

Strengthening Marine Environmental Protection and Response Potential Legislative Amendments

Discussion Paper

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1.0 PURPOSE

The Government of Canada's **Oceans Protection Plan**¹ aims to build a world-leading marine safety system that will protect the marine environment and coastal communities from the potential impacts of shipping and navigation. As part of the **Oceans Protection Plan**, the Government of Canada is considering changes to key pieces of legislation to strengthen marine safety and environmental protection.

The purpose of this discussion paper is to seek comments from the public, Indigenous communities and groups, industry, and stakeholders on the direction of the potential legislative changes.

Comments received on this document will inform future government discussions and decisions. The contents of this paper, and any comments received are for discussion purposes only and are not binding on the Government of Canada or on any other party.

2.0 BACKGROUND

Canada has the longest coastline in the world. Our coasts enable the export of our goods overseas and the import of foreign goods into Canada. They are home to Canadian fisheries, attract tourism, support coastal communities' livelihoods and Indigenous communities' cultures and ways of life, and play a key role in growing the Canadian economy.

Thousands of tonnes of goods, including agricultural and grain products, natural resources, and consumer products, are transported daily along all of Canada's coasts, as well as in the Great Lakes and the St. Lawrence Seaway. In 2017, ports and marine shipping handled \$101 billion (19%) of Canada's exports to world markets and \$116 billion (21%) of Canada's total imports by value. Petroleum products represented the largest marine export and import commodity travelling through Canadian ports and on Canadian waters; 24% of our marine exports and 17.8% of our marine imports by value were petroleum products. Marine trade employs approximately 250,000 Canadians and injects more than \$25 billion to Canada's economy.

To ensure safe and environmentally responsible shipping, the Oceans Protection Plan will strengthen Canada's already well-established marine safety system, which is designed to protect life, health, property and the marine environment. The marine safety system is designed to prevent incidents from happening. This is achieved through a number of regulations and standards governing the construction and operation of vessels, on-board equipment and systems, crew and passengers, cargo handling and shipping, and navigation within Canadian waters.

Under Canadian law ship owners and the marine transportation industry are responsible for preventing oil spills. For example, the marine transportation industry must put in place procedures for safe operations onboard their ships, follow international rules for preventing collisions at sea, have up-to-date nautical charts, have a passage plan for each trip, be equipped with technology that allows Canada to monitor the ship's progress, and ensure that their officers and crews are properly trained, qualified, and competent.

¹ For more information about the Oceans Protection Plan, visit: <https://www.tc.gc.ca/eng/oceans-protection-plan.html> and <http://www.tc.gc.ca/eng/improving-marine-safety-through-the-oceans-protection-plan.html>

A key component of Canada's marine safety system is the Marine Oil Spill Preparedness and Response Regime², which aims to protect marine environments and communities from the risk and impacts of oil spills from ships and oil handling facilities that transfer oil to or from ships. This Regime has three components:

- **Prevention:** avoiding accidents and incidents;
- **Preparedness and response:** being ready and able to quickly and effectively respond to a pollution incident; and
- **Liability and compensation:** based on the polluter pays principle.³

Responsibilities within the Marine Oil Spill Preparedness and Response Regime are shared between the shipping industry and the Government of Canada, with several federal departments playing key roles:

- Ship-owners and operators of oil handling facilities are responsible for preparedness and response to oil spills. As well, regulated vessels and oil handling facilities located south of 60°N must have an arrangement with a Transport Canada-certified Response Organization that would respond to a spill on their behalf. These Response Organizations maintain strategically located response equipment, trained responders and response plans, and conduct exercises on a regular basis;
- Transport Canada is responsible for ensuring alignment of the Marine Oil Spill Preparedness and Response Regime with international standards, policy-making, regulatory development, and enforcement;
- The Canadian Coast Guard is responsible for ensuring that responses to ship-source pollution incidents are effective, efficient and appropriate. The Canadian Coast Guard is also responsible for ensuring an appropriate response to ship-source and mystery-source spills in Canadian waters and within Canada's exclusive economic zone (up to 200 nautical miles). As well, the Canadian Coast Guard is responsible for maintaining oil spill response capacity in the Arctic;
- Environment and Climate Change Canada and Fisheries and Oceans Canada provide scientific expertise to support response decision-making.

