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**Clinique de droit environnementale
Environmental Law Clinic**

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: 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
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EXECUTIVE SUMMARY:

Amendments to the *Navigable Waters Protection Act* came into force on March 12, 2009. Transport Canada states that these changes were to be implemented in the short-term to streamline the approval of infrastructure and resource development projects in response to the current economic crisis. The amendments formed part of the government's strategy to balance the need for economic stimulus and other socio-environmental considerations.

We are sensitive to the need to expedite infrastructure projects in this time of economic downturn. However, we have grave reservations about the long term implications of the navigation protection regime that is being established through the NWPA amendments. We urge this Committee to examine the clause-by-clause analysis that we have submitted, in order to contemplate how the goals of process "streamlining" may be achieved without sacrificing the paramount common law and statutory duty of navigation and environmental protection.

The amended NWPA only requires a meaningful approval process for the most significant projects, exempting all others from any environmental assessment and public consultation and notification. Sections 5 and 9 establish a new tiered approval process with the level of requirements corresponding to the level of expected interference with navigation. Only works that the Minister considers "substantially interfere" with navigation are subject to the full approval requirements. All other works can be approved without an environmental assessment or public consultation. And it is critical to understand that there are no objective criteria to determine what constitutes substantial interference. This is obviously problematic, and opens the door for abuse of Ministerial discretion.

The amended NWPA creates extraordinary powers for the Cabinet or Minister to exempt broad classes of waterways without any objective criteria or requirement to consult. No cabinet or ministerial exemption orders would be reviewable by Parliament. This is not conducive to good public policy decisions about navigation protection. Sections 5.1, 12 and 13 establish new powers to create exemptions for classes of works and classes of waterways either through Cabinet order or regulation or Ministerial order. These statutory instruments, particularly the orders, are subject to minimal transparency and accountability requirements. Note also that these powers are normally employed to regulate specific single private interests or emergency situations, not to limit the scope of an Act by exempting entire classes of works and waterways that affect the public right to navigation.

Our concerns with these broad and relatively unfettered exemption powers are justified

given recent developments. On May 9, 2009, the *Minor Works and Waters (Navigable Waters Protection Act) Order* was published in the *Canada Gazette, Part I*. According to Transport Canada officials with whom we spoke at a briefing on April 30th, 2009 in Ottawa, this initial list of class exemptions was developed many months ago in consultation with industry. No paddling, ecotourism, hunting/fishing, or environmental groups were consulted. The list includes waterways considered navigable by recreational paddlers and allows the placement of temporary works that have the potential to significantly interfere with navigation. The placement of these works will likely result in interference with navigation during construction and unknown levels of environmental damage. This exemption process differs starkly from the exemption process developed for the Ontario class environmental assessments. The Ontario class EAs provide a model that is far more transparent, requiring reasons for establishment of the class, consideration of environmental impacts and public consultation.

The amended NWPA adopts a “repair the harm after it is done” approach to mitigate the increased risk of navigation and environmental harms associated with the new approval process and exemption powers. Section 11.1 appears to recognize the increased risk to navigation and the environment by creating a Ministerial power to amend an approval even if the proponent is constructing the works according to the terms and conditions. The Minister can exercise this power if the work has become a danger to navigation or “in the public interest.” The Minister may also suspend or cancel an approval “in the public interest.” This *ex post facto* approach is inappropriate for the protection of public rights, and cannot mitigate or correct irreparable harm.

In terms of enforcement, sections 33-40 further exhibit this reactive rather than proactive approach to the protection of the public right to navigation. These provisions establish extensive powers of investigation and enforcement, and increase the maximum fine from \$5,000 to \$50,000. However, these increased powers will be largely meaningless as Transport Canada does not intend to allocate additional resources to the enforcement of the Act regardless of the increased risk inherent in the relaxed approval system and increased exemptions.

Finally, it is a fallacy to assume that a statutory review process will correct the obvious deficiencies of these amendments. Although Section 41 establishes a five-year review of the Act, now is the moment to correct deficiencies that have been identified through the Senate review process. We cannot allow this new regime to become entrenched, leaving public navigation rights to be trumped by short-term economic interests.

