

**SUBMISSION BY THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION
TO THE GOVERNMENT OF CANADA REGARDING
DISCUSSION PAPER: STRENGTHENING MARINE ENVIRONMENTAL
PROTECTION AND RESPONSE
POTENTIAL LEGISLATIVE AMENDMENTS**

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I. INTRODUCTION

This is the submission of the Canadian Environmental Law Association (“CELA”) in relation to the Government of Canada’s *Discussion Paper On Potential Legislative Amendments To Strengthen Marine Environmental Protection And Response*.¹ The overarching purpose of the *Discussion Paper* is 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.

While CELA supports the overall purpose of the *Discussion Paper*, we provide the following specific recommendations, spanning enhancements to marine protection, through the protection of species at risk and facilitating the connectivity of habitats, and the expansion of the amendment’s scope, to include other threats in addition to oil spills.

II. BACKGROUND

CELA is a non-profit, public interest organization that works toward protecting human health, safety and the environment. CELA advocates for comprehensive laws, standards and policies that will protect and enhance the public health and environmental quality in Ontario and throughout Canada.

Since 1970, CELA has used legal tools, undertaken ground breaking research and conducted public interest advocacy to increase environmental protection and safeguard communities. As a specialty clinic funded by Legal Aid Ontario, we also provide equitable, access to justice to those otherwise unable to afford representation for their environmental problems. CELA is greatly

¹ Transport Canada, “Discussion Paper – Strengthening Marine Environmental Protection and Response: Potential Legislative Amendments” (August 2018) online: <http://www.tc.gc.ca/eng/potential-legislative-amendments-strengthen-marine-environmental-protection-response.html>

committed to increasing public participation in environmental decision-making and working with public interest groups to foster long-term sustainable solutions.

CELA has a long history of working to improve water source protection and to stop water pollution. This has included working with First Nation’s communities in the development of source water protection plans and the drafting of legal tools to address threats to water. Furthermore, CELA’s Healthy Great Lakes program has engaged a broad network of individuals and organizations in shaping, implementing, and making use of laws and policies that protect and restore the waters of the Great Lakes – St. Lawrence River Basin.

In addition to falling within our Water Sustainability priority, our review and comments on this *Discussion Paper* aligns with our work to protect and restore waters in Canada, in furtherance of our access to environmental justice mandate. A collection of CELA’s work related to Water Sustainability can be viewed online at: <http://www.cela.ca/collections/water>

III. DISCUSSION PAPER QUESTIONS

Enhance Marine Ecosystem Protection

I. Enable Marine Ecosystem Protection

Question: 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?

CELA supports and advocates for the Government to regulate shipping and navigation with a view to mitigating broader environmental risks. Harm to our oceans is concerning, regardless of the size and frequency of the pollution source, and CELA is particularly concerned about the cumulative effects of ocean pollution.² Large oil spills in ocean water necessitate immediate and effective responses, however, they are not the only environmental hazard arising from shipping and navigation. There are a number of other sources of pollution and environmental disturbances that arise, for instance, from vessel and shipping activities.

Recommendation: CELA recommends that the shipping and navigation industry be managed with an ecosystem-based approach that prioritizes healthy oceans, safe shipping practices, and recognizes the cumulative impact of other industry sectors.³ Specifically,

² Michelle Molnar and Nicole Koshure, *Cleaning Up Our Ocean. A Report On Pollution From Shipping-Related Sources In The Pacific North Coast Integrated Management Area (Pncima) On The British Columbia Coast* (2009) online (pdf): David Suzuki Foundation <<https://david Suzuki.org/science-learning-centre-article/cleaning-ocean-report-pollution-shipping-related-sources-pacific-north-coast-integrated-management-area-pncima-british-columbia-coast/>> at intro [Cleaning Up Our Ocean].

³ Living Oceans Society, *Shipping on the British Columbia Coast. Current Status, Projected Trends, Potential Casualties, and Our Ability to Respond: A Briefing Note* (2011) online (pdf): <https://www.acee-ceaa.gc.ca/050/documents_staticpost/cearef_21799/86129/Shipping_on_the_BC_Coast.pdf> at 39 [Shipping on the British Columbia Coast].

sensitive areas within oceans, both biotic and geographic, should be considered when developing regulations. These sensitive areas include but are not limited to: known or prospective mating/spawning grounds of fish and other marine wildlife; species at risk; travel patterns for large aquatic mammals; seasonal movement, mating, and feeding patterns of species; and other considerations which can mitigate the interaction between ocean animal life and ships or their waste.

i. Broader environmental risks of shipping and navigation

CELA recommends that the Government consider regulating the following areas in addition to oil spill pollution control:

• **Water Pollution:**

- Chronic Oil Pollution (“COP”): COP results from marine traffic, frequently occurring during cargo transfers where ships discharge oily bilge, waste water, engine, tank, and ship-board machinery washings. COP has persistent, cumulative impacts on marine plants and animals and can be as toxic to marine life as large single instance oil spills. For example, as many marine birds are killed by COP as catastrophic oil spills.⁴
- Black Water Sewage: According to the Environmental Protection Agency (EPA), vessel based sewage is more concentrated and therefore more harmful, than domestic sewage.⁵ In addition, human waste has the potential to contain various pharmaceuticals of which the environmental effects are not well understood. Ports, often located in protective harbours, can trap waste and magnify its effects on the environment. The discharge of sewage needs to be tightly regulated to ensure that it is being treated appropriately, and that the procedures undertaken to treat the sewage do not pose environmental hazards themselves. An example of the negative environmental and human health impacts arising from vessel sewage is its effect on filter feeders (such as oysters, clams, and mussels), which can pose serious human health threats if those filter feeders are later consumed by humans.⁶
- Grey Water Sewage: Grey water is wastewater from sinks, showers, and galleys, and is the largest source of liquid waste generated by cruise ships.⁷ Its discharge is largely unregulated; however, it has been found to contain organics, petroleum hydrocarbons, oils, greases, metals, suspended solids, nutrients, chloroform bacteria, personal care products, and products whose effects on the environment are

⁴ Shipping on the British Columbia Coast, *supra* note 3.

⁵ Petros J. Katsioloudis, “Green Ships: Keeping Oceans Blue” (2010) 69:5 *Technology Teacher* 5 [Green Ships].

⁶ Green Ships, *supra* note 5.

⁷ James E.N. Sweeting, & Scott L. Wayne, *A Shifting Tide: Environmental challenges and cruise industry responses* (2003, The Center for Environmental Leadership in Business) online (pdf): <http://www.sw-associates.net/wp-content/uploads/2011/09/Final-Cruise-Report.pdf>.

unknown.⁸ Of major concern regarding grey water is its release near shellfish beds, shorelines, or within protected areas.⁹

- **Solid Waste**¹⁰: In the United States alone, ships were responsible for over 111,000 tonnes of garbage annually.¹¹ Many complications arise from solid waste disposal at sea such as entanglement (primarily sea birds and turtles), consumption of waste by marine and terrestrial animals, and alteration of the nutritive content of the food chain.¹² When waste is consumed, it causes choking, damage to the stomach lining, intestinal blockage, foraging limitations, digestive issues, reduced nutrient absorption, and physiological defects.¹³ Solid waste disposal needs to be regulated for incoming and outgoing ships.
- **Discharges to Air**: Marine transport is one of the most energy efficient modes of transportation; however, in many regions, emissions from vehicles and vessels make up 80% of air pollution.¹⁴ Key compounds emitted by vessels include carbon dioxide, nitrogen oxides, sulphur oxides, carbon monoxide, volatile organic compounds, black carbon, and particulate matter. Air pollution has been linked to a variety of public health concerns and ecosystem impacts, as well as global warming and ocean acidification.¹⁵ In order to mitigate these effects, regulations must urge the shipping and navigation industry to streamline their vessels and ensure emissions standards are being met. Further, emissions standards need to become increasingly strict to ensure that progress is being made on eliminating, or limiting emissions.
- **Hazardous and Noxious Substances (HNS)**: Spills from the transport of Hazardous and Noxious Substances (HNS) by ships can have a significant impact on public health, the environment, marine life, and the economy. HNS include substances transported in bulk as liquids, liquefied gases, solid materials and materials in package form. Between the years 2001 and 2010, there was 98 documented chemical spills from ships in Canadian waters.¹⁶ Canada does not have a national framework for addressing HNS spills into the marine environment, despite the need for one being identified several decades ago. The transport

⁸ Fisheries and Oceans Canada, *Marine environmental quality in the North Coast and Queen Charlotte Islands, British Columbia, Canada: A review of contaminant sources, types and risks* by D. I Johannessen, et al. (Sydney: Fisheries and Oceans Canada, 2007) online (pdf): Department of Fisheries and Oceans <<http://www.dfo-mpo.gc.ca/Library/328420.pdf>> at xii, 87.

⁹ A Shifting Tide, *supra* note 7

¹⁰ Solid waste refers to waste such as glass, metals, plastic, paper, cloth, food, wood, rubber, and packing materials.

¹¹ Thomas Van Hinte, *Thomas Managing impacts of major projects: an analysis of the Enbridge Gateway Pipeline proposal* (Resource and Environmental Management Master’s Thesis Report, Simon Fraser University, 2015) [unpublished] online (pdf) <summit.sfu.ca/system/files/iritems1/5107/etd1608.pdf>.

¹² Cleaning Up Our Ocean, *supra* note 2.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*; and Shipping on the British Columbia Coast, *supra* note 3.

