



**BY MAIL AND FACSIMILE**

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December 31, 2009

Dear Mr. Hahn:

**Re: Engagement on and development of the proposed Minor Works and Waters Regulations pursuant to the *Navigable Waters Protection Act***

Please find enclosed Lake Ontario Waterkeeper's comments on the existing Minor Works and Waters Order under the *Navigable Waters Protection Act*, and the development of a regulation based on that Order.

Part A of the submission includes a background on the legislation, the right to navigate, and the process by which the *Act* was recently amended. Part B describes the fundamental flaws contained in the existing *Order*. We invite you to review these sections closely, because they provide vital context for understanding the recommendations contained in Part C.

If you have any questions or comments, please do not hesitate to contact me at 416-861-1237 or [Krystyn@waterkeeper.ca](mailto:Krystyn@waterkeeper.ca). I look forward to meeting with you in the new year to discuss this matter.

Yours truly,

Krystyn Tully  
Vice President

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## PART A: BACKGROUND

The *Navigable Waters Protection Act (NWPA)* is one of Canada's oldest laws. The *NWPA* was not revolutionary; it drew from a variety of well-established and respected conventions, including tradition, principles of common law, Magna Carta, and the Code of Justinian. In this sense, the *NWPA* was “born with a grey beard”, coming into force on the shoulders of centuries-old practices designed to protect every person's right to navigate on water.<sup>1</sup>

The first *NWPA* received Royal Assent on the 17<sup>th</sup> of May, 1882.<sup>2</sup> According to the statute, all bridges that could interfere with navigation on a waterway must be approved by the highest level of the Canadian government: the Governor General in Council. Prior to 2008, Parliament modified the *Act* just three times in order to add new projects to the list of those requiring federal approvals (including dams, wharves, and causeways).

### A.1 Parliament launches a review of the *NWPA*.

In 2008, Parliament began discussing the most sweeping changes to the *Act* in its history. Transport Canada officials attributed the impetus for these changes to bottlenecks created by the processes of (a) determining whether or not a waterway is navigable (and therefore protected) and (b) conducting environmental assessments. Staff stated that the department handles approximately 5,000 applications each year and that each officer has “in excess of 100 files they must be working on each year.”<sup>3</sup> The backlog of pending approvals was said to be “impeding both economic growth and the actual construction of

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<sup>1</sup> For the origin of the phrase “born with a grey beard”, see Bill Shuter, “Tradition as Rereading” in David Galef, ed., *Second Thoughts: A Focus on Rereading* (Detroit: Wayne State University Press, 1998) 75 at 81.

<sup>2</sup> “An Act respecting Bridges over navigable waters, constructed under the authority of Provincial Acts” in *Acts of Canada, Fourth Session, Fourth Parliament*, 45 Victoria, 1882.

<sup>3</sup> House of Commons, Standing Committee on Transport, Infrastructure and Communities, 39th Parliament, 2nd Session (12 February 2008) at 1145 (David Osbaldeston), online: Parliament of Canada <<http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=3274882&Language=E&Mode=1&Parl=39&Ses=2>>.

transportation infrastructure, which in turn is putting the government's Building Canada plan at risk.”<sup>4</sup>

On April 17, 2008, Lake Ontario Waterkeeper received an invitation from Mr. Mervin Tweed, Chair of the Standing Committee on Transport, Infrastructure and Communities, to provide a submission regarding proposed amendments to the *Navigable Waters Protection Act*. A list of seven proposed changes was included in the letter. Waterkeeper provided written submissions on May 12, 2008 and appeared before the Transportation Committee on May 29, 2008. To our knowledge, Waterkeeper was the only organization with concerns about the amendments that appeared before the committee. On June 12, 2008, the Transportation Committee presented the following recommendations to Parliament:

- Exclude “minor waters” from the NWPA;
- Define “navigable water”;
- Exclude “minor works” from the NWPA;
- Remove the four “named” works from the NWPA (thereby eliminating mandatory review of bridges, booms, causeways and dams);
- Ensure that other environmental assessment triggers are not done away with or impeded;
- Increase fines;
- Take into account international obligations regarding removal of wrecks and derelict vessels;
- Define inspection powers; and
- Include a five-year review clause.<sup>5</sup>

At that time, the Committee promised additional public consultation would occur:

We would also note that this is the first stage in our process dealing with amendments to the NWPA. Once we receive the government’s proposed

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<sup>4</sup> House of Commons, Standing Committee on Transport, Infrastructure and Communities, 39th Parliament, 2nd Session (12 February 2008) at 1115 (Marc Grégoire), online: Parliament of Canada <<http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=3274882&Language=E&Mode=1&Parl=39&Ses=2>>.

<sup>5</sup> House of Commons, “Consideration of Proposed Amendments to the Navigable Waters Protection Act”, Report of the Standing Committee on Transport, Infrastructure and Communities, by Mervin Tweed, MP, Chair, 39th Parliament, 2nd Session (June 2008), online: Parliament of Canada <<http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=3566517&Language=E&Mode=1&Parl=39&Ses=2>>.

amendments we will be undertaking further consultations on this piece of legislation.<sup>6</sup>

## **A.2 Parliament expedites an overhaul of the NWPA; the Senate investigates.**

The process suggested by the Committee's report to Parliament never occurred. The Government of Canada did not propose amendments back to the Committee. Neither the Committee nor Transport Canada undertook further formal consultations on the legislation.

