

Submission in response to Federal Department of Transportation's review of the revisions required to the Navigable (Waters) Protection Act

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Thank you for this opportunity to comment on revisions to the Navigable (Waters) Protection Act.

The Process

If a house does not have a good solid foundation, it will never be a good house. It is the same thing with government processes. How they are done will determine the value of the outcome.

When the Liberal Party of Canada formed the government of Canada one year ago, the Prime Minister reiterated election promises that federal environmental protection legislation and policies stripped by the previous government would be reinstated.

Related to that promise, the Liberal federal government recently initiated a dizzying series of consultation processes. Unfortunately, all large bureaucracies are comprised of branches or departments who seem to: memorize their specific mandates; don blinders to the world around them; and, just focus on doing their own thing within their own hierarchies. In 2007, I heard the Hon. Claudette Bradshaw, former Liberal MP for Moncton-Riverview-Dieppe, term this as "siloizing". She was very involved in issues such as poverty, homelessness, and supports to vulnerable families, and this made her crucially aware that the public good is not served when each public service unit works within its own silo, within the boundaries of its own mandate, not noticing where there is overlap.

Siloization is what has happened with the federal consultations on each of several Acts: the Canadian Environmental Assessment Act (CEAA), the National Energy Board (NEB), the Fisheries Act (FA), and the Navigable (Waters) Protection Act (N(W)PA). For decades, some for more than a century, these have served as a web of interrelated processes to protect our environment. It is impossible to consider how one of these pieces of legislation should be amended to improve

environmental protection, without also delving into what the current state of the others mentioned above. The siloization of the consultation processes seriously undermines their value.

Despite the intentional castration of these Acts between 2009 and 2014, they are still linked: both the NEB and the N(W)PA stream into the CEAA when the NEB and N(W)PA Acts still trigger a CEAA review. The NEB, in theory, may trigger the need to comply with the N(W)PA (or at least it should!). The FA connects to the others, particularly the N(W)PA, and the Oceans Act (OA) and the Species At Risk Act (SARA). (Both these latter two are discussed slightly below.) Not all these Acts are currently the objects of public consultation, but four of them are.

In my working life, I have conducted many sorts of public consultations and community engagement processes, both working inside government, and as a consultant for non-profits and public agencies. I understand how difficult it would have been to integrate these consultations, but it was what should have been done. In practical terms, the concurrent separate public consultation processes have been held in virtually competing times and places. Few of us in volunteer groups or under-resourced non-governmental organizations, who are deeply concerned about environmental protection, have been able to engage in all the separate processes.

You who are reading this are getting paid to do so. Public service is your job. We want to believe in the genuineness of the government's commitment towards making environmental protection revisions to those denuded pieces of protective legislation. The process you have used for these consultations has done little to reassure many members of the public that you are listening. Bear in mind that volunteer community members are using personal time from our lives to share our views.

Don't disappoint us. Consider what has happened politically in England and the United States during the past year: that is what happens when the sitting government is completely out of touch with the body politic. This caution is underscored in a just-released report from the Canada West Foundation, "One thing seems very clear: The world of elite, centralized decision-making without local engagement is fast becoming a thing of the past."¹

Here's hoping your government value and consider all deputations and submissions on all these Acts, including how they connect to each Act. The world is on the absolute brink of ecoapocalypse. Canada is contributing a great deal to the wrong side of the equation right now. We need to clean up our act, for the sake of all future generations. The balance of life on earth hangs on stewardship of what we have left of the natural world. At this time in human history, bureaucratic silos must be torn down. You must realize that unity of purpose is what our future generations need.

What Happened to this Act in 2012?

Let's start with the name of this Act. It used to be called the Navigable Waters Protection Act. It lost the crucial word "*waters*" at the same time as it was stripped clean of much of its protective content by the previous federal government in 2012, via Omnibus Bill C-45. Throughout this brief, I refer to its present incarnation as the Navigable (Waters) Protection Act (N(W)PA) because ensuring "WATER" is front and centre in this Act is crucial. Water is Life. Without water, our entire planet has nothing. Our human species is quickly poisoning and depleting this essential natural resource.