¹⁶ Transport Canada, “Discussion Paper: Maritime Transport of Hazardous and Noxious Substance: Liability and Compensation” (October 2010), online: Transport Canada <<http://www.tc.gc.ca/media/documents/policy/hns-discussion-paper.pdf>>.

of HNS by sea entails far more difficulties and complexities than oil transportation; preparedness and response systems in place for oil spills cannot readily be applied to HNS releases. HNS involve an extremely wide range of chemicals and substances with varying degrees of toxicity and risks to the marine environment, and very few can be physically removed once released into the marine environment.¹⁷ It is recommended that regulatory efforts be aimed at developing formal approaches to HNS preparedness and response in Canada.

- **Invasive Species:** One of the largest challenges facing the shipping and navigation industry is safe and effective ballast water management. While ballast water is recognized as imperative for sea travel, the proper regulation of the former is necessary in order to combat the expansion of invasive species. The effect of a regulation on ballast water can be significant. For example, in 2006, mid ocean ballast water became mandatory in Canada. Since then, no new invasive species detected have been attributed to ballast waters.¹⁸ Enforcing good ballast water practices is a difficult endeavor, and thus regulatory enforcement may be most effective through informational distribution directly to ship owners and captains.
- **Anthropogenic Noise Pollution:** With the growth of vessel traffic in the past few decades, the level of ocean noise pollution has also increased.¹⁹ Sound caused by human activity can interfere with marine mammals dependence on the physics of underwater sound for communication, reproduction, navigation, and locating food. Noise pollution from engine propellers, seismic surveys, and navy sonar have resulted in trauma, death, and mass strandings of some species of cetaceans.²⁰ Regulatory efforts need to be aimed at preserving a balance between ship speed and sound emittance, while considering where and when the location and distance of the sound will travel. Marine Protected Areas (MPAs), with mandated protection from ensonification, are one of the most effective ways to protect cetaceans and their habitat from noise pollution.²¹ Another way to combat underwater sound is to place geographic and seasonal restrictions on noise-generating activities.²²
- **Ship Strike:** Fatal collisions between ships and whales have become a leading threat to the survival of various whale species.²³ The recent increase in ship strikes has resulted from a rise in ocean traffic as well as the inability of whales to interpret an approaching ship due

¹⁷ Alan Khnee-Jin Tan, *Vessel-Source Marine Pollution: The Law and Politics of International Regulation*, (New York: Cambridge University Press, 2006) at 335.

¹⁸ Tony Walker, “Green Marine: An environmental program to establish sustainability in marine transportation” (2016) 105:1 *Marine Pollution Bulletin* 199 [Green Marine].

¹⁹ Shipping on the British Columbia Coast, *supra* note 3.

²⁰ Cleaning Up Our Ocean, *supra* note 2.

²¹ L.S. Weilgart, *Managing Noise through Marine Protected Areas around Global Hot Spots* (Department of Biology, Dalhousie University, Halifax) [unpublished] online: <<http://whitelab.biology.dal.ca/lw/publications/8.%20Weilgart%202006.%20Managing%20noise%20MPAs..pdf>> [Managing Noise through MPAs].

²² Jeremy Firestone and Christina Jarvis, “Response and Responsibility: Regulating Noise Pollution in Marine Environment” (2007) 10 *Journal of International Wildlife Law and Policy* 109 at 151

²³ Cleaning Up Our Ocean, *supra* note 2.

to excess ocean noise.²⁴ Of the species most at risk are the Fin whales and Humpback whales.²⁵ Ship strikes must be considered when regulating the shipping and navigation industry as it poses a serious risk to the continued existence of large ocean mammals.

ii. Tools for marine species and habitat conservation

MPAs have been identified as one of the most effective means to protect cetaceans and their habitat from the impacts of vessel and shipping activities. Healthy oceans depend on a network of MPAs to protect species, habitats and ecosystems. Although MPAs currently exist in the Canadian framework, the network between MPAs needs to be strengthened in order to create an effective barrier of defence between anthropogenic activities and the marine environment.

In order to ensure effective MPA management and the protection of cetaceans and their habitat, the Government must adopt regulations that are strict, but fair, and meaningful. An effective management strategy will ensure that the MPA is sufficiently large enough to safeguard the natural habitat and migration corridors. Management schemes should establish a “network” of MPAs which encompass whole ocean basins, represents all habitat types, protects special sites (spawning, mating grounds), and addresses specific threats to marine species and ecosystems. Such a network ensures the connectivity of MPAs, allowing for the safe movement of nutrients, larvae, juveniles, and adult marine species.²⁶

In addition, MPA management plans must be applied holistically and extend to the entire ecosystem. It is important that MPAs be viewed as a starting point for conservation, rather than an end goal. In order to ensure success of the MPAs, the Government must be committed to continued funding, oversight, management, monitoring, and enforcement of MPAs.²⁷

To establish an effective MPA management plan, it takes time, careful planning, and coordination between government authorities and affected parties. In the interim, alternative measures can be taken to lessen the effect of shipping and navigation on marine ecosystems, such as diverted shipping lanes, area/time closures for noise sources, and/or remedies to other marine ecosystem threats described above. These alternatives should be viewed as interim measures while the appropriate establishment of the MPAs is being developed.²⁸

Recommendation: CELA recommends that the Government regulate the broader environmental effects of shipping and navigation through a network of MPAs.

²⁴ *Ibid.*

²⁵ *B.C. Cetacean Sightings Network*, online: Wild Whales ><http://wildwhales.org>>

²⁶ David Suzuki Foundation, *Marine Protected Areas 101* (March 2014) online (pdf): David Suzuki Foundation <<https://david Suzuki.org/science-learning-centre-article/marine-protected-areas-101/>>

²⁷ Managing Noise through MPAs, *supra* note 21.

²⁸ *Ibid.*

Question: What are the potential impacts and implications if the government puts in place regulations to better protect marine ecosystems?

The implications of regulatory responses to protect marine ecosystems are difficult to fully appreciate because of the complexity of relationships between marine, land, and atmospheric environments. The picture is further complicated by the dynamic interactions between bodies of water, which are physically connected but governed by different protection practices. Further, the health of marine ecosystems depends, not only on other environments, but also on industry and evolving anthropogenic practices.

CELA submits this complexity and interwoven nature of marine ecosystems can and should be viewed as an opportunity for Government regulations to initiate holistic support for the environment in one of Canada’s most profitable and busiest industries.

For example, the relationship between the marine ecosystem and atmospheric environment means that regulations put in place to reduce emissions resulting from shipping practices would affect both water, land, and air quality. Regulations can also have the effect of shifting perspectives on environmental protection to become more unified, and instigate more clean practices across all of Canada’s international and domestic economic practices. There is also the potential for implications to industry; if regulations are put in place to reduce noise pollution, for example, which thereby protect sought after commercial fish stocks upon which fishing industries rely, there will be economic salvation in addition to the immediate benefit to marine animal welfare. If these industries are protected, such that they are become sustainable, harvested resources from marine ecosystems may continue to be a source of revenue for the economic growth of the Canada.

There are many benefits to imposing regulations that reduce the environmental impact of shipping practices on marine ecosystems. These involve benefits to the health of connected environments, to the Canada’s sustained industry and economic well-being, and to the welfare of the wildlife and humans who inhabit these environments. Imposing such regulations will not be without challenge, however, if understood as impetus for technological development, sustainable industry, and protection of all who inhabit the earth, these challenges have the potential to raise Canada’s environmental and economic profile on a global level.

Recommendation: CELA recommends that the Government implement regulations that reflect an ecosystems approach and ensures the protection of the environment.

Question: What non-regulatory approaches could be taken to better protect marine ecosystems?

CELA supports the use of non-regulatory approaches to better protect marine ecosystems. Non-regulatory approaches can be important and even integral to ensuring compliance with regulations.

Some non-regulatory measures which the Government can implement are:

- Possible incentives and/or rewards for industry members who contribute to limiting their environmental footprint;
- Incentives and/or rewards for companies who either develop or implement innovative strategies for decreasing their environmental footprint;
- Preferential shipping practices in Canadian waters for industry members who have a proven track record of clean shipping practices – this can include more direct routes, less coast guard intervention, and possible tax breaks.

A recent contract awarded by the Canadian National Shipbuilding Procurement Strategy evinces a missed opportunity for non-regulatory efforts to promote environmentally friendly practices in the shipping and navigation industry. On October 19th, 2011, Irving Shipbuilding Incorporated (ISI) and one other proponent, were awarded a \$33 Billion contract for construction of approximately 40 ships.²⁹ CELA does not intend to pass judgement into ISI’s environmental practices, however, large contracts such as the one awarded to ISI provide Canada with leverage to impose environmentally friendly practices and thresholds on industry proponents.

One environmental risk reduction program which could be established as a requirement to obtaining these large contracts is the current voluntary opt-in program, Green Marine.³⁰ Participants in the program include ship-owners, ports, terminals, Seaway corporations, and shipyards. The program requires, for certification, that participants benchmark their annual environmental performance through an exhaustive self-evaluation process, which is based on twelve “performance indicators”. These indicators analyze topics, such as aquatic invasive species management, community impact, environmental leadership, garbage management, greenhouse gas emissions, underwater noise, and waste management, to name a few. The self-reports are authenticated by an independent and objective “verifier”, who then publishes the reports. Certification under the Green Marine program is an example of a non-regulatory effort which the Government could implement to promote environmentally friendly practices. The program is currently supported by the Government on a voluntary basis.

Recommendation: CELA recommends the use of non-regulatory approaches as a means of ensuring compliance with environmental regulations, such as the implementation of MPAs.

II. Enable Rapid Intervention by Transport Canada to Address Marine Safety and Environmental Risks

Question: What are the potential impacts and implications if the government proceeds with this potential amendment?

CELA supports rapid intervention by Transport Canada to address marine safety and environmental risks, provided that the rapid intervention is constrained by an established and informed emergency protocol.

²⁹ Green Marine, *supra* note 18 at 206.

