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Navigation Protection Act
Written brief to
Standing Committee on
Transport, Communities and Infrastructure

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Dear Members of the Standing Committee on Transport, Communities and Infrastructure:

RE: *Navigation Protection Act*

We thank the Standing Committee for inviting written briefs from the public as part of its review on the *Navigation Protection Act* (NPA), formerly the *Navigable Waters Protection Act* (NWPA).

In 2012, the Harper government's omnibus budget bill, Bill C-45, removed protections from 99 per cent of lakes and rivers in Canada under the NWPA. Aside from removing the word "waters" from the title of the act and renaming the legislation the NPA, Bill C-45 stripped protections from most lakes, rivers and navigable waterways, leaving only three oceans, 97 lakes and 62 rivers under the purview of the NPA. The NPA also exempts large pipelines and powerlines from scrutiny so the impacts of these projects are no longer assessed for any navigable waterway.

The changes continue to impact local economies, Indigenous' rights and waterways from coast to coast. Industrial projects such as pipelines, dams, mines and fish farms are moving forward with little or no scrutiny on their impacts on navigable waters. Many of these projects are happening on the traditional territory of Indigenous peoples and will have impacts on their cultures, ways of life and economies.

There are strong connections between clean drinking water, recreation and healthy fisheries. For this reason, the NWPA must be restored and strengthened. This act, along with other pieces of legislation, is important to protect water in Canada and in Indigenous communities.

The recommendations that the Standing Committee will put forward to the federal government can play a critical role in strengthening this act so that waterways are fully protected. Water legislation, including the NPA/NWPA, must be restored and enhanced in a manner that makes them part of a broad vision and long term plan to transition away from fossil fuels and other extractive industries and that creates green, sustainable jobs.

In order to do so, we urge the Standing Committee to incorporate the following five points in its recommendations to the federal government.

1. Protections must be put back on all lakes, rivers and waterways, so that every lake and every river is protected.

The former Harper government removed protections for 99 per cent of lakes and rivers by creating a schedule which lists the 97 lakes, 62 rivers and three oceans. It also changed the wording in the NHPA so that most protections only apply to the waterways listed in the Schedule of the act. 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. The title of the act must be changed back to *Navigable Waters Protection Act* to return to the original spirit and intent of the act.

Industrial projects such as dams, mines, fish farms, pipelines and powerlines are moving forward with little or no review under the NPA despite the projects' threats to navigable waters that are currently unprotected under the *Navigation Protection Act*.

For example, the proposed Energy East pipeline which would run from the Alberta tar sands to New Brunswick, the proposed Trans Mountain Expansion pipeline which would transport tar sands from Alberta to Vancouver, British Columbia, the Keeyask Dam and the Bipole Transmission Line in Manitoba, and the Ajax Mine in British Columbia are projects that have had little or no review by Transport Canada under the NPA, yet have significant impacts on navigable waters, fishing, boating and recreation. Some of these examples, including their impacts on navigable waters, are examined in the report *Every Lake, Every River: Restoring the Navigable Waters Protection Act*.ⁱ

2. Reinstate and strengthen federal scrutiny of pipelines and powerlines under the NHPA and assessment of waterways under the Canadian Environmental Assessment Act (CEAA). Implement strict safeguards for waterways within the framework of the United Nations-recognized human right to water and include a clause in the Act so that potential spills or discharge of harmful substances are assessed for their impact on all navigable waters.

The NPA exempts pipelines and powerlines from scrutiny so the impacts of these projects are no longer assessed for any navigable waterway. Changes were made to the *National Energy Board Act* and the *Canada Oil and Gas Operations Act* so the definition of "project" does not include pipelines or transmission lines, and so environmental assessments no longer occur under the NPA for these kinds of projects.

Because the NPA exempts pipelines, projects like Energy East or Trans Mountain are going forward without review of the 2,963 and 1,309 respective waterways they cross. The Trudeau government approved the Trans Mountain pipeline last week using the weakened NPA and environmental protections to approve the project and has now put the 1,309 waterways at risk.

Communities rely on these thousands of waterways for transportation, fishing, boating and recreation.

The scope of environmental assessments was also drastically narrowed. Ecojustice notes that under the CEAA 2012, projects that go through comprehensive environmental studies – the second most rigorous of the three processes – no longer need to include a range of information in their project descriptions including:

- A description on the impact on navigable waters or any unique or special resources not already identified;
- A description of the components of the environment that are 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;
- A description of the name, width and depth of any waterway affected by the project and a description of how the waterway is likely to be affected.

This information must be included in project descriptions and permit applications under the NWPA and the CEAA.

