Honourable Marc Garneau  
Minister of Transport  
330 Sparks Street  
Ottawa, Ontario  
K1A 0N5  

January 15, 2019  

Dear Minister Garneau:  

The Canadian Energy Pipeline Association (CEPA) would like to thank Transport Canada for the opportunity to comment on the first two discussion papers regarding the proposed implementation of the Canadian Navigable Waters Act (the Act). CEPA members collectively operate 119,000 kilometres of transmission pipeline in Canada. These energy highways transport approximately 1.2 million barrels of liquid petroleum products and 5.4 trillion cubic feet of natural gas each year. CEPA believes that legislation and subsequent regulations should provide more certainty and clearly define criteria. The proposed implementation of the Act, however, has the potential to add uncertainty and a lack of transparency compared to the current regulations. In addition, CEPA is concerned about how these regulations will fit with Bill C-69 and how a coherent regulatory framework can be achieved. Specifically, the Act contemplates allowing anyone to apply to add waterways to the Schedule at any time. This would be highly prejudicial to project proponents as it would allow for the Schedule to be continually changing and would make it extremely difficult to plan for and execute projects.  

Accordingly, we urge Transport Canada to further define criteria required for a navigable water to be included in the Schedule and ensure definitions and timelines are clear to avoid ambiguity and prevent delay. This criterion should take into consideration that pipelines do not typically interfere with navigation. This applies to all methods of pipeline construction and maintenance. Therefore, CEPA and its members request that certainty be built into the Act/regulations to ensure pipeline related projects will remain largely outside of the major works application and review process.  

In addition to the above, you will find CEPA’s detailed comments to questions raised in the two discussion papers released as well as CEPA’s previous submission regarding the proposed changes in the attached. CEPA looks forward to continuing our participation in future consultations on the proposed Canadian Navigable Waters Act. Please do not hesitate to contact the undersigned if you have any questions or require clarification regarding any of the comments made above.  

Yours sincerely,  

Jim Campbell  
Vice President, Business Environment
### CEPA Position: Implementation of the Proposed Canadian Navigable Waters Act

#### Proposed Approach - Step 1: Determining Navigability

A waterway would need to meet the definition of "navigable water" under the proposed Act in order for us to consider including it in the Schedule.

The definition in the proposed Act has 2 elements: a) use, and b) accessibility.

- **Use for transport or travel:** If the body of water is used or has a reasonable likelihood to be used by vessels for transport or travel, it’s useable. This includes commercial use, recreational use, or use by Indigenous peoples to exercise their rights.
- **Accessibility:** The body of water is considered to be accessible if:
  - o the public can access it by land or by water
  - o it has two or more riparian (waterfront) owners, or
  - o it is owned solely by the Crown

If the waterway is both usable and accessible, it meets the definition of a navigable water and may be eligible to be included in the Schedule.

#### Proposed Approach - Step 2: Analyze the navigable water using key factors

- **If the waterway is navigable, an applicant would be able to go ahead with their application.**
- The proposed Act lists 7 factors Transport Canada would consider when deciding whether to add a navigable water to the Schedule:
  1. Is the navigable water on a nautical chart issued officially by or on the authority of the Canadian Hydrographic Service?
  2. What are its physical characteristics?
  3. Does it connect to other navigable waters (and if so, how)?
  4. Is it safe to navigate there?
  5. What is the past, current or anticipated navigation through the waterway?
  6. Are there Indigenous peoples of Canada who navigate, have navigated or will likely navigate this waterway in order to exercise their rights recognized and affirmed by section 35 of the Constitution Act, 1982?
  7. What is the overall cumulative impact of works on navigation in the waterway?