³⁰ *Green Marine*, online: Green Marine <<https://www.green-marine.org/>>.

The implications and efficacy of short term, time-limited orders from the Minister, aimed at providing immediate recourse during an environmental catastrophe is a fact driven analytical undertaking. However, given the nature of emergencies, it often results that short term responses are inadequate, ill-conceived, lacking of efficiency, and potentially harmful to the environment. As a result, CELA recommends that short-term responses not be relied on as a solution to oil spills, toxic leaks, and other sources of marine pollution. With the proper regulatory structure in place, prevention will vitiate the need for emergency ministerial powers.

The health of marine ecosystems depends on, and influences, many other environments, human health, and the shipping industry itself. The complexity of marine ecosystems and its interconnected nature should not stand as a barrier to effective regulatory efforts, but rather, as an effort to improve aquatic life, human life, and the longevity of economic prosperity in the industry. For example, regulations which seek to reduce emissions resulting from shipping practices, would affect both water and air quality. This may also have the effect of shifting general perspectives on environmental protection. Similarly, longer term regulations for marine shipping practices may have the effect of raising Canada as a leader in marine ecosystem protection, creating impetus for our shipping partners to follow, and to more strictly govern their own practices. Such succession of events would create homogeneity within the regulation of shipping and navigation, increasing industry profits while protecting the environment.

That said, incidents do occur which require emergency prowess. Delegation of an emergency power to the Minister would satisfy the need for quick action when such environmental issues demand so. For example, in June 2018, sightings of the endangered North Atlantic Right Whale caused the Department of Fisheries and Oceans to order an emergency closure of fisheries in the Southern Gulf of St. Lawrence.³¹ Such action was required and necessary for the survival of the species. However, in circumstances that require emergency action by responders and time-limited orders, the Minister should be delegated discretion insofar as an established emergency protocol allows. An established emergency protocol protects those involved in the incident, the Government’s liability, and the environment from an erroneous discretionary decision by the Minister. Such emergency protocols may include “Alternative Response Measures” as discussed later in this submission.

Recommendation: CELA recommends rapid intervention by Transport Canada to address marine safety and environmental risks, provided that the rapid intervention is constrained by an established and informed emergency protocol.

III. Enhance Deterrence and Enforcement

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

³¹ Fisheries and Ocean Canada, “Notice of fisheries closures : Presence of North Atlantic Right Whale, online: <<http://www.dfo-mpo.gc.ca/fm-gp/peches-fisheries/comm/atl-arc/right-whale-baleine-noires-1106-en.html>>.

i. Impact on prosecutions

One potential concern regarding this proposal is that Transport Canada (TC) staff may utilize AMPs to address serious cases of non-compliance with the CSA. While CELA appreciates the merit of AMPs as an additional enforcement tool to address offences which pose a minor risk of environmental harm, prosecutions should continue to be utilized for those violations having greater environmental consequences and especially where there is a serious risk to human health and safety.

It is important that AMPs be regarded as a supplement, but not a replacement for environmental prosecutions. AMPs are only effective if there is a credible threat of criminal prosecution.³² In light of TC’s poor track record of prosecuting violations under the *Canada Shipping Act (CSA)*³³, CELA is concerned that TC staff may utilize the more expeditious process provided by AMPs in lieu of prosecutions for the more egregious violations.

Applying an economic analysis, one of the limitations on AMPs for deterring marine pollution is that where the probability of detection is very low, which in practice is often the case, the optimal sanction to deter marine pollution may be very high.³⁴ Since marine polluters are often organized as corporate entities and have the benefit of limited liability, the likelihood that this optimal fine might exceed the corporate offender’s assets is high and non-monetary sanctions, such as imprisonment, are therefore necessary to achieve deterrence.³⁵ Therefore, it is recommended that AMPs be used where deterrence can be achieved through modest sanctions. By contrast, where the likelihood of detection is low, and thus the social harm and the potential gain to the polluter is high, non-compliance should be addressed through criminal proceeding.³⁶

TC staff should be trained in the use of AMPs to ensure that they are applying them in a manner that is proportionate to the impugned conduct. We recommend that TC review criminal prosecutions and AMPs under the *CSA* every five years to ensure that its enforcement goals are being met. The review should consider why TC decided to use AMPs as opposed to criminal prosecutions in each case. Sufficient funding must be set aside for both criminal and AMP enforcement regimes.

Recommendation: CELA supports the Government’s proposal to increase the maximum Administrative Monetary Penalty (AMP) amount under the *CSA* above the current

³² Ramani Nadarajah, “Environmental Penalties: New Enforcement Tool or Demise of Environmental Prosecutions?” in Stanley Berger & Dianne Saxe, eds, *Environmental Law: The Year in Review 2007* (Aurora, Ontario: Canada Law Book 2008) 111 at 122.

³³ “Dozen reports concerning offshore oil pollution are received by TC and EC every year. Very few of these reports are investigated because resources for gathering evidence are limited and consequently convictions are unlikely.” (see Francis Wiese, *Seabirds and Atlantic Canada’s Ship-Source Oil Pollution* (September 2002) online (pdf): World Wildlife Fund Canada <http://awsassets.wwf.ca/downloads/wwf_northwestatlantic_seabirdsandshipsourceoilproduction.pdf> at 23 [Seabirds and Atlantic Canada’s Ship-Source Oil Pollution])

³⁴ Michael Faure, “Criminal Liability for Oil Pollution Damage: An Economic Analysis” in Michael G. Faure, Han Lixin, & Shan Hongjun, eds, *Maritime Pollution Liability and Policy China, Europe and the US*, (The Netherlands: Kluwer Law International, 2010) [Criminal Liability for Oil Pollution Damage].

³⁵ Criminal Liability for Oil Pollution Damage, *supra* note 33.

³⁶ *Ibid.*

maximum of \$25,000 for infractions against marine safety and environmental requirements, provided AMPs do not replace prosecutions for serious offences.

ii. Procedural justice considerations

It is important to note that imposing high AMPs can pose serious procedural and access to justice concerns. Because AMP schemes do not offer the same level of procedural protections that are offered to accused persons by way of prosecution, including section 11 of the *Canadian Charter of Rights and Freedom*, the constitutionality of an AMP regime could be challenged if a penalty is found to be criminal in nature. Although the Supreme Court of Canada has stated that the magnitude of an AMP on its own is not determinative and very large penalties may be imposed in the administrative context if necessary to deter non-compliance³⁷, the Government should consider this issue when deciding how much to raise the maximum penalty over the current \$25,000 limit.

iii. Additional considerations

a. Criteria for determining penalty amount

The Schedule in the AMP Regulations³⁸ sets out the applicable penalty range for each offence in the CSA. The Regulations, however, do not provide any instructions for how to arrive at a penalty amount within the given range, and there are no publicly available guidance or policy documents.

The Regulatory Impact Statement (RIS) released prior to the introduction of the CSA AMP Regulation provides some insight into how the penalty amount within a given range is determined.³⁹ The RIS states that three penalty ranges are set based on the seriousness of the offence. To determine the penalty amount within the range, consideration is given the specific circumstances of each violation, including any mitigating or aggravating factors, such as the previous violations under the Act and any consequences of the violation. Vessels and corporations are subject to higher penalties than are individuals. The penalty amount within the range is determined based on Department policies and guidelines.

In contrast to the AMP regime under the CSA, the *Environmental Violations Administrative Monetary Penalties Regulations* (EVAMPR)⁴⁰ administered by Environment Canada provide an example of well-designed AMP scheme. They provide a detailed breakdown of how the penalty amount is determined in each case. Guidance and policy documents are also made publicly available. The Schedule sets out specific amounts that can be added on to a baseline penalty for history of non-compliance, economic gain, and environmental harm.

³⁷ *Guindon v Canada*, 2015 SCC41, [2015] 3 SCR 3

³⁸ Administrative Monetary Penalties and Notices (CSA 2001) Regulations (SOR/2008-97)

³⁹ Government of Canada, Department of Transport, “*Regulations Amending the Administrative Monetary Penalties and Notices (CSA 2001) Regulations, Regulatory Impact Statement*” (14 October, 2017), online: Canada Gazette <<http://www.gazette.gc.ca/rp-pr/p1/2017/2017-10-14/html/reg3-eng.html>>

⁴⁰ Environmental Violations Administrative Monetary Penalties Regulations (SOR/2017-109)

It is recommended that the Government consider providing more clarity to the public on how penalty amounts are arrived at under the CSA AMP regime by amending the Regulation to include specific instructions or, at minimum, making guidelines and policy documents publicly available. Mechanisms should be explicitly provided for removing the economic benefit for non-compliance, capturing the environmental harm caused by the violation, and history of non-compliance.

Recommendation: CELA recommends that the Government establish clearly defined criteria for determining the penalty amount, including history of non-compliance, economic gain, and environmental harm.

b. AMP proceeds

Currently, AMP proceeds collected under the CSA AMP regulations are deposited into the Consolidated Revenue Fund.⁴¹ By contrast, penalties collected under the EVAMPR are credited to the Environmental Damages Fund (EDF)⁴², the objective of which is to assist in the rehabilitation of injured or damaged environmental/natural resources, and to ensure that proposed projects to help rehabilitate the environment are cost effective and technically feasible.⁴³ In Ontario, penalties collected under the *Environmental Penalties Regulations 222/07* and *223/07* pursuant to *Environmental Enforcement Statute Law Amendment Act, 2005*⁴⁴, are deposited into the Ontario Community Environment Fund, a special purpose fund for environmental projects.⁴⁵ Similarly, in the United States, penalties are a source of funding for the Oil Spill Liability Trust Fund (OLSTF). The OLSTF is discussed below in detail in the section addressing the *Discussion Paper’s* proposal to modernize the Canada’s Ship-source Oil Pollution Fund (SSOPF).