Instead, in January of 2009, the *Budget Implementation Act* was introduced in Parliament; this *Act* contained extensive amendments to the *NWPA*. Numerous representatives from environmental organizations, paddling and outdoors groups, and First Nations communities voiced concerns about the amendments. However, no changes were made and the *Act* received Royal Assent on March 12, 2009.

While the House of Commons was passing the *Budget Implementation Act*, the Senate passed a motion authorizing the Standing Senate Committee on Energy, the Environment, and Natural Resources (SCEENR) to examine and report on "those elements dealing with the Navigable Waters Protection Act."<sup>7</sup> The Committee was instructed to present its final report no later than June 11, 2009.

Between April 23, 2009 and June 4, 2009, the SCEENR held nine hearings. They heard from 32 people representing 19 organizations, departments or individuals. Nine of the organizations that appeared were from environmental and paddling communities, three from the First Nations, two from the federal government, two from industry, one from provincial government, one from municipalities, and one individual.

The SCEENR tabled its report on June 11, 2009. Entitled *Report Addressing Bill C-10, Navigable Waters Protection Act*, this document contains four recommendations:

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<sup>6</sup> House of Commons, "Consideration of Proposed Amendments to the Navigable Waters Protection Act", Report of the Standing Committee on Transport, Infrastructure and Communities, by Mervin Tweed, MP, Chair, 39th Parliament, 2nd Session (June 2008) at 5, online: Parliament of Canada <<http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=3566517&Language=E&Mode=1&Parl=39&Ses=2>>.

<sup>7</sup> Senate, Debates of the Senate (Hansard), 146:19, 40th Parliament, 2nd Session (12 March 2009) at 1405, online: Parliament of Canada <[http://www.parl.gc.ca/40/2/parlbus/chambus/senate/DEB-E/019db\\_2009-03-12-e.htm?Language=E&Parl=40&Ses=2#30](http://www.parl.gc.ca/40/2/parlbus/chambus/senate/DEB-E/019db_2009-03-12-e.htm?Language=E&Parl=40&Ses=2#30)>.

1. The committee recommends that Transport Canada develop and implement an effective communication strategy and consultation process to seek the views of waterway stakeholders on any future amendments to the *Act*, including any changes to regulations, and during the five year review of the *Act*.
2. That the Navigable Waters Protection Program develop regulations to replace the Ministerial Order of May 9, 2009.
3. That Transport Canada amend relevant sections of the *NWPA* using a process outlined in section 32 of the Canada Shipping Act, 2001 for incorporating reference materials.
4. That the federal government ensure adequate resources are made available to the Navigable Waters Protection Program so that it can better meet its economic targets for infrastructure development and reduce the delays for larger projects while maintaining its responsibility to protect the public right of navigation.<sup>8</sup>

### **A.3 First lists of “minor” works and “minor” waters are published, without consultation, in May 2009.**

The *NWPA* states that no works shall be built in, on, over, under, through, or across any navigable water without the Minister's prior approval and, where navigation would be substantially interfered with, the imposition of terms and conditions. The revised *NWPA* creates an exception to this rule<sup>9</sup> and gives the Minister of Transport the power to exempt whole classes of projects or whole classes of waterways from the traditional approvals process.<sup>10</sup>

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<sup>8</sup> Senate, “Report Addressing Bill C-10, Navigable Waters Protection Act”, Report of the Standing Senate Committee on Energy, the Environment, and Natural Resources, 40thth Parliament, 2nd Session (June 11 2009) at IV, online: Parliament of Canada <<http://www.parl.gc.ca/40/2/parlbus/commbus/senate/com-e/enrg-e/rep-e/rep09jun09-e.pdf>>.

<sup>9</sup> 5.1(1) Despite section 5, a work may be built or placed in, on, over, under, through or across any navigable water without meeting the requirements of that section if the work falls within **a class of works**, or the navigable water falls within **a class of navigable waters**, established by regulation or under section 13 [by Order].

<sup>10</sup> 13(1) For the purposes of section 5.1, the Minister may, by order,

- a. establish classes of works or navigable waters; and
- b. impose any terms and conditions with respect to the placement, construction, maintenance, operation, safety, use and removal of those classes of works or works that are built or placed in, on, over, under, through or across those classes of navigable waters. ...

If the Minister chooses to exercise his or her powers, the order must be published in the Canada Gazette, but **no public consultation is required**. This because the new *NWPA* declares that such orders are not statutory instruments.<sup>11</sup>

Using his power under section 13 of the amended *NWPA*, Minister of Transport John Baird published the *Minor Works and Waters Order* on May 9, 2009 in Part I of the *Canada Gazette*. The *Order* came into effect on June 7, 2009.

The *Order* establishes the following classes of works:

- Erosion protection works
- Docks & boathouses
- Winter crossings
- Aerial cables (power and communication)
- Submarine cables (power and communication)
- Pipeline crossings
- Water intakes
- Dredging
- Temporary works

The *Order* also establishes exempted classes of waters. There are three classes of navigable waters established by the *Order*:

- Minor sections of navigable waters (200 metres)
- Artificial irrigation channels and drainage ditches
- Private lakes

As an alternative to the traditional regulatory review process, the *Order* describes criteria that apply to all classes of “minor” works and all “minor” waters, as well as the generic terms and conditions that will apply to all projects exempted from the review process.

