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Standing Committee on Environment and Sustainable Development
Via email at envi@parl.gc.ca.

Dear Committee Members:

Re: Canadian Navigable Waters Act

Thank you for the opportunity to address the provisions of Bill C-69 related to the *Canadian Navigable Waters Act*.

We agree with Liberal MP, Kirsty Duncan, as she then was, when she challenged the then government to view water "the foundation of life and that it is essential for socio-economic systems and healthy ecosystems," and adopted the recommendations of an SFU report on climate change adaptation, which (in her paraphrase) called for:

> a dramatic reform of Canada's water governance structures and made many recommendations: the recognition that water is a human right integral to the health and security of Canadians; the development of a new Canadian water ethic; the creation of a national water commission to advance policy reform; an improved understanding of the importance of water to Canadians' way of life; national water conservation guidelines and improved monitoring; and co-ordinated long-term national strategies for sustainably managing water in the face of climate change.[1]

It is unfortunate, in conducting its review of Canada's environmental laws, that the government has reviewed each statute independently, with little consideration of overlaps, synergies and opportunities presented by a more holistic vision. A holistic view of the federal jurisdiction over navigable waters, fish, fish habitat, transboundary waters, climate change and other matters could have resulted in the type of modern environmental safeguards committed to by the government.

However, the following comments focus on the *Canadian Navigable Waters Act*, as proposed. In our view, this Act requires serious amendments if it is to achieve the government's promise to restore lost environmental protections.[2]

The following discussion and recommendations are organized around:

- Consideration of environmental values under the *Canada Navigable Waters Act*;
- An expansive and heritage-focused view of navigable waters;
- Recognizing the Government's key role in protecting Navigation; and
- Regulation of pipelines and transmission lines.

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1 https://openparliament.ca/debates/2012/12/3/kirsty-duncan-2/.

2 https://www.liberal.ca/realchange/environmental-assessments/, last accessed 4 April 2018.

Consideration of Environmental Values

Prior to 2012, Canada's environmental laws clearly required environmental impacts to be considered[3] – even if only briefly – before the federal government would approve development on navigable waters. Under the *Canadian Environmental Assessment Act, 1992*, a decision regarding navigable waters would need to include consideration of the:

> environmental effects of the project, including the environmental effects of malfunctions or accidents that may occur in connection with the project and any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out;[4]

Prior to 1992, the *Navigable Waters Protection Act* did not require consideration of environmental values, but it was considered to be a very relevant and proper consideration. Indeed, case law going back to the earliest days of Canada recognized that the public right to navigate gave the public rights and interests in the health and cleanliness of those waterbodies.

Thus in the 1866 case of *AG v. Harrison*, the Court of Chancery for Upper Canada held that the dumping of sawmill waste into a navigable river violated the public's right to navigate, because "the rights of the public in navigable waters are [equivalent to] those of a riparian proprietor…" The court notes that those rights include:

> a clear right to enjoy the river … in exactly the same condition in which it flowed formerly, so that cattle may drink of it without injury, and fish which were accustomed to frequent it may not be driven elsewhere.

In 1992, in the landmark *Friends of the Oldman River* case, the Supreme Court of Canada confirmed that it was appropriate for the Minister of Transport to consider environmental factors in deciding whether to issue or refuse permits under the NWPA; indeed, it also noted that the federal government "likely … always did take into account the environmental impact" of such works.

Given the focus of the proposed Act on navigable waters as "aqueous highways," it is worth noting that the Supreme Court has noted that even in relation to built highways, governments have a responsibility to consider environmental values, describing them as "in a broad general sense, a trustee of the environment for the benefit of the residents in the area of the road allowance and, indeed, for the citizens of the community at large."[5] Drivers are entitled not only to the use of roads, but their "use and enjoyment." They expect that roads will be managed not only to get them from point A to point B, but to also with regard to broader social values, such as public safety, aesthetics, community planning and the environment. It would be peculiar if we expected less in relation to the regulation of navigable waters.