Therefore, it is recommended that the Government deposit AMP proceeds into a fund that can be used to address ship-source oil pollution. One option is to deposit AMP funds into SSOPF so that funds can be used for oil spill response, recovery and rehabilitation activities.

Recommendation: CELA recommends that the Government deposit AMP proceeds into a fund that can be used to address ship-source oil pollution.

Strengthen Environmental Response

I. Enable Early Intervention during a Pollution Incident

Question: 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?

⁴¹ *Canada Shipping Act, 2001* (S.C. 2001, c. 26), s. 160(3).

⁴² *Environmental Violations Administrative Monetary Penalties Act* (S.C. 2009, c. 14, s. 126), s. 27(3)

⁴³ Frank Maes, ed, *Marine resource damage assessment: Liability and compensation for environmental damage* (Dordrecht: Springer, 2005) at 76.

⁴⁴ *Environmental Enforcement Statute Law Amendment Act, 2005*, S.O. 2005, c. 12 - Bill 133 [EESLA].

⁴⁵ *Ibid*, EESLA, s 182.2 (1).

CELA supports early intervention by the Canadian Coast Guard during all environmental disasters including oil pollution, however, emergency response needs to be informed by an established emergency protocol.

During Exxon Valdez’ oil spill disaster on the Bligh reef in 1989, a large area of the Alaskan marine ecosystem was destroyed; water temperatures increased, ice melted, and populations of marine animals declined (specifically 28 different species of animals and plants).⁴⁶

Approximately 250,000 seabirds (40% of the region’s population) were killed, and species such as the killer whale pigeon Guillemots still have not shown signs of recovery.⁴⁷ Similar tragedy surrounded the Deepwater Horizon Oil Spill disaster, which claimed 11 workers lives and is now projected to cost British Petroleum over \$65 billion.⁴⁸

Industry participants and users of the marine environment are legally responsible for responding to pollution and similar environmental incidents, however, the Coast Guard is Canada’s national backstop in the event of major incidents in Canadian waters.⁴⁹ It is imperative that the Coast Guard have the authority to order industry participants to take measures to repair, remedy, minimize, or prevent pollution damage from occurring in the environment. This authority should allow the Coast Guard to demand necessary action and to monitor future and current remediation efforts.

However, similar to the restrictions on time-limited orders previously proposed in this submission, CELA submits that orders by the Coast Guard to prevent, minimize, or inhibit pollution should be made within the bounds of an emergency protocol. This protocol should be created in consultation with environmental experts, in addition to other stakeholders, to identify: proper remediation techniques based on various factual circumstances which may arise; sensitive areas which contain concentrations of wildlife; and other considerations which would facilitate effective emergency responses. Such protocols can increase the likelihood that the decision made is an appropriate one and will in fact protect the environment.

Recommendation: CELA recommends early intervention by the Canadian Coast Guard into all environmental disasters including oil spill pollution, however, emergency responses need to be informed by an established emergency protocol.

⁴⁶ A. L. Balogun, A.N. Matori, K. W. Toh Kiak, “Developing An Emergency Response Model For Offshore Oil Spill Disaster Management Using Spatial Decision Support System (SDSS)” (Paper presented to ISPRS TC III Mid-term Symposium “Developments, Technologies and Applications in Remote Sensing” 7-10 May 2018)

⁴⁷ National Oceanic and Atmospheric Administration, Office of Response and Restoration, “How Oil Harms Animals and Plants in Marine Environments” (2018) online: <https://response.restoration.noaa.gov/oil-and-chemical-spills/oil-spills/how-oil-harms-animals-and-plants-marine-environments.html>

⁴⁸ Ron Bousso, *BP Deepwater Horizon costs balloon to \$65 billion* (16 January 2018), online: <https://www.reuters.com/article/us-bp-deepwaterhorizon/bp-deepwater-horizon-costs-balloon-to-65-billion-idUSKBN1F50NL> [BP Deepwater Horizon costs].

⁴⁹ James R. Mitchell, *The Canadian Coast Guard in Perspective (a paper prepared for Action Canada)* (Ottawa: Action Canada, August 2018) online: Action Canada http://www.actioncanada.ca/wp-content/uploads/2014/04/Canadian-Coast-Guard-In-Perspective_EN.pdf

II. Enable Early Intervention during a Pollution Incident (Support Rapid Response)

Question: What are the implications of enabling the Canadian Coast Guard, and any accompanying external experts, to cross over and use private lands to support an environmental response?

The ability to have full and unimpeded access to cross and use property in order to respond to an environmental emergency is not currently at the disposal of the Canadian Coast Guard. CELA supports the right to cross and use private lands in order to facilitate emergency responses to environmental disasters, however, this discretion must be exercised with extreme caution and in consideration for the privacy rights of individuals and property owners. If this authority is to be given to the Coast Guard, CELA agrees that provisions for compensation to the landowner must be included.

To protect the privacy interests of an individual when emergency responders wish to cross and/or use private land, the Government must balance the severity of the environmental emergency and the damage to the individual’s privacy, as a result of the trespass. The balancing that takes place here is similar to the balancing of interests in the defence of public necessity in American property law.⁵⁰

In exercising the discretion to cross over and potentially use private lands, the Coast Guard must be mandated to consider a non-exhaustive list of factors, such as: type of private property, potential damage to the property, buildings on the property, alternative routes of access, length of occupancy on private lands, who else will be brought on the land with the Coast Guard, impediment that will occur to the land-owner, and cost to the landowner (not just financial). The list of factors to consider can never be exhaustive as exercising this discretion will be a fact driven exercise; however, the positive outcomes that will result from the intrusion must be weighed against the negatives.

Two major considerations for exercising this discretion must be considered: (1) with explicit denial of entry from the landowner, can the Coast Guard still exercise its right to enter, and (2) what evidentiary issues for legal proceedings will arise, or rather, what implications will this rule have on the execution of law enforcement. CELA does not take a particular stance on these issues, however, believes that before the Coast Guard can be empowered with this authority, consultation with the Canadian people and law enforcement officials must be undertaken.

Recommendation: CELA supports the right to cross and use private lands in order to facilitate emergency responses to environmental disasters, however, this discretion must be exercised in light of privacy and property rights of landowners.

⁵⁰ John Alan Cohan, *Private and Public Necessity and the Violation of Property Rights* (2007) 83 *North Dakota Review* 651.

Question: 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.

CELA believes that immunity from liability should not be extended to parties providing advice and expertise to the Canadian Coast Guard and other federal departments.

Expert opinion is intended to provide guidance to responders in order to carry out effective and responsible actions. Removing liability from experts may render the given opinions reckless, as the expert has no deterrence for negligence. The law of negligence is intended to keep people honest about their professions and their behaviors, but without it, the harm caused by negligent behavior becomes inappropriately assigned.

For example, if a negligent but immune opinion is acted upon by the Government and harm ensues, the damages from such an opinion rests with either the Government or the victims of such negligence. In the former, taxpayers bear the costs of a negligent expert, and in the latter, victims become unfairly burdened in their health, socially, and/or economically, without any recourse for justice.

This recommendation applies to expert opinions given to the Canadian Coast Guard by external parties, and not emergency first responders.

Recommendation: CELA recommends that immunity from liability should not be extended to parties providing advice and expertise to the Canadian Coast Guard and other federal departments.

III. Support More Effective Response to Oil Spills in Water: Alternative Response Measures

Question: 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?

While CELA recognizes the importance of ensuring that Canada’s arsenal of oil spill response measures is reflective of technological advancements in order to enable the effective removal of oil from our waters, the Government must give serious consideration to the fact that knowledge gaps exist regarding the ecological, environmental, and human health impacts of alternative response measures, as well as their effectiveness. Further research regarding the implementation of any alternative response measures is required.

Two alternative response measures, in-situ burning and chemical dispersants, highlight these concerns. In addition to addressing existing knowledge gaps, CELA recommends the development of a robust and transparent policy towards the approval and use of alternative response measures, including the use of an Environmental Net Benefit Analysis, as described below.

i. In-situ burning

In-situ burning (ISB) involves the controlled burning of oil that has spilled from a vessel or a facility at the spill location. ISB is now recognized as a viable response measure to clean up oil spills in water. Under the right conditions, in-situ burning may provide a rapid and effective way to remove oil from the surface of the water.⁵¹ ISB can contribute to environmental protection by reducing the likelihood that oil will spread on the water surface and reaching shorelines.⁵² Moreover, under some conditions, burning may be the preferred or only method to remove oil from the water surface, such as in ice conditions.⁵³ Like all response measures, its efficacy is subject to weather conditions.⁵⁴

Nevertheless, ISB is not without concerns or risks. The primary environmental and health concerns related to ISB are the emissions produced by the fire. ISB should not be used where there are vulnerable human, or wildlife populations located near or downwind from the burning site.⁵⁵ Atmospheric emissions of concern, such as smoke plume, unburned hydrocarbons, etc., are formed and released when oil is burned. A protocol for calculating safe minimum distances away from populated and sensitive areas should be created.⁵⁶

The burning process also leaves an oil residue that is typically heavier than oil, which may cause it to sink. Although it is possible to collect the residue, this rarely occurs in practice. It has been reported that during the Deepwater Horizon oil spill, ISB generated tens of thousands of barrels of residues in the northern Gulf of Mexico, most or all of which eventually sank to the seafloor.⁵⁷ While the residue does not appear to be a concern to water column organisms⁵⁸ there are possible impacts to surface dwelling species and benthic species by ingestion and smothering. These risks, however, are lower than when fresh oil remains in the water.

