

DISCUSSION PAPER
The *International Boundary Waters Treaty Act*
and the *Canadian Environmental Assessment Act*

Introduction

Foreign Affairs and International Trade Canada (DFAIT) and the Canadian Environmental Assessment Agency (the Agency), are proposing to add the *International Boundary Waters Treaty Act* (IBWTA) to the Law List Regulations and Inclusion List Regulations of the *Canadian Environmental Assessment Act* (CEAA).

The IBWTA is Canada's implementing legislation for the 1909 *Canada-United States Boundary Waters Treaty* (*Boundary Waters Treaty*). An *Act to Amend the International Boundary Waters Treaty Act* and related regulations came into force on December 9, 2002 and serve to implement more effectively the *Boundary Waters Treaty*. The key amendment to the IBWTA resulted in the requirement for a licence from the Minister of Foreign Affairs (the Minister) for any activity in Canada involving boundary or transboundary waters that would have the effect of altering the natural level or flow of waters on the United States side of the border. It is proposed that the need to issue a license under the IBWTA, trigger the need to perform an environmental assessment, as committed to in the Regulatory Impact Analysis Statement associated with *Act to Amend the International Boundary Waters Treaty Act* and related regulations. Effectively, DFAIT would be responsible for ensuring that an environmental assessment is conducted before issuing a permit.

This discussion paper provides the background and context for this initiative.

Canada-United States Boundary Waters Treaty

The *Canada-United States Boundary Waters Treaty* (*Boundary Waters Treaty*) established the principles and mechanisms to prevent and resolve disputes, primarily those pertaining to water quantity and quality along the Canada-United States boundary. Through the *Boundary Waters Treaty*, Canada and the United States are mutually obliged to protect natural levels and flows of waters shared between the two countries. These relevant obligations are contained in Article III and IV of the *Boundary Waters Treaty*. Article III requires the two countries to prevent uses, obstructions or diversions that affect the natural level or flow of boundary waters, unless approved by special agreement between the US and Canada or approved by the International Joint Commission that was established under the *Boundary Waters Treaty*. Article IV addresses waters flowing from boundary waters and transboundary rivers flowing across the border and requires Canada and the United States not to allow the construction or maintenance on their respective side of the border of any remedial or protective works, dams or other obstructions, which would raise the natural water levels on the other side.

The *Boundary Waters Treaty* defines boundary water as:

“waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portions thereof, along which the international boundary between the United States and the Dominion of Canada passes, including all bays, arms, and inlets thereof, but not including tributary waters which in their natural channels would flow into such lakes, rivers, and waterways, or waters flowing from such lakes, rivers, and waterways, or the waters of rivers flowing across the boundary.”

A river that forms or runs along the boundary (as opposed to crossing it) is a boundary water. For example, boundary waters include Lake of the Woods, the Great Lakes, the section of the St. Lawrence River from the outlet of Lake Ontario to Cornwall, Ontario-Massena, New York, the Upper St. John River (Quebec/New Brunswick) and the St. Croix River (New Brunswick).

The *Boundary Waters Treaty* defines transboundary waters as "rivers flowing across the boundary." For example, transboundary waters include, depending on the issue under the provisions of the *Boundary Waters Treaty*, the Red River, Milk River (Alberta), Souris River, Richelieu River, and Saint John River.

IBWTA

The relevant amendments to the IBWTA introduced a licencing system which confirms the authority of the Minister to approve or reject projects in Canada that could have an impact on the natural level or flow of boundary waters or transboundary waters on the other side of the border. Prior to the amendments, the Government of Canada assessed potential projects against Canada's obligations under the *Boundary Waters Treaty*. The intent of the amended IBWTA and regulation is to improve on the approval system by making it more transparent and structured.

Separately, the requirements of the *Boundary Waters Treaty* must be satisfied either through a special agreement between Canada and the United States or an approval from the International Joint Commission. For further information on the requirements of the *Boundary Waters Treaty*, please see the appended “Boundary Waters Treaty”.

The relevant licencing provisions are contained in sections 11 and 12 of the IBWTA.

(a) Section 11: Boundary Water Licence

Section 11 requires that persons carrying out water-related projects in boundary waters obtain a licence when the projects are likely to affect, permanently or temporarily, in any way the natural level or flow of boundary waters in the United States. Licences are not required for ordinary domestic and sanitary purposes, such as home water consumption and water treatment and sewage projects, as outlined in subsection 11(2). This provision more effectively implements Article III of the *Boundary Waters Treaty* and uses similar wording contained in that Article.

Specifically, subsection 11(1) states:

“Except in accordance with a licence, no person shall use, obstruct or divert boundary waters, either temporarily or permanently, in a manner that affects, or is likely to affect, in any way the natural level or flow of the boundary waters on the other side of the international boundary.”

Projects that could be captured under section 11 include the construction, modification or operation of international bridges and dams that cross boundary waters, and remedial, maintenance and protective works within the Canadian side of a boundary water (e.g., shoreline stabilization, dredging) if the project has an impact, either temporarily or permanently on the natural level or flow of boundary waters on the United States side of the border. For example, cofferdams used in the construction of bridges could result in a temporary impact on natural water levels or flows and therefore would trigger the licencing requirements under section 11.