¹ Pipeline opposition isn't really about climate change, Canada West Foundation finds. CBC News Web. 24 Nov 2016. <http://www.cbc.ca/news/canada/calgary/canada-west-foundation-trust-report-energy-projects-1.3865432>

Virtually every one of Canada's lakes and rivers is “*navigable*” because any might be, or is presently being, navigated by kayak, canoe, boat, or ship for one or more of: fishing, recreation, ecotourism, transportation, industrial purposes, shipping of goods, etc. In its original form, the N(W)PA applied to waterways that are used for any form of navigation – whether traditional, ceremonial, personal, recreational, or commercial.



The original Act was designed to ensure that waterways stay open and available to navigation because all are entitled to traverse on our waterways, but only in so far as navigation activities will not cause any harm to the waterways. (Without getting into legal terminology, as I use it here “harm” could mean pollution, or posing further risk to endangered fauna or flora, or a wide variety of other factors.) For these reasons, any “*work*” proposed to be constructed or placed in, on, over, under, through or across any navigable water had to be reviewed. Before the Harper-era amendments, the government website said “The Navigable Waters Protection Program (NWPP) is responsible for the protection of the public right to navigation and **the protection of the environment** through the administration of the Navigable Waters Protection Act (NWPA)” (bolded text is my emphasis).

In 2009, the Harper regime began tinkering with the Act. As things were before revisions, any “work that would *substantially interfere* with navigable waters” *automatically triggered* a CEAA assessment. In 2009, a two-tier system was created under this Act, which sorted “work” activity into two categories: “major” and “minor.” From then on, referral to the CEAA was only required for “major works.”

All the other changes that undermined the N(W)PA happened in 2012, via Omnibus Bill C-45. After those 2012 changes were enshrined in law in 2014, the government website still continued to state concern for protecting “traditional and recreational” uses of waterways, as well as the “environmental effects” of proposed projects on waterways. ²

A major way the previous government undermined the regulatory protections was by creating a very limited schedule of waterways governed by the N(W)PA. Since the Harper-era changes, 3 oceans, 97 lakes, and 62 rivers (or parts of rivers) are governed by this Act. Based on an estimated 32,000 major lakes and 2.5 million rivers in Canada, 99% of the Canada's waterways are not protected now under this Act – including some of the largest lakes in the country. ³

Another major issue with the current N(W)PA is that it exempts pipelines and power-lines from CEAA review. This may be hard to believe, considering the environmental impact these “works” can have. It seems incomprehensible that the impacts of these projects need no longer be assessed for any navigable waterway in Canada, but thanks to a Greenpeace Access to Information request we know why this is so. The changes to this Act in Omnibus Bill C-45 were requested in late 2011 by a think-tank consortium called Energy Framework Initiative, which includes Canadian

² Navigation Protection Program. Transport Canada, 26 Aug. 2014. Web. 17 June 2016. <https://www.tc.gc.ca/eng/programs-621.html>

³ Every Lake, Every River: Restoring the Navigable Waters Protection Act. Council of Canadians Web. 26 Oct 2016. <http://canadians.org/sites/default/files/publications/report-everylakeeveryriver.pdf>

Association of Petroleum Producers and the Canadian Energy Pipeline Association. ⁴

In its 2012 critique of the proposed Bill C-45 changes, Ecojustice identifies all that was wrong with the revisions. Their analysis is as valid today as it was then. I hope all members of the panel reviewing these submissions have taken time to carefully consider Ecojustice's October 2012 Legal backgrounder: Bill C-45 and the Navigable Waters Protection Act (RSC 1985, CN-22). In this brief, Ecojustice argues cogently that the interrelationship between how water is used and its protection as a vital resource for all life, demands stringent and priority regulatory measures. ⁵

Discussion on Intersecting Matters

Our supporters and neighbours use our local rivers and streams for fishing, transportation, ecotourism, guiding, recreation, livelihood, traditional, and ceremonial uses. This includes: Kouchibouguac River, Kouchibouguacis River, Saint-Charles River, Richibucto River (main, and all branches), Molus River, Bass River, Salmon River, St. Nicholas River (main, and all branches), Bouctouche River, Little Bouctouche River, Chockpish River, Mascogne River, and Canaan River, as well as the streams, wetlands, coves, and smaller lakes in our county. Living in and from the water is a way of life for almost all Peoples in our region.