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<sup>11</sup> 13(2) An order under subsection (1)

- a. is not a statutory instrument within the meaning of the Statutory Instruments Act; and
- b. shall be published in the Canada Gazette within 23 days after the day on which it is made.

## A.4 Transport Canada intends to replace the *Order* with a permanent Regulation.

Transport Canada is now in the process of developing a regulation that will replace the *Order*. It expects to have the regulation ready for publication in Part I of the *Canada Gazette* in Fall 2010. It will then be subject to a 30 day comment period. Transport Canada expects the final regulation will be published in Part II of the *Gazette* in early 2011.<sup>12</sup>

Transport Canada is seeking comments on the *Order* to help develop the regulation. Specifically, the department is asking these questions:

- Should the list of classes of works be modified, either by adding new classes or removing existing classes?
- Are there ambiguities in the criteria defined in the *Minor Works and Waters (Navigable Waters Protection Act) Order*?
- Are there contradictions or inconsistencies between criteria?
- Is the rationale for some criteria not evident?
- Are some criteria too onerous? Too lenient?

The regulation will be promulgated under the *NWPA* as Part I of an omnibus regulation. Transport Canada staff recently explained to LOW that they plan to release only one regulation under the *NWPA*. Where regulations are normally developed on one discrete matter or subject area, Transport Canada will instead issue these as individual “Parts” under one regulation. As each Part is developed, the entire regulation will be re-released for comment and re-promulgated.

Lake Ontario Waterkeeper has made the utmost effort to respond to Transport Canada’s request for specific feedback on the *Minor Works and Waters Order*. We must emphasise, however, that without access to the draft regulation, we are dealing in the abstract. We made this same observation when appearing before the TRAN Committee in 2008 and, despite the Committee’s assurances, never had a meaningful opportunity to discuss the legislative amendments.

We hope that these comments provide the guidance sought by Transport Canada at this early stage. We also wish to make it quite clear that this consultation is not a substitute for

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<sup>12</sup> Personal Communication, Kenneth Hahn, Project Manager - Regulatory Development, Navigable Waters Protection Program, Transport Canada (4 December 2009).

consultation on the regulation itself. We trust that, by responding to Transport Canada's request now, we are not prejudicing consultation opportunities on the specific regulatory language. As always, we look forward to every opportunity to discuss regulatory and legislative amendments related to this very important piece of legislation.

## **A.5 Transport Canada has failed to release crucial background information.**

Before we move to our analysis of the existing *Order*, there is an important piece of context that Lake Ontario Waterkeeper needs to draw to the attention of Transport Canada staff and decision-makers. Not only has the department and the Government of Canada failed to engage in appropriate levels of public consultation throughout this amendment process (as described above), the department has failed utterly to disclose vital background information.

For more than nine months, Lake Ontario Waterkeeper has awaited disclosure of documents requested under the *Access to Information Act* (the *AIA*). LOW submitted a request under the *AIA* to Transport Canada on March 19, 2009, asking for:

a copy of all documents related to the proposed changes to the Navigable Waters Protection Act, which were included in Part 7 of Bill C-10, An Act to Implement Certain Provisions of the Budget. Bill C-10 was introduced to Parliament on January 26, 2009. We are requesting documents, including but not limited to internal briefing notes, memos, and slideshow presentations, created between January 1, 2005 and the current date.

Without narrowing our request, we are particularly interested in documentation pertaining to consultation conducted by the Transport Canada on the proposed changes. This includes meeting notes, dates and times of meetings, emails, letters and notes of telephone calls. All documents relating to efforts made by Transport Canada to consult with the public or specific stakeholders are part of this request, as are any documents containing feedback received by Transport Canada on the NWPA.

Transport Canada staff stated that the request would involve a "room full" of material, that it would cost "tens of thousands of dollars", and that LOW "wouldn't get it anytime soon". LOW was told that David Osbaldeston, the Manager of the Navigable Waters Protection Program, wished to speak with LOW staff to address the scope of the request.

LOW has attempted to co-operate with Transport Canada to facilitate disclosure, however no information has ever been released. LOW's request was submitted March 19, 2009. As of December 31, 2009, it has been 287 days since that request was submitted. No notice

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of an extension (per section 9 of the *AIA*) or notice of a new time period was provided to LOW by Transport Canada. Accordingly, LOW submitted a complaint to the Privacy Commissioner of Canada (PPC) in May 2009. A call to the PCC in December of 2009 revealed that the PCC is having difficulty obtaining the documents from Transport Canada.

In our experience, Waterkeeper has never before had so much trouble obtaining information from a government department. Transport Canada's failure to comply with the requirements of the *Access to Information Act* have two important consequences for this consultation process. First, Waterkeeper and other members of the public do not have access to all of the information that we need in order to fully comment on the potential impacts of the proposed regulation. Second, the department's failure to disclose information about the decision-making process contributes substantially to the general atmosphere of mistrust, skepticism, and cynicism in the consultation process.