In the report *Our Right to Water: A People's Guide to Implementing the United Nations' Recognition of the Right to Water and Sanitation*, Council of Canadians National Chairperson Maude Barlow outlines the three obligations the recognition of a human right to water imposes on governments: the obligations to respect, protect, and fulfill. This includes government's obligation to prevent third parties from interfering with the enjoyment of the human right. For example, a government is required to protect a community from pollution by corporations or governments.

The United Nations has passed several resolutions recognizing the human rights to water and sanitation and all governments are obligated to implement these rights. The Trudeau government must restore and enhance water legislation such as the NPA/NWPA in a manner that respects the human right to water including safeguarding water from oil spills and other pollution.

The potential impacts of a project such as the Energy East on navigable waterways, including the impacts of potential spills, pipeline must be assessed under the NPA.

The difficulty of cleaning up diluted bitumen was made clear by a spill in the Kalamazoo River in Michigan in 2010. The Enbridge spill leaked the thick tar-like substance into the river for 17 hours before the pipeline was shut down. After the spill on the Kalamazoo River, sections of the river and Morrow Lake remained closed to recreational use and boating for nearly two years

after the spill. Sections of the river also remained closed for dredging operations to retrieve some of the submerged diluted bitumen more than three years after the spill.

Oil spills or other pollution can seriously hamper navigable waters, drinking water, recreation and fishing. One of the biggest flaws in the changes made by the former federal government to the NWA is the exemption from federal scrutiny of the impact of oil and gas pipelines that cross waterways. TransCanada's proposed Energy East pipeline is an example of a project that is being reviewed without the Act's scrutiny of impacts on navigation and navigable waterways. If built, Energy East would be the largest pipeline in North America, transporting 1.1 million barrels per day (bpd) of crude oil from the Alberta tar sands to New Brunswick, crossing nearly 3,000 rivers, lakes and streams on its route.

According to the report *Quantifying Risk: Calculating the probability of an Energy East pipeline rupture*, TransCanada's Energy East pipeline would have a 15 per cent chance of a full bore rupture every year.ⁱⁱ A catastrophic rupture could produce the largest oil spill in recent Canadian history – up to 30 million litres of diluted bitumen (dilbit) – in a worst case scenario.

TransCanada's proposed leak detection system can only detect leaks greater than 1.5 per cent of the pipeline's capacity. This means that based on Energy East's total capacity of 1.1 million bpd, an undetected leak of 1.5 per cent could release up to 16,500 barrels (2.6 million litres) of oil in a single day. Considering the enormous spill risks of the pipeline, the NPA must restore federal scrutiny of waterways that are traversed by Energy East and other pipelines.

Dilbit is much harder to clean up than conventional oil, creating a bigger threat to navigable waters. In December 2015, the U.S. National Academy of Sciences released a comprehensive study that shows how dilbit differs dramatically from other types of oil commonly transported by pipeline.ⁱⁱⁱ The report explains that, unlike conventional oil, bitumen sinks in water, and the pipeline industry and emergency responders not equipped with the special strategies and tactics needed to clean up a dilbit spill.^{iv} The difficulty of cleaning up dilbit was made clear by the disastrous spill of an Enbridge pipeline into the Kalamazoo River in Michigan in 2010 that took six years and cost more than \$1.2 billion to clean up.^v

The 4,600 kilometre Energy East pipeline would cross 2,963 identified waterways and countless smaller streams and wetlands along the way.^{vi} Energy East will not undergo any scrutiny under the NPA despite the fact it puts thousands of waterways at risk. From drinking water sources, to fishing, tourism and recreational waters, to North Atlantic Right Whale habitat and the home of the world's largest tides in the Bay of Fundy, these waterways would all be in danger from a pipeline spill. If approved, Energy East could put the drinking water of more than 5 million people at risk, including in cities like Winnipeg, North Bay, Ottawa, Montreal and Saint John. Many of the waterways at risk of an Energy East spill are on First Nations' treaty, traditional and unceded land and subject to unique rights enshrined under the Canadian Charter of Rights and

Freedoms, Treaty Rights and the UN Declaration on the Rights of Indigenous Peoples that must be respected by the federal government and TransCanada.

For specific case studies of the threat Energy East poses to the waterways it crosses and the drinking water of 5 million Canadians, please see the April 2016 report *Energy East: A Risk to Our Drinking Water*.^{vii}

The proposed Energy East pipeline shows how a large energy project can pose massive risks to navigation and to the drinking water of municipalities and communities along the pipeline route.