Canada's Marine Oil Spill Preparedness and Response Regime is built on:

- Shared responsibility between government and industry;
- International and domestic cooperation;
- Comprehensive and effective legislation and regulations;
- The polluter pays principle.

The number and volume of ship-source oil spills in Canadian waters have been declining consistently since the 1980s due to improvements in vessel design, technology, shipping practices, and the establishment of Canada's Marine Oil Spill Preparedness and Response Regime in 1995. However, vessel traffic and cargo

² For more information about the Marine Oil Spill Preparedness and Response Regime visit:

<http://www.tc.gc.ca/eng/marinesafety/oep-ers-regime-menu-1780.htm>

³ For more information about liabilities and compensation related to oil spills from ships visit:

<https://www.tc.gc.ca/eng/marinesafety/liability-compensation-ship-source-oil-spills-4512.html>

volumes have grown, and are expected to continue to grow over the next few years on all of Canada's coasts as overseas trade and the movement of goods and cargo continues to increase. With increases in vessel traffic and cargo volumes, there may be increased risk of marine safety accidents and pollution incidents.

In addition, as vessel traffic continues to increase on Canada's coasts, the impact of shipping and navigation on the marine environment may increase, too. A number of impacts stemming from the operation of vessels and vessel equipment in Canada's waters during the course of everyday shipping and navigation has the potential to adversely affect marine life and degrade marine habitats, including vessel collisions, vessel-generated underwater noise, vessel wake, and emissions.

The **Oceans Protection Plan's** goal is to protect Canada's coasts in a modern and advanced way that ensures environmental sustainability and promotes safe, responsible shipping. As part of implementing the **Oceans Protection Plan**, the Government is considering changes to key pieces of legislation, including the *Canada Shipping Act, 2001* and the *Marine Liability Act*, to:

- enhance marine ecosystem protection;
- strengthen environmental response;
- modernize Canada's Ship-Source Oil Pollution Fund; and
- support research and innovation.

3.0 ENHANCE MARINE ECOSYSTEM PROTECTION

3.1 *Enable Increased Regulatory Safeguards to Better Protect Marine Ecosystems*

Vessels of all sizes can have impacts on the environment beyond spills, such as vessel strikes on marine mammals, shoreline erosion, vessel wake, underwater noise, and emissions. For example, vessel-generated underwater noise can disrupt the ability of whales to find prey, feed, communicate, and find mates, as was shown through studies on the Southern Resident Killer Whale population in British Columbia's Salish Sea⁴. Vessel strikes, often associated with higher vessel speed, were a factor in some of the 12 reported deaths of North Atlantic Right Whales in the Gulf of St. Lawrence in 2017. Slowing down vessels reduces vessel-generated underwater noise and reduces the risk of vessel-whale collisions.⁵

Under the *Canada Shipping Act, 2001*, Transport Canada can regulate shipping, navigation, and vessel operations to protect marine environments. However, Transport Canada's authorities to do so are focused on pollution prevention and response, and are limited in their ability to prevent or mitigate other environmental impacts of shipping and navigation such as negative impacts on marine life. Therefore, the Government is considering strengthening the Minister of Transport's authorities to put in place regulatory safeguards to better protect marine ecosystems from the potential impacts of shipping and navigation.

Seeking Your Views:

From your perspective,

- **If the government were to regulate shipping and navigation to mitigate broader environmental risks, what would you consider to be the top priorities for regulation and why?**
 - **What are the potential impacts and implications if the government puts in place regulations to better protect marine ecosystems?**
 - **What non-regulatory approaches could be taken to better protect marine ecosystems?**
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⁴ Fisheries and Oceans Canada, Recovery Strategy for the Northern and Southern Resident Killer Whales (*Orcinus orca*) in Canada," *Species at Risk Act Recovery Strategy Series*, Fisheries and Oceans Canada, Ottawa, 2011, 27, http://www.sararegistry.gc.ca/virtual_sara/files/plans/rs_epaulard_killer_whale_v02_1011_eng.pdf