The 2012 changes to the N(W)PA deliberately omit the need for review of commercial /industrial issues that relate to resource extraction such as oil and gas. These activities are the ones MOST likely to cause irreparable harm to the living water itself, and/or the life in, on and around any affected waterways, including human life. People will step up to protect their water in the absence of a regulatory system that does this. New Brunswick also has no meaningful water resource protection regulations. That is why we had to mount such a strong resistance to the proposal to start shale gas fracking here. Hard as that was, if we have to do it again, we will.



Leaving rivers and lakes aside for a moment, loud warning bells are ringing about the current government's sincerity re: protecting oceans, which are already heavily stressed. We are also very concerned about the Northumberland Strait, and the coastal bays and harbours in our region, which are deeply impacted by dredging and industrial contamination. And we feel strongly connected to Chaleur Bay and the Bay of Fundy, even though they are not in our County.

We continue to be alarmed about the impact the EnergyEast Pipeline will have on the Bay of Fundy, which is where TransCanada plans to have its final export terminus. There are SARA protection designations for the Right Whale in the Bay of Fundy, as well as other species at risk and loss of habitat issues. The proposed fuel to be pipelined to, and shipped out from, a port near Saint John is bitumen. Bitumen is highly toxic, The additives mixed in to allow the gooey, sludgy Bitumen to flow through a pipeline are often even more toxic. The blended substance is called Dilbit. It is not possible to clean from waterways. It clumps and sinks, does not float like most petroleum products.

When a group of inland fishermen deputants spoke at the NEB hearing in Saint John in August

⁴ http://www.greenpeace.org/canada/Global/canada/pr/2013/01/ATIP_Industry_letter_on_enviro_regs_to_Oliver_and_Kent.pdf. Web. 27 Nov 2016.

⁵ https://www.ecojustice.ca/wp-content/uploads/2015/03/NWPA_legal_backgrounder_November-20-2012.pdf> Ecojustice. Web. 27 Nov 2016.

2016, they were told that the NEB panel would not consider the impact on the Bay of Fundy of TransCanada's: Energy East pipeline; proposed end-of-the-line terminal; and, coastal export shipping.⁶ Why would the NEB say they are not considering this? There is something deeply wrong when a government has regulations with loopholes like this! Federal regulatory silos contribute to this situation, but primarily it shows how a “blind eye” can be turned to environmental issues when big industry players are pressing government.

Just looking at one estuary in this area, it is immediately obvious in a silo-free world SARA, NEB, FA, CEAA, and N(W)PA would have an active role in collaborating to ensure protection of this specific portion of the Bay of Fundy, as *should* the Oceans Act. “In March 2007 the Musquash Estuary was designated as Canada's sixth Marine Protected Area and New Brunswick's first. The protection of this last fully functioning estuary on the Bay of Fundy was realized through the work and collaboration of many partners. The designation, through the Federal Department of Fisheries and Oceans, ensures the protection of Musquash under Canada's Oceans Act.”⁷ ...Well, apparently not so much “protection” actually...

By the way, the same thing happened on the west coast, with Kinder Morgan's Trans Mountain expansion: the NEB refused to consider the impact of that plan in regards to coastal waters. A major concern with this latter proposal is it will further impact the habitat of the Southern Orca population, which also has endangered status under SARA.

A Department of Fisheries and Oceans staffer recently explained to me that we really ought not to worry about the sea coast because the new *Ocean Protection Policy* (OPP, which is under the OA) will be looking after our coasts. He showed me a shiny coloured map of what will be protected. Because I was aware of all I had written in this submission, I had the feeling I was not getting the whole story, so I did some research on the OPP.