Therefore, before the Government approves the use of ISB as an alternative response measure for oil spills, CELA recommends that more research should be undertaken to determine the harmful emissions that are released into the atmosphere and marine environment during ISB, and to ascertain the safety and effectiveness of ISB as an oil spill response tool.⁵⁹

⁵¹ Mervin Fingas, “In-situ Burning: An Update” in Mervin Fingas, ed, *Oil Spill Science and Technology*, 2nd ed (New York: Gulf Publishing Company, 2016) 483 [In-situ Burning: An Update 2016].

⁵² In-situ Burning: An Update 2016, *supra* note 51.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ Elise Decola and Sieree Fletcher, *Framework for the Development of Nunavut Community Oil Spill Response Plans* (report to WWF Canada) (Nuka Planning and Research Group, 2015) online (pdf): World Wildlife Fund Canada <http://awsassets.wwf.ca/downloads/170405_oilspillresponseframeworknunavut_web.pdf> [Framework for the Development of Nunavut Community Oil Spill Response Plan].

⁵⁶ Merv Fingas, “In-situ Burning: An update” in Merv Fingas, ed, *In-Situ Burning for Oil Spill Countermeasures*, ed, (Boca Raton: Taylor & Francis Group, 2018) [In-situ Burning: An update 2018].

⁵⁷ Scott A. Stout and James R. Payne, “Chemical composition of floating and sunken *in-situ* burn residues from the *Deepwater Horizon* oil spill” (2016) 108:1-2 *Marine Pollution Bulletin* 186.

⁵⁸ Studies show that burn residues have little to no acute aquatic toxicity (see In-situ Burning: An update 2018, *supra* note 56, at 62, 64].

⁵⁹ K. Lee, M. Boufadel, B. Chen, J. Foght , P. Hodson, S. Swanson, A. Venosa, *Royal Society of Canada Expert Panel Report: The behaviour and environmental impacts of crude oil released into aqueous environments* (Ottawa: The Royal Society of Canada, 2015) online (pdf): Royal Society of Canada <https://rsc-src.ca/sites/default/files/pdf/OIW%20Report_1.pdf> at 209 [Royal Society Expert Panel Report].

ii. Chemical dispersants

Dispersants are chemical spill-treating agents that promote the breakup of oil slicks into small droplets of oil in the water column where they can be diluted, dissolved, and degraded. If they are effective, dispersants can prevent an oil slick from forming on the water’s surface and from reaching sensitive coastal areas.⁶⁰ However, the use of dispersants as a means to respond to an oil spill is highly controversial, and there are conflicting views within the scientific and environmental community regarding their effectiveness and toxicity.⁶¹

Dispersant effectiveness is defined by the amount of oil put into the water column relative to that which remains on the surface.⁶² Dispersant application (by aircraft or vessel) is not always possible or successful in reaching its target.⁶³ Even if applied successfully, dispersant efficacy is contingent on a number of factors, including oil type or composition, timing of application, weather, water temperature, and water salinity.⁶⁴ Existing data suggest the window of opportunity for effective use of dispersants is relatively short, with estimates ranging from a few hours to a few days.⁶⁵ For example, analysis of dispersant use during the Exxon Valdez showed that this response method was ineffective due to a number of factors.⁶⁶

Even if applied effectively, dispersants and chemically dispersed oil are known to have harmful effects on marine life. Chemically dispersed oil can be more toxic than naturally dispersed oil or dispersants alone.⁶⁷ High concentrations of oil droplets in the water column can expose aquatic organisms to oil, that may otherwise not have been affected.⁶⁸ One particular toxic effect of

⁶⁰ Framework for the Development of Nunavut Community Oil Spill Response Plan, *supra* note 55

⁶¹ E. Point, *Dispersant Use on Canada’s Pacific Coast: Relevant factors and preliminary factors and preliminary response gap analysis for the Enbridge Northern Gateway project area* (Living Oceans Society, 2011) online (pdf): Canadian Environmental Assessment Agency <https://www.ceaa.gc.ca/050/documents_staticpost/cearef_21799/83874/Dispersant_Use.pdf>.

⁶² Merv Fingas, *A Review of Literature Related to Oil Spill Dispersants Especially Relevant to Alaska 2002-2008*. (report prepared for the Prince William Sound Regional Citizens’ Advisory Council) (2008) online (pdf): <<https://pdfs.semanticscholar.org/01e3/32793f926a13c6ef2dbb68f7401676a40e92.pdf>> [A Review of Literature Related to Oil Spill Dispersants Especially Relevant to Alaska].

⁶³ A Review of Literature Related to Oil Spill Dispersants Especially Relevant to Alaska, *supra* note 62.

⁶⁴ Nuka Research and Planning Group, *Non-mechanical Response Gap Estimate for Two Operating Areas of Prince William Sound. Report to Prince William Sound Regional Citizens’ Advisory Council* (15 April 2008) online (pdf): <http://www.pwsrca.org/wp-content/uploads/filebase/programs/oil_spill_response_operations/oil_spill_response_gap/2008_non-mechanical_response_gap_estimate.pdf>.

⁶⁵ National Research Council, *Oil Spill Dispersants: Efficacy and Effects* (Washington, DC: The National Academic Press, 2010) online (pdf): <https://www.nap.edu/resource/11283/oil_spill_dispersants_key_findings_final.pdf> [Oil Spill Dispersants: Efficacy and Effects].

⁶⁶ D. Gilson, *Report on the Non-Mechanical Response for the T/V Exxon Valdez Spill*, (submitted for the Oil Spill Prevention and Response Committee (OSPR) of the Prince William Sound Regional Citizens’ Advisory Council) (30 August 2006) online (pdf): <http://www.pwsrca.org/wp-content/uploads/filebase/programs/environmental_monitoring/report_on_non_mechanical_response.pdf>.

⁶⁷ Framework for the Development of Nunavut Community Oil Spill Response Plan, *supra* note 55.

⁶⁸ C. Lindgren, H. Lager, & J. Fejes, *Oil Spill Dispersants: risk assessment for Swedish waters* (2001) online (pdf): IVL Swedish Environmental Research Institute <<https://www.ivl.se/download/18.343dc99d14e8bb0f58b73e6/1445515480644/B1439.pdf>>.

chemically dispersed oil that has been documented is the increased exposure of fish to polycyclic aromatic hydrocarbons.⁶⁹ Long-term effects from the use of dispersants in response to the Deep Water Horizon spill have been reported.⁷⁰ Environment Canada’s approval of Corexit 9500A as an oil spill-treating agent in 2015 was strongly opposed by the environmental community due to high levels of toxicity and its overall ineffectiveness at protecting shorelines, seabirds, and marine mammals from oil spill damage.⁷¹ While many scientific studies conclude that the potential environmental costs of dispersant use are, in most cases, outweighed by the much shorter residence time of dispersed oil in the environment⁷², these studies continued to be challenged⁷³ and begs the question of what trade-offs are willing to be considered.

Overall, a lack of data exists concerning the actual mechanisms of toxicity from exposure to chemically dispersed oil.⁷⁴ In 2015, an Expert Panel of the Royal Society of Canada released a report on the impact of oil spills suggesting that not enough is known about chemical dispersants to approve their use. The Panel recommended that further research be undertaken to assess the toxicity of dispersed oil on the marine environment, aquatic life, and marine birds and mammals.⁷⁵

Therefore, CELA recommends that the issue of toxic effects of dispersants and chemically dispersed oil be treated as a serious issue by the Government when considering whether to remove legal impediments to the use dispersants as an alternative response measure in Canada. The Government should undertake further research on the toxicity of dispersed oil before approving the use of dispersants. Research should also be undertaken to determine if effective and non-toxic biosurfactants can be developed as alternatives to traditional chemical dispersants.

Nonetheless, should the Government decide to allow the use of dispersants as an alternative response measure in Canada despite the lack of information, it is recommended that the use of chemical dispersants be considered only as a last resort when all other response measures are deemed inadequate on a case-by-case basis where there is a demonstrated net environmental benefit and only in strictly limited quantities.⁷⁶

Recommendation: CELA recommends that further research is needed before the Government considering legislating the use of alternative response measures to respond to emergency situations in Canadian waters.

⁶⁹ S.D. Ramachandran, et al., “Oil Dispersant Increases PAH Uptake by Fish Exposed to Crude Oil” (2004) 59(3) *Ecotoxicology and Environmental Safety* 300.

⁷⁰ National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, *Deep Water: The Gulf Oil Disaster and the Future of Offshore Drilling*, (United States, 2011), online: <<https://www.gpo.gov/fdsys/pkg/GPO-OILCOMMISSION/pdf/GPO-OILCOMMISSION.pdf>> at vii-ix [National Commission Report].

⁷¹ World Wildlife Fund Canada, “Re: WWF-Canada Submission to the Frontier and Offshore Regulatory Renewal Initiative (FORRI) Revised Policy Intentions” (10 July 2018) online (pdf): <https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/energy/pdf/WWF-Canada.pdf>> [Re: WWF-Canada Submission].

⁷² R.C. Prince, et al., “The primary biodegradation of dispersed crude oil in the sea” (2013) 90(2) *Chemosphere* 521

⁷³ S. Kleindienst, J.H. Paul, S.B. Joye, “Using dispersants after oil spills: impacts on the composition and activity of microbial communities” (2015) 13 *Nat. Rev. Microbiol.* 388.

⁷⁴ Oil Spill Dispersants: Efficacy and Effects, *supra* note 65.

⁷⁵ Royal Society Expert Panel Report, *supra* note 59, at 162.

⁷⁶ Re: WWF-Canada Submission, *supra* note 71, at 12.

iii. Framework for Alternative Response Measures in Canada

Should the Government remove current legal impediments to the use of alternative response measures in Canada, it is recommended that the Government develop a robust and transparent policy towards their approval and use.

a) Testing and approval

CELA recommends the Government create a robust framework with established protocols for testing the efficacy and toxicity of alternative response measures, tied to intended use. Only Government approved alternative response measures should be authorized for use.