⁵ Statement by Ministers LeBlanc and Garneau on report released on this summer's North Atlantic Right Whale deaths https://www.canada.ca/en/fisheries-oceans/news/2017/10/statement_by_ministersleblancandgarneauonreportreleasedonthissum.html

3.2 *Enable Rapid Intervention by Transport Canada to Address Marine Safety and Environmental Risks*

At times, situations arise that may pose immediate marine safety or environmental risks, and which require the federal government to take quick action to protect marine environments, or reduce marine safety risks. Examples include the need to impose vessel slowdowns in the Gulf of St. Lawrence to address vessel strikes on North Atlantic right whales, or impose vessel slowdowns in the Salish Sea to address the impacts of vessel-generated underwater noise on the Southern Resident Killer Whales. Although the federal government currently has a mix of binding and voluntary measures it can put in place to address urgent marine safety and environmental risks, it needs to improve its authority to respond quickly to urgent situations.

To strengthen its authority to act quickly, the Government is considering giving the Minister of Transport the authority to issue time-limited orders to mitigate risks to marine safety and/or the marine environment. These orders would provide immediate short-term protection and provide the Government the time needed to determine the appropriate longer-term solution.

Seeking Your Views:

From your perspective, what are the potential impacts and implications if the government proceeds with this potential amendment?

3.3 *Enhance Deterrence and Enforcement*

It is far more effective to prevent marine safety accidents and pollution incidents, than to manage their effects. To promote safe and environmentally responsible practices, the Government can impose administrative monetary penalties on those who do not comply with shipping regulations and standards as established by the *Canada Shipping Act, 2001*. However, the maximum amount of these penalties is relatively low (\$25,000), and has not been updated in over a decade. This small penalty is no longer an effective deterrent to bring repeat offenders into compliance.

To enhance compliance and encourage safe and environmentally responsible shipping, the Government of Canada is considering increasing the maximum potential administrative monetary penalty for infractions against marine safety and environmental requirements. The current graduated enforcement approach for administrative monetary penalties would be maintained.

Seeking Your Views:

From your perspective, what are the potential implications and impacts of raising the maximum amount of administrative monetary penalties for violations of shipping regulations and standards?

4.0 STRENGTHEN ENVIRONMENTAL RESPONSE

4.1 *Enable Early Intervention during a Pollution Incident*

The Canadian Coast Guard is responsible for ensuring that responses to pollution from ships or oil handling facilities are effective, efficient, and appropriate. If the Canadian Coast Guard believes that a vessel or oil handling facility has discharged, is currently discharging, or is likely to discharge a pollutant such as oil, it can:

- take measures necessary to repair, remedy, minimize, or prevent pollution damage from the vessel or oil handling facility;
- monitor the measures taken by any person; or
- direct any person or vessel to take any necessary measures.

The Government is considering changes to legislation to strengthen and clarify the Canadian Coast Guard's ability to intervene earlier when there may be a spill from a ship. This may include issuing mandatory directions, on a precautionary basis, to a vessel or oil handling facility to avoid escalation of a potential pollution incident, while working closely with all response partners.

Polluters remain liable for any consequences associated with taking or refraining from taking any measures directed by the Canadian Coast Guard, as well as any costs or expenses incurred from following those directions to prevent or respond to a real or potential pollution incident. This would include complying with any directions issued by the Canadian Coast Guard on a precautionary basis.

Under the Oceans Protection Plan, we want to strengthen environmental response so that action can be taken earlier, faster, and more effectively.

Seeking Your Views:

From your perspective, what would be the potential impacts and implications of the Canadian Coast Guard being able to intervene earlier during a marine pollution incident to prevent or minimize a potential spill?

4.2 *Enable Rapid Response to Marine Pollution Incidents*

4.2.1 *Support Rapid Response*

As outlined in Section 2.0 (Background), different federal departments and agencies have different roles, mandates, and authorities within the Marine Oil Spill Preparedness and Response Regime. However, during a marine pollution emergency, timely decisions and well-defined lines of authority are essential to avoid confusion, delays, and further environmental damage. To ensure consistent federal direction is provided to responders, the Government is considering legislative changes so that roles and responsibilities are clear, including that the Canadian Coast Guard is the lead federal agency responsible for responding to marine pollution incidents that have happened or are at risk of happening. The responsibilities of other government departments, and those of the ship owners/operators and response organizations would not change. As well, provincial/local authorities would continue to exercise their authorities within their mandates.