- **Transport Canada must provide clear and unambiguous criteria and definitions in order to provide certainty and transparency for all parties.**
- **Similar to the above, how will the 7 factors be evaluated and according to what criteria?** For example:
  - o What physical characteristics would be important in determining whether a waterway should be added to the Schedule?
  - o How would it be determined whether it is "safe to navigate there"?
  - o How would the past, current, and anticipated navigation through a waterway be determined?
- **How would it be determined whether there are Indigenous peoples who navigate, have navigated or will likely navigate the waterway to exercise their rights?** Time of navigation (current vs. long-past historic use) and frequency should be considered, as well as collective use, as section 35 rights are held by the collective, not by individuals.
- The physical characteristics of a waterway should be determined in Step 1 rather than included in the Schedule.
## Process for adding navigable waters to the Schedule - 1. Submission of applications

Following this first application process, we will continue to accept and review applications on an ongoing basis. Eligible navigable waters will continue to be added to the Schedule periodically, depending on the volume of navigable waters to be added.

If you want to request the addition of a navigable water to the Schedule, we encourage you to begin gathering the following information:

- a description of how the waterway is accessible to the public
- confirmation of whether there are two or more waterfront owners
- if there is a single waterfront owner, confirmation of whether the owner is the Crown or a province
- confirmation of whether the waterway is on a nautical chart
- the waterway's:
  - average depth and width
  - size of basin
  - length
- description of any natural obstructions (for example, falls, rapids, beaver dams, a steep drop, vegetation, etc.) that could impact navigation
- list of any navigable waters the waterway is connected to, and a description of its physical characteristics
- number of days in a year it can be used for navigation
- list of works on the waterway (for example, bridges, booms, dams, causeways, terminal facilities, break walls, infills, artificial islands, marinas, aerial cables, etc.) and a description of their cumulative impact on navigation

Information about navigation safety concerns, including accidents or incidents that happened there

Description of past, present and future use by Indigenous peoples to exercise their rights (for example, to fish, hunt, trap, harvest or use the waters for cultural reasons).

## Process for adding navigable waters to the Schedule - 2. Assessment of applications

During this stage, we would assess applications and publish a list of navigable waters we find to be eligible. This list would be online for public comment for 30 days.

## Process for adding navigable waters to the Schedule - 3. Additions of navigable waters to the Schedule

Applications for waterways that meet the definition of a navigable water and other criteria, would be added to the Schedule. This would happen through a Ministerial Order that amends the Schedule.

- CEPA strongly supports the continued use of a Schedule, as this would provide a high level of clarity. However, as currently worded, subsection 29(2) of the proposed Act contemplates that anyone can apply to add waterways to the Schedule at any time. It would be highly prejudicial to project proponents for the Schedule to be continually changing, as it would make it very difficult to plan for and execute projects. All stages in the process need to be defined by clear deadlines.
- To provide certainty, predictability and transparency for all parties, the Schedule should remain static, subject to periodic reviews on the recommendation of the Minister, the length of which should be included in the Act (e.g. five years). Rather than anyone being able to submit a request anytime, it would be better to include an opportunity for public comment at the time of the periodic review. CEPA would expect that preparation of the initial Schedule could take up to one year, to allow sufficient time for public consultation.
- Subsection 29(3) should be amended such that the Minister’s order amending the Schedule would not apply retroactively to projects for which regulatory applications have already been submitted.
- The criteria used to develop the Schedule, and to periodically update it, should, to the extent possible, be based on scientific evidence to make the review/decision process as objective as possible.
- The intermittent addition/revision of scheduled waterways does not work for industries such as pipelines as the application preparation and review process for a major project could take several years (pending the outcome of Bill C-69). If the Schedule of waterways is allowed to change at random intervals, project developers run the risk of added uncertainty in their project proposals. This would further compound the uncertainty of investment in resource development across Canada.

- In addition to the list of navigable waters found to be eligible, initial application materials for adding navigable waters to the Schedule should also be made available for public review and comment, for a period of 30-days.