Any regulation developed in the future for the purpose of authorizing alternative response measure should be subject to public consultation. Alternative response measures approved for use should be reviewed every five years.

b) Authorizing use during incident

CELA recommends that the Government establish a robust and transparent decision-making process to approve the use of alternative response measures in authorized areas during an incident based on Net Environmental Benefit Analysis (NEBA).

CELA agrees with the *Discussion Paper’s* proposal to allow the use alternative response measures during an incident only where 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. CELA supports *Discussion Paper’s* proposal to give the Minister of Fisheries and Oceans and the Canadian Coast Guard the responsibility for conducting the NEBA analysis, as opposed to placing this responsibility with the operators responsible for a spill.

An Expert Panel of the Royal Society of Canada identified NEBA as a reliable strategy for decision-makers when determining what response options are appropriate at a specific oil spill location. NEBA is used to identify and compare the impacts of an oil spill on the environment based on response techniques employed, in order to select the technique that better mitigates the impacts. In the context of oil spills, NEBA should examine the trade-offs between the impacts on surface versus subsurface resources and offshore versus shoreline impacts.⁷⁷

The Government should clarify what “benefits” or factors (i.e. ecological, cultural, socio-economic) are considered when calculating whether there will be a net environmental benefit. Future regulations and publicly available guidelines should explain when the process would apply and how the benefits and impacts would be evaluated.

The determination of net environmental benefit should be based on scientific evidence. However, one of the limitations of applying NEBA in the context of an oil spill is that its effectiveness is contingent on the availability of sufficient information regarding sensitive areas, the

⁷⁷ Royal Society Expert Panel Report, *supra* note 59, at 162-163.

environmental effects of oil, and the efficacy of various response technologies.⁷⁸ In order to support evidence-based decisions on net environmental benefits, the Expert Panel of the Royal Society identified the need for the Government to gather baseline data of species that frequent areas at risk for oil spills and investigate the effects alternative response measures under controlled field experiments.⁷⁹ Without conducting further research, Existing knowledge gaps about the impacts of alternative response measures, particularly the toxicity of dispersants, make it difficult, if not impossible, to weigh the environmental benefits and drawbacks of particular alternative response measures. Therefore, CELA urges that the Government adopt the Expert Panel’s recommendation to undertake additional research before approving the use of alternative response measures in Canada, dispersants in particular.

In addition, because the window of opportunity for the effective use of alternative response measures during a spill is relatively short, the Canadian Coast Guard must be able to make timely decisions on their use. Therefore, it is recommended that the efficacy and environmental impacts of alternative response measures should be studied far in advance of a potential spill and pre-approved for use through the Area Response Planning process⁸⁰ in order to determine the circumstances and conditions under which such techniques may or may not be used in a particular region.

c) Operational planning and resource capacity

CELA recommends that operational planning regarding the use alternative response measures should be developed by the Government. In particular, the Government should establish geographic zones where alternative response measure are authorized.⁸¹ Port and operator oil spill contingency plans should be required to establish criteria for deciding whether or not to use dispersants and the conditions under which they might be used, as well as identify areas that might be sensitive to the impacts of alternative response techniques and describe measures that will be taken to protect these areas.⁸²

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ Area Response Plans (ARP) are develop to provide guidance to program personnel when responding to a spill. ARPs are developed through area risk assessment methodology, which consists of three steps: (1) determining the probability of an oil spill; (2) modeling an oil spill; and (3) evaluating environmental sensitivities. (See Transport Canada, *Area Response Planning Initiative*, online: Transport Canada <https://www.tc.gc.ca/eng/marinesafety/oep-ers-arp-4473.html>>).

⁸¹ Geographic Response Plans (GRP) or Geographic Response Strategies (GRS) are location-specific strategies to protect vulnerable sites that are of particular ecologic or socioeconomic importance. GRP and GRS have been developed in many jurisdictions around the world. Some plans are developed by operators, some by response contractors, and others by government agencies (Elise DeCola, *Marine Oil Spill Prevention Preparedness, Response And Recovery: World-Leading Approaches From Select Jurisdictions* (report to the British Columbia Ministry of Environment) (October 2015) online (pdf): <<https://www2.gov.bc.ca/assets/gov/environment/air-land-water/spills-and-environmental-emergencies/docs/materials/bc-world-leading-approaches-for-select-jurisdictions-oct2015.pdf>> [World-leading Approaches from Select Jurisdictions]).

⁸² World-leading Approaches from Select Jurisdictions, *supra* note 81.

In addition, CELA recommends that the Government also ensure that sufficient resource capacity (stockpiles, application equipment and platforms, trained personnel) are developed and in place in order to respond to an emergency.⁸³

d) Governance

CELA recommends Government oversight for the entire life cycle of treating agents, from testing and approval, to incident specific and long-term monitoring.

Long-term monitoring after a spill is essential to evaluating the effectiveness and environmental impacts of alternative response measures. This information is needed to inform future decisions about the use of alternative response measures. One potential concern, however, is the 2013 Tanker Safety Expert Panel finding that neither industry nor the Government have a formalized process for monitoring the long-term recovery of the natural environment post-spill. This is concerning not only from the perspective of alternative response measures, but the long term recovery of the natural environment generally. The Government must ensure that environmental monitoring post-incident is conducted in order to evaluate any potential long-term impacts of spills and response measures utilized, including alternative response measures.

Recommendation: In addition to addressing existing knowledge gaps, CELA recommends the development of a robust and transparent policy towards the approval and use of alternative response measures, including the use of Environmental Net Benefit Analysis.

Modernize Canada’s Ship-Source Oil Pollution Fund

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

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

CELA supports the *Discussion Paper’s* proposal to eliminate the Ship-Source Oil Pollution Fund’s (SSOPF) per-incident limit of liability of \$174,611,294 to allow non-capped compensation for eligible claims from victims and responders of oil spills from ships.

The United States’ Oil Spill Liability Trust Fund’s (OSLTF) per-incident limit of liability of \$1 billion has been identified as a world-leading marine oil spill regime.[69] Removing the SSOPF’s liability ceiling to allow for non-capped compensation would not only bring Canada in line with best practice response systems, but would make it a leader in this regard. It is important to note that while the OSLTF’s per-incident limit is high when compared to SSOPF, it has been criticized as inadequate in light of the Deepwater Horizon incident.⁸⁴

Eliminating the per-incident limit of liability is consistent with the “polluter pays principle”, which states that the responsibility for all costs associated with an oil spill should rest with the

⁸³ *Ibid.*

⁸⁴ National Commission Report, *supra* note 70, at 245.

polluter (i.e. shipowner) and the oil cargo industry. The cargo industry, not Canadian taxpayers, should bear the responsibility for the full costs of oil spills.

Removing the current liability ceiling of the SSOPF is the first step to ensuring that adequate funding is available to cover claims from a worst case oil spill. Based on a review of recent incident costs worldwide, the cost associated with a major or catastrophic spill could exceed the maximum compensation per incident currently available under the SSOPF. Technological limitations, particularly in the Arctic offshore⁸⁵, projected increase of vessel and tanker traffic, particularly in the Salish sea⁸⁶, and multiple offshore oil projects and proposed pipeline projects, serve to increase the risk of occurrence of a worst-case spill scenario in Canadian waters.

The Deepwater Horizon oil spill serves as a benchmark for estimating the potential cost of a similar major oil spill in Canadian waters. Based on recent estimates, the clean-up and compensations costs that have resulted from the spill have exceed \$65 billion.⁸⁷ Another incident that supports high potential costs is the Prestige incident that occurred in 2002 on the coast of Galicia, Spain, which resulted in approximately \$1.7 billion in clean up and compensation costs. An oil spill of this scale in Canada would surpass the maximum per-incident liability of the SSOPF and would use up a significant portion of the Fund, should the Government proceed with its proposal to allow unlimited compensation.

As a result, in addition to removing the liability ceiling, CELA recommends that the Government evaluate fund reserves to ensure that adequate funding is available to cover a worst-case oil spill. The Government should consider taking immediate actions to increase the Fund’s balance. This recommendation is discussed in more detail below in the context of a levy.

Currently, the SSOPF guidelines only cover claims for the cost of cleaning oil from oceans, inland waters and shorelines, managing oiled wildlife, prevention measures, and damages to economic activities, such as business and private property.⁸⁸ Claims for damages to an ecosystem’s natural resources (shores, birds, fish, habitat, etc.) are not explicitly included.⁸⁹ As discussed below in further detail, the Government should expand the scope of compensation under the SSOPF to include natural resource damages, including restoration and recovery activities, in order to bring Canada in line with best practice response systems.

⁸⁵ The Arctic’s cold climate has been found to increase the persistence of oil in the environment, and oil movement may be affected by the presence of sea ice. Wildlife in the Arctic may be more vulnerable to oil spills due to cold temperatures. (The Pew Environment Group, *Oil Spill Prevention and Response in the U.S. Arctic Ocean: Unexamined Risks, Unacceptable Consequences*, (November 2010), online (pdf): The Pew Charitable Trusts <<http://www.pewtrusts.org>> at 3, 5).

⁸⁶ Anna Hall, *State of the Ocean in the Pacific North Coast Integrated Management Area (PNCIMA)* (2008) Available online (pdf): <http://cpawsbc.org/upload/State_of_the_ocean_PNCIMA_report_2008.pdf>.

⁸⁷ BP Deepwater Horizon costs, *supra* note 48.