## **PART B: ANALYSIS OF THE EXISTING ORDER**

### **B.1 The *Order* is unworkable and should not be the model for a regulation.**

The *Order* released by Transport Canada in May 2009 is fundamentally flawed, both in substance and procedural aspects. The *Order* is based on an unworkable premise: that abstract or general lists of works and waterways can be created that successfully capture the kinds of works that can be undertaken without impact on navigation. It is virtually impossible to create lists that still account for site-specific issues and preserve individuals' rights to notice and comment.

Specifically, the *Order* is flawed in four ways:

1. It is virtually unenforceable;
2. The criteria for "minor works" fail to protect navigation;
3. The criteria for "minor waters" fail to protect navigation; and
4. It violates the principles of natural justice and procedural fairness.

Because of the fundamental flaws in the *Order*, Waterkeeper recommends a new approach for drafting the regulation. Our recommendations can be found in Part C of this submission, following our commentary on the existing *Order*.

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## **B.2 Substantive flaws exist in the existing Order.**

### ***B.2.1: The Order does not contain monitoring or reporting requirements.***

The *Order* describes terms and conditions that works in each class must meet in order to remain exempt from the usual *NWPA* review process. It does not, however, contain any provisions that describe how minor works or projects on minor waters will be catalogued, how impacts will be monitored, when or if impacts will be assessed, and how the terms and conditions will be enforced. Not only do these critical omissions make terms and conditions in the *Order* virtually meaningless, they create *less* transparency, *more* uncertainty, and *more* confusion in the regulatory process than ever before.

### ***B.2.2: The criteria for “minor works” in the Order fail to protect navigation.***

The Order establishes nine classes of works that are exempt from the *NWPA*. Each class is defined by a heading and specific criteria. Some are subject to terms and conditions that apply to all projects within the class. For many of the classes, the project criteria are ambiguous. Some classes will catch projects that should not be exempted from Ministerial review, while others seem not to apply to any real-world projects. For those classes with terms and conditions attached, the terms are not adequate to protect navigation or the environment. All the “minor works” provisions are flawed in that they focus on the technical specifications of projects, rather than the effects the project has on navigation.

#### **Submarine Cables:**

The class for submarine cables is flawed. From a policy-making perspective, no rationale is provided to describe why the exemption is needed. More importantly, there are no terms or conditions imposed by the *Order* in association with submarine cables. It is not clear why submarine cables are treated differently from pipeline crossings, for example, which require the proponent to clearly sign the site, to restore the bed of the water following construction, and to allow vessels safe access through the work site at all times. Following construction, anchoring poses a threat to submarine cables and must be prohibited in their vicinity. This is a permanent interference with navigation practices and, at the very least, requires terms and conditions be followed to minimise threats to both cable-owners and navigators.

#### **Pipeline Crossings:**

The class for pipeline crossings is flawed. There is no evidence whatsoever to support the assertion, inherent in the *Order*, that “all pipelines are created equal” and, by virtue of their

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nature, can be universally exempt from the provisions of the *NWPA*. From a policy-making perspective, the location of pipelines can be one of the most important aspects of the planning process. As the department well-knows, pipelines can be some of the most controversial development projects proposed in Canada and it is absurd to overlook or minimise the policy implications of labelling all pipelines “minor”.

Pipelines pose at least five separate barriers to navigation:

- First, the construction process creates barriers to navigation because of the presence of machinery, work crews, floating pipeline, etc. Generally, this barrier appears to be the only one contemplated in the current *Order*.
- Second, the pipelines themselves, once in place, create obstacles for navigation and anchoring. They also contribute to sedimentation, which results in permanent changes to navigation.
- Third, pipelines are often linked to larger development projects that alter land and water use patterns on and near navigable waterways. The differing and site-specific nature of these alterations means that no one “class” can protect navigation for all communities.
- Fourth, construction of pipelines often requires de-watering of adjacent areas. The collection of large amounts of groundwater can lower water levels temporarily or permanently near pipeline construction sites; similarly, the discharge of collected groundwater into surface waters can raise water levels or change water temperatures in a way that threatens navigation.
- Fifth, the potential impacts on navigation of the *contents* of the pipeline itself must be considered. Rupture or damage to pipelines containing gas, oil, sewage or other environmental hazards can forever alter the navigability of most waterways. Merely by rendering the water too contaminated to touch, too hazardous to navigate, or too aesthetically displeasing to use, pipelines can destroy the navigability of a river as effectively as a dam.

### **Water Intakes:**

The class for water intakes is flawed. As with pipelines, water intakes may create temporary or permanent barriers to navigation resulting from construction, interference with anchoring, sedimentation, and related land and water-use practices. No single set of terms and conditions could protect navigation in every instance. Furthermore, the criteria set out in the *Order* are different depending on whether the intake is in charted or

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uncharted navigable water, yet no rationale for these differing criteria is provided. It is not self-evident how they protect navigation.

### **Dredging:**

The class for dredging is flawed. The criteria are confusing, since they exempt dredging projects that take place more than 30 metres from a navigation channel.<sup>13</sup> In our experience, many dredging projects are undertaken to facilitate navigation; it is not clear what dredging projects the *Order* contemplates. Furthermore, the definition of channel may be “based on local knowledge” yet the very purpose of the *Order* is to minimize delays relating to consultation or review of the project. How can “local knowledge” be a factor - as it should be - if individuals with local knowledge are never consulted? This paradox underscores the fundamental flaw with the current approach to creating classes of minor waters and works.