Understanding that the amendments have become law, the following recommendations could mitigate the deficiencies about the lack of transparency, accountability and effectiveness of the NWPA:

- Establish objective criteria to determine what works substantially interfere with navigation

- Establish objective criteria to guide the creation of class exemptions
- Reestablish public consultation for all approvals and for the development of class exemptions.
- Incorporate consideration of navigational and sustainable development principles in all approval and exemption decisions.

In conclusion, the NWPA amendments represent a partial abandonment of the Government's role to protect the public right to navigation in favour of particular economic interests. It is easy to understand why many civil society groups assert that the amendments represent an incremental privatization of navigable waters, since public rights will be less easily defended, and opportunities to interfere with navigation and ecological integrity will be increased. Requirements for environmental assessments and public consultation have been largely abolished, such that the majority of works will now proceed without knowledge of the environmental impact and without the public being alerted at all. At the end of the day, the NWPA debate is about the kind of democracy we embrace in Canada.

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ANALYSIS AND DISCUSSION:

The amended Act contains new provisions intended to streamline the approval process under the *Navigable Waters Protection Act* (NWPA). This memorandum summarizes the major changes featured in the amended Act and provides an analysis on the suitability of these changes. The new amendments can be characterized into five groups:

1. Less protection & consultation: tiered approval process & public notification requirements
 - Section 5: Tiered approval system
 - Section 9: Tiered public notification requirements

2. Fewer waterways protected: Exemptions for “classes of works” and “classes of waterways”
 - Section 5.1: Class exemptions defined by Cabinet regulation or Ministerial order
 - Section 12: Cabinet power to exempt classes of works and navigable waters
 - Section 13(1): Ministerial power to exempt classes of works and navigable waters

3. Reactive, not proactive approach to the protection of the public right to navigation
 - Section 4(3): Ministerial orders for alteration or removal of Crown works with amnesty
 - Section 9(2): Ministerial discretion to require plans for management and operation of Tier 1 works
 - Section 11.1: Ministerial discretion to amend, suspend or cancel approvals
 - Section 33-39: New investigative and enforcement powers
 - Section 40: Increased maximum fine amounts
 - Section 41: Five-year review of Act
4. Further amendments to narrow the range of waterways protected by the Act
 - Section 2: New definition of “work”
 - Section 4(2): Amnesty for existing Crown works
5. General amendments to streamline approval process and clarify confusion
 - Section 2(1): Clarifies the Act applies to Crown works
 - Section 3(2) Ministerial power to combine related works for consideration
 - Section 4(1) Amended Act applicable from date of enactment
 - Section 6(4) Approval after commencement of construction
 - Section 7(1) Approval fees for construction of new works
 - Section 13: Bridges over St. Lawrence River now under NWPA jurisdiction

A) Sections 5, 9: New Tiered Approval Process and Public Notification Requirements

Under the previous Act, all bridges, booms, dams and causeways (“named works”), and all works that interfere with navigation were subject to one standard approval process. This process included submission of work plans and site descriptions to the Minister, an assessment of the impact on navigation, an environmental assessment and public consultation through the submission of work plans and site descriptions to a publicly accessible location and publication of the notice in the *Canada Gazette* and two newspapers one month prior.

The new Section 5 abolishes the “blanket” approval requirement for the four named works and, combined with Section 9, creates a tiered approval system for all works based on the level of interference with navigation. Tier 1 consists of works that “substantially interfere with navigation” and are subject to similar conditions as all works in the previous Act: submission of work plans and site descriptions to the Minister, assessment of the impact on navigation, environmental assessment and public notification through the submission of work plans and site descriptions to a publicly accessible location, publication in the *Canada Gazette* and a newspaper, and a 30-day period for written comments to the Minister. The amended Act contains a new clause that allows the Minister to require the plans for the management and operation of Tier 1

works. Tier 2 consists of works that “interfere, other than substantially, with navigation” and are subject to relaxed requirements imposed only at the Minister’s discretion. The proponent must submit the plans and site description to the Minister but there is no requirement to perform an environmental assessment or public notification unless the Minister. Tier 3 consists of exempted works which can be constructed without an NWPA approval at all.