⁸⁸ Government of Canada, Ship-source oil pollution fund claims manual: 2014 Edition, *Commissioner of the Environment and Sustainable Development: The Commissioner’s Perspective* (Ottawa: Administrator of the Ship-source Oil Pollution Fund, 2014), online (pdf): Ship-source Oil Pollution Fund < <http://sopf.gc.ca/wp-content/uploads/pdf/2014-SOPF-Claims-Manual.pdf>> [SSOPF Claims Manual]

⁸⁹ Stafford Reid, *Major Marine Vessel Casualty Prevention, Preparedness and Response along British Columbia’s Coastal Waters* (prepared for Marine Planning Partnership for the North Pacific Coast) (June 2014) online (pdf): Coastal First Nations <https://coastalfirstnations.ca/wp-content/uploads/2017/06/Marine_Vessel_Casualty_Issues_Solutions_MaPP.pdf> [Stafford Reid].

Therefore, should the Government expand the amount of compensation, CELA recommends that the Government take immediate actions to increase the Fund’s balance in order to ensure that there are sufficient funds for natural resource damages.

Recommendation: CELA recommends that a claimant’s compensation not be capped for eligible claims.

Recommendation: CELA recommends that the Government evaluate fund reserves to ensure that adequate funding is available to cover a worst-case oil spill.

II. Modernized Levy Mechanism and Fund Replenishment

CELA supports the *Discussion Paper’s* proposal to amend the *Marine Liability Act* to allow the SSOPF to be temporarily funded by the Government in the event that funds become insufficient to pay for the costs of an oil spill incident. CELA also supports the recommendation to reinstate a levy paid by oil receivers and exporters to repay any funds provided by the Government, however CELA recommends that the Government go further and reinstate, or at minimum, temporarily reinstate a levy immediately to increase the financial safety margin of the SSOPF, as opposed to waiting until the fund is depleted.⁹⁰ As discussed in the previous section, based on a review of oil spill incident costs worldwide, it is necessary to ensure that the SSOPF is capable of handling claims from a catastrophic spill. The US OSLTF has been recognized as a world-leading marine oil spill regime, and currently contains approximately \$5.7 billion.

Establishing a precise numerical figure for the levy is beyond the expertise of our organization but must be considered. The threshold should be established from the perspective of a worst-case oil spill, and should be sufficient to pay for response costs and compensation, including natural resource damages. Expanding the scope of compensation to include natural resource damages is discussed in detail below.

The purpose of establishing and maintaining a dedicated fund with industry contribution is to “pre-emptively transfer the risks of financial liability for remediation and compensation from taxpayers to industry, reducing the potential difficulties of enforcing liability obligations after a spill has occurred.”⁹¹ While the SSOPF was originally financed by levies imposed on oil receivers and shippers in Canada, no levies have been imposed since 1976. The fund is currently financed through accumulated interest and cost recovery. Building up the balance of SSOPF upfront through an industry levy is consistent with the purpose of a dedicated remediation and compensation fund, as opposed to temporarily placing the financial burden of oil spills on the taxpayer in the event that the fund becomes depleted.

The US OSLTF’s largest source of revenue, by contrast, has been a per-barrel excise tax, collected from the oil industry on petroleum produced in or imported to the United States.⁹²

⁹⁰ Shipping on the British Columbia Coast, *supra* note 3.

⁹¹ William Amos & Ian Miron, “Protecting Taxpayers and the Environment Through Reform of Canada’s Offshore Liability Regime” (2013) 9:1 McGill JSDLP [Protecting Taxpayers and the Environment].

⁹² Seabirds and Atlantic Canada's Ship-Source Oil Pollution, *supra* note 33.

Recommendation: CELA recommends that the Government reinstate, or at minimum, temporarily reinstate a levy to increase the financial safety margin of the SSOPF.

III. Quickly Providing Funds

i. Emergency funding

CELA supports the *Discussion Paper*’s proposal to broaden the SSOPF to provide emergency funding to support oil spill operations undertaken by the Canadian Coast Guard.

As a benchmark, the US OSLTF has \$50 million available in its emergency fund for Federal On-Scene Coordinators to respond to oil spills and for federal trustees to initiate natural resource damage assessments. The Emergency Fund is a recurring \$50 million available annually, and funds not used in a fiscal year are available until expended. In the event that \$50 million is inadequate, there is authority to advance up to \$100 million from the Principal Fund to fund removal activities.⁹³ The OSLTF’s emergency fund is recognized as an element of a world leading oil spill response regime.⁹⁴

The Government should clarify whether it intends to annually apportion a particular amount of money from the SSOPF to create an emergency fund or simply advance emergency funding on an as-needed-basis. CELA recommends that the Government adopt the former approach in order to ensure that funds are available to the Canadian Coast Guard for response operations when needed. The Government should also consider giving the Canadian Coast Guard the authority to supplement emergency fund shortfalls in order to ensure that response operations are not delayed in the event of insufficient funds.

Recommendation: CELA recommends that the Government broaden the SSOPF to provide emergency funding to support oil spill operations undertaken by the Canadian Coast Guard.

ii. Fast track claims process

CELA supports the *Discussion Paper*’s proposal to create a fast track process for small claims submitted to the SSOPF by 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. CELA recommends that the Government develop threshold and basic criteria that would guide the fast track claims process in consultation with stakeholders.

For example, in order to develop a framework for a fast track claims process under the International Oil Pollution Compensation (IOPC) Fund, working group meetings were held to seek input. During the meetings, consideration was given to two options for processing small

⁹³ United States Coast Guard, *The Oil Spill Liability Trust Fund (OSLTF)* online (pdf): United States Coast Guard <https://www.uscg.mil/Mariners/National-Pollution-Funds-Center/About_NPFC/OSLTF/>

⁹⁴ World-leading approaches from select jurisdictions, *supra* note 81.

claims: first, a lump sum payment could be made on the basis of limited or no investigation and compensation could be paid on the basis of an estimation; and second, flexibility could be introduced into the claims assessment process by accepting estimations of individual losses provided a minimum standard of proof was met and there was a clear link of causation with the incident. Support was expressed for the latter option.⁹⁵

The fast track claims process under the IOPC Fund provides an example of a well-designed system. Under the IOPC Fund fast track claims process, claimants with small claims now have the option of having their claim assessed on the basis of a limited investigation of their losses or having a more detailed comprehensive assessment with a longer timeframe. Claimants who disagree with a settlement offer under the fast track assessment process will only have their claim reconsidered on the basis of new information proving their loss, which may result in higher or lower assessment than initially.⁹⁶

In CELA’s opinion, the IOPC fund approach for small claims achieves a good balance between expediency, due process, and maintaining the integrity of the claim’s assessment process. The Government should consider developing a similar fast track process for small claims. A fast track process for small claims must still require clear link of causation with the incident.

CELA also recommends that all assessment and valuation guidance documents should be made publicly available.

Recommendation: CELA supports a well informed and transparent fast track approach for small claims, which achieves a balance between expediency, due process, while maintaining the integrity of the claims assessment process.

iii. Additional Considerations

a) Natural resource damage compensation

CELA notes that environmental or natural resources damages are not explicitly provided for in the scope of compensation in the SSOPF guidelines. The concept of environmental or natural resource damage assessment is to determine “residual” damages (to shores, birds, fish, habitat, etc.) after cleanup is completed.⁹⁷ Compensation for unmitigated impacts to ecological services is a matter of equity.⁹⁸ Best practices oil response systems have an established process for evaluating and restoring environmental or natural resources damages.⁹⁹

⁹⁵ International Oil Pollution Compensation Funds, “Revision of the Claims Manual. Note by the Secretariat” (6 August 2012), online: <documentservices.iopcfunds.org/meeting-documents/download/docs/3615/lang/en/>

⁹⁶ International Oil Pollution Compensation Funds, *Claims Manual, October 2016 Edition*, (2016) online (pdf): IOPC Funds <https://www.iopcfunds.org/uploads/tx_iopcpublishations/IOPC_Funds_Claims_Manual_ENGLISH_WEB_01.pdf> at 22.

⁹⁷ Stafford Reid, *supra* note 89.

⁹⁸ *Ibid.*

⁹⁹ World-leading approaches from select jurisdictions, *supra* note 81.

Much more clarity is needed on whether the SSOPF compensates environmental or natural resource damages. This question has been subject to debate in the environmental community. It has been suggested by some that the definition of “oil pollution damage” in the *Marine Liability Act (MLA)*¹⁰⁰ appears sufficiently broad to allow the Administrator of the SSOPF to entertain claims for environmental damages for a loss not tied to some identifiable economic consequence. Others argue that in light of the particular provisions respecting liability for the costs of “reasonable” measures to minimize or prevent “oil pollution damage”, it is quite clear that such non-use value claims are not provided for under the SSOPF’s governing statute.¹⁰¹ Currently, the SSOPF guidelines only explicitly cover claims for the cost of cleaning up oil from oceans, inland waters and shorelines, managing oiled wildlife, prevention measures, and damages to economic activities, such as business and private property.¹⁰² To date, neither the Canadian courts nor the Administrator of the SSOPF have considered the meaning of pollution damage in this context; the SSOPF has not yet handled an environmental damages claim.

In the US, the *Oil Pollution Act of 1990*, explicitly provides for payment of natural resource damage claims from the OSLTF. Under the OSLTF, natural resources damages are limited to a maximum of \$500 million per incident.¹⁰³ The Emergency Fund under the OSLTF is also made available for trustees (State and Federal Government ecological departments, First Nations Bands) to initiate natural resource damage assessments. Only designated Trustees may submit natural resource damages claims. Under US regulations, the trustee may consider a plan to restore and rehabilitate or acquire the equivalent of the damaged natural resource.

