

Legal update

The *Canadian Navigable Waters Act* – giving Canada’s waterways a wide berth

March 2018 Environmental

This update continues our discussion of the changes proposed by Bill C-69, which was introduced in February 2018 to amend multiple pieces of environmental legislation, including the current *Navigation Protection Act (NPA)*. The *Canadian Navigable Waters Act (CNWA)* proposed in Bill C-69 is an attempt to fulfill the “back to the future” election promise of restoring the long-standing *Navigable Waters Protection Act (NWP)*. While the *CNWA* does not accomplish that, nor reinstitute its former role in “triggering” federal environmental assessments, if enacted it will make significant changes to the protection of Canada’s navigable waters.

A broader category of “work” regulated by the act

The *CNWA* proposes to expand the definition of “work” in two ways:

- the definition of “work” expands on the definition under the *NPA* as “includ[ing] any structure, device or thing, whether temporary or permanent, that is made by humans” to include “a structure, device or other thing used for the repair or maintenance of another work,”
- it expands the type of alterations to navigable waters constituting “work” from those that involve “the dumping of fill or the excavation of materials from the bed of any navigable water” to also include “dredging of material from the bed of any navigable water.”

The proposed legislation will also give the minister the power to make orders “designating any works that are likely to slightly interfere with navigation as minor works” or “designating any works that are likely to substantially interfere with navigation as major works.” The legislative amendments clarify what constitutes regulated works, but also retain ministerial discretion to classify particular works.

Multiple triggers for ministerial approval of work

Under the *CNWA*, determining if ministerial approval is required for a particular work will require determining *both* the classification of the work and the classification of the affected waterway. The *CNWA* will require an owner of a proposed or existing work to seek approval from the minister where the owner seeks to “construct, place, alter, rebuild, remove or decommission”:

- a major work in, on, over, under, through or across any navigable water; or

- a major work or an undesignated work (i.e., neither a major work or a minor work) in, on, over, under, through or across any navigable water that is listed in the schedule.

If a minor work is in, on, over, under, through or across any navigable water, the owner may construct, place, alter, rebuild, remove or decommission that work without ministerial approval but in accordance with *CNWA* requirements.

If an owner intends to undertake an undesignated work in, on, over, through or across an unlisted navigable water, the owner must either seek ministerial approval or, instead, issue a public notice of the intended work, and address any public comments that are received prior to proceeding with the work. The mechanics surrounding the public notice procedure are to be elaborated upon in regulations.

Farewell to Canada's "aqueous highway"

Canada first enacted legislation to protect the navigability of Canada's waterways (the original *NWPA*) in 1882. Despite this long history, the proposed *CNWA* is the first iteration that provides an arguably complete definition of "navigable waters." Beginning in 1906, the "canoe test" was the common law test for determining whether or not a Canadian waterway was navigable—if a canoe could be floated down a waterway, it was navigable. Following a legislative amendment in 2009, Transport Canada introduced the "aqueous highway test" for assessing navigability¹—if a waterway was, is or could be an aqueous highway, it was navigable.

Under the proposed legislation, "navigable water" would be defined as:

navigable water means a body of water, including a canal or any other body of water created or altered as a result of the construction of any work, 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.

It remains to be seen whether the definition of "navigable water" under the proposed *CNWA* will lead to much change since the proposed definition includes the elements in the *NWPA* of current or potential public use for commercial or recreational purposes; however, the wording does suggest that the consideration of historical use may be limited to uses that justify s. 35 *Constitution Act, 1982* claims. The *CNWA* will continue to employ a schedule of navigable waterways that have been identified as requiring the highest level of protection under the legislation. Although it is possible that the jurisprudence surrounding the aqueous highway test may inform the interpretation of the new definition, the demise of the canoe and aqueous highway tests will at least make this area of law slightly less colourful.

Other notable changes

- **Increased maximum penalties.** The maximum administrative penalty for an individual would increase from the current \$5,000 to \$50,000 and in any other case from the current \$40,000 to \$250,000. An individual will face a fine of not more than \$100,000 for a first offence under the *CNWA* and a fine of not more than \$200,000 and/or six months' imprisonment for subsequent offences. A corporation will face a maximum fine of not more than \$500,000 for its first offence and not more than \$1 million for subsequent offences.
- **Multiple explicit requirements to consider potential effects upon Indigenous rights and traditional knowledge.** This requirement is consistent with the minister's obligations under the common law.

- **A registry to make information publicly accessible.** The specifics of a registry will be determined by regulation, but a logical model is the contaminated site registry approach established in multiple provinces. Similar to contaminated sites legislation across Canada, the *CNWA* will give the minister the power to require an owner to remediate impacts from its works, which could include removal of the works or increasing water levels if there has been dewatering. Where the owner refused to comply the minister may take the necessary actions and seek cost recovery from the owner.
- **A process for the general public to recommend waterways for inclusion in the schedule.** This feature seems to be a nod to criticism of the earlier replacement of the “canoe test” with the schedule of recognized navigable waters. It is worth watching to see whether there will be numerous applications from concerned Canadians and invested environmental organizations given the absence of a direct link to an environmental assessment trigger.

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Footnote

- ¹ Transport Canada, Fact Sheet #5: Determining Navigability (October 2016)
https://www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/navigation-protection/Fact_sheet_5_Determining_navigability.pdf

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