The tiered approval system results in reduced protection for the public right to navigation and the environment. Bridges, booms, dams or causeways will no longer require automatic NWPA approval, even though these works will always have a significant impact on navigation. Environmental assessments and public consultation are now required only for works that the Minister considers substantially interfere with navigation. Transport Canada admits that the NWPA is the single largest law list trigger for environmental assessments pursuant to the *Canadian Environmental Assessment Act*. Removing this trigger will result in the majority of works now being approved without any assessment of their impact on the environment or full consideration of the impact on the public use of the waterway.

B) Sections 5.1, 12, 13: New Exemptions for “Classes of Works” and “Classes of Waterways”

The most novel aspect of the amended Act is the creation of the power to exempt classes of works and classes of waterways from the NWPA approval process [amended s. 5.1] through Cabinet orders or regulations [amended s. 12] or Ministerial orders [amended s. 13(1)] No such power existed in the previous Act. These provisions grant unfettered power to the Cabinet and Minister to narrow the application of the Act. This power stands in stark contrast to the Class Environmental Assessment processes established by the Ontario government to streamline provincial assessments.

i) “Unfettered” class exemptions under the amended NWPA

The new Act provides no guidelines or criteria by which these exemptions decisions should be made, effectively leaving the decision entirely at the discretion of the Cabinet or Minister. Regulations and orders must be published in the *Canada Gazette* 30 days in advance of their coming into effect. No meaningful public consultation is required by the Act.

The use of Cabinet or ministerial orders to exempt works and waterways is particularly extraordinary. Orders are developed using a less transparent process than regulations, not requiring public consultation nor subject to Parliamentary review. Ordinarily, these non-regulatory statutory instruments are used to make rules affecting a single private interests or for emergency situations, not permanent orders affecting a long-standing public right to navigation. In the previous Act, ministerial orders were allowed to be used only when immediate action was required to deal with risks to safety and security.

These were interim orders with a statutorily-imposed time limit on their validity. The new Act greatly expands the power of ministerial orders, allowing their use to exempt entire classes of works and waterways from the Act and also imposes no time limit on these orders. The ministerial orders are shielded from not only public comment but also Parliamentary review through an exemption from the *Statutory Instruments Act*.

The danger posed by this form of delegated power is the lack of accountability of the Cabinet regulations and particularly, the Cabinet and ministerial orders. Exemptions could be created that subvert the purpose of the Act, to protect the public right of navigation, in favour of economic concerns. In practice, it is much easier to make an order than it is to make a regulation. Thus it is likely that exemptions will be achieved by ministerial order, without public or Parliamentary oversight. Transport Canada has been clear that it intends to employ ministerial orders to create exemptions to respond quickly to the current economic situation:

The application for approval processes of Part I of our Act...cannot be accomplished quickly enough to respond to the current economic crisis. It was recognized that timely action was required in order to expedite the development and delivery of critical infrastructure projects. The amendments thus provide for the development of Orders until Regulations may be adopted.¹

The first ministerial order creating class exemptions was issued on May 9, 2009. The Transport Minister published the *Minor Works and Waters (Navigable Waters Protection Act) Order* in the *Canada Gazette, Part I*. Transport Canada did not make the information available for comment prior to publication. The Order will come into effect on June 9, 2009, after a 30-day notice period. There is no opportunity for meaningful public comment prior to its coming into effect.

The ministerial order creates exemptions for nine classes of works and three classes of waterways (see Annex 1 for descriptions of classes). Transport Canada has stated that minor waterways will be defined as waters that cannot be reasonably navigated by the public. However, the definition of “minor waterway” in the Order is broad, including all waters less than 1.2 m wide OR less than 30 cm deep. This definition would include a multitude of waterways currently in use by recreational kayakers. Transport Canada has justified its exemptions for classes of works on the basis that exclusion of these works will ensure a timely review of other works that do have the potential to significantly interfere with navigation. However, the exemption for “temporary works” allows the construction and placement of structures that can span halfway across a navigable channel and thus, could have significant effects on navigation and the environment. The exempted works appear to be focused on restricting interference with charted navigation channels (important to commercial shipping) but interference with other (recreational) navigable waterways are accepted, establishing a hierarchy of waterways worthy of protection.