The dredging section of the *Order* goes on to exempt projects if all dredged material is deposited above the high-water mark, or in waters where the disposal is authorised by or under an Act of Parliament and where there are more than 20 fathoms of water at all times. This section is problematic. The wording that exempts projects where material will be deposited above the high water mark may be interpreted as an *approval* for the deposit of materials above the high water mark; this is outside the department's jurisdiction and should not be included in the regulation. The same is true for deposits in deep water, which may violate other federal laws, including the *Fisheries Act*. Transport Canada's criteria must be limited to preventing effects on navigation and the environment. They must not be positively prescriptive, especially in terms of where material may be deposited.

The section in the *Order* on dredging is also flawed in that it refers to specific dredging technology. The *Order* states that projects can only be exempt from the *NWPA* if, “no suction dredging that includes any floating or submerged pipes is used” (section 9(1)(d)). By focusing on a specific technology instead of the effects of using it - such as blocking navigation or changing the shape of a channel - the *Order* introduces a technology bias. Rather than prescribe specific technologies, the *Order* could and should simply offer exemptions only for projects that will not interfere with navigation.

### **Temporary Works:**

The general class for temporary works fails to create requirements for public notice such as signage. As noted above, it is also virtually unenforceable because of the *Order*'s overall

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<sup>13</sup> Navigation channel is defined as, “a chartered channel, a buoyed channel or a channel that, based on local knowledge, exists for navigation purposes”.

lack of reporting and monitoring requirements. Just as other classes require specific wording and placement for signage, temporary works should have similar terms and conditions.

### **Winter Crossings:**

The Order creates a class of works for winter crossings, also known as winter roads. These crossings are generally built to allow vehicles to cross rivers or creeks while the water is frozen. This class of projects is also flawed.

To provide Transport Canada with feedback on winter crossings based in firsthand knowledge, Lake Ontario Waterkeeper consulted William Tozer, the Moose Riverkeeper. William is a member of the Moose Cree First Nation. He is a well-known guide, hunter, trapper and former bush pilot. He continues to work with his family's business, Bushland Airways, one of James Bay's oldest family-owned bush plane companies. William's knowledge of Mushkegowuk geography, ecology, and people is unparalleled. He is a harvester and environmentalist with a deep understanding of his homeland. He lives his life on the rivers of James Bay, teaching visitors about the importance and sustainability of his world.

According to Mr. Tozer, winter roads are built throughout the Moose River watershed each winter, over large rivers and small creeks alike. Recently, the membership of the Moose Cree First Nation voted to accept a proposed winter road from Moose Factory to Otter Rapids. That road will include winter crossings over a number of rivers and streams, including the Moose River and the French River.

Mr. Tozer has seen the approach to winter crossing construction change and improve over time, but major problems with their removal remain. Based on his experiences and observations, Lake Ontario Waterkeeper submits the following information about winter crossings, impacts on navigation, and the flaws with the current *Order*.

- **Winter roads are more developed structures than their name suggests.** Winter crossings are not simply paths marked across already frozen waterways. Instead, they are built up and reinforced with layers of ice and compacted snow. In the past, they have included other materials, including log fills, but this is no longer a widely-accepted practice. Even without other materials, the frozen road is essentially a solid dam across the river, often metres thick and much thicker than the natural ice cover.
- **It is *not* current practice to remove the full winter road in the spring.** Instead, roads are either left in their entirety (usually on small creeks), or a chunk is removed from

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the centre of the crossing. At most, one-third of the road is removed to facilitate break-up. The incomplete removal of winter roads leads to negative consequences for the rivers and creeks. It is important to note that this practice developed under the older, more protective version of the *NWPA*. This pattern of behaviour suggests that compliance with the newer, more lenient privileges described in the *Order* is unlikely.

- **If the blockage is not removed *before* the spring break-up begins, the winter crossing can cause ice to pile up and block the river upstream.** These ice jams can cause significant flooding and damage upstream from the crossing. They may also lead to a surge in flow downstream during spring melt: as the waterway melts faster than the thick crossing, water builds up above the blockage; when the road gives, the built-up pressure causes a surge of water to flow downstream, which can cause road wash-outs, sedimentation, and damage to vegetation and animal habitat including beaver lodges. These problems apply equally to small and large crossings. The *Order* does not contain appropriate review and reporting requirements to ensure compliance with the kinds of terms and conditions that would prevent such blockages and surges.

The failure to completely remove winter roads prior to spring break-up, without prior Ministerial approval to leave the road in place, is already a contravention of section 5 of the *Navigable Waters Protection Act*. The practice is not exempted from the requirement for approval by the current *Minor Works and Waters Order*, since that *Order* requires complete removal of the work before the commencement of spring break-up. The practice may also lead to contravention of section 35 of the federal *Fisheries Act*, where the ice dams create a harmful alteration, disruption, or destruction of fish habitat.

In a situation such as this, where routine non-compliance with federal statutes is observed, less stringent review by federal officials is unwarranted and may exacerbate the problem. Until it is standard practice to entirely remove winter crossings prior to spring break-up in compliance with the *NWPA* and the *Fisheries Act*, it is not appropriate for winter crossings to be included on the list of exempted minor works. In essence, those who have been unable or unwilling to comply with legislative requirements are being rewarded for their failures by receiving exemptions from regulatory requirements.

