



FACT SHEET #5:

DETERMINING NAVIGABILITY

October 2016

The *Navigable Waters Protection Act* (NWPA) was amended in 2009, and again in 2012, when it was renamed the *Navigation Protection Act* (NPA). In addition to these legislative amendments, Transport Canada updated the process to decide if a waterway is navigable, to better align with court decisions.

What are “navigable waters”?

Navigable waters are water bodies determined to be navigable under common law. In addition to what the courts have determined to be navigable through a number of cases, the NPA provides a partial definition, “*navigable waters*” include, “*a canal and any other body of water created or altered as a result of the construction of any work.*”

In the absence of a formal definition of navigable waters under the legislation, Transport Canada applies a “navigability test” that includes a threshold, consistent with case law, for when a waterway is considered navigable and subject to the Act.

When is navigability assessed?

All waters listed on the Schedule are considered navigable. This means there is no need to make a determination when an owner makes a request for an authorization on a Scheduled water.

Navigability assessments are needed when the Minister of Transport considers:

- an opt-in application under section 4 of the NPA, which allows owners to request that the Act apply to their work;

- whether the throwing, depositing, and dewatering prohibitions under sections 21 to 23 of the NPA apply; and
- adding a waterway to the Schedule, as per section 29 of the NPA.

How is navigability assessed?

Drawing on recent court decisions, Transport Canada has developed a **Navigability Assessment Framework** to consistently assess whether a waterway is navigable. The framework includes criteria it must consider in each assessment. These criteria are summarized below:

- 1) *Navigable in fact*: Do the physical characteristics of the waterway support carrying a vessel of any size from one point to another?
- 2) *Use by the public for navigation*: Is the public currently using the waterway as an aqueous highway?
- 3) *Historical use*: Did the public historically use the waterway as an aqueous highway?
- 4) *Reasonable appeal for public use*: Is there a reasonable likelihood that the public will use the waterway as an aqueous highway?

Key difference in the definition of navigable waters, between the NPA and the NWPA

With the coming into force of the amended legislation, the new Navigability Assessment Framework (see above) was consistently applied to all navigation assessments.

Question

- ◆ Which navigable waters do you believe the *Navigation Protection Act* should apply to, and why?