The current NPA does not require the assessment of the impacts an oil spill would have on navigation, nor did the former NWPA. The proposed Energy East pipeline demonstrates why the Act must be enhanced to include assessments of potential spills and impacts on navigation. It also demonstrates the intimate link between navigation, clean healthy water and safe drinking water. The federal government should take steps to fulfill its responsibility to protect all waterways and drinking water by reinstating and strengthening federal scrutiny of pipelines under the NPA/NWPA, and assessment of waterways under the CEAA.

3. Create an independent expert panel including holding public consultations and incorporating feedback to strengthen the NPA/NWPA.

Right now only written comments are being requested by the Standing Committee on Transportation, Infrastructure and Communities. As of November 15, 2016, there were only 15 representatives that were invited to present to the Standing Committee including the Canadian Construction Association, the Canadian Energy Pipeline Association, Fédération québécoise des municipalités, the Saskatchewan Association of Rural Municipalities, the Congress of Aboriginal Peoples, the Métis National Council, the Council of Canadians, Paddle Canada and the Fraser Basin Council. I (Emma Lui from the Council of Canadians) presented on October 27, 2016 but my time was cut short because Conservative Member of Parliament and Vice-Chair Luc Berthold introduced a motion that would see that no more witnesses present before the committee on this review. The majority of that meeting was focused on debating Vice-Chair Berthold's motion limiting discussion on the Council of Canadians' concerns, including concerns from their supporters and community chapters.

Transport Canada has reached out to some stakeholders to gather comments for its presentation to the Standing Committee but it is unclear how many different stakeholders have been contacted.

The Standing Committee and Transport Canada's processes are not easy to find and the average person in Canada likely does not know that these processes are occurring despite the impacts the NPA has on local waterways.

The Trudeau government has announced public consultations and independent expert panels for its reviews on the CEAA and the National Energy Board. Protection for navigable waters affects residents and communities from coast to coast. The Trudeau government must also hold public consultations and create an independent expert panel for its review of the NPA to better engage people in Canada.

4. Consult with Indigenous communities and incorporate the obligation to obtain free, prior and informed consent into the NWPA so that Indigenous treaty and water rights are respected and a nation-to-nation relationship is truly established.

The Harper government's 2012 budget bills and changes to the NWPA fanned the flames of discontent amongst Indigenous communities. The federal government not only washed its hands of protecting lakes and rivers, it also ignored the constitutional duty to consult with First Nations. Until the Trudeau government restores the NWPA, it is also neglecting this legal responsibility to consult with First Nations.

In January 2015, the Mikisew Cree First Nation won its legal challenge against the Harper government's Bills C-38 and C-45, which removed federal protection for most of the waterways in the traditional territory of the Mikisew Cree in northern Alberta. Federal Court Justice Roger Hughes ruled that the Harper government should have consulted with First Nations before introducing the omnibus bills C-38 and C-45 two years ago.

It is unclear how the Standing Committee and the federal government will obtain free, prior and informed consent of Indigenous Nations, but the federal government has publicly committed to ratifying and implementing the UN Declaration on the Rights of Indigenous Peoples.

The UN Declaration on the Rights of Indigenous Peoples requires free, prior and informed consent of Indigenous communities on projects, policies and decisions affecting water. In order to implement the UN Declaration on the Rights of Indigenous Peoples, free, prior and informed consent must be obtained from Indigenous communities on any changes to the NPA/NWPA, relevant regulations and all applications that are submitted under the Act in order to fully respect Indigenous treaty and water rights.

5. Ensure that a consultation process is established that fosters true collaboration between communities and government so regulatory agencies implement community recommendations on an ongoing basis. Develop clauses that establish a community's right to say "no" to projects that threaten waterways and empowers communities to create low-carbon, sustainable alternatives and jobs that safeguard water.

There are several proposed projects such as the Site C dam, the Energy East and Trans Mountain pipelines and the Muskrat Falls dam, that are being opposed by local communities

and that will have impacts on navigable waterways. Communities must have a mechanism in the NPA/NWPA that empowers them to say “no” to projects that put navigable waters at risk.

The Site C dam was recently approved despite it being built on the “protected” Peace River.

Council of Canadians Political Director Brent Patterson has described Site C as “a proposed 60-metre high, 1,050-metre-long earth-filled dam and hydroelectric generation station on the Peace River between the communities of Hudson's Hope and Taylor on Treaty 8 territory in northeastern British Columbia. It would create an 83-kilometre-long reservoir and flood about 5,550 hectares of agricultural land southwest of Fort St. John. It would also submerge 78 First Nations heritage sites, including burial grounds and places of cultural and spiritual significance. Logging and land clearing for the dam began last summer.”