When responding to marine pollution incidents, the Canadian Coast Guard must be able to set up operations quickly and efficiently. Sometimes, this means that the Canadian Coast Guard must move equipment over and/or set up coordination activities on private land. Both circumstances require advance approval by the property owner, which can delay response to a marine pollution response.

To support rapid response to marine emergencies and pollution incidents, the Government is considering changes to legislation to allow the Canadian Coast Guard, and any persons accompanying them such as external experts, to enter, use, or pass through private property when conducting marine pollution prevention and response activities without first getting the property owner's approval. Provisions to fairly compensate property owners for any loss or damage caused by the use of the property during the environmental response are also being considered.

4.2.2 *Ensure the open sharing of expert advice during an environmental response*

During an environmental response, additional scientific, local, and technical expertise and advice may be required from parties that are external to the federal government. However, there is a risk that these parties may be reluctant to provide their expert advice out of concern that they will be held personally liable for any damages that may occur as a result of their advice.

To ensure responses to marine pollution incidents are informed by the best expert advice possible, the Government is considering legislative amendments to extend immunity from liability to external parties providing advice and expertise to the Canadian Coast Guard and other federal departments in support of a ship-source oil spill response. Immunities would remain the same for industry and industry response representatives. The Government is focusing its consideration on those individuals, such as scientists, local experts, and other external advisors, who would be working with the federal departments in response related decision-making.

Seeking Your Views:

From your perspective, what are the potential implications and impacts of:

- Enabling the Canadian Coast Guard, and any accompanying external experts, to cross over and use private lands to support an environmental response; and
 - Extending immunity from liability to external parties providing advice and expertise to the Canadian Coast Guard and other federal departments in support of an environmental response?
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4.3 *Support More Effective Response to Oil Spills in Water: Alternative Response Measures*

By law, certain substances are prohibited from being introduced into Canada's waters because they may cause harm to marine ecosystems, human health, and marine resources such as fish stocks and aquaculture. These are important protections and are vital to the sustainability of Canada's marine environments. However, these laws may also limit the effectiveness of environmental responses to oil spills by preventing the use of some products or techniques that could help when cleaning up after an oil spill.

At present, conventional containment and recovery techniques, such as booms, skimmers, and sorbents, are used when responding to oil spills from ships and oil handling facilities. While these tools and techniques work well in some situations, their effectiveness is limited by factors such as the type of oil, the size of the spill, and environmental and weather conditions (e.g. rough waters). Large oil spills or spills in remote locations, for example, may exceed the capacity of booms or limit the window of opportunity to successfully use conventional containment and recovery techniques.

Alternative Response Measures are products, processes, and techniques that offer an expanded range of options for responding to oil spills and mitigating their effects. They can be used alongside conventional containment and recovery techniques to enhance the effectiveness of the response. Alternative Response Measures include techniques such as burning the spilled oil off the surface of the water, and products such as spill-treating agents that change the behavior of spilled oil to reduce the overall impact of an oil spill on the environment. Scientific research has found Alternative Response Measures to be effective tools for cleaning up oil spills, and are currently being successfully used in other countries to respond to marine oil spills, e.g. the United States, Norway.

Increasing access to a broader range of response tools would enable those responding to an oil spill to use the most effective tools and techniques to address oil spills and mitigate their impacts. To increase the effectiveness of oil spill response, the Government of Canada is considering legislative amendments to:

- Allow the use of Alternative Response Measures as additional tools to respond to oil spills from ships and oil handling facilities, only when the Minister of Fisheries, Oceans and the Canadian Coast Guard determines that there is likely to be a net environmental benefit and authorizes their use;
- To enable the Minister of Environment and Climate Change to establish, by regulation, a central list of Alternative Response Measures that may be authorized for use; and
- Allow the same range of Alternative Response Measures to be used to respond to oil spills from ships, oil handling facilities, pipelines, and offshore drilling platforms.