- As noted above, the Schedule should remain static, subject to periodic reviews. However, should subsection 29(3) of the Act remain, it should be amended such that the Minister’s order amending the Schedule would not apply retroactively to projects for which regulatory applications have already been submitted.
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| Tailored Process for Indigenous applications | In order to support Indigenous groups who want to request the addition of navigable waters to the Schedule, we’re proposing a tailored process. This process would aim to address barriers to participation, such as financial constraints and technical and administrative capacity. The tailored process for Indigenous peoples could include the following elements:  
  - Providing funding and dedicated Transport Canada staff to support Indigenous groups who want to add navigable waters to the Schedule.  
  - Providing funding to establish an Indigenous resource person(s) to support Indigenous groups who want to add navigable waters to the Schedule.  
  - Providing additional opportunities for information sharing between Transport Canada and Indigenous groups who want to add navigable waters to the Schedule (for example, during the assessment and decision phases of the process).  
  Depending on the feedback we get, we may adjust this tailored process. | - CEPA is generally supportive of a tailored process for Indigenous applications, provided that the information requirements are similar to non-Indigenous applications. Proponents should not be responsible for providing funding for this process.  
- In response to a tailored process for Indigenous groups, CEPA requests that the information shared between Indigenous groups and Transport Canada also be available to the public for comment/response. |
| Major Works Order | Proposed approach  
The Major Works Order would ensure that works that substantially interfere with navigation require an approval, even if they are located on a navigable water that is not listed in the Schedule of the Act. Any work listed in the Major Works Order would go through the same review process we use to assess proposed works on navigable waters listed in the Schedule. If an owner wanted to construct, place, alter, rebuild, remove or decommission a major work, they would need to:  
  - publish a public notice  
  - put information about the project in a new public registry  
  - apply to Transport Canada for approval  
To address any concerns about navigation, approval would be subject to terms and conditions set by Transport Canada. | - Pipelines should not be included in the Major Works Order as they do not substantially interfere with navigation. This applies to all methods of pipeline construction, operation and maintenance. The pipeline industry requires certainty that pipeline related projects will remain outside of the Major Works application and review process except in those circumstances where navigation to a waterway will be permanently impacted (e.g. aerial crossings).  
- Pipelines installed under frozen conditions or pipelines installed without surface disturbance (e.g. horizontal directional drills or boring) create no impacts to navigation and should continue to be considered as minor works. Temporary works such as bridge and water isolation/control installation and removal during pipeline construction should also continue to be considered as minor works. These installations have well-established mitigation measures to address any temporary navigational concerns.  
- Temporal factors should be considered in the definition and determination of Major Works as certain projects may have temporary navigation impacts.  
- CEPA supports maintaining the self-assessment process for determining whether an activity qualifies as a Major Work.  
- Knowing what will be considered a Minor Work is just as important as knowing what will be considered a Major Work. It would be prudent to be able to review the two in conjunction to provide meaningful feedback.  
- The Minor Works Order streamlined the review process and drastically improved the review timelines for projects that had little to no impact to the navigability of the waterway. Currently, most pipeline construction falls under the Minor Works Order. Ideally, Minor Works would continue to include pipeline crossings, erosion protection, winter crossings and water intakes.  
- Additional clarity is needed on the items proposed as Major Works:  
  o Ferry cables  
    - The pipeline industry uses tracing cables for horizontal directional drills. These are temporary installations and should not be considered a Major Work.  
  o Bridges  
    - What does "block" navigation mean? Is this based on vessel size or temporal duration of the activity?  
    - Would there be exceptions for temporary bridges? Temporary |
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|       | bridges installed during pipeline construction should fall under a Minor Works Order. | ▪ CEPA suggests that there needs to be a defined time range that would qualify a bridge as temporary.  
▪ Is there a requirement for temporary bridges to have a freeboard clearance to account for navigation of a waterway?  
▪ Confirmation is needed that this would not apply to temporary bridges installed when a waterway is frozen or dry and is therefore non-navigable.  
  ▪ Dams or water control structures  
    ▪ Installation of temporary pipeline isolation or water control features should not be considered Major Works.  
▪ CEPA would prefer to see parallel processing of all navigable waters applications during the regulatory review process. Sequential application processing (post-approval) leads to inevitable construction delays.  
▪ If a Major Works Order is required for all major work activities on scheduled or unscheduled navigable waters, there would be no purpose of having a Schedule of waterways. To provide greater transparency and regulatory clarity, the Act must limit the requirement for a Major Works Order to those waterways identified in the Schedule. |