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### ***B.2.3: The criteria for “minor waters” in the Order are flawed.***

Section 11 of the Order defines a water as “minor” if:

- the average width is less than 1.2 metres;
- the average depth is less than 0.3 metres;
- it is between 1.2 and 3 metres wide, with an average depth of 0.3 to 0.6 metres;
- the slope is greater than 4%
- the sinuosity ratio is greater than 2; **or**
- there are more than two natural obstacles, at least one of which is upstream and another downstream from the midpoint of the centre line of the waters.

While Transport Canada may feel able to generalize about the effects of a specific type of work for which the Department receives hundreds of similar applications each year, it is more problematic to apply a similar broad-based approach to waters. Each one is unique, in geography, hydrogeology, and ecology, as well as in the uses that are made of it by the public. Exempting the water from the *NWPA* for any project that could be built on, in, over, or through it is not logically connected to Transport Canada’s mandate: to protect navigation and the environment.

Under the *Order*, waters can be defined as minor and exempted from the application of the *Act* based on evaluation of 200-metre segments. By breaking the water into relatively small segments, then applying the criteria to those individual segments, waters are more likely to meet the criteria and qualify as a “minor water”. This aspect of the *Order* goes against the nature of navigation as the process of moving from one place to another. Further, it ignores the fact that water naturally flows from one place to another. Upstream or downstream projects can have impacts throughout the course of the water body. For instance, a project built in an exempted 200-metre section could result in sedimentation that flows downstream, hampering or blocking navigation in previously navigable sections.

Further, the definition of navigable waters as minor based on their width, depth, and sinuosity will catch waters navigated by small craft like kayaks and canoes. This has the effect of devaluing these more traditional forms of navigation as minor or not worth protection. The fact that these waters are caught by the *Act* at all means they are navigable; this part of the *Order* tries to minimise that status as “minor”. Specifically, the inclusion of waters with a width of 1.2 m or less, without any restriction on depth, means that deep but narrow streams that are fully navigable by kayak or canoe can be considered minor. Similarly, the definition of waters with an average depth of less than 0.3 m, without

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any limits on width, mean that a very wide but shallow river, stream or pond will be exempted from protection.

In addition to exempting “minor waters”, the Order exempts private lakes from application of the *NWPA*. This criterion is based entirely on property rights rather than the potential effects of projects on navigation. In the case of private lakes up to five hectares in area, the criteria is delinked from navigation and rooted instead in the current ownership regime for the lake. This means that lakes currently held by private owners could have their navigability destroyed without protection for future users. It puts private rights over public navigation rights, and privileges current ownership over the rights of future generations.

In general, the criteria for “minor waters” are abstract, arbitrary, and will do little to promote or protect navigation in the future. They are unnecessarily complicated and destined to create confusion, controversy, and problems in the future.

### **B.3 The Order violates the principles of procedural fairness and natural justice.**

Transport Canada staff have explained that a major aim of changing the *NWPA* and creating the Minor Works and Waters Order and regulation is to reduce a bureaucratic backlog and increase the efficiency of the approvals process. Lake Ontario Waterkeeper respects the department’s efforts to improve operations, but submits that due process and environmental protection - including public notice, participation, and appeal rights - are not inefficiencies or “red tape”. Therefore, while Transport Canada strives to manage its resources effectively, it cannot sacrifice the fundamental rights of Canadians to procedural fairness and natural justice. Furthermore, it cannot forget that its mandate to protect navigation is paramount over other policy or political aims.

Under the current *Order*, the Ministerial review system is replaced by giving full discretion to Transport Canada’s Field Officers. The Field Officers exempt works and waters from section 5 of the *NWPA* after applying the criteria in the *Order*. If exempted, a project need not undergo review by the Minister and will not be subject to unique terms and conditions outside the standard ones imposed on its class of works. While many of the works described by the Order may not result in an infringement of Canadians’ right to navigate, the myriad of different waterways with unique characteristics in this country mean that no criteria can be perfect. Regardless of how finely tuned the criteria are, a regulation based in broad generalisations about waterways will end up exempting projects that should have been examined individually. The result will be that projects that should not be approved, or

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that merit further terms and conditions, may be approved as a matter of course under the regulation and that navigation rights will suffer.

Under the *Order*, the decision to exempt a project from Ministerial review is made without public notice or an opportunity for public participation. No public rights of appeal exist if a work or water is exempted. Short of seeking judicial review, the public has no right to challenge a decision affecting the navigability of a waterway. The lack of a notice requirement means that the public is not likely to even know that a waterway it uses or relies upon has been declared part of an exempted class. This is an unacceptable infringement of the most basic procedural rights held by Canadians. It violates the principles of procedural fairness and opens the federal government up to legal challenges.

## **C: RECOMMENDATIONS**

It is clear from reviewing the *Order* and the background of the *NWPA* that the existing approach is fundamentally flawed. The *Order* tries to list the different kinds of projects and waters that need less government oversight, but it utterly fails to do so responsibly or effectively. The department has also described the resource limitations that affect its ability to monitor and enforce compliance with the *NWPA*. Even if the individuals working in the department today have the best intentions possible, it is their responsibility to create a system that will protect navigation on Canada's waterways today and in the future.

