwelling-house

36. (1) If any place referred to in subsection 34(1) is a dwelling-house, the designated person may not enter it without the consent of the occupant except under the authority of a warrant issued under subsection (2). □□

Authority to issue warrant

(2) On ex parte application, a justice of the peace may issue a warrant authorizing the person who is named in it to enter a dwelling house, subject to any conditions that may be specified in the warrant, if the justice is satisfied by information on oath that

	<p>(a) the dwelling-house is a place referred to in subsection 34(1);</p> <p>(b) entry to the dwelling-house is necessary for the purpose of verifying compliance or preventing non-compliance with the Act and any regulation or order; and</p> <p>(c) entry to the dwelling-house was refused by the occupant or there are reasonable grounds to believe that entry will be refused or consent to entry cannot be obtained from the occupant.</p>
N/A	<p>PROHIBITIONS</p> <p><i>False statements or information</i></p> <p>37. (1) No person shall knowingly, orally or in writing, make a false or misleading statement or provide false or misleading information, in connection with any matter under this Act, to a designated person who is carrying out their functions under section 34.</p> <p><i>Obstruction</i></p> <p>(2) No person shall knowingly obstruct or hinder a designated person who is carrying out their functions under section 34.</p>
N/A	<p>INJUNCTION</p> <p><i>Injunction</i></p> <p>38. (1) If, on the application of the Minister, it appears to a court of competent jurisdiction that a person has done, is about to do or is likely to do any act constituting or directed toward the commission of an offence under this Act, the court may issue an injunction ordering a person named in the application</p> <p>(a) to refrain from doing an act that, in the opinion of the court, may constitute or be directed toward the commission of the offence; or</p> <p>(b) to do an act that, in the opinion of the court, may prevent the commission of the offence.</p> <p><i>Notice</i></p> <p>(2) No injunction may be issued under subsection (1) unless 48 hours' notice is served on the party or parties named in the application or the urgency of the situation is such that service would not be in the public interest.</p>
N/A	<p>IMMUNITY</p> <p><i>Not personally liable</i></p> <p>39. (1) Servants of the Crown, as those terms are defined in section 2 of the Crown Liability and Proceedings Act, are not personally liable for anything they do or omit to do in good faith under this Act.</p> <p><i>Crown not relieved</i></p> <p>(2) Subsection (1) does not, by reason of section 10 of the Crown Liability and Proceedings Act, relieve the Crown of liability for a tort or extracontractual civil liability to which the Crown would otherwise be subject.</p>

11.	<p>Section 40: Increased fines for contravention of the Act</p> <p>The previous Act contained several provisions that established specific offences through contravention of the Act. Each offence triggered penalties ranging from a fine of \$500 to \$5000, and imprisonment of up to six months.</p> <p>The amended Act consolidates the “Offences and Punishment” provisions into one section and increases the maximum fine to \$50,000. The previous fines were considered inadequate to deter contravention of the Act in light of the overall scope of most projects constructed under the Act.</p> <p><i>Recommendation: Support the increased fines as a more realistic deterrent to contraventions to the Act.</i></p>	
	REPEALED VERSION	NEW AMENDED VERSION
	<p><i>Offence and punishment (orders respecting unauthorized works)</i> 6.(2) Any owner or person who fails to comply with an order given to that owner or person pursuant to paragraph (1)(a) or (c) is guilty of an offence and liable on summary conviction to a fine not exceeding five thousand dollars.</p> <p><i>Punishment for contravening order or regulation (Cabinet order or regulation)</i> 12. (2) Any order or regulation made under this section may prescribe therein the punishment to be imposed on summary conviction for any contravention thereof but that punishment shall not exceed a fine of five hundred dollars or imprisonment for a term of six months or both.</p> <p><i>Failure to comply with order (removal of obstacle or obstruction)</i> 19. (2) Where a person to whom an order is given pursuant to subsection (1) fails forthwith to comply with the order, (a) the person is guilty of an offence and liable on summary conviction to a fine not exceeding five thousand dollars; and (b) the Minister may order the vessel to be removed to such place as the Minister deems fit, and the costs of removal of the vessel shall be recoverable against the person as a debt due to Her Majesty.</p>	<p>OFFENCES AND PUNISHMENT</p> <p><i>Offence</i> 40. (1) Every person is guilty of an offence and is liable on summary conviction to imprisonment for a term of not more than six months or to a fine of not more than \$50,000, or to both, if the person contravenes (a) an order given under subsection 4(3), paragraph 6(1)(a) or (c) or subsection 19(1); (b) an interim order made under section 13.1 or 32; (c) an order or regulation made under section 12 or 30; or (d) subsection 15(1) or section 21, 22, 35 or subsection 37(1) or (2). <i>Vessel liable for fine</i> (2) If any materials referred to in section 22 are thrown from or deposited by a vessel and a conviction is obtained for that activity, the vessel is liable for any fine that is imposed and may be detained by any port warden or the chief officer of customs at any port until the fine is paid. <i>Continuing offence</i> (3) If the offence under subsection (1) is committed or continued on more than one day, the person who commits it is liable to be convicted for a separate offence for each day on which it is committed or continued.</p> <p>□ □</p>