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[3] Andrew Gage, "Why navigation protection is also environmental protection," blog post, West Coast Environmental Law (2016): **https://www.wcel.org/blog/why-navigation-protection-also-environmental-protection**.

[4] *Canadian Environmental Assessment Act*, S.C. 1992, c. C-37, ss. 16, 18 (repealed).

[5] *Scarborough v. R.E.F. Homes Ltd.* (1979), 9 M.P.L.R. 255 (Ont. C.A.), cited with approval in Canadian Forest Products v. BC, 2004 SCC 38, at para. 73 (Emphasis in original).

Require consideration of environmental factors

The requirement that the government consider environmental impacts in decisions concerning navigation was eliminated in Bill C-38, through amendments to the *Canadian Environmental Assessment Act*. While Bill C-69 does not propose to restore such requirements in relation to all government decisions, decisions affecting navigable waters are, by their nature, particularly likely to have environmental repercussions. Moreover, the government made specific commitments to restore lost environmental protections associated with the *Navigable Waters Protection Act* and to modernize it. Consequently, it is quite appropriate to mandate consideration of environmental values and impacts arising from decisions under the *Canada Navigable Waters Act*.

In our view, to restore lost protections, Bill C-69 must be amended to require and allow for consideration of the environmental and social benefits and impacts of navigable waters and of works. In particular, sections which limit the ability of the Minister to consider environmental, social and other values in relation to works on navigable waters include:

- Section 6 which requires the Minister to notify the owner that no authorization is required where navigation is not threatened, even where works that have been designed to mitigate infringement to navigation rights as a result threaten environmental, social, cultural and other implications associated with the works.
- Section 10.2(1)(a) which allows an owner to proceed with a work where serious concerns about environmental, social or other values have been raised, provided the owner has addressed navigation impacts.
- The use of an undefined term, "navigation", which may exclude public use and enjoyment of navigable waters for purposes other than passage, such as swimming, gathering of aquatic plant species, and other cultural and recreational purposesthat have traditionally been protected by the public right of navigation.

Without the above amendments, the Act would allow works to be authorized under the CNWA that compromise wetlands, destroy wildlife habitat or interfere with cultural uses. An owner who presents a narrow interpretation of what constitutes navigation may fail to consider the impacts of a work on the public's use and enjoyment of navigable waters, which at common law are protected by the public right to navigate.

The relationship between these provisions and s. 2.3 of the CNWA is very unclear. Section 2.3 requires the Minister, in making any decision under the Act, to consider the affected rights of Indigenous peoples. Because Indigenous rights are inextricably linked with environmental health, this requirement may mean that the environmental implications of a work must be considered in exercising the power under s. 6. However, since there is no "government decision" mandated by s. 10.2, the public notification provisions could allow a project to be developed without consideration of s. 35 rights.

When the Minister actually considers whether or not to grant an authorization, the Minister is not required to consider environmental, social or other values (except as they relate to impact on Indigenous rights under s. 2.3), but may do so if he or she considers them "relevant.")

At this stage the Minister is involved in a balancing of rights and interest. Under the CNWA, as proposed, the Minister may authorize an infringement of the public right of navigation, and he or she would presumably do so if the private benefits (and any associated benefits to the public) identified by

the owner outweigh the harm caused to public navigation. But that's an incomplete balancing – since it ignores other public and private rights and interests that may be impacted by the works.

For example, if (as has happened frequently in BC) the Minister is asked to approve the diversion of a river into a pipe for hydro-electric generation (a micro-hydro project), it would be absurd for the Minister to balance the benefits of hydro-power generation against the loss of navigation opportunities of kayakers and other recreational users only, while ignoring the loss of habitat or concerns from local water users and riparian owners and other public and private values that favour not authorizing the infringement of the public right of navigation. In many cases such hydro-electric projects are located above a fall or other feature which prevents fish passage and their environmental impacts would not be regulated by the *Fisheries Act*.