¹ Transport Canada summary of the NWPA amendments issued at the April 30, 2009 information session.

The order specifies terms and conditions for the construction and maintenance for several of these classes. The terms and conditions are focused on providing safe or alternate access and adequate warning of hazards during construction and restoring the natural contours of the bed after construction. These conditions permit significant interference with navigation during construction, which can proceed for an extended time period. No conditions appear to be directed to the protection of the natural environment.

The class exemption provisions have granted extraordinary unfettered power to the Cabinet and Minister to exempt entire classes of works without accountability to the public or Parliament. The general exemption clause in the previous Act exempted works that did not interfere with navigation [previous s. 5(2)]. This clause reasonably narrowed the application of the Act while ensuring that works that could interfere with navigation were assessed for the impacts on navigation and the environment. The new class exemptions amount to a significant narrowing of the waterways protected under the Act, allowing the Cabinet and Minister to exempt works that interfere with navigation without objective criteria, environmental assessment or public consultation and free from Parliamentary review. This provision, if deemed necessary, could be improved by creating objective criteria to guide the decision-making of the Cabinet and Minister. These criteria should include a maximum allowable level of interference with navigation and damage to the natural environment. A further improvement would be to recommend public consultation in the development of the class exemptions to ensure that the decisions are fully-informed and strike the proper balance between economic considerations and the Act's purpose to protect the public right to navigation.

ii) Better balance in the Ontario Class Environmental Assessment Process

The Ontario government developed ten Class Environmental Assessments (EA) to streamline the process for groups of works that are routinely carried out and have known, predictable and manageable impacts. The classes are created by proponents who apply to the Minister of the Environment for approval of the class. Once approved, the proponent can undertake the projects within the class without an individual EA.

The Ontario *Environmental Assessment Act* requires a project proponent to provide specific justification for the class exemption. The required information includes the expected range of environmental effects, measures that could be taken to mitigate against adverse environmental effects and public consultation measures. The Act provides objective criteria on which the Minister should base the decision to grant a class EA. The first criterion listed is “the purpose of the Act” which is the protection of the environment.

Importantly, there is an appeal mechanism where any interested person, group or government agency with significant environmental concerns may request that the work

be subject to a higher level of EA study to meet their concerns.

The class exemptions in the amended NWPA could be improved by incorporating principles present in the Ontario class EA regime. First, decisions to create an exemption should be made with consideration of the protection of the public right to navigation as a primary factor. Any exemptions should be developed with public consultation. Once established, the Minister should provide reasons for granting the exemption and require the mitigation of adverse harm for the range of expected effects on navigation and the environment.

C) Reactive, not proactive approach to the protection of the public right to navigation

Several new monitoring and enforcement powers have been included in the amended Act. The Minister can require plans for the management and operation for Tier 1 works, those that the Minister considers would *substantially* interfere with navigation [amended s. 9(2)]. Submission of these plans allows NWPA program officers to monitor the ongoing operation of high-risk works. The Minister can order the alteration or removal of those Crown works with “amnesty” approvals if the work has become a danger to interference with navigation or generally, in the public interest [amended s. 4(3)]. This power attempts to mitigate the risk undertaken by the fact that the Act allows Crown works continue to exist without any assessment of their impact. This ‘after-the-fact’ order can be issued only after damage to navigation rights has already occurred, as the provision requires that the work has become a danger.

i) Section 11.1: The Minister can amend, suspend or cancel approvals of works that have become a danger or generally “in the public interest”

A new provision, Section 11.1, creates the power for the Minister to amend an approval even if the work is being constructed and maintained according to the approved plans. The Minister can amend an approval if satisfied that the work has become a danger to or interference with navigation due to time and changing navigational conditions or the amendment is “in the public interest.” The Minister may also suspend or cancel an approval “in the public interest.” These new powers are impressive, but appear to combine the new relaxed approval process with a “repair the harm after it is done” attitude towards the public right to navigation.

ii) Sections 33-40: The Act creates broad investigative powers and increased fines to ensure compliance but are meaningless without adequate resources

The Act creates broad new powers to investigate and enforce compliance with the Act [amended ss. 33-39]. The Minister can create a monitoring unit with sweeping investigative powers to verify compliance with the NWPA. 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. The maximum fine amount was increased from \$500 to \$50,000 and fines can be repeated for each day the offence is continued [amended s. 40].