Site C has been vehemently opposed by First Nations and northern communities. UNESCO was recently on a monitoring mission to assess the impact Site C would have on the Peace and Athabasca Rivers which converge in Wood Buffalo National Park, a designated World Heritage Site.

Texas-based Kinder Morgan is proposing to twin the Trans Mountain pipeline from northern Alberta to the British Columbia coast to increase the pipeline's capacity from 300,000 barrels per day to 890,000 barrels per day. The pipeline would carry diluted bitumen from the tar sands through Jasper National Park, into the Lower Mainland of British Columbia, across the Vedder Fan aquifer and the municipality of Chilliwack's protected groundwater zone, then across the Fraser River and to the Westridge Marine Terminal at Burrard Inlet for export on 400 supertankers a year.

Patterson points out that while the National Energy Board acknowledges that the pipeline would potentially cross 246 watercourses in Alberta and 1,063 watercourses in British Columbia, it demands little more of Kinder Morgan than for the Texas-based company to file an inventory of these waterways along with a safety plan for navigable waterways.

The Innu and Inuit have opposed the Muskrat Falls dam in Labrador. The Muskrat Falls hydroelectric dam project is part of the Lower Churchill Project and would see construction of an 824 megawatt dam. Patterson has also warned that, “The dams are being built on Innu lands and would severely impact Inuit peoples. In 2012, the federal government provided a loan guarantee of \$6.4 billion to enable the project to proceed. It also removed federal oversight of the Churchill River in their Navigation Protection Act. If not stopped, the dam will flood 41 square kilometres and establish a 100 square kilometre reservoir.”

These projects are being vehemently opposed by communities and are clear examples of why the Act must be amended to empower local communities to be able to say “no” to projects that threaten waterways.

In 2012, Mountain Equipment Co-op presented a list of 40 recreationally important waterways that are no longer protected. They pointed out that the outdoor recreation industry creates at least 6 million jobs in Canada. In comparison, there are roughly only 250,000 jobs in mining, oil and gas and logging combined which makes up about only 1.6% of the jobs in Canada. The Trudeau government is approving and subsidizing projects in the fossil fuel and extractives industries, but according to Statistics Canada most of the jobs are actually in non-extractive industries: 12 per cent are in retail trade, 12 per cent are in health care and social assistance, another 12 per cent are in manufacturing, 8 per cent are in accommodation and food services and 8 per cent are in educational services, for example.

The federal government’s review of the NPA must be part of a broader, long term vision to transition away from fossil fuel and extractive projects and prioritize job creation in green, sustainable sectors which is where the majority of jobs are already being created.

Conclusion

People are hungry for real change. The recommendations made by the Standing Committee in the coming months have the power to effect real change for the lakes, rivers and other waterways across Canada and Indigenous communities. We thank you again for your time and urge you to include these recommendations that will protect every lake and every river now, and in the future.

Sincerely,

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The Council of Canadians is a social action organization and we advocate for clean water, fair trade, green energy, public health care, and a vibrant democracy. We have 60 chapters and 100,000 supporters across Canada, many of whom have lakes and rivers in their communities that are unprotected under the Navigation Protection Act. Many have expressed concerns about projects that threaten navigable waters in their communities.

Environmental Defence is an environmental action organization that challenges, and inspires change in government, business and people to ensure a greener, healthier and prosperous life

for all. Since 1984, Environmental Defence has been inspiring change by connecting people with environmental issues that affect their daily lives in their homes, workplaces and neighbourhoods.

ⁱ Every Lake, Every River: Restoring the Navigable Waters Protection Act. The Council of Canadians. 26 October 2016. <<http://canadians.org/report-everylakeeveryriver>>.

ⁱⁱ Quantifying Risk: Calculating the Probability of an Energy East Pipeline Rupture. Rep. Council of Canadians, 2 Sept. 2015. Web. 17 June 2016.

ⁱⁱⁱ Energy East: A Risk to Our Drinking Water. Rep. Environmental Defence, Transition Initiative Kenora and Council of Canadians, N.p., Apr. 2016.

^{iv} Ibid.

^v Hasemyer, David. Enbridge's Kalamazoo Spill Saga Ends in \$177 Million Settlement. Inside Climate News (July 20 2016). Web. <<https://insideclimatenews.org/news/20072016/enbridge-saga-end-department-justice-fine-epa-kalamazoo-river-michigan-dilbit-spill>>.

^{vi} Energy East: A Risk to Our Drinking Water. Rep. Environmental Defence, Transition Initiative Kenora and Council of Canadians, N.p., Apr. 2016.

^{vii} Ibid.