As proposed, s. 7(7)(i) allows the Minister to consider "any other information or factor that he or she considers relevant," which could allow the Minister to consider such private and public harm and risks, but the Minister is not required to consider the full context before authorizing the infringement of the public right to navigate.

Recommendations:

- Amend s. 6 to specify that the Minister may (rather than must) notify the owner that no authorization is required, and to permit the Minister to consider the environmental, Indigenous, social, cultural and other implications associated with the works in deciding whether or not to do so.
- If the "public notice" provisions are retained (contrary to our recommendation, below), then amend s. 10.2(1)(a) to require an application for an approval where any comment – including those related to environmental and social values other than navigation – remains unresolved.
- Define "navigation" to clarify that it includes public use and enjoyment of navigable waters, including for purposes other than passage.
- Amend section 7(7) to require the Minister to consider the full range of public, private and Indigenous rights and values that may be impacted by a work before authorizing the infringement of public navigation rights.

Expansive and heritage-focused view of navigable waters

Even if the government is not going to introduce holistic water protection legislation, the CNWA should recognize that protecting navigation and navigable waters is about more than just protecting the current use of such waters, but also about the protection of broader public values, including passing on a network of navigable waters to future generations.

Unlike the NWPA or the NPA, the CNWA provides a definition of "navigable water," rather than relying on the common law definition.

> ***navigable water*** means a body of water … that is used or where there is a **reasonable likelihood** that it will be used by vessels, in full or in part, for any part of the year as a means of transport or travel for **commercial or recreational purposes**, or as a means of transport or travel for Indigenous peoples of Canada exercising rights recognized and affirmed by section 35 of the *Constitution Act, 1982*, **and**
> **(a) there is public access, by land or by water**;

(b) there is no such public access but there are two or more riparian owners; or
(c) Her Majesty in right of Canada or a province is the only riparian owner.

This definition inappropriately restricts the scope of the Act in several ways:

- "Reasonable likelihood of use" is vague and is significantly weakens the common law rule of "capable of being used."
- It is not entirely clear that "commercial" or "recreational" includes scientific, educational and other purposes not necessarily caught by those terms.
- It is not clear that "transport or travel" includes swimming, wading, and other recreational or cultural use of water traditionally protected by the regulation of water bodies that are capable of navigation.
- The legal status of public access to lakes and other navigable waters is often unclear. Legal public access may be established by common law doctrine of dedication and acceptance and through various other means, and is often be a matter of some dispute. For example, a court case is currently being argued between the Nicola Valley Fish and Game Club and a land owner, the Douglas Lake Cattle Company, over whether or not there is an existing public right of way to Minney and Stoney Lakes, near Merritt, BC. There are many other lakes to which public access is disputed by the land owners. Excluding lakes without public access from the definition of navigable waters, particularly lakes with a history of recreational use, reduces or eliminates protection for these water bodies. At least one such lake appears to have been entirely drained by the Douglas Lake Cattle company.
- There may also be cases in which there is a dispute as to whether public access by water is feasible, as where white water kayakers descend rapids that appear impassible.
- The definition does not address Indigenous rights of access that may exist across private properties. It is possible that a court would interpret such a right would mean that the Indigenous group is a second riparian, but this is not clear.
- The fact that a lake or waterbody is surrounded by property that is currently owned by a single property owner does not mean that that water body has not been used for navigation and recreation, or that it may not be again if and when the ownership situation changes. If we recognize the heritage values of navigable waters, then privately owned lakes should be protected, just as a heritage building situated on private property is protected.
- Making navigability dependent on private ownership means that provincial laws concerning property use will determine which water bodies receive federal protection.

We recommend either eliminating the statutory definition in favour of the common law definition, or adopting a definition based on capacity for navigation which eliminates the various exceptions.