The increased monitoring and enforcement powers, and increased fine amounts are desirable in principle, but combined with the relaxed approval requirements represent an reactive rather than proactive 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. A primary concern is that it is not clear that these extensive investigative powers are in accordance with Charter principles related to lawful search and seizure. A second concern is that the effectiveness of this monitoring and 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 existing (resource-stretched) 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.

The increased powers of monitoring and enforcement will be effectively meaningless without the proper resources to implement these powers. Even if the resources were available, this approach would turn the NWPA program into one focused on reacting to mitigate damage to navigation rights and the environment rather than focused on protecting these rights. A more effective method would be to return to the focus of the previous Act which created a proactive regime that ensured that all works that could interfere with navigation were assessed prior to, not after, construction and operation.

iii) Section 41: Five-year review of Act does not mitigate lack of public consultation prior to enactment

The Act calls for a review of the NWPA five years after the coming into force of the Act [amended s. 41]. Transport Canada provides the following reason for the five-year

review:

There are a number of changes that could be made to the Act to more effectively manage the increasing shared use of Canada's waterways. Additionally, the inclusion of a five-year review clause in the Act enables the correction of any deficiencies identified through the implementation of these amendments. As part of this review, the ongoing need of the use of Orders would be assessed.

While the five-year review is desirable, when viewed in combination with lack of comprehensive public consultation prior to the enactment of the amendments and the near-complete removal of any public consultation prior to this review, it could be too little too late. Transport Canada itself admits that changes could be made to make the Act more effective, and several stakeholders from the recreational hunting and boating community have voiced strong concerns over the amended Act. The statement from Transport Canada indicates that they plan to take a "wait and see" attitude, allowing the Act to continue with its known deficiencies for five years and then discussing lessons learned at that time. The Ministry explicitly acknowledges the extraordinary use of Orders to create exemptions to the Act, by specifically stating that their use will be assessed in the review.

This attitude would allow systems that permit damage to the public right to navigation and the environment to continue for a minimum of five years without recourse. Transport Canada admits that the amendments were developed in consultation with industry representatives but minimal input from other stakeholders. This clear deficiency in public consultation could be mitigated by undertaking public consultation now that could inform and lead to the enactment of regulations that would mitigate the most harmful affects of the amended Act.

D) Further amendments that narrow the range of waterways protected by the Act

The previous Act contained a general exemption clause [Section 5(2)] for works that the Minister considered did not interfere substantially with navigation. No exemptions were allowed for four named works: bridges, booms, dams and causeways. These works were considered, by their nature, to always have an impact on navigation and thus warranted review by the Minister. The amended Act introduces significant changes to the exemption regime, most notably the new power to create class exemptions by Cabinet regulation [Section 12] or ministerial order [Section 13] discussed in the previous section. The new definition of "work" and a provision granting an amnesty for Crown works without prior NWPA approvals further narrow the scope of works for which an NWPA approval is required.

i) New definition of "work": Creates onus on the community to disprove exemptions

The previous general exemption for works that do not interfere substantially with

navigation [repealed s. 5(2)] has been repealed and replaced with an exemption embedded into the new, more general, definition of “work” [amended s. 2]. This change leads to reduced clarity about what works the Act applies to and who is responsible for this determination.

The previous definition of “work” enumerated specific types of works that were included in the definition regardless of their effect on navigation. The definition concluded with a general “catch-all” clause that included “any structure, device or thing that may interfere with navigation.” The new definition deletes most of the enumerated list, but retains the general “catch-all” clause. Most notably, it applies the limiter “may interfere with navigation” to the entire definition.