We believe that a regulation based on a different approach than the *Order* will be more successful. This approach should focus on the effects of the works on waters and navigation. We submit that such an approach could be implemented in a manner consistent with the *NWPA*, and that it would be less confusing, less uncertain, more transparent, and more efficient than the approaches in place now.

### **Recommendation 1: Establish classes of works based on impacts to navigation.**

The *Order* is based on an unworkable premise: that abstract or general lists of works and waterways can be created that successfully capture the kinds of works that can be undertaken without impact on navigation. The approach is fundamentally flawed because it focuses on the works and waters, rather than observable effects on transportation and navigability. The focus on structures and waters does not go to the heart of Transport Canada's mandate, which is:

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**To serve the public interest through the promotion of a safe and secure, efficient and environmentally responsible transportation system in Canada.**<sup>14</sup>

To ensure that developments do not decrease the transport efficiency or environmental integrity of a waterway, Transport Canada should establish criteria on the basis of the *effects* of that development on navigability and the environment. These effects will be clearly observable and measurable, such as sedimentation, change to the contours, depth, or flow of a navigable water, dewatering, or the deposit of obstacles. Projects that will not cause any of the identified effects can be exempted by Transport Canada's regulation, subject to public notice and comment opportunities. Projects that will cause those effects must be reviewed on a individual basis.

For example, in the current *Order*, classes of projects are defined by the purpose of the development: to lay a submarine cable, to create a winter crossing, to lay a pipeline, etc. Inherent in this approach is the flawed assumption that all projects with the same goal will have the same impact, regardless of scale, location, technologies, etc. These classes should be replaced by one or more classes defined by impacts on navigation: e.g. temporary impacts during construction, impacts of the final project, etc. Impacts may be temporary or permanent, localized, upstream, or downstream. They may be irreparable or repairable. They may create physical barriers to navigation or chronic deterrents. They may be visible or submerged.

There are three significant advantages to this approach to class-making. First, Transport Canada retains its focus on safe, secure, efficient, and environmentally responsible transportation. Second, it is vastly more efficient to base classes on impacts than on project goals; the department cannot possibly consider every possible type of work or every possible site-specific issue in advance; nor can the ordinary citizenry be expected to learn about, discuss, and provide comment on issues that may not affect their community for a generation. Third, it is objective and more easily enforced. If a work does result in any of the defined impacts - sedimentation, blockage, etc. - it will be readily apparent. This objective criteria provides greater certainty to industry, allowing those works that truly have no impact on navigation to move forward.

## **Recommendation 2: Affirm the public's right to notice and comment**

Notice is one of the most basic procedural rights guaranteed by Canadian common law, as most other participation rights flow from it. As Professor David Mullan writes:

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<sup>14</sup> Transport Canada, "Our Missions", online at: <[www.tc.gc.ca/eng/aboutus-department-overview.htm](http://www.tc.gc.ca/eng/aboutus-department-overview.htm)>.

It is one of the fundamentals of procedural fairness that those affected by decisions coming within its ambit should in general receive notice of the process about to be undertaken in a sufficient degree of detail and in a timely enough fashion to enable the effectuation of their participatory entitlements.<sup>15</sup>

Professor Mullan describes a spectrum of notice requirements depending on the nature of the decision being made, with quasi-criminal or employment decisions requiring a highly personalised and specific form of notice, while decisions affecting the public more broadly may only require publication of general details in a local newspaper. LOW submits that this instance most closely resembles the latter, and so a form of notice modelled on public decision-making is appropriate. This would require Transport Canada to consider (a) the most appropriate medium to communicate that a decision regarding a waterway is being made, so as to ensure that all those affected by the decision receive the notice in practice; and (b) enough detail to ensure the public understands the potential consequences of the decision and how they can get involved if they wish to do so.

Providing notice to the community should not generally create undue burden on Transport Canada. If the department is correct and many projects have no impact on navigation, then there will be few responses from the public. If the department has overlooked specific projects that will impede navigation and have caused concern in the community, then Transport Canada staff will have an opportunity to mitigate those impacts, address concerns, and better fulfil its mandate.

To affirm the public's right to notice and comment, a short provision or set of provisions should be included in any regulation that ensure the following:

- the public is notified when an exempted work is proposed in their community;
- members of the public have an opportunity to object to the exemption if navigation is to be impacted;
- members of the public have an opportunity to recommend specific terms and conditions that would better protect navigation; and
- the public is notified when a decision is made.

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<sup>15</sup> David J. Mullan (2001) "Essentials of Canadian Law: Administrative Law" (Toronto: Irwin Law) at Chapter 13, p.1. Note: Widely-published in the administrative law area, Professor Mullan's work is often cited by the courts, including the Supreme Court of Canada.

### **Recommendation 3: Include a process for appealing decisions to include a work or water in an exempted class.**

The second half of the fundamental right to notice guaranteed to all Canadians is the right to be heard. While this does not always mean the right to an oral hearing, the right requires some means by which a notified person can make their case to the decision-maker. This is known as the principle of *audi alteram partem*, or “hear the other side”. Without this right, the right to notice would be near to meaningless, as the public would not be empowered to participate on the basis of the knowledge given.

