

May 10, 2024

The Honourable Pablo Rodriguez  
Minister of Transport  
Transport Canada  
330 Sparks Street  
Ottawa, Ontario  
K1A 0N5

**Re: WaterPower Canada Comments regarding Transport Canada's Review of the Canadian Navigable Waters Act**

Dear Minister Rodriguez,

WaterPower Canada is pleased to provide its input and comments for Transport Canada's five-year review of the Canadian Navigable Waters Act.

WaterPower Canada (WPC) is the national industry association representing the Canadian hydroelectricity sector. Our members include both public and private hydropower producers, equipment manufacturers, engineering and construction firms and other suppliers of goods and services for the hydropower industry.

Hydropower facilities produce over 60% of Canada's electricity. Accelerated investment in maintaining, refurbishing, and expanding existing hydropower facilities and developing new hydropower generation stations are essential for Canada's economic competitiveness and energy security and for achieving our national greenhouse gas emissions reduction targets.

Achieving Canada's GHG reduction targets will require rapid electrification of the economy and rapid growth of Canada's non- and low-emitting electricity. While much of the new energy can come from variable renewables like wind and solar power, we will require significant additions of firm resources available on demand to ensure grid reliability when variable renewables are unavailable.

Hydropower is an ideal solution because it is firm and renewable, and Canada has tens of thousands of megawatts of hydropower potential.

Our members own, operate, and maintain thousands of structures located on waterbodies, many of which are navigable. We thus have a strong interest in ensuring that, while protecting navigation, the Canadian Navigable Waters Act provides timely and predictable approval mechanisms for legitimate works that may interfere with navigation and does not create unwarranted obstacles to the timely execution of maintenance and repair activities at existing facilities.

We have reviewed Transport Canada's discussion paper and the questions included in the paper and offer the following comments.

## 1. Intention of the Act

### 1.1 *Since the implementation of the Act in 2019, has your experience navigating on Canada's waterways improved, gotten worse, or stayed the same? Why?*

WaterPower Canada has no comment regarding waterway navigation.

### 1.2 *What are your thoughts on the provisions and/or operation of this Act? What recommendations would you make to improve things?*

Overall, the administration of the Act is efficient, and the online service and communications with Transport Canada officials are good. However, applying the Act remains a demanding task for our industry because of the complexity of the classification of water bodies and categories of works.

The CNWA and its implementation put too much emphasis and impose too many conditions on works that present only a very small or negligible risk to navigation. Simplifying the process for such works would allow a better allocation of resources.

Some areas where improvements could, in our opinion, be made include clarifying the "no interference" concept, streamlining the process for public notification, and simplifying the requirement of the online public registry for "other works that are not likely to impede navigation".

We also suggest that a simplified process be established for all maintenance and repair work at existing hydropower facilities. This process would apply to all works unlikely to have significant impacts on navigation. Such a regime could facilitate the timely maintenance of this critical part of Canada's electricity infrastructure.

## 2. Indigenous Partners and Peoples

- 2.1 *Since the implementation of the Act in 2019, has your experience navigating Canadian waterways to exercise rights recognized and affirmed by section 35 of the Constitution Act, 1982 been impacted? If so, how?*

WaterPower Canada has no comment regarding experiences with navigation.

- 2.2 *Does Transport Canada consult with Indigenous Peoples appropriately on decisions made under the Act that impact you, your community, your organization, or your government? What could be improved?*

In our members' experience, Transport Canada's consultations with Indigenous peoples have generally been satisfactory. However, progress needs to be made in identifying the indigenous communities that need to be consulted to delineate the perimeter of the consultations better. Some of our members have also expressed the desire for more transparency vis-à-vis the proponent during government-led consultations.

## 3. Navigable Waters

- 3.1 *Do you think the current definition of “navigable water” includes bodies of water that do not need the protection of the public right to navigate? Can you provide an example?*

The current definition (Section 2 of the CNWA) is too broad; it is also vague in certain regards.

First, the definition includes practically all artificial bodies of water that are not owned by a single person other than the Crown. This could cover, for example, the reservoirs of a closed-loop pumped-storage hydropower facility, or a diversion channel which is part of a conventional hydropower facility.

There is no justification for including such water bodies in the definition of navigable waters. We suggest that artificial bodies of water that have not flooded a natural, existing, navigable lake or river, be removed from the definition of navigable waters.