While seemingly minor, this amendment results in a major change to the way in which the Act is triggered. Previously, Section 5(2) required that the project proponent provide proof to the Minister that the work did not “substantially interfere with navigation” to qualify for the general exemption. The new Act removes this legal duty on the proponent and shifts the onus onto the community to prove that a work “may interfere with navigation.” This will absolve the Ministry from carrying out its duty to protect the public right to navigation unless it receives proof of interference to navigation. This shift in onus is particularly problematic when viewed in combination with the reduced public notification requirements in the new Act [amended s. 9]. In effect, the Ministry has imposed a duty on the community to prove the navigational effect of works, while at the same time, handicapping their ability to do so by not informing the community about the majority of these works.

ii) Section 4(2): “Amnesty” for existing Crown works without NWPA approvals

Prior to 1992, the Crown assumed that the Act was not applicable to Crown works. A 1992 Supreme Court of Canada decision The Court held that this interpretation was incorrect and found that the Act 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 application for approval of the existing work prior to the submission of a subsequent application for the actual modification being considered.

Section 4(2) of the new Act grants *de facto* NWPA approvals to existing Crown works. The provision is intended to expedite the approval process for the modification of Crown works by providing an “amnesty” for the original construction of these works.

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 allow Crown works for which no assessment has been about their risk to navigation to remain, perpetuating the diminished protection of the public right to navigation. Admittedly, requiring immediate

NWPA approvals for the multitudes of Crown works without NWPA approval would be onerous. The previous system, requiring an assessment of the impact of the original construction when the need for modification of the work arises, is a reasonable compromise between the need for an efficient approval process and the need to protect navigation rights. The new amnesty results in an assessment focused solely on the modification, removing the only opportunity to assess and mitigate any damage to navigation rights caused by the original Crown work.

E) Other general amendments

Other general amendments in the Act were included to streamline the approval process and clarify previous confusion over the interpretation of the Act.

Section 2(1) clarifies that the Act applies to Crown works.

Section 3(2) allows the Minister to combine related works for single approval under the Act. Combining works can be appropriate when there are several similar crossings over the same waterway or over waterways with substantially the same characteristics.

Section 4(1) provides that the new amendments apply only to the construction rebuilding, repairing or altering of works commenced after the amendments on March 12, 2009.

Section 6(4) maintains the ability of the Minister to grant an approval of a work after construction has commenced that existed in the previous Act, and clarifies that the Minister may impose terms and conditions on the approval.

Section 7(1) maintains the ability of the Minister to prescribe fees and the time frame of validity of the approval by regulations. Fees are imposed on Tier 1 works (not Tier 2 or 3 works) and approvals obtained after the commencement of construction.

Section 13 allows works constructed over the St. Lawrence River to be approved under the NWPA. Under the previous Act, these works required formal Parliamentary approval.

F) Conclusion

The amendments to the *Navigable Waters Protection Act* were focused on streamlining the approval process for infrastructure and resource projects. The application of the Act has been narrowed and the requirements for environmental assessment and public consultation have been relaxed. This means fewer waterways protected, less accountability for government decisions, less environmental protection and less public consultation, all in the name of expedited infrastructure projects.

Transport Canada claimed that “[t]he [previous] Act had become an impediment to

economic development and to the development of Canada's transportation infrastructure." The purpose of the Act is the protection of the public right to navigation, a purpose that will inevitably conflict at times with economic and infrastructure development. It is important to ensure that all amendments are in accordance with this overall purpose of the Act. Contrary to this, many of the amendments were prompted by perceived economic need to the detriment of navigational interests.

Transport Canada claims that the enactments were developed over years of consultation with various stakeholders. While this is likely true for many provisions, it does not appear to hold for the new power to exempt classes of works and waterways by an order of Cabinet or the Minister. Transport Canada noted that while the amendments provides authority for the Cabinet to establish these exemptions through regulation, this process was not quick enough to "respond to the current economic crisis." The Act, thus, allows the Minister and Cabinet to use orders, with their lack of transparency and accountability, to create permanent exemptions aimed at addressing the economic crisis, not to protect navigational and environmental rights. The question remains whether the proper balance has been struck, and the review of the legislation shows that the right to navigation has largely suffered due to the amendments.