(b) Section 12: Transboundary and Water from Boundary Waters Licence

Section 12 requires that persons setting up any obstruction project, including remedial and protective works and dams, in: Canadian waters flowing from boundary waters: or, in rivers flowing into Canada (transboundary waters) that are likely to raise in any way, either temporarily or permanently, the natural water levels in the United States must obtain a licence. The purpose of this provision is to more effectively implement the first paragraph of Article IV under the *Boundary Waters Treaty* and the section utilizes language taken from that paragraph to ensure consistency with the *Boundary Waters Treaty* obligations. Subsection 12(2) allows for exceptions to the licencing requirement specified in the regulations; no exceptions have been specified to date.

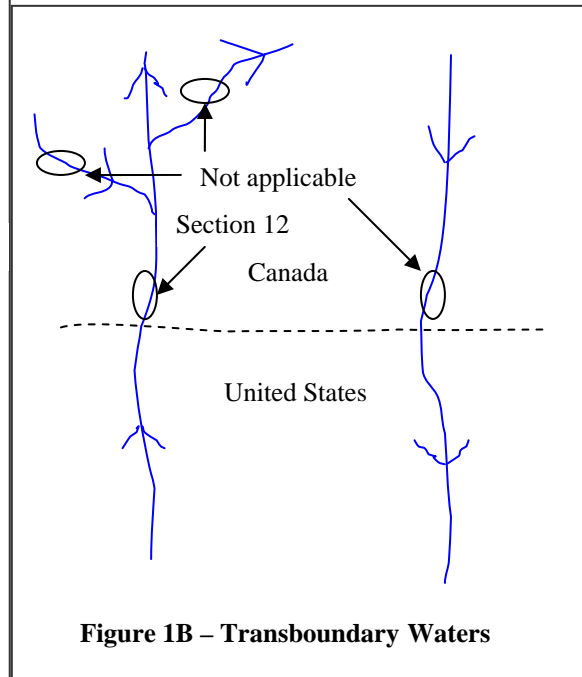
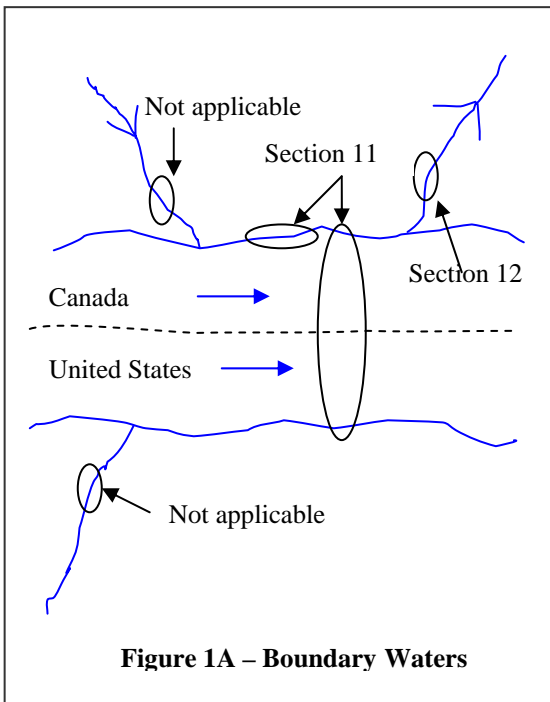
Subsection 12(1) specifically states:

“Except in accordance with a licence, no person shall construct or maintain, either temporarily or permanently, any remedial or protective work or any dam or other obstruction in waters flowing from boundary waters, or in downstream waters of rivers flowing across the international boundary, the effect of which is or is likely to raise in any way the natural level of waters on the other side of the international boundary.”

Projects that could be captured under subsection 12(1) could include dams or dykes constructed in Canada, on transboundary waters that are flowing into Canada or on Canadian waters flowing from boundary waters that would have the effect of raising, either temporarily or permanently, the natural level of water in the United States.

The need for a licence will be commensurate with the nature of the proposed project and proposed setting. For example, for certain boundary and transboundary waters (e.g., smaller boundary rivers such as the Detroit River), levels and flows can be sensitive to relatively minor projects (e.g., shoreline alteration), whereas other boundary and transboundary waters (i.e., Great Lakes) are not affected.

In order to better illustrate the applicability of sections 11 and 12 of the IBWTA, Figures 1A and 1B outline the different settings in which a licence may be required, as well as settings in which a licence would not be required.



Licensing Process Overview

In order to determine whether a license is needed from the Minister, proponents of water-related projects in Canada are required to apply for a license to the Minister. Applications must contain, among other information requirements outlined in section 3 of the IBWTA, a “concise environmental analysis”. Currently, DFAIT relies on the technical expertise of Environment Canada in initially determining whether the proposed project will affect natural levels and flows in the United States. The International Joint Commission and the State Department, which is responsible for the Boundary Waters Treaty in the United States, are advised of the determination that a project will require a license from the Minister. For further information on determining the need for a license under the IBWTA, please refer to the appended “IBWTA License Determination Flowchart”.