Prime Minister Justin Trudeau was asked, during the November 16, 2016 OPP announcement, if his government would conduct studies under SARA to protect Southern resident orcas on the west coast, before making a decision on the Kinder Morgan Trans Mountain proposal. He responded, “We take the responsibilities under SARA extremely seriously in this government and that's why we're engaged very closely in monitoring marine mammals, proper research and habitat protection,” he said, avoiding the question.⁸ My concerns about the OPP were heightened by this waffling answer.

On closer examination, I learn that the OPP is “heavy on programs for oil spill clean-up, mapping oil spill trajectories, predicting behaviour of oil in water, Indigenous community response teams and the like...”⁹ The OPP is not about “protection.” Consider the use of condoms: by using them a person is *protecting* against unwanted pregnancy and disease, by *preventing* the transmission of substances from one body to another. By the same token, protection in environmental health contexts means *preventing* dangerous contamination.

6 1000 fishermen are thrown overboard by the NEB on Day #1 Energy East hearing. Council of Canadians. Web. 12 Aug 2016. <<http://canadians.org/blog/1000-fishermen-are-thrown-overboard-neb-day-1-energy-east-hearing>>

7 http://www.natureconservancy.ca/en/where-we-work/new-brunswick/featured-projects/musquash_estuary.html 17 Nov 2016.

8 <http://www.nationalobserver.com/2016/11/07/news/trudeau-announces-historic-15-billion-protection-plan-canadas-coasts>; 17 Nov 2016.

9 <http://www.nationalobserver.com/2016/11/08/opinion/editorial-ocean-protection-now-code-oilsands-pipelines-and-tanker-traffic>; 17 Nov 2016.

The OPP is an optical illusion. It is primarily about disaster recovery and restoration.¹⁰ It promises to “protect” by ameliorating the impacts of poisonous spills and other accidents that will certainly arise from continuing oil and gas exploration, mining, and transportation along our territorial ocean coasts, and by restoring damaged habitats after accidents. The fact is, as stated above, bitumen (the primary product the tarsands companies want to export via these tidewater pipelines) cannot be cleaned up. The Canadian public (taxpayers like the supporters of our chapter and our allies) will be paying a fortune to be ready to clean up after the gigantic, super-wealthy oil and gas industry make even more messes in our coastal waters.

The OPP will not solve problems caused by stripping of our environmental regulatory processes under the Harper regime. It paves the way for more oil tankers. It will not stop oil and gas industrial activities on our vulnerable and at risk coastal waters, many of which are home to species that are endangered, threatened, or of special concern.¹¹ It does not even promise to stop these activities in our already designated Marine Protected Areas, where there are known to be Species At Risk.

It seems that pipelines, oilsands expansion, and fracking are more important to this government than ocean species protection and development of renewable energy that does not poison water, and all that lives in the water or depends on water. This so-called “Ocean Protection Plan” (OPP) might well be a signal that the Minister of Transportation has already decided not to revise the N(W)PA back to its original state, when it required CEAA review for all proposals related to coastal use by the oil and gas industry. Clearly, our federal government is preparing for the continuing disastrous spills and accidents that will accompany the expansion of exports from the tarsands and fracking industries in Canada. It must be stated here that this is entirely contrary to the federal government's commitment to play its part in keeping global warming to under 1.5 degrees (centigrade).

What Needs to Be Done

We deeply oppose how Bill C-45 gutted the protective mechanisms in the Navigable (Waters) Protection Act. We are joined in this concern by Anglophone, Acadian, Mi'kmaq and Newcomer allies in this region. The current version of the Act allows humans the right to traverse all waterways as they wish, but does almost nothing to protect the rights of all those humans who rely on all the other important uses of water. It fails to protect most forms of life in, on and around the water from harm. It fails to protect the water itself, which is a living entity as well.



For the Kent County NB Chapter of the Council of Canadians, here following is the *why* and *what* is essential regarding revisions to the N(W)PA:

1. Protections must be put back on all lakes, rivers and waterways, so that every lake and every river is protected. This means the schedule must be eliminated and the wording changed back so that protections in the Act apply to all lakes, rivers and other navigable waterways.
2. Changes were also made by the Harper-regime to the *National Energy Board Act* and the *Canada Oil and Gas Operations Act*, so that CEAA environmental assessments are no

¹⁰ <http://www.pm.gc.ca/eng/news/2016/11/07/prime-minister-trudeau-announces-oceans-protection-plan>. Web 17 Nov 2016.