Seeking Your Views:

From your perspective, what are the potential implications and impacts of allowing the federally-regulated use of Alternative Response Measures to clean up oil spills?

5.0 MODERNIZE CANADA’S SHIP-SOURCE OIL POLLUTION FUND

The *Marine Liability Act* is the principal legislation dealing with liability and compensation in the event of pollution damage from a ship. Its intent is to establish uniform rules that are consistent with international law and that balance the interests of ship-owners and other parties involved in a maritime accident. The *Marine Liability Act* is based on the polluter-pay principle and there are various tiers of compensation available from multiple sources. It incorporates both international conventions to which Canada is party, and domestic compensation provisions, and provides for various levels of liability, depending on the type of oil causing the pollution damage and the type of vessel involved in an incident.

Generally, ship-owners are strictly liable for costs, losses or damage related to a discharge or threat of discharge from their ship. Canada is party to four international conventions that are implemented in the *Marine Liability Act*. The International Oil Pollution Compensation Funds provide compensation in the case when the ship-owner is not liable, unable to meet their liability or the damage surpasses their limit of liability.

Canada’s domestic *Ship-Source Oil Pollution Fund* (the Fund)⁶ was established in 1973 as the first domestic fund in the world providing additional coverage for oil spills. The Fund provides compensation for pollution damage of all types of oil from all types of ships in Canada, and also covers marine mystery spills (i.e., spill from an unidentified source). It was originally financed by levies imposed on oil receivers and shippers in Canada.

The Fund is both a fund of last resort if claims are above and beyond the ship-owner’s liability, and of first resort where the claim can be filed directly to the Administrator of the Fund who will assess claims, make an offer of compensation, and once accepted, seek to recover the amount paid from the polluter or other responsible party.

As the Canadian marine transportation industry continues to evolve, it is important that Canadian legislation and regulations also evolve to ensure Canadians are well protected from the risks associated with the transportation of oil by ship. While Canada has never suffered a catastrophic oil spill, there is still a need to be prepared should this unlikely event occur. Canada’s *Ship-Source Oil Pollution Fund* needs to be suitably adapted to provide effective and adequate compensation to all Canadians.

5.1. *Lifting the Ship-Source Oil Pollution Fund’s Per-Incident Limit of Liability*

The *Marine Liability Act* establishes a per-incident limit of liability for the *Ship-Source Oil Pollution Fund* that specifies the maximum amount of compensation that can be paid out from the Fund for a single oil spill incident. The current per-incident limit of liability of the Fund is \$174,611,294; an amount adjusted annually for inflation.

If a major pollution incident were to occur, despite the significant amount of compensation available from the ship-owner and the insurer, as well as the International Oil Pollution Compensation Funds (should they apply), totaling some \$1.5 billion, this limit may prevent responders and victims from being fully compensated. In these circumstances, the total amount of compensation would be pro-rated across

⁶ For more information about the Ship-Source Oil Pollution Fund, visit: <http://sopf.gc.ca/en/>

claimants, meaning that only a percentage of the amount claimed would be paid to all claimants, for example at 30 per cent.

The Government is considering eliminating the *Ship-Source Oil Pollution Fund's* per-incident limit of liability so that unlimited compensation would be available for eligible claims from victims and responders of oil spills from ships. Lifting the limit would mean that, in the unlikely event of a catastrophic oil spill, the Fund would fully compensate any eligible costs above the amounts available from ship owner's insurance and the international funds (as these limits are set out in international conventions and will not change), instead of pro-rating compensation based on the total amount of claims and the amount of funding available. Should the Government remove the Fund's limit of liability, it will build on the current strengths of the regime of covering a broad range of reasonable costs, actual losses and damage set out in established criteria.

5.2 Modernized Levy Mechanism and Fund Replenishment

In the unlikely event that there is insufficient funds in the *Ship-Source Oil Pollution Fund* to compensate for all eligible costs related to an incident, the federal government is proposing to amend the *Marine Liability Act* to allow the Fund to be temporarily funded by the Government of Canada. Any funds temporarily provided by the federal government would be repaid through a levy paid by oil receivers and exporters.

