

W. A. Allen  
9 First Ave.  
Burk's Falls  
Ontario P0A 1C0

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The Honourable Mervin Tweed, Chairperson  
House of Commons Standing Committee on Transport, Infrastructure and Communities  
House of Commons, Parliament Buildings  
Ottawa, Ontario  
K1A 0A6

Ref: [TweedM@parl.gc.ca](mailto:TweedM@parl.gc.ca)

**Re: CONCERN ABOUT PROPOSED AMENDMENTS TO THE NAVIGABLE WATERS  
PROTECTION ACT (NWPA) AND REQUEST TO HAVE THE PROPOSED AMENDMENTS TO  
NWPA WITHDRAWN FROM THE BUDGET IMPLEMENTATION ACT  
([HTTP://LAWS.JUSTICE.GC.CA/EN/SHOWFULLDOC/CS/N-22///EN](http://laws.justice.gc.ca/en/showfulldoc/cs/n-22///en))**

Dear Mr. Tweed,

Congratulations on your re-election earlier this month as Chairperson of the House of Commons Standing Committee on Transport, Infrastructure and Communities (TRAN).

I request that TRAN recommend to the House of Commons that proposed amendments to the Navigable Waters Protection Act (NWPA) be withdrawn from C-10, the Budget Implementation Act (BIA) currently before the House.

I write as a concerned Canadian taxpayer and a person involved in shaping public policy through my sharing with public officials of the results of certain cultural heritage research which I have undertaken, through my writing and public presentations and through my involvement in the public input phase of the development of public policy. My research has been influenced by long term personal relationships with many Aboriginal leaders and by the nature of dialogue which I have observed between Aboriginal leaders and government officials looking to integrate Aboriginal perspectives into developing instruments of public policy. Respect for Aboriginal consultation and perspectives also have been embedded into various recent federal and provincial legislation. As a result of my background it is clear to me that Aboriginal people have particular cause for concern about the proposed NWPA amendments and that TRAN has not ensured sufficient, if any, input from Aboriginal people and has not assessed adequately, if at all, the negative implications that implementation of the proposed amendments would have on Aboriginal people.

In the interests of transparency and consistency with other legislation I believe that any amendments to NWPA need to be considered separately and with comprehensive public input, including Aboriginal input.

I have many concerns about the proposed NWPA amendments but let me highlight a few.

1. The proposed amendments to NWPA interfere with progress that in recent years has characterized much of the positive dialogue between Aboriginal people and authorities in provincial and federal governments. Aboriginal people with constitutional fishing rights are impacted negatively by the proposed NWPA amendments more than most other Canadians since free navigable access to all fish harvest areas guaranteed in treaties is essential if the treaties are to be honoured. The notion of “minor waters” as proposed contravenes Canada’s commitments to Aboriginal people under treaty obligations and under consultation and accommodation requirements. Aboriginal people should not be cast as stakeholders since their relationship with government is of a higher order than a stakeholder relationship. Implementation of the proposed NWPA amendments will risk challenges to the Honour of the Crown. Challenges to the Honour of the Crown would risk enormous taxpayer expenditure to rectify and could cause unnecessary social disruption due to a “stick-in-the eye” approach from the federal government.

2. The impetus for the proposed amendments seem to flow from recommendations from Transport Canada officials who appeared before TRAN on February 12, 2008 and relayed requests for changes from a narrow segment of society represented by those interested in only some proposed future economic needs (eg. ecotourism business needs so dependent on river navigability apparently excluded) and in issues related to increases in the volume and variety of uses of Canada’s waterways. TRAN also heard about a backlog of projects waiting for approval, a backlog that could be reduced by development of new NWPA legislation.

<http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=3566517&Language=E&Mode=1&Parl=39&Ses=2&File=18>). Such an impetus for legislated change to NWPA is ill founded since it has a narrow focus on economic development, (and only some potential economic development at that) to the exclusion of other interests in navigable waters. The ill founded impetus shows a limited reactive stance rather than a stance built on a vision of the future where economic variables are only one element in a complex web of interconnected issues, not the least of which is a sustainable environment.

3. Under the proposed NWPA amendments the public right of navigation would change from a public right that pre-dates Confederation to an activity subject to broad ministerial discretion of unprecedented scope, allowing definition of classes of projects not requiring government approval

or environmental assessment and not subject to transparent disclosure, parliamentary review or consultation with the public that the government is entrusted to protect. Such a process would sidestep generally accepted accountability requirements, including those monitored by the Auditor General and those espoused by the Canadian Council of Ministers of the Environment in its *Consultation on Canadian Environmental Assessment Processes* ([http://www.ccme.ca/assets/pdf/consultation\\_pkg\\_e.pdf](http://www.ccme.ca/assets/pdf/consultation_pkg_e.pdf)). The proposed amendments reveal an attitude of repairing harm to public interests after the fact rather than preventing harm in the first place. I believe that the public interest would not be served by making the proposed NWPA changes to such a fundamental and historic right of Canadians.