In parallel, the Minister could be given the power to include by order specific man-made water bodies where navigation is likely to occur.

Second, the definition includes practically all waters 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. The inclusion of the term "likely to be used" without any reference to the potential importance of future navigation for the various categories of users makes the definition too broad.

The large number of water bodies that may be considered navigable even in the absence of navigation significantly increases the administrative burden and legal obligations of any owner who constructs or modifies works in areas where, currently, there is no navigation and provides no benefit in return.

**3.2** *Do you think the current definition of “navigable water” excludes bodies of water that need the protection of the public right to navigate? Can you provide an example?*

We are unaware of any such situation.

## 4. Works

**4.1** *When building a work in a navigable water, have you faced any barriers due to CNWA requirements? How have these barriers impacted your use of the waterway? Do you have any suggestions for how to address these barriers while still protecting the right to navigate?*

To date, our members have not brought any situation to our attention where the CNWA has prevented the construction of a needed work.

However, the complexity of the regulatory regime makes it demanding in terms of qualified human resources and time. Approvals or notifications are often required in situations where they do not provide any perceptible benefit to navigators.

The regime sometimes makes it difficult to proceed with maintenance or repair work when the need for such work becomes clear only after the spring freshet because the construction season is short while public safety concerns require that the work be done promptly but do not make it an undisputable emergency as defined in the Act.

**4.2** *Are works appropriately categorized between the Major Works Order, Minor Works Order, and works other than a major work or a minor work? Are the requirements for major works and minor works sufficient to protect the right to navigate these waters?*

In our opinion, the numerous conditions that apply to minor works (which, by definition, are works that interfere only slightly with navigation), exceed what is needed to protect navigation.

One example of the improvements that could be made is the removal of paragraph (a) from section 9 on temporary works. Doing so would make all temporary works<sup>1</sup> that meet conditions (b) and (c) minor works and reduce the paperwork required to proceed with many routine activities unlikely to impede navigation.

Since geotechnical drilling and engineering surveys conducted from a barge or from dry ground only slightly impede navigation and are temporary by nature, such works should be added to the Minor Works Order.

Some adjustments to the Minor Works Order could also be made to reduce the burden on owners of existing facilities when they proceed to repair and maintenance activities. Such activities, or the works they are comprised of, could be included in the Order as an additional category. A preferable approach would be to include in the Act provisions allowing owners of all legally built existing facilities to proceed to repair and maintenance activities that do not hinder navigation.

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<sup>1</sup> Currently, only temporary works undertaken at sites of another minor work are classified as minor. This excludes temporary works undertaken at the site of an existing major work, as well as at the site of an existing work which is neither major nor minor. It also excludes temporary work at greenfield sites.

- 4.3 *Does the public online registry provide sufficient opportunities to comment on a project's impact on navigation before its construction? Are your comments addressed in a meaningful way?*

WaterPower Canada has no additional comments.

## 5. Schedule / Public Resolution

- 5.1 *In the public resolution process, the owner of the work has the responsibility to address any navigation-related comments received. What has been your experience with this process, either as the commenter or the owner of the work?*

The experience of the hydropower industry with the public resolution process is still too limited for us to comment.

- 5.2 *The Act has changed the process for adding navigable waters to the schedule. What is your opinion on this process?*

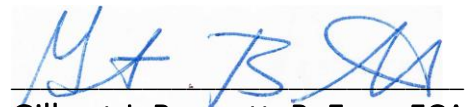
Adding a navigable water to the schedule significantly increases the constraints and costs to owners and proponents of works located on the newly listed waterbody. We believe that because the decision to add a waterbody to the schedule requires the weighting of the potential benefits to navigation against the costs to owners of works that may belong to many other sectors of the economy, it would be preferable that the decision be made by order in Council, on the recommendation of the Minister of Transport, instead of simply being made through a Ministerial Order.

- 5.3 *Is Transport Canada's protection of the public right to navigate on non-scheduled navigable waters sufficient?*

WaterPower Canada believes that the public right to navigate is well-protected, and as discussed through this submission, certain aspects of the regulatory framework go beyond the steps necessary to protect this right.

In closing, we wish to thank you for providing an opportunity to comment. We are looking forward to participating in the subsequent phases of the CNWA review, and we are available to discuss the matters raised in this letter at your convenience.

Sincerely,



**Gilbert J. Bennett, P. Eng., FCAE**  
President

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