The Government of Canada is considering legislative amendments to ensure that the *Ship-Source Oil Pollution Fund* can be replenished through levies:

- First, an annual levy on oil receivers and exporters is proposed that would be used to replenish the *Ship-Source Oil Pollution Fund*. The administrative burden of this new modernized levy for industry would be minimized by aligning it with the existing reporting obligations for contributions to the international funds; and,
- Second, amendments are proposed to create a supplementary levy. In the event that funds are temporarily provided by the Government of Canada, a supplementary levy could be imposed on industry to ensure the Government of Canada is reimbursed, if the annual levy is insufficient.

It is important to note that the Government of Canada is not proposing to reinstate the annual levy unless the Fund was depleted.

5.3 Quickly Providing Funds

Oil spill responders are expected to assume the financial risk of a response up-front. When a response is mounted, responders must cover its costs, which can be significant in the case of a major oil spill, and seek reimbursement from the responsible ship-owner or their insurer, the international funds, and the *Ship-Source Oil Pollution Fund* after the fact. This process can create financial difficulty when the amounts are substantial.

The Government is considering enabling up-front emergency funding from the *Ship-Source Oil Pollution Fund* to the Canadian Coast Guard, as the lead federal agency responding to ship-sourced spills.

Separately, the Government is also considering developing a fast track process for small claims submitted to the *Ship-Source Oil Pollution Fund*. Any person with a small claim would be able to submit to the Fund

Administrator under the fast-track claim process. The threshold and basic criteria that would guide this process has yet to be determined. This process would be available to any organization, community, business, or individual who has suffered actual damage or losses due to oil contamination, or has eligible expenses related to the clean-up of oil as well as preventative measures.

Seeking Your Views:

From your perspective, what are the potential implications and impacts of the above potential changes to modernize the Ship-Source Oil Pollution Fund?

6.0 SUPPORT RESEARCH AND INNOVATION

A world-leading marine safety system requires a solid foundation of research and evidence. Research and development are crucial to formulating policy, understanding the environmental risks and impacts of pollution, and ensuring that the most effective tools and techniques are available to enhance marine safety and environmental protection. As well, new innovations and technologies are emerging that could enhance marine safety and environmental protection, e.g. new vessel designs, technologies and systems, and on-board equipment.

Research and the testing of innovative technologies and techniques under real-world conditions are essential to expand our knowledge base and to develop and assess the effectiveness of new tools and techniques to improve safety and mitigate environmental risks. However, current environmental and/or marine safety regulations may limit the ability to conduct research and development under real-world conditions.

To support research, the Government of Canada is considering legislative amendments to enable the Minister of Environment and Climate Change to authorize the research and testing of substances, techniques, equipment and related processes and procedures for the purpose of enhancing scientific knowledge to support environmental emergency policy making and operational decision making.

The Government of Canada is also considering legislative amendments to enable the Minister of Transport to provide time-limited exemptions from regulatory requirements and standards for the purpose of promoting innovation in, for example, vessel design, systems and on-board equipment to enhance marine safety and environmental protection.

Seeking Your Views:

From your perspective, what are the potential implications and impacts of enabling the Government of Canada to permit research and testing in Canada's waters for the purpose of enhancing marine safety and environmental protection?

7.0 SHARE YOUR VIEWS

Transport Canada is interested in receiving written feedback from all interested parties on the topics contained in this document. Comments received will be used to support future government discussions on the potential legislative amendments.

Interested parties are invited to share their views at: TC.OPPLegis-LegisPPO.TC@tc.gc.ca.

ANNEX A LINKS FOR MORE INFORMATION

Marine Oil Spill Preparedness and Response Regime:

<http://www.tc.gc.ca/eng/marinesafety/oep-ers-regime-menu-1780.htm>

Oceans Protection Plan: The Plan

<https://www.tc.gc.ca/eng/oceans-protection-plan.html>

Improving marine safety through the Oceans Protection Plan: Fact Sheets

<https://www.tc.gc.ca/eng/improving-marine-safety-through-the-oceans-protection-plan.html>

Liability and Compensation - oil spills from ships:

<https://www.tc.gc.ca/eng/marinesafety/liability-compensation-ship-source-oil-spills-4512.html>

Ship-Source Oil Pollution Fund:

<http://sopf.gc.ca/en/>