IBWTA and the CEAA

The Regulatory Impact Analysis Statement (RIAS) which accompanied the regulatory changes to the IBWTA specifies that if a license is required under section 11 or 12 of the IBWTA, an environmental assessment pursuant to the CEAA will be required, before such a license can be issued by the Minister. In order to fulfill the RIAS requirement pertaining to environmental assessment obligations pursuant to the CEAA, FAC is seeking to add the IBWTA to the Law List Regulations and Inclusion List Regulations of the CEAA. The addition of the IBWTA to these CEAA Regulations will also ensure that environmental effects of projects are carefully considered, do not cause significant adverse environmental effects in the United States or Canada, and capture projects with potential environmental effects that otherwise may not be assessed through other regulatory triggers (i.e., *Fisheries Act*, *Navigable Waters Protection Act*). DFAIT, however, anticipates that projects requiring licenses under the IBWTA from the Minister will often involve other federal authorities with environmental assessment responsibilities (i.e., Fisheries and Oceans Canada, Transport Canada). In these projects, FAC will work with other federal authorities in a coordinated fashion to ensure that an effective and efficient environmental assessment process is completed.

The likely section of the IBWTA that will be added to the Law List Regulations will be Section 16: “Subject to the regulations, the Minister may, on application, issue, renew or amend a licence to do any activity referred to in subsection 11(1) or 12(1), subject to any terms or conditions the Minister considers appropriate.” Since physical activities not related to physical works (e.g., dredging) could affect levels and flows, wording will also be added to the Inclusion List Regulations, referencing physical activities requiring a licence under the IBWTA.

Next Steps on the CEAA Law List Regulations

The results of these consultations will inform the subsequent drafting of regulatory amendments and the associated Regulatory Impact Analysis Statement (RIAS). Following publication of the regulatory amendments in the Canada Gazette Part 1, comments will be analysed, the RIAS updated, and the regulatory amendments submitted for final approval.

APPENDIX 1 - BOUNDARY WATERS TREATY

In addition to the requirements under the *International Boundary Waters Treaty Act*, the Governments of Canada and the United States must satisfy the obligations under the *Boundary Waters Treaty*. The *Boundary Waters Treaty*, signed in 1909, provides the principles and mechanisms to help prevent and resolve disputes, primarily those concerning water quality and quantity along the boundary between Canada and the United States.

The *Boundary Waters Treaty* also established the International Joint Commission (IJC) as a binational organization to assist Canada and the United States in preventing and resolving disputes. In particular, the IJC issues Orders of Approval in response to Applications for the use, obstruction or diversion of waters that flow along, and in certain cases across, the boundary when such uses affect the natural water levels or flows on the other side of the international boundary.

The *Boundary Waters Treaty* Articles III and IV (1) provide the basis for the IJC's project approval functions. Article III applies to boundary waters, whereas Article IV applies to transboundary waters and to waters flowing from boundary waters.

Article III provides that Canada and the United States will not allow any new uses, obstructions or diversions, either temporary or permanent, of boundary waters in either country that affect the natural level or flow of boundary waters in the other without the authority of the country where the use, obstruction or diversion takes place and without the approval of the IJC or a special agreement between the Governments of Canada and the United States. Article III does not apply to the ordinary use of boundary waters for domestic and sanitary purposes. Approval of a project under Article III, either by Order of the IJC or special agreement between Canada and the United States, is in addition to the licence requirements under section 11(1) of the *International Boundary Waters Treaty Act*.

Article IV (1), provides that unless there is a special agreement between the two governments or an IJC order neither Canada nor the United States will allow the construction or maintenance in their respective countries of any remedial or protective works or any dams or other obstructions in:

- (a) rivers that flow from boundary waters; or,
- (b) rivers that flow across the boundary (transboundary waters),

if the works, dams or obstructions will raise the natural level in the upstream country.

Approval of a project under Article IV (1), either by the IJC or by special agreement between Canada and the United States, is in addition to the licence requirements under section 12(1) of the *International Boundary Waters Treaty Act*.

Article VIII establishes rules or principles which govern the IJC in deciding on applications involving the use, obstruction or diversion of waters pursuant to the IJC's approval responsibilities under Articles III and IV. These rules and principles include the provisions that:

- (a) The IJC in its discretion may make its approval conditional upon the construction of remedial protective works to compensate for the use or diversion, and the IJC may require suitable and adequate provision be made for the protection and indemnity against injury of any interests on either side of the boundary;
- (b) The IJC in cases under Article IV that involve the elevation of the natural levels of waters on the other side of the boundary shall require, as a condition of its approval, that suitable and adequate provision be made for the “protection and indemnity of all interests on the other side of the line which may be injured thereby.”

Appendix 2 - Is a licence required under the *International Boundary Waters Treaty Act*?