4. Under Part D, Inter-Departmental Assessment “Triggers”, of TRAN’s **“PROPOSED AMENDMENTS TO THE NWPA”** TRAN recommended that *“the government, in amending the NWPA, ensure that the “trigger” mechanisms contained in other pieces of relevant legislation for environmental assessments and fisheries habitat assessments are not done away with or impeded.*

(<http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=3566517&Language=E&Mod e=1&Parl=39&Ses=2&File=18>).

This recommendation is naïve in the extreme. Passage of the NWPA recommendations would indeed impede environmental assessments and fisheries habitat assessments and introduces the notion of the legitimacy of compensation for lost fish habitat. The TRAN premise is unfounded if one examines reality. Private sector hydro-electric works are subject to a much weaker Environmental Assessment regime than those required by the NWPA. This is because municipal roads, sewage and water infrastructure have been approved as one of the ten classes subject to the streamlined “Class Environmental Assessment” (class EA) process rather than the more comprehensive Individual Environmental Assessment (individual EA) process. At the Ontario provincial level there are no Ministry of Environment protocols for assessing the cumulative and synergistic effects of a proposal in a systematic way. Even after the famous 2008 Lafarge Environmental Review Tribunal (ERT) and Divisional Court decisions, more recently confirmed by the Ontario Court of Appeal, affirmed the need to apply a ministry’s Statements of Environmental Values in routine environmental decision-making, the Ontario Minister of the Environment still exercised his sole discretionary power to reject well founded requests for an Individual Environmental Assessment on a hydro-electric proposal which had no provision for fish passage. This ministerial decision came forward even though American eel, a species which needs to migrate back to the sea to spawn and now is listed as endangered in Ontario under the Ontario Endangered Species Act 2007, was reaching extirpation levels in the watershed where the proposal was made. Furthermore, despite the fanfare for the Endangered Species Act in Ontario, an exception regulation, O. Reg. 242/08, was enacted under pressure from industry lobbies that wish to avoid their responsibilities under the Act. The end result is a lack of protection for the fish

species from the legislation that promises such protection and was designed to provide that protection.

Protections are no better at the federal level. Here also, the migratory American eel, highly significant in historic Aboriginal life patterns of eastern Canada, is a lens through which clauses in Canada's *Fisheries Act* are coming under intense scrutiny. That scrutiny started to build in 2004 when the commercial fishery for eels closed on only the Ontario side of the Ottawa River watershed, as the long Aboriginal history with eels in the Ottawa River Watershed as far north as Temiskaming District became more widely known, and as it became apparent that Fisheries and Oceans Canada (FOC) was continuing to drag its feet in addressing the federal Environment Commissioner's 2001 criticism of FOC's weak protection strategy for American eel. Eight years later, FOC continues to grapple with implementing protections for fish under the *Fisheries Act*. On February 17, 2009 Minister of Fisheries and Oceans, Gail Shea, responded to several questions which I had posed to her last December. She noted that the questions which I raised are complex and will require some time to prepare.

In short, TRAN should be under no illusion that the trigger mechanisms and protections which it assumes are in place in environmental assessments and fisheries habitat assessments actually are in place. Such is not the case.

5. The perceived need for changes to NRPA appears to have been eroded completely by the federal government announcement that later in 2009 it plans to present a bill to reform the *Canadian Environmental Assessment Act*. TRAN has not shown that it has consulted with a wide range of environmental groups about this change since it started examining possible changes to NRPA.

6. Although carefully considered infrastructure projects need to be implemented to stimulate short term economy gains in Canada, this need should not carelessly remove safeguards that protect Canada's environment and that help to protect fish habitats required to meet government biodiversity and species at risk commitments. TRAN has not shown that facilitation of short term economic projects is in the best long term overall interests of Canadians.

7. Clearly, navigation is entirely under federal jurisdiction and federal jurisdiction alone. Except for NWPA there are no laws or regulations in place to protect the public right of navigation in

Canada. The provinces have no jurisdiction over navigation and no ability to protect navigable waters. It is inaccurate for TRAN to project partnerships with provinces as a means to address Canadians' navigation rights.

Given the seven points raised I request that TRAN recommend to the House of Commons that proposed amendments to the Navigable Waters Protection Act (NWPA) be withdrawn from C-10, the Budget Implementation Act (BIA) currently before the House.

Thank you for considering this request.

William A. (Bill) Allen