> ***navigable water*** means a body of water … that is used or which is capable of being used by vessels, in full or in part, for any part of the year as a means of transport or travel for public purposes including recreation and commercial purposes, or for the purposes of Indigenous peoples of Canada exercising rights recognized and affirmed by section 35 of the *Constitution Act, 1982*.

The government's role in protecting navigation

The continued use of a schedule of protected waterways means that the government is abdicating its responsibility to protect waterways which are not on that schedule. While we recognize that the fact that major works will be regulated on unscheduled rivers, and that there is a new public notification process proposed, the fact is that, under the proposed CNWA, the vast majority of works on the vast

majority of rivers will not receive proactive government protection. At best, the government may become involved where a very persistent member of the public has become aware of the proposed works, complains about a matter "related to navigation", participates in 45 days of negotiations with the land owner (who may be understandably less than pleased at having to do so), and then request that the Minister finally become involved.

While this is an improvement on the *Navigable Protection Act*, which gave no recourse to the public in relation to violations of public rights on non-schedule waters, it offloads from the government the responsibility for identifying threats to navigable waters, assessing and responding to those threats and engaging in efforts to mitigate threat. This is not restoration of protection for navigation. It invites conflict between neighbours and on that ground, there is likely to be less protection for navigable waters.

Moreover, the lack of government involvement in most authorizations under the Act will undermine the ability of the government to address cumulative impacts of a wide range of smaller projects on navigation and on the health of navigable waters.

With many works not requiring government approval, the rights of Indigenous nations related to navigable waters are also likely to be undermined. We do not believe that the Public Notification process, applied to First Nations, is consistent with the honour of the Crown.

While we approve of improved public notice, a registry of all projects (including minor ones), and other transparency measures, the Crown should not abdicate its duty to proactively protect navigation, and should therefore retain approval on all non-minor works. Consequently, the Schedule should be eliminated and, as promised by the current government, full protection for navigable waters should be restored. Public notification would allow the public to provide input to the Minister at the earliest stages of considering a request for approval.

Moreover, the Minister should be required to periodically evaluate whether minor works are having a cumulative impact on waterways.

Finally, modernizing the government's role in navigable water protection requires that opportunities for joint management with Indigenous governments must be explored. The First Peoples of what is now Canada were the first trustees, and first users, of the country's river ecosystems, and their role in managing those ecosystems must be recognized and expanded.

Navigation, pipelines and transmission lines

In 2012, the elimination of government approvals for navigation on all but schedule-listed rivers and lakes was widely viewed as helping the construction of pipelines, which frequently cross many navigable waters. Bill C-69 offers the pipeline industry a different solution – exempting pipelines and transmission lines that are regulated by the new Canada Energy Regulator (CER, formerly the National Energy Board) from the *Canadian Navigable Waters Act*. Instead, the CER will have full authority to consider the impacts of the pipelines on navigation and to approve pipeline activities or transmission lines that affect navigation.

This shift in authority raises concerns that local communities, including Indigenous communities, may not have full notice and opportunity to be heard regarding impacts to their local navigable waters. Such local views may be lost amidst the consideration of pipelines that cross many rivers over thousands of kilometres. If the CER is to undertake such regulation, the legislation should guarantee

the public notice and other procedural rights, and address constitutional requirements related to consultation and accommodation of Indigenous communities.

Conclusion

The federal government promised Canadians that the lost environmental protections for navigable waters would be restored. Unfortunately, the proposed CNWA, while including some welcome measures, must be amended to achieve this goal. Specifically, the CNWA must:

- Require consideration of environmental values in decisions under the Act;
- Adopt an expansive and heritage-focused view of navigation;
- Recognize the key role of the Government and Indigenous governments in proactive protection of navigation; and
- Ensure that the public is heard on the local navigation impacts of linear projects.

We would also encourage the government to consider developing a more holistic *Canada Water Act* in the future.

Sincerely,

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