The streamlining of the new Act has come at the cost of public consultation and accountability. The provisions create a system where projects can be rushed through with no notice to the public before and no accountability to Parliament after. This brings inherent increased risks to navigational rights which the Act attempts to mitigate through stronger enforcement powers and increased fines. However, without proper resources to administer the enforcement program, these powers will be meaningless. The sum of the amendments results in expedited, higher-risk approvals with no meaningful oversight from the public, Parliament or the navigational experts at Transport Canada themselves. The first opportunity for real reflection will occur through the five-year review, which allows a minimum of five years of potential damage to the right to the public right to navigation. Navigation rights and environmental protection are not areas appropriate for sacrificing in the short term and recovering in the long-term; the damage, once done, is difficult to repair. The NWPA has been transformed from proactive legislation aimed at the protection of the long-standing right to navigation to a reactive legislation aimed at mitigating the damage to navigational rights likely from the new tiered approval system.

Annex 1: Class Exemptions*Minor Works and Waters (Navigable Waters Protection Act) Order*

The nine exempted classes of works are:

- **Shoreline protection** (parallel to shoreline) within 5 m from the high-water mark. Safe access and warning signs must be provided during construction of the work.
- **Docks and boathouses** that do not extend further than adjacent docks and are 30 m from any navigation channel.
- **Winter crossings** on waters not navigable other than by an ice breaker. All parts of the work must be completely removed before first thaw and the waterbed must be restored to its natural contours if disturbed by the works.
- **Aerial cables** on uncharted waterways less than 15m wide (except a canal accessible to the public) and 1 km from a lake or tidal water. Safe access and warning signs must be provided during placement of the works.
- **Submarine cables** (power lines and communication cables only) that lie on or under the waterway bed in uncharted waters more than 10m from a dock or boat launch and not across a port entrance.
- **Pipelines** buried beneath the waterway bed in uncharted waterways less than 50 m wide unless regulated under the *National Energy Board Act* or requiring temporary cables not lying on the waterway bed at any time. Safe access and warning signs must be provided during placement of the works. The waterway bed must be restored to its natural contours after construction.
- **Water intake** pipes less than 10 cm in diameter that lies on the waterway bed, placed more than 50 m from a navigation channel. Any intake structure must be less than 50 cm from the waterway bed and must not be associated with a dam, weir or headpond. The intake must be > 2.5 m deep in uncharted waters and < 0.5 m deep in charted waters. No floating pipes shall be left unattended during placement of the works.
- **Dredging** as part of the regular maintenance around docks, retaining walls, marina basins and other structures. The dredging operation must be more than 30 m from a navigation channel and the material dredged must be disposed on land or offshore if authorized by an Act of Parliament. The operation cannot include suction dredging with floating or submerged pipes, cables that cross navigable waters and blasting.
- **Temporary works** required for the construction of any exempted class of work except for roads, bridges, dams, cofferdams, berms and booms. The temporary work must not cross more than halfway from one side of a navigable water, or change the course or cross a navigation channel. Safe access and warning lights at 30 m spans must be provided during construction or placement. The temporary work must be completely removed after construction and the bed of the navigable waters must be restored to its natural contours.

The three exempted classes of waterways are:

- **Minor waterways** are defined as a 200(+) metre span of water less than 1.2m wide or less than 30cm deep OR a 200(+) metre span of water between 1.2m to 3m wide and 30 to 60cm deep, with a slope² of less than 4%, and with a sinuosity ratio³ of less than 2%, and with more than 2 natural obstacles.
- **Artificial irrigation channels and drainage ditches** with an average width of less than 3m unless created from a natural body of water.
- **Private lakes** less than five hectares in area that are entirely enclosed by private land of one owner with no public access or easements and no connection to navigable waters.

² The slope of the navigable waters is the differential elevation of the water surface from the upstream end of the centre line of the navigable waters to the downstream end of that line

³ The sinuosity ratio is the ratio of the length of the centre line of the navigable waters to the length of a straight line that starts and ends at the same points as the centre line.