In the case of a regulation under the *NWPA*, the right to be heard is of special importance. Transport Canada staff readily admitted throughout the Senate hearing process that they have a limited number of officers in the field across Canada (approximately 42).<sup>16</sup> This greatly increases the likelihood that the Department may fail to identify projects that will significantly diminish navigation. This can be remedied, to a certain extent, by ensuring that the public is notified and given the opportunity to be heard. Waters important for navigation that happen to meet the regulation’s exemption criteria can be identified, allowing Transport Canada to make an informed decision about the proposal.

Many models for effective public appeal rights exist. One example that could be used as a model by Transport Canada is found in Ontario’s *Aggregate Resources Act*.<sup>17</sup> Under that *Act*, when a potential licensee has met the prescribed criteria for a licence, they must notify the public. During the consultation period that follows notice, any person may file written notice with the provincial Minister of Natural Resources and the proponent describing their objection to the licence. If the objections cannot be resolved between the objector and the proponent during the consultation period, the Minister can refer the matter to the Ontario Municipal Board for a hearing. If this model was incorporated into the regulation, it would address the procedural defects in the existing *Order*. It would also provide Transport Canada with a way to be informed when a project has erroneously been exempted from the *NWPA*.

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<sup>16</sup> See for example: Senate, **The Standing Senate Committee on Energy, the Environment and Natural Resources**, 40th Parliament, 2nd Session (23 April 2009) at p.8 (David Osbaldeston).

<sup>17</sup> R.S.O. 1990, Chapter A.8, s.11.

#### **Recommendation 4: Include monitoring, reporting, and enforcement provisions to guarantee compliance and accountability.**

In order to be effective, the regulation must provide for follow-up to ensure compliance with the terms and conditions for exempted works. The regulation must address the consequences for a work that is exempted on the basis of certain terms and conditions, but then fails to meet the criteria. For instance, if a winter crossing is exempted from Ministerial review by the regulation, but is not fully removed prior to spring break-up, Transport Canada must establish a concrete mechanism whereby staff will learn of the non-compliance. Reliance solely on local people to report non-compliance to Transport Canada is not sufficient.

At a minimum, monitoring, reporting, and enforcement provisions should define:

- how exempted works will be documented (who will document, how documentation will be submitted, received, filed, and disseminated at Transport Canada);
- how minor works and/or works on minor waters (if this class is retained) will be monitored (who will monitor, who will verify, how monitoring data will be submitted, received, filed, and disseminated at Transport Canada);
- what the consequences for failure to monitor will be; and
- what the consequences for failure to comply will be.

It is outside of the scope of a regulation to describe resource allocation. That said, given Transport Canada limited resources and the Senate Committee's recommendation regarding funding, it would be wise to include information about the department's ability to fulfil its new responsibilities in the related regulatory impact statement.

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## SUMMARY

When Transport Canada staff requested feedback on the *Minor Works and Waters Order*, with the aim of developing a more effective Minor Works and Waters Regulation, they asked five specific questions. The above commentary supports Lake Ontario Waterkeeper's answers to those questions, which can be summarised as follows:

### **Should the list of classes of works be modified, either by adding new classes or removing existing classes?**

Yes. The lists of classes of works and classes of waters should be modified dramatically. Exemptions from the *NWPA* should be determined on the basis of effects, instead of the characteristics of works or waters.

### **Are there ambiguities in the criteria defined in the *Minor Works and Waters (Navigable Waters Protection Act) Order*?**

Yes. Many of the criteria in the *Order* are ambiguous, primarily because of the attempt to list every kind of project that may be considered "minor" in an abstract context. Such an approach to criteria-making will *always* result in ambiguities.

### **Are there contradictions or inconsistencies between criteria?**

Yes. As described above, it is not clear why some classes require signage where others do not; some refer to specific technology where others do not; some are based on private property rights, while most are not; and some make distinctions between chartered and uncharted waters that are not clearly connected to navigation. To remedy these inconsistencies, Transport Canada should focus the regulation on *effects* rather than the myriad varieties of work and water. The current approach will *always* result in contradictions and inconsistencies.

### **Is the rationale for some criteria not evident?**

Yes. The rationale for *all* criteria is not evident. The classes seem to favour specific development projects for reasons unrelated to navigation matters. Furthermore, no rationale has ever been provided to the public.

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## **Are some criteria too lenient?**

Yes. The situation with winter roads described above clearly illustrates this point, as the *Order* allows the construction of winter crossings using bank cuts and material other than ice or snow, where these practices are no longer acceptable in the north. This is only one example, made possible by William Tozer's familiarity and experience with ice roads. Problems like this are a necessary result of focusing on specifics of a certain type of work or technology. Transport Canada can avoid these issues by staying closely to its mandate, with a regulation based on effects on navigation and the environment.

## **Recommendations**

1. Establish exemptions based on impacts on navigation, rather than the characteristics of works or waters.
2. Affirm the public's right to notice and comment.
3. Include a process for appealing decisions to include a work or water in an exempted class.
4. Include monitoring, reporting, and enforcement provisions to guarantee compliance and accountability.

## **Conclusion**

Lake Ontario Waterkeeper thanks Transport Canada for the opportunity to review the *Order* and provide these comments. We hope that these suggestions help Department staff to frame the regulation in a way that better complies with Transport Canada's mandate, and enables them to continue working to protect Canadian's right to navigate. We look forward to meeting with you soon to discuss these comments in further detail.

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