Therefore, CELA recommends that the Government explicitly include environmental or natural resources damages under the SSOPF, and create publicly available environmental damage claims guidelines. The guidelines should include an approach developed for assessing and valuing cultural loss designed to accommodate Canada’s Indigenous peoples. Guidelines should be created through multi-stakeholder workshops on natural resource damage assessment and compensation, and subject to public consultation once created.

It has also been suggested within the environmental community that consideration should be given to expanding the SSOPF’s mandate to include all environmental damages from a vessel incident, not just for oil pollution.¹⁰⁴ It is therefore recommended that contributors to the SSOPF be expanded to include both convention and non-convention vessels that pose an environment and socio-economic risk to Canada’s marine waters and coasts.¹⁰⁵

¹⁰⁰ *Oil pollution damage*, in relation to a ship, means loss or damage outside the ship caused by contamination resulting from the discharge of oil from the ship. (see *Marine Liability Act*, (S.C. 2001, c. 6), s. 91 (1))

¹⁰¹ Kenneth A. Macinnis, “The Canadian SSOP Fund and Environmental Damage Assessment (EDA) in Canada” in Frank Maes, ed, *Marine resource damage assessment: Liability and compensation for environmental damage* (Dordrecht: Springer, 2005)

¹⁰² SSOPF Claims Manual, *supra* note 88.

¹⁰³ United States Coast Guard, *The Oil Spill Liability Trust Fund (OSLTF)* online (pdf): United States Coast Guard <https://www.uscg.mil/Mariners/National-Pollution-Funds-Center/About_NPFC/OSLTF/>

¹⁰⁴ EnviroEmerg Consulting Services, *Major Marine Vessel Casualty Risk and Response Preparedness in British Columbia* (prepared for Living Oceans Society) (July 2018) online (pdf): Living Oceans Society <https://www.livingoceans.org/sites/default/files/LOS_marine_vessels_report.pdf> [EnviroEmerg Consulting Services].

¹⁰⁵ EnviroEmerg Consulting Services, *supra* note 104.

Recommendation: CELA recommends that the Government explicitly include environmental or natural resources damages under the SSOPF.

b) Liability limits of the ‘responsible party’

According to the *MLA*, Responsible Parties (i.e. shipowners) are liable for pollution damages, clean-up costs and reinstatement measures from oil spills, based on the “polluter pay” principle. However, the *MLA* also establishes a financial limit to this liability. To be entitled to the limit of financial responsibility, ship owners must have an arrangement with a *Protection and Indemnity Club* (i.e. insurance). Generally speaking, this limit is determined based on the tonnage of a ship.

Once a ship owner reaches their limit of financial liability, they are no longer considered the Responsible Party; this responsibility is transferred to the government (in other words, the taxpayers). At this point, the SSOPF comes into play to cover the shortfall. However, as discussed above, because of the SSOPF’s own liability cap, the costs of a spill might still not be fully covered and are transferred to the taxpayers. Low liability limits amount to an industry subsidy as they disproportionately shift the risks and the burdens of shipping and vessel activities from industry to taxpayers and the environment.¹⁰⁶

Therefore, it is CELA’s recommendation that, in addition to above amendments to the SSOPF, the Government amend the *MLA* to establish unlimited financial liability for Responsible Parties regarding all clean-up costs, recovery costs, and impacts to the ecosystem. Alternatively, liability limits must be increased to reflect the cost of a worst-case oil spill scenario. Furthermore, the limit should not apply where a responsible party has violated a statute or regulation.¹⁰⁷

Recommendation: CELA recommends that the Government amend the *MLA* to establish unlimited financial liability for Responsible Parties, or substantially increase liability limits to reflect worst case oil spills.

Support Research and Innovation

Question: What are the potential impacts and implications of enabling the Government of Canada to permit research and testing in Canada’s waters for the purposes of enhancing marine safety and environmental protection?

CELA recognizes the need for substantial increases in research and development to improve response capability to marine incidents, as well as to more fully understand and address the environmental, cultural, and socio-economic effects of increased vessel traffic and marine mammal casualties. However, the most extreme and obvious consideration when undertaking research and development in the “real-world” is the potential that experiments will harm the environment without yielding a “greater good” finding. In other words, is it fair to potentially

¹⁰⁶ Protecting Taxpayers and the Environment, *supra* note 91, at 13.

¹⁰⁷ *Ibid* at 40-41.

destroy one habitat to save others? CELA wishes to provide an ongoing precedent which exemplifies a good solution this question.

The International Institute for Sustainable Development’s (IISD) Experimental Lakes Area (ELA) is one of the world’s most influential, yet subtle, freshwater research facilities located in Northern Ontario. At the ELA, “real world” experiments are conducted on freshwater lakes in order to obtain more “real world” results. The ELA land and lakes have been extensively surveyed and studied in order to obtain a baseline for the research area. The IISD’s ELA was first established in response to increasing populations and to address issues such as climate change, agricultural runoff, water management, contaminants such as mercury and organics, and an expanding list of new chemical substances. For 50 years, the ELA has provided governments’ with cost effective answers to concerns regarding environmental policies, regulations, and management.¹⁰⁸ If the Government wished to set up a program similar to the IISD’s ELA, it would require years of planning and research before the first study could be conducted. One existing tool that can be used to establish environmentally safe areas for research and testing, such as the ELA, is an Environmental Impact Assessment (EIA). EIA’s are used to identify the impacts of the proposed project on the surrounding environment.

Experiments in “real world” circumstances have benefits which lab results cannot mimic; however, granting exemptions from rules and regulations to real world experiments must be an informed decision conducted with caution. If licenses for study were to be granted by the Government, it would be important that the proponent submit detailed study proposals pursuant to established EIA requirements. Details of environmental considerations could include, such as species involved, geographic areas involved, potential risks, emergency/contingency plans, hypothesis, purpose for research, proof of funding, and decommissioning plans.

Recommendation: CELA recommends that if exemptions to regulations are to be granted for research purposes, designated research areas should be established pursuant to Environmental Impact Assessment requirements.

All of which is submitted this 5th day of October, 2018.

CANADIAN ENVIRONMENTAL LAW ASSOCIATION



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¹⁰⁸ IISD Experimental Lakes Area. *The World’s Freshwater Laboratory*, online (pdf): International Institute for Sustainable Development ><https://www.iisd.org/sites/default/files/publications/iisd-ela-brochure.pdf>>

SUMMARY OF RECOMMENDATIONS

Enhance Marine Ecosystem Protection

Enable Marine Ecosystem Protection

Recommendation: CELA recommends that the Government regulate the broader environmental effects of shipping and navigation through a network of MPAs.

Recommendation: CELA recommends that the Government implement regulations that reflect an ecosystems approach and ensures protection of the environment.

Recommendation: CELA recommends the use of non-regulatory approaches as a means of ensuring compliance with environmental regulations, such as the implementation of MPAs.

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

Recommendation: CELA recommends rapid intervention by Transport Canada to address marine safety and environmental risks, provided that the rapid intervention is constrained by an established and informed emergency protocol.

Enhance Deterrence and Enforcement

Recommendation: CELA supports the Government’s proposal to increase the maximum Administrative Monetary Penalty (AMP) amount under the *Canada Shipping Act (CSA)* above the current maximum of \$25,000 for infractions against marine safety and environmental requirements, provided AMPs do not replace prosecutions for serious offences.

Recommendation: CELA recommends that the Government establish clearly defined criteria for determining the penalty amount, including history of non-compliance, economic gain, and environmental harm.

Recommendation: CELA recommends that the Government deposit AMP proceeds into a fund that can be used to address ship-source oil pollution.

Strengthen Environmental Response

Enable Early Intervention during a Pollution Incident

Recommendation: CELA recommends early intervention by the Canadian Coast Guard into all environmental disasters including oil spill pollution, however, emergency responses need to be informed by an established emergency protocol.

Enable Early Intervention during a Pollution Incident (Support Rapid Response)

Recommendation: CELA supports the right to cross and use private lands in order to facilitate emergency responses to environmental disasters, however, this discretion must be exercised in light of privacy and property rights of landowners.

Recommendation: CELA recommends that immunity from liability should not be extended to parties providing advice and expertise to the Canadian Coast Guard and other federal departments.

Support More Effective Response to Oil Spills in Water: Alternative Response Measures

Recommendation: CELA recommends that further research is needed before the Government considering legislating the use of alternative response measures to respond to emergency situations in Canadian waters.

Recommendation: In addition to addressing existing knowledge gaps, CELA recommends the development of a robust and transparent policy towards the approval and use of alternative response measures, including the use of Environmental Net Benefit Analysis.

Modernize Canada’s Ship-Source Oil Pollution Fund

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

Recommendation: CELA recommends that a claimant’s compensation not be capped for eligible claims.

Recommendation: CELA recommends that the Government evaluate fund reserves to ensure that adequate funding is available to cover a worst case oil spill.

Modernized Levy Mechanism and Fund Replenishment

Recommendation: CELA recommends that the Government reinstate, or at minimum, temporarily reinstate a levy to increase the financial safety margin of the SSOPF.

Quickly Providing Funds

Recommendation: CELA recommends that the Government broaden the SSOPF to provide emergency funding to support oil spill operations undertaken by the Canadian Coast Guard.

Recommendation: CELA supports a well informed and transparent fast track approach for small claims, which achieves a balance between expediency, due process, while maintaining the integrity of the claims assessment process.

Recommendation: CELA recommends that the Government explicitly include environmental or natural resources damages under the SSOPF.

Recommendation: CELA recommends that the Government amend the MLA to establish unlimited financial liability for Responsible Parties, or increase liability limits to reflect worst case oil spills.

Support Research and Innovation

Recommendation: CELA recommends that if exemptions to regulations are to be granted for research purposes, designated research areas should be established pursuant to Environmental Impact Assessment requirements.

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