¹¹ Table 5 has status categories: http://www.cosewic.gc.ca/eng/sct0/assessment_process_e.cfm. Web. 28 Nov 2016

longer triggered by these kinds of projects. This is exacerbated by the fact that the current N(W)PA exempts pipelines and other oil and gas industry “works.” All these Acts must be revised to ensure that this industry can only operate around water safely, ie. without threat to the environment, especially waterways, underground aquifers, etc.

3. All project applications must submit information that fully describes:
 - the impact on navigable waters or any unique or special resources not already identified;
 - components of the environment likely to be affected by the project and a summary of potential environmental effects and information relating to the terrain, water bodies, air, and vegetation that would give federal authorities a more accurate picture of the environment that may be impacted by the activity;
 - the name, width and depth of any waterway affected by the project and a description of how the waterway is likely to be affected.
4. The United Nations has recognized the human right to water. A clause including Canada's recognition of this human right, and guaranteeing to uphold this right, must be included in the initial description of the to-be-revised N(W)PA, to ensure that everyone understands why “works” that could result in potential spills or discharge of harmful substances must be assessed for their impact on all navigable waters.
5. We are aware that Indigenous Peoples living in First Nation communities, or otherwise recognized as indigenous under the *Indian Act*, have been given greater assistance and leeway regarding these consultations. That is excellent, but their rights to Free, Prior and Informed Consent must be upheld in your decision-making process.
6. According to some news reports, the same fossil fuel industry advocacy groups that told Harper's government how to amend the N(W)PA in 2012 (discussed above) are currently registered to lobby the current federal government on these environmental legislation reviews. We can only imagine that these registered lobbyists had advance notice, and have adequate resources, to ensure they attend all the consultations processes mentioned on the first page of this submission. Even in government's consultation processes there is inequity. While the gate for industry lobbyists is well lit and manned 24-7 with a welcoming presence, the hidden entrance for the rest of us, the grassroots people and volunteer advocacy groups, is down a bramble-ridden path, and there are no lights. It is also often locked (too late, too long, too off-topic, etc.). As I mentioned above, we grassroots people are getting very tired with being handled so disrespectfully in this *democracy*. The only way your government can make this right is to undertake a second round of consultation once proposed changes are drafted.
 - Put all contentious approvals on hold and put all public service resources towards doing consultations in an integrated, people-friendly, grassroots accessible manner, for all the regulatory legislation currently under review.
 - Show us how the proposed changes will work together to protect our environment for future generations.

- Develop clauses in the new proposed legislation that empower local communities of all cultures with the right to say “no” to projects that threaten waterways and that support communities to create low-carbon, sustainable jobs that safeguard water.

Thank You, Merci and Wela'liek

Central to our thinking is the notion that disconnection from the land is dehumanizing and someone must take on the task of stewardship.

For that reason, arguably we owe a debt of gratitude to the Harper regime, for spurring the development of Idle No More. Certainly, we have learned how much all us grassroots people have in common, living in communities that rely directly on the environment for our sustenance. We could never have rescued our community from the threatening jaws of getting fracked for shale gas without the unity in action that arose from the Harper regime's attack on the natural environment and all those who seek to protect it.

Here in Kent County, our allies in Elsipogtog First Nation recently announced intent to seek judicial recognition of their rights as Title-Holders for this district of Mi'kma'ki. As non-Indigenous people we have no rights and our government is not doing the watchdog protection it should. Thank Heavens that Indigenous Peoples across the country are stepping forth to use their legal strategies to slow down industry's unbridled and voracious attack on all our essential resources for survival.

We sincerely hope your government will do the right thing, and reinstate protection of the waters, and protection for all the rest of our very vulnerable and stresses natural environment, following this whirlwind consultation process.

Msit No'kmaq. We Are All Related.