Failure to give notice or to signal or light

26. Every person required by this Part to give notice to the Minister or to the chief officer of customs at any port of any obstruction or obstacle to navigation, or to place and maintain a sufficient signal or light to indicate the position of the obstruction or obstacle, who fails to give that notice or to place or maintain that signal or light is guilty of an offence.

Contravention of section 21 (throwing or deposit of sawdust)

27. Any person who contravenes section 21 is guilty of an offence and liable on summary conviction to a fine not exceeding five thousand dollars for each offence.

Fine (throwing or deposit of stone)

28. Any person who contravenes section 22 is guilty of an offence and liable on summary conviction to a fine not exceeding five thousand dollars and, in any case where any materials referred to in that section are thrown from or deposited by a vessel and a conviction is obtained therefor, the vessel is liable for the fine and may be detained by any port warden or the chief officer of customs at any port until the fine is paid.

Punishment for contravention of regulation (regulation of ferry cables and swing or draw bridges)

31. Any regulation made under this Part may prescribe the punishment to be imposed on summary conviction for any contravention thereof but that punishment shall not exceed a fine of five hundred dollars or imprisonment for a term of six months or both.

12.	<p>Section 41: Five-Year Review of Act</p> <p>The amended Act features a new provision requiring a 5-year review of the amendments. Transport Canada states that the review enables the correction of any deficiencies identified through the implementation of the amendments. It specifically notes that the “ongoing need of the use of these Orders would be assessed”, implicitly admitting the extraordinary nature of the use of the ministerial orders to create exemptions to the Act. The Department states that additional changes could be made to the Act to more effectively manage the increasing shared use of Canada’s waterways. Several stakeholders that were not consulted in the drafting of the amendments have also expressed the need for changes to the Act to better balance the right to navigation with efficiency concerns. It is clear that this Act is in transition and requires additional work to achieve the proper balance between the right to navigation and the need for efficiency.</p> <p>The five-year review clause is a beneficial provision allowing for public consultation about the Act in general in five years. However, it is not an adequate replacement for the meaningful public consultation throughout the approval process for specific works that has been repealed in the amendments.</p> <p><i>Recommendation: Support the five-year review clause, but ensure that other means of public consultation are reestablished.</i></p>	
	REPEALED VERSION of the NWPA	NEW AMENDED VERSION of the NWPA
	N/A	<p><i>Review of Act</i></p> <p>41. (1) A review of the provisions and the operation of this Act must be completed by the Minister before the end of the fifth year after the day on which this section comes into force.</p> <p><i>Tabling of report</i></p> <p>(2) The Minister shall cause a report of the review to be laid before each House of Parliament on any of the first 15 days on which that House is sitting